# THE REMEDIES GAP: COMPENSATION AND IMPLEMENTATION UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

SHEILA K. HYATT*

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## INTRODUCTION

The enactment of the Education for All Handicapped Children Act of 1975 [hereinafter EHA][1] brought about rapid and widespread change in the availability of public education programs for handicapped children. Prior to its enactment, the education of such children was largely a matter of happenstance; local or state programs or private facilities might or might not be available or affordable.[2] Handicapped children and their families had to fend for themselves to find appropriate or even adequate services. Many handicapped children were excluded from the regular educational system. If public services

* Professor of Law, University of Denver College of Law. J.D., 1974, Washington University School of Law (St. Louis). I am grateful for the research assistance of Charlotte Vogel, Kathy S. Holden, Wiley Todd Linville, Pamela Carter, and Kris Sanko.

1. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-1461 (1988)).

2. For a history of the development of special education for handicapped children in this country, see, *e.g.*, Contemporary Studies Project, *Special Education: The Struggle for Equal Educational Opportunity in Iowa*, 62 IOWA L. REV. 1283 (1977); *Lazerson, The Origins of Special Education*, in SPECIAL EDUCATION POLICIES: THEIR HISTORY, IMPLEMENTATION, AND FINANCE 15 (J. Chambers & W. Hartman eds. 1983) [hereinafter SPECIAL EDUCATION POLICIES].

were available, they were offered in separate classes, buildings, or institutions.[3] As late as 1970, it was estimated that some two million handicapped children between the ages of seven and seventeen were not enrolled in school, and perhaps two million more were not receiving an adequate education.[4]

Advocates for the interests of handicapped children sought change on two fronts — the courts and Congress. After the results in two federal district court cases,[5] which held that handicapped children had a right to a publicly funded education,[6] Congress enacted the EHA. In order to ameliorate the

3. For an overview of the historical bases for the segregation of children with handicaps, see Miller & Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1, 6-12 (1978); Turnbull, Brotherson, Czyzewski, Esquith, Otis, Summers, Van Reusen & DePazza-Conway, *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 RUTGERS L.J. 489 (1983). An interesting comparison of the legal aspects of segregation on the basis of race and segregation on the basis of handicap is found in Goodwin, *Public School Integration of Children with Handicaps after* Smith v. Robinson: *"Separate but Equal" Revisited?*, 37 ME. L. REV. 267 (1985).

4. *See* H.R. REP. NO. 805, 93d Cong., 2d Sess. 53, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4093, 4138.

There have also been serious problems of misclassification. In one study in Philadelphia, of 378 students classified as educable mentally retarded, the diagnosis for 25% was found to be erroneous. *See* Garrison & Hammill, *Who are the Retarded?*, 38 EXCEPTIONAL CHILDREN 13, 18 (1971). Additionally, there have been significant problems with respect to the relationship between race and handicap. All too often, school officials have used culturally-biased tests and other special needs classification techniques. Administration of these tests has resulted in inappropriate placement of minority students out of the regular classroom and into special education programs. *See* Parents in Action on Special Education (PASE) v. Hannon, 506 F. Supp. 831 (N.D. Ill. 1980) (discussing the history of the racially disproportionate impact of I.Q. tests and the factors relevant to a determination of culturally-biased testing techniques, and finding that defendant school's tests are not so biased); Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (ruling that use of I.Q. tests had a disproportionate effect on black children and violated the Rehabilitation Act, the EHA, Title VI and the fourteenth amendment), *aff'd in part, rev'd in part*, 793 F.2d 969 (9th Cir. 1984) (affirming that use of tests had discriminatory impact on blacks and violated the EHA, the Rehabilitation Act, and Title VI, but not the fourteenth amendment); Rothstein, *Educational Rights of Severely and Profoundly Handicapped Children*, 61 NEB. L. REV. 586, 594 n.35 (1982).

5. Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), *modifying*, 334 F. Supp. 1257 (E.D. Pa. 1971) [hereinafter *PARC*]; Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

6. The *PARC* and *Mills* cases gave significant impetus to the enactment of the EHA. In *PARC*, the plaintiffs brought a class action on behalf of mentally retarded children who had been excluded from public school systems because they were deemed to be uneducable. The plaintiffs asserted that this exclusion denied them equal protection of the laws, and that the state must provide a hearing before any child vaguely classified as "uneducable" could be deprived of a public education. *PARC*, 343 F. Supp. at 283. The district court agreed, and the parties entered into a court-approved consent decree which required the state to include handicapped children in public educational programs, to establish due process hearings for dispute resolution, to provide periodic review of the children's progress, to finance a program for the training of teachers, and, in cases where public education would not be appropriate, to place children in private facilities at state expense. *Id.* at 306-16.

In *Mills*, the plaintiffs sought to require the District of Columbia Board of Education to provide specialized classes for children who were mentally retarded, emotionally disturbed, and hyperactive. The Board's defense of lack of funds was rejected, and the court issued a wide-ranging remedial order much like that in *PARC*. The order included several features which later appeared in the EHA: the requirement that each child be provided with an appropriate

history of exclusion and segregation of handicapped children and to bring them into the mainstream of public education, the EHA "legalized"[7] special education by conceptualizing it as a right[8] to a free appropriate public education.[9] Parents must be included in the planning of their child's "individualized educational program" [hereinafter IEP]; they are given rights to notice and to a full dress due process hearing before an impartial hearing officer with respect to disputes about their child's programming.[10] Decisions by the hearing officer ultimately are reviewable in federal district court.[11] The terms

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education at public expense in the least restrictive environment, and that the parents be afforded notice and an opportunity to be heard when changes in educational programming were proposed. *Mills*, 348 F. Supp. at 877-83.

7. Legalization has been described as one method of giving substance to a policy objective. As Professors Neal and Kirp have summarized the concept in connection with special education:

> The characteristic features of legalization include a focus on the individual as the bearer of rights, the use of legal concepts and modes of reasoning, and the employment of legal techniques such as written agreements and court-like procedures to enforce and protect rights. The [EHA] is filled with legal concepts and procedures: the notion of right or entitlement, the quasi-contractual individualized education program (IEP) meeting in which the right is elaborated, the provision of due process guarantees and appeal procedures, and implicitly, the development of principles through the mechanism of precedent.

Neal & Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63, 65 (1985); *see also* Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976); Tweedie, *The Politics of Legalization in Special Education Reform*, in SPECIAL EDUCATION POLICIES, *supra* note 2, at 48; Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891.

8. The EHA is essentially a funding statute, as it funnels federal money into the states and thereafter to local school districts. The notion of the "right" to a free appropriate public education derives from those provisions of the EHA which require states to guarantee that each handicapped child be provided with an appropriate education in order to receive the federal funds. *See infra* note 41. The "right" in question here (considered in *PARC* and *Mills*, discussed *supra* note 6), is partially based on an equal protection argument which ensures that handicapped children not be excluded from publicly funded education of some sort. *See* Brown v. Board of Educ., 347 U.S. 483 (1954). Beyond this threshold, however, there is no widely accepted concept of equal educational opportunity. *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 868-83 (1975); Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087 (1973); Wegner, *Variations on a Theme — The Concept of Equal Educational Opportunity and Programming Decisions Under the Education for All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 169 (1985); Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973).

9. 20 U.S.C. § 1412(1) (1988); 34 C.F.R. § 300.121(a) (1989); *see infra* note 41.

10. 20 U.S.C. § 1415(b)(2) (1988); 34 C.F.R. § 300.506 (1989); *see infra* notes 52-66 and accompanying text.

11. Federal jurisdiction is not exclusive. 20 U.S.C. § 1415(e)(2) (1988). The cases heard by state courts do not differ substantially from the federal cases. They tend also to involve parents seeking public funding for expensive private placements. *See, e.g., In re* John K., 170 Cal. App. 3d 783, 216 Cal. Rptr. 557 (Ct. App. 1985) (where the school district has acted in bad faith by egregiously failing to comply with the procedural requirements of the EHA, parents are entitled to reimbursement for unilateral placement of handicapped child in private residential facility); Taglianetti v. Cronin, 143 Ill. App. 3d 459, 493 N.E.2d 29 (App. Ct. 1986) (ruling that

"legalized" or "legalization" are used to reflect all of these features.

The EHA has brought about substantial and rapid change in the provision of special education services to this disadvantaged group.[12] There is no longer any debate about the wrongfulness of excluding handicapped children from the school system and, although there are still resource allocation problems, no child can be turned away.[13]

Following the declaration and acceptance of these basic principles, however, the focus of the EHA turned almost immediately from issues of exclusion to issues surrounding the kind and quality of education a handicapped child would receive. It is in this arena that the effectiveness of the EHA has been seriously questioned.[14] Prominent among the EHA's troubles is the low quality of parental participation in IEP conferences,[15] which frequently are highly formal and non-interactive.[16] In addition, the adversary-model due pro-

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parents of handicapped child were not entitled to reimbursement for expenses incurred in the unilateral placement of their child in an institution not approved by the state); D.S. v. Board of Educ., 188 N.J. Super. 592, 458 A.2d 129 (App. Div.) (deciding that the cost of placing handicapped children in residence at special education facilities was to be assumed by the public agency placing the child in the residential school), *cert. denied*, 94 N.J. 529, 468 A.2d 184 (1983).

12. In 1966, approximately 2.1 million children were receiving special educational services. *See* Clune & Van Pelt, *A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 LAW & CONTEMP. PROBS. 7, 52 n.232 (1985). By 1983-84, that number had grown to 4.3 million. U.S. DEP'T OF EDUC., SEVENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION OF THE HANDICAPPED ACT (1985).

13. In Honig v. Doe, 484 U.S. 305 (1988), the Supreme Court held that the right to non-exclusion under the EHA extends even to those children whose behavior is disruptive and dangerous. Such children cannot be unilaterally expelled from school if their behavior stems from their handicap. *Id.* at 323. While allowing that courts may retain their equitable powers to temporarily enjoin a dangerous disabled child from attending school, the Court stated that the EHA's legislative history makes clear that Congress sought to remedy the unilateral exclusion of children by school officials. *Id.* at 324-25.

14. The weaknesses and failures of EHA implementation have been noted, inter alia, by J. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986); Clune & Van Pelt, *supra* note 12; David & Greene, *Organizational Barriers to Full Implementation of P.L. 94-142*, in SPECIAL EDUCATION POLICIES, *supra* note 2, at 115; Hill, *Legal Conflicts in Special Education: How Competing Paradigms in the Education for All Handicapped Children Act Create Litigation*, 64 U. DET. L. REV. 129 (1986); Neal & Kirp, *supra* note 7; Van Pelt, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 WIS. L. REV. 1469, 1516-21; Weatherly & Lipsky, *Street Level Bureaucrats and Institutional Innovation: Implementation of Special Education Reform*, 47 HARV. EDUC. REV. 172 (1977).

15. *See* Hill, *supra* note 14, at 143-44 ("Parents are usually outnumbered, and the dynamics of small group interaction works against them exerting any influence.").

16. Professor Handler describes the IEP process as follows:

> Several studies show that what in fact happens is a two-step process. There is a preplacement meeting to "organize" the data and develop a consensus among the school personnel as to the general disposition of the case, followed by the placement meeting which the parents . . . attend. . . . IEPs are signed off and assignments made. The IEPs are drafted before the meeting, and most activity with the parents is designed to get their written permission for the testing, the IEPs and the assignments. . . . The IEPs are kept as general as possible to avoid accountability by the special education people. The use of overly technical language hinders communica-

cess procedures, which are designed to allow parents to enforce their substantive rights, are used mainly by a handful of usually wealthy and knowledgeable parents.[17] Finally, even favorable decisions for parents have not always resolved the dispute satisfactorily.[18]

The most striking characteristic of the current EHA enterprise, therefore, is the remarkable gap between the statute's promises and the empirically demonstrated reality. The EHA's failures have been traced to the inherent weaknesses of the legalization model itself, which can degenerate into formalism or "legalism," where the strict compliance with procedures takes precedence over any substantive change.[19] It is said that the mismatch between a highly individualized and discretionary delivery of special education services and the highly legalized EHA is untenable and unworkable.[20] Additionally, a legalized, adversary system can foster defensiveness, delay, and hostility.[21] The costs of legalization, both in human energy and in dollars, is such that only the wealthy and knowledgeable have meaningful entry into the processes which purport to be designed for all.[22] Moreover, legalization in the school setting has been criticized particularly as running counter to the educational mission.[23]

In light of this critique, the recommendation for "treatment" of the EHA's problems is fairly predictable: less legalization. This has meant the

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tion with parents. Nevertheless, parents are intimidated by the complexity of the process, and the IEP becomes a legal formality.

J. HANDLER, *supra* note 14, at 67.

17. M. BUDOFF & A. ORENSTEIN, DUE PROCESS IN SPECIAL EDUCATION: ON GOING TO A HEARING 287-88 (1982). In a Massachusetts study of due process proceedings, it was found that a disproportionate number of high status parents were involved. *Id.* at 289. Minority and low-income families that did not exercise their rights to due process were interviewed in the study to determine their reasons. *Id.* at 287. One of the primary explanations was the perception that the right to appeal was too difficult, both emotionally and economically. *Id.* at 288. The parents also felt that hearings were relatively ineffective in obtaining the desired changes in their child's program. *Id.* at 287.

18. Twenty-eight percent of parents interviewed at the end of their first due process hearing stated that they would not go through the process again. *Id.* at 118. Among those who responded in this manner, 30% responded with replies like: "Even though we won, the school did not change anything;" "the whole process is so disorganized, unprofitable, and inconsistent that the merits of the case have little to do with whether you win or lose." *Id.* Most parents in this study reported that, even though they won at the hearing, they faced continuing problems. *Id.* at 121. Sometimes the schools would fail to act, tacitly or explicitly ignoring an order when they lost. *Id.* Some schools did not pay private tuition promptly; some did not pay at all, forcing the parents to pay. *Id.* The parents then had additional legal expenses to recover from the school. *Id.*

19. Neal & Kirp, *supra* note 7, at 79, 82.

20. J. HANDLER, *supra* note 14, at 11-12, 161-69.

21. Neal & Kirp, *supra* note 7, at 76-80, 82.

22. M. BUDOFF & A. ORENSTEIN, SPECIAL EDUCATION APPEALS HEARINGS; THEIR FORM AND THE RESPONSE OF PARTICIPANTS 6-11 (1979); Kirst & Bertken, *Due Process Hearings in Special Education: Some Early Findings from California*, in SPECIAL EDUCATION POLICIES, *supra* note 2, at 136, 153.

23. "Proceduralization is hardly the demise of authority. . . . My concern is that untempered public distrust will lead to a formalism in which procedure is deified at the expense of education." Yudof, *supra* note 7, at 917.

call for more informal dispute resolution mechanisms[24] and less participation by attorneys.[25] While the macro-benefits of legalization may be too great to abandon,[26] the commentators have uniformly sought to pull back from what are considered the less attractive features of legalization,[27] and comparative studies have explored less adversarial approaches to special education delivery.[28]

The EHA has been described as a highly legalized system. If one looks only at its processes, from complaint to decision making, this is an accurate characterization. However, the EHA did not expressly incorporate fines, penalties, or monetary damages into its private enforcement mechanisms. This gap has not received adequate attention in analyses of the statute's failures. Public law rights administered by lower-level officials and bureaucrats have been called highly "remedy-dependent," requiring a significant level of vindication in order to assure compliance.[29] The remedial dimension of the EHA, however, has been so inconsistent with the substantive rights of the statute

24. *See, e.g.*, Clune & Van Pelt, *supra* note 12, at 38; Neal & Kirp, *supra* note 7, at 84-86. *See generally* J. HANDLER, *supra* note 14.

25. *See* Note, *Congress,* Smith v. Robinson, *and the Myth of Attorney Representation in Special Education Hearings: Is Attorney Representation Desirable?*, 37 SYRACUSE L. REV. 1161 (1987).

26. It has been widely accepted that one of the primary benefits of legalization is the legitimation of the claims of the newly recognized rights-holders; J. HANDLER, *supra* note 14, at 152 ("We have struggled too hard to change our legal culture and reconceive the relation of the citizen to the state to throw out these hard-earned gains because adversarial advocacy is not working in the discretionary situation."); Clune & Van Pelt, *supra* note 12, at 46 ("The ultimate advantage of legalization is the production of rapid change through substantively empty demand entitlements."); Neal & Kirp, *supra* note 7, at 75 ("The embodiment of values in law and the possibility of sanctions offer powerful reference points to those implementing a reform, thereby serving as a rallying point for claims on the system and a powerful resource for responding to arguments from competing value positions.").

27. *See, e.g.*, Clune & Van Pelt, *supra* note 12, at 55; Neal & Kirp, *supra* note 7, at 80-87.

28. *See, e.g.*, Kirp, *Professionalization as a Policy Choice: British Special Education in Comparative Perspective*, in SPECIAL EDUCATION POLICIES, *supra* note 2, at 78-83 (explaining that in Great Britain, special education is almost exclusively in the province of professionals and is an "institutionally marginal service" isolated from ordinary schools). As Professor Kirp states, the professional model in special education has been adopted in Great Britain and is comparable to how medical doctors make their decisions about treatment. Only at the far reaches of incompetence is it easy to imagine patients seeking judicial review of most medical decisions. Thus, the professional model places nearly absolute authority in the hands of the "experts." *Id. See also* Levin, *Equal Opportunity for Children with Special Needs: The Federal Role in Australia*, 48 LAW & CONTEMP. PROBS. 213, 272 (1985) (concluding that "Australia's educational system is basically paternalistic: the power of educational decisionmaking is entrusted to the professional. The political/legal culture of the United States . . . makes parents more ready to assert their rights against the professional and courts more ready to enforce those rights than is evident in Australia."); J. HANDLER, *supra* note 14, at 92-119. Professor Handler discussess the "cooperative" model of special education decision making as it is played out in Madison, Wisconsin. *Id.* at 80-119. This model essentially rejects adversarial procedures in special education decision making and relies on parent-school communication, cooperation, and continuing negotiation for conflict resolution. *Id.* at 92-103. *See generally* Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181, 186-87.

29. P. SCHUCK, SUING GOVERNMENT 26-27 (1983).

(which are expressed in language of unconditional entitlement) that implementation failures are the logical result.

It is the thesis of this Article that the absence of competent remedies[30] in the system has exacerbated implementation problems. Although implementation problems can be attributed to a myriad of causes and conditions, the "remedies gap" has been overlooked as a source of difficulty. Remedies are essential components in a private enforcement model,[31] and their absence has at least partially disabled the potential impact of the EHA.

This Article first examines the structure and history of the EHA. Next, the Article explores the significance of the "remedies gap" both in the statute as written and in the current interpretations of the statute by the courts. It then focuses on the two most recent developments in special education law: the 1986 enactment of the Handicapped Children's Protection Act[32] and the 1985 United States Supreme Court decision in *School Committee of Burlington v. Department of Education*.[33] Both of these developments enhance the remedies available under the EHA and illustrate the inexorable pressure towards

30. The terms "remedy" and "remedial" are used here to refer to the relief fashioned to benefit or compensate the prevailing party, and this is the only meaning which is intended in this Article. The terms are sometimes used, however, as synonyms for the procedure or the avenue by which that relief may be sought. Justice Blackmun, for example, refers to 42 U.S.C. § 1983 as a "statutory remedy" and identifies the due process hearing procedures of the EHA as "administrative remedies." Smith v. Robinson, 468 U.S. 992, 1012 (1984). These alternative usages are not intended here.

31. A clear distinction should be made again between the question of "remedy" as it is used in other contexts and the issues involved here. The past two decades have seen an increase in regulatory systems in which the law is silent or incomplete with respect to enforcement mechanisms, leaving the courts to decide, for example, whether or not to "imply" from the statute a private right of action or "private remedy." These "implication" cases have generated a great deal of interesting scholarship. *See, e.g.*, Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1198 (1982).

Under current doctrine, resolving implication problems requires a quite formalistic analysis of congressional intent (a usually unsatisfactory undertaking). The most recent cases have signaled a trend away from implying a private right of action when Congress has been silent on the issue. *See, e.g.*, Daily Income Fund v. Fox, 464 U.S. 523, 527-35 (1979) (holding that investment company does not have an impled right of action under section 36(b) of the Investment Company Act of 1940); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 18-24 (1979) (implying that a private cause of action existed under section 215 of the Investment Advisors Act of 1940 but holding that no private cause of action existed under section 206 of the same Act); Touche Ross & Co. v. Redington, 442 U.S. 560, 568-71 (1979) (holding that there is no private cause of action for damages under section 17(a) of the Securities Exchange Act of 1934); *see also* Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L. REV. 665 (1987). *But cf.* Cannon v. University of Chicago, 441 U.S. 677 (1979) (ruling that a petitioner alleging harm stemming from violation of Title IX does have a private cause of action).

In the case of the EHA, however, Congress has explicitly chosen private enforcement as the primary mechanism for ensuring compliance with the law. *See* 20 U.S.C. § 1415(b) (1988). The problem is that private enforcement has not been very effective. A possible explanation for this ineffectiveness is that the EHA's private action has not included all of the relief typically associated with private enforcement.

32. Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified at 20 U.S.C. § 1415(e)(4)(B), (f)); *see infra* notes 120-41 and accompanying text.

33. 471 U.S. 359 (1985); *see infra* notes 174-200 and accompanying text.

further legalization despite some critics' exhortations toward a contrary course. Next, the Article examines the connection between the substantive right and the remedial regime and argues that as the courts have defined the substantive right more specifically, and thus narrowly, they have broadened the availability of remedies. The final Section surveys the various remedies which are potentially available under the EHA and explores the effect of each remedy on EHA implementation.

## I. THE PROVISIONS OF THE EHA

The EHA is a funding statute, affording federal money[34] to assist state and local agencies to provide educational services to handicapped children.[35] Receipt of the federal money is conditioned on compliance with extensive substantive and procedural requirements. The responsibility for compliance rests on both the State Education Agency,[36] which is the initial recipient of the appropriation, and the Local Education Agency,[37] which receives its allocation from the state.[38] In most states, these entities translate roughly into the state board or department of education and the local school district.

To receive the federal financial assistance, a state must show that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education."[39] The state and, in turn, the school district, must have procedures which ensure that all children who are handicapped are identified, located, evaluated,[40] and provided with free appropriate public educa-

34. The federal money appropriated under the EHA covers only about nine to fourteen percent of the total cost of the handicapped child's education. Bartlett, *The Role of Cost in Educational Decisionmaking for the Handicapped Child*, 48 LAW & CONTEMP. PROBS. 5, 29 (1985). The states thus have "bought into" the highly complex federal scheme for a relatively small reward.

35. Handicapped children are defined by the EHA as "mentally retarded, hard of hearing, deaf, speech, or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health-impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(a)(1) (1988). For a more extensive list of definitions of handicapped children, see 34 C.F.R. § 300.5(b) (1989).

36. 20 U.S.C. § 1401(7) (1988).

37. *Id.* § 1401(8); 34 C.F.R. § 300.8(b) (1989).

38. 20 U.S.C. § 1411(c)(1)(B) (1988).

39. *Id.* § 1412(1); *see also* 34 C.F.R. § 300.121(a) (1989).

40. 20 U.S.C. § 1412(2)(C) (1988); 34 C.F.R. §§ 300.128(a)(1), 300.220 (1989). Depending on the internal organization of educational delivery within a state, the state may sometimes be the direct provider of education for some children, usually in state-run schools designed specifically for the handicapped. Schools such as these have come under attack because of their potential to run afoul of the EHA's mainstreaming requirements. *See infra* note 46 and accompanying text. The Sixth and Eighth Circuits, however, have held that such state schools, even though segregated, do not violate the EHA per se, reasoning that in some circumstances the marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which cannot be provided in the non-segregated setting in a cost-efficient manner. The resolution of the issue is driven by economic analysis rather than rights-based analysis. *See, e.g.*, Roncker v. Walter, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983); A.W. By & Through N.W. v. Northwest R-1 School Dist., 813 F.2d 158 (8th Cir. 1987).

tion,[41] including special education[42] and related services.[43] These special education and other services must be provided at no cost to the parent and must conform to an IEP.[44]

The IEP is a written statement prepared at a meeting between designated school personnel and the child's parents. It describes the child's present levels of educational performance, the goals of the program, the specific services included, the projected dates for initiation and anticipated duration of the services, and appropriate objective criteria for determining whether the plan is being successfully implemented.[45] The IEPs are to be implemented in the least restrictive environment possible[46] — that is, the handicapped children

41. Free appropriate public education is defined as special education and related services which: are "provided at public expense under public supervision and direction and without charge"; "meet the standards of the state educational agency"; "include an appropriate preschool, elementary, or secondary education in the state involved"; and are "provided in conformity with the individualized education program." 20 U.S.C. § 1401(18) (1988); 34 C.F.R. § 300.4 (1989). After much debate in the lower courts, the Supreme Court eventually established a substantive interpretation of free appropriate public education in Board of Educ. v. Rowley, 458 U.S. 176 (1982); *see infra* notes 205-22 and accompanying text.

42. " 'Special education' means specially designed instruction, at no cost to [the] parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. § 1401(16) (1988); 34 C.F.R. § 300.14 (1989). There is no requirement that students be educated by the public entity itself, which may contract with private facilities for the provision of services. It is this situation which gives rise to much litigation. Where parents believe that the school district does not offer an appropriate education but that a private (and usually expensive) facility does, the parent may seek to overturn the school district's placement decision and obtain public funding for the private placement. *See, e.g.*, Stanger v. Ambach, 501 F. Supp. 1237 (S.D.N.Y. 1980). *See generally* Mooney & Aronson, *Solomon Revisited: Separating Educational and Other than Educational Needs in Special Education Residential Placements*, 14 CONN. L. REV. 531 (1982) (proposing a test for the courts to apply in cases in which the issue is whether the school district or the parents should be responsible for expenses incurred for the residential placement of a handicapped child and concluding that under the test a court must decide whether the placement is required strictly for educational purposes); Rothstein, *Educational Rights of Severely and Profoundly Handicapped Children*, 61 NEB. L. REV. 586 (1982) (evaluating the extent to which a state school system is required to educate profoundly retarded children and discussing the implications of recent developments in this branch of special education).

43. Related services are transportation and other supportive services "including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be used for diagnostic and evaluation purposes only" as may be required to assist a handicapped child to benefit from special education, and include early identification and assessment of handicapping conditions in children. 20 U.S.C. § 1401(17) (1988). For a more extensive list of related services see 34 C.F.R. § 300.13 (1989).

44. 20 U.S.C. § 1413(a)(4)(B) (1988).

45. *Id.* § 1401(19); 34 C.F.R. § 300.346 (1989). "The IEP meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs and what the anticipated outcomes may be." *Id.* pt. 300, app. C(I)(a).

46. 20 U.S.C. § 1412(5)(B) (1988); 34 C.F.R. § 300.550(b) (1989). Education in the least restrictive environment is mandated to avoid the segregation of handicapped children and the resulting stigmatization. Children who can function with some supportive services in regular classrooms alongside non-handicapped children are to remain there if practicable. For discussions of the mainstreaming requirement, see Meyers & Jenson, *The Meaning of "Appropriate"*

are to be mainstreamed. Additionally, IEPs are to be reviewed and updated annually.[47]

Evaluations of handicapped children must be administered in the child's native language and must include at least one procedure that is not an I.Q. test.[48] All assessments are to be free from racial or cultural bias[49] and are to include all areas of suspected disability.[50] Multi-disciplinary teams participating in evaluations, IEP development, and placement decisions are not to base placement decisions on tests alone.[51]

The EHA cannot be comprehended without an appreciation for the role which procedure plays in carrying out its purposes.[52] As indicated, recipient states are required to assure that each child will receive a free appropriate public education, which is defined in part by compliance with the requirements for parental participation in the process of IEP development. Notice to the parent is mandated at several stages of the process: when the school district identifies the child as handicapped, evaluates the child for determination of a handicapping condition, proposes to change the child's evaluation or identification, or refuses either initially or subsequently to identify or evaluate the child.[53]

The parents are entitled to review their child's records and test results[54] and are permitted to obtain independent evaluations by professionals of their own choosing.[55] If the parent and the school authorities cannot agree upon the child's placement, program, or any other aspect of the child's education,[56] the parent may request a due process hearing[57] before an impartial hearing

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*Educational Programming Under the Education for All Handicapped Children Act*, 1984 S. ILL. L.J. 401; Miller & Miller, *supra* note 3, at 6-12; Turnbull, Brotherson, Czyzewski, Esquith, Otis, Summers, Van Reusen & DePazza-Conway, *supra* note 3; Goodwin, *supra* note 3; Turnbull, Brotherson, Wheat & Esquith, *The Least Restrictive Education for Handicapped Children: Who Really Wants It?*, 16 FAM. L.Q. 161 (1982).

47. 34 C.F.R. § 300.343(d) (1989).

48. 20 U.S.C. § 1412(5)(c) (1988); 34 C.F.R. § 300.532(a)(1), (d) (1989). *See generally* Kleinman, *The Discriminatory Use of I.Q. Tests in the Placement of Disproportionate Numbers of Black Children in Classes for the Retarded*, 14 COLUM. HUM. RTS. L. REV. 101 (1982).

49. 20 U.S.C. § 1412(5)(c) (1988); 34 C.F.R. § 300.530(b) (1989).

50. 34 C.F.R. § 300.532(f) (1989).

51. *Id.* § 300.533.

52. The Supreme Court has expressly recognized the confluence of substance and procedure under the EHA. In Board of Education v. Rowley, 458 U.S. 176 (1982), the Court held that "adequate compliance with the procedures prescribed [under the EHA] would in most cases assure much if not all of what Congress wished in the way of substantive content of an IEP." *Id.* at 206.

53. 20 U.S.C. § 1415(b)(1)(C) (1988); 34 C.F.R. § 300.504 (1989).

54. 20 U.S.C. § 1415(b)(1)(A) (1988); 34 C.F.R. § 300.502 (1989).

55. 20 U.S.C. § 1415(b)(1)(A) (1988); 34 C.F.R. § 300.503 (1989).

56. Parental consent must be obtained before: (i) conducting a preplacement evaluation; and (ii) initial placement of a handicapped child in a program providing special education and related services. 20 U.S.C. § 1415(b)(1)(C), (D) (1988); 34 C.F.R. § 300.504(b) (1989). When a parent refuses to consent, the school district may invoke the due process hearing procedures provided by the EHA. *Id.* § 300.504(c).

57. 20 U.S.C. § 1415(b)(2) (1988); 34 C.F.R. § 300.506 (1989).

officer.[58] The hearing may be "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[59]

The administrative hearing is subject to an extensive set of rules and regulations.[60] Parents are entitled to a timely response to their complaint, they may be accompanied by counsel and experts,[61] and they may cross-examine and compel the attendance of witnesses.[62] The impartial hearing officer must provide written findings of fact and a copy of the decision.[63] All of this is to be accomplished within forty-five days of the request for a hearing, and if the hearing was held at the local level, appeal therefrom is to the state educational agency.[64] After the decision at the state level, the parties may bring a civil action in federal district court or a state court of competent jurisdiction.[65] The court shall receive the records of the administrative proceedings, hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, grant such relief as the court determines is appropriate.[66]

## II. THE REMEDIES GAP: LEGAL ORIGINS

The EHA was enacted against a background of discrimination, wrongful classification, and exclusion faced by handicapped children. The Act adopted procedures to correct *these* wrongs, but it was not particularly well-suited to resolving some difficult qualitative educational questions raised under this reformist legislation.[67] Once the grossest violations of the rights of handicapped children were addressed, disputes arose about the kind and quality of services offered. Some of these disputes ended up in the courts as full-blown litigation,

58. In order to assure impartiality, federal regulations require that a hearing may not be conducted by an employee of a public agency which is involved in the education of the child, or by any person having a personal or professional interest which would conflict with her objectivity in the hearing. 20 U.S.C. § 1415(b)(2) (1988); 34 C.F.R. § 300.507(a) (1989). This requirement adds significantly to the cost of due process hearings. Even when the dispute is at the local level, state education employees have been disqualified from serving as hearing officers because of their potential indirect connection with the case if it is appealed to the state level. *See, e.g.*, Monahan v. Nebraska, 491 F. Supp. 1074, 1091 (D. Neb. 1980) (ruling that state statute giving State Commissioner of Education discretion to change decision made during due process hearing conflicts with federal statute), *aff'd in part, vacated in part on other grounds*, 645 F.2d 592 (8th Cir. 1981), *cert. denied*, 460 U.S. 1012 (1983). This requires most school districts to hire "outside" hearing officers, who may be academicians, attorneys, or special education professionals from neighboring school districts.

59. 20 U.S.C. § 1415(b)(1)(E) (1988).

60. 34 C.F.R. §§ 300.506-300.514 (1989).

61. 20 U.S.C. § 1415(d)(1) (1988); 34 C.F.R. § 300.508(a)(1) (1989).

62. 20 U.S.C. § 1415(d)(2) (1988); 34 C.F.R. § 300.508(a)(2) (1989).

63. 20 U.S.C. § 1415(d)(4) (1988); 34 C.F.R. § 300.508(a)(5) (1989).

64. 20 U.S.C. § 1415(c) (1988); 34 C.F.R. § 300.510 (1989).

65. 20 U.S.C. § 1415(e)(2) (1988); 34 C.F.R. § 300.511 (1989).

66. 20 U.S.C. § 1415(e)(2) (1988).

67. Of course, lack of attention to substantive goals is one of the hallmarks of legalization. *See* Yudof, *supra* note 7, at 905 ("A large measure of the appeal of legalization is that it does not require specific outcomes.").

with pleadings that were required to contain "a demand for judgment for the relief [which may be in the alternative or of several different types] the pleader seeks."[68] However, the EHA is vague about the remedies ultimately available to parents who challenge the school district's educational programming, in that it merely provides that the federal court grant "such relief as it determines is appropriate"[69] to the prevailing party.

Traditionally, most courts interpreted the language of the EHA to afford only prospective injunctive relief.[70] Thus, a parent dissatisfied with the special educational services offered to the child might undergo a protracted process of litigation at her own expense[71] which, in the end, might or might not afford relief which would still benefit the child.[72] Any educational harm resulting from the school district's dereliction was not considered compensable.[73] The child's placement in the interim, and financial responsibility during that period, have been matters of great dispute.[74] Those plaintiffs bold enough to litigate therefore sought, in addition to prospective injunctive relief, attorney's fees, reimbursement for out-of-pocket expenditures, compensatory damages, and compensatory educational services.[75]

The EHA itself provided no certain, predictable, or meaningful remedies, and consequently, litigants turned to supplementary avenues for relief. At the time the EHA was adopted, there were two other statutes which provided ammunition for those involved in litigation. First, there was section 504 of the Rehabilitation Act of 1973[76] [hereinafter section 504] which was a general statute prohibiting discrimination on the basis of handicap in any program receiving federal assistance.[77] The regulations promulgated by the Department of Education to implement section 504 in the school setting, however, were issued after the enactment of the EHA and were designed to dovetail with the latter.[78] The regulations define discrimination in the elementary and

68. FED. R. CIV. P. 8(a)(3).

69. 20 U.S.C. § 1415(e)(2) (1988).

70. *See* cases cited *infra* note 224.

71. In 1986, Congress finally amended the EHA to provide for the recovery of attorney's fees. *See infra* notes 120-41 and accompanying text.

72. *See supra* notes 17-18 and accompanying text.

73. *See infra* notes 142-64 and accompanying text.

74. *See infra* text accompanying notes 142-54.

75. *See infra* notes 255-71 and accompanying text.

76. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (1988)). For an excellent discussion of the relationships between the EHA, section 504 and section 1983, see Wegner, *Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence* (pts. 1 & 2), 17 J. L. & EDUC. 387, 625 (1988).

77. The legislative antecedents in the wording of section 504 were section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1988), which prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1988), which prohibits discrimination on the basis of sex under any program or activity receiving federal financial assistance.

78. The regulations are codified at 45 C.F.R. pt. 84 (1989). The section 504 regulations require that each recipient of federal funds provide a free appropriate public education designed

secondary school context as the failure to provide a free appropriate public education. This definition essentially restated the right, however indeterminate, guaranteed by the EHA.[79]

The second statute utilized by EHA litigants was section 1983[80] which provides a cause of action for the deprivation of rights, privileges, or immunities secured by the Constitution or federal law. There were two separate bases for joining a section 1983 claim with an EHA claim. First, the plaintiff could allege that the failure to provide a handicapped child with free appropriate public education was a denial of equal protection[81] or due process, thus alleging a direct constitutional violation.[82] The other basis for a section 1983 claim

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to meet the individual needs of handicapped children in the least restrictive environment. *Id.* §§ 84.33-84.34. The regulations also require that recipients establish a system of procedural safeguards which includes notice, an opportunity for the parents to examine relevant records, an impartial hearing with the right to counsel, and a review procedure with respect to actions regarding the identification, evaluation, or educational placement of handicapped children. *Id.* § 84.36. Compliance with the procedural provisions of the EHA is stated to be "one means" of meeting these requirements. *Id.*

79. *Id.* § 84.33. Whether the substantive content of the rights secured by section 504 and those secured by the EHA is different is discussed in Wegner, *supra* note 76, at 395-404 (pt. 1), 635-50 (pt. 2).

80. 42 U.S.C. § 1983 (1988). That section provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding.

81. The equal protection basis for the protection of handicapped children's rights in public education was explored in the *PARC* and *Mills* cases but was short-circuited by the enactment of the EHA. *See supra* note 6. It is fairly clear that to exclude a child from school without a hearing would violate the due process clause. Goss v. Lopez, 419 U.S. 565, 582 (1975). What is not at all clear, however, is whether a handicapped child has a constitutional right to any particular form of educational programming or whether that child has any constitutional right to due process when her programming is changed. Neither of these rights is available to non-handicapped children. A related and even thornier question asks whether a child has an independent, constitutionally-based right to due process before she is removed from school when there is no constitutional right to an education in the first instance. *See* Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323 (1987) (arguing that procedural due process is subject to constitutional constraints in all cases); Terrell, *Liberty and Responsibility in the Land of "New Property": Exploring the Limits of Procedural Due Process*, 39 U. FLA. L. REV. 351 (1987) (arguing that, with the government-as-monopolist in entitlements, the boundary between "new property" and rights is blurred); Wegner, *supra* note 76, at 626-35 (pt. 2) (noting the difficulties in establishing procedural violations under section 1983 when the substantive right has not yet been established).

82. It is unlikely that garden-variety special education disputes rise to the level of Constitutional deprivations. Thus, resort to the Constitution for educational deprivations is seldom necessary or fruitful. Interestingly, however, the Supreme Court in Smith v. Robinson, 468 U.S. 992 (1984), implied that the due process rights attendant to special education claims may have independent constitutional grounds: the Court stated that section 1983 would be available where "plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they were *constitutionally due*." *Id.* at 1014 n.17 (emphasis added). It is not at all clear that a handicapped child is *constitutionally* entitled to notice and a hearing when a school district decides to make adjustments in her educational programming which do not result in exclusion, although such a right exists under the EHA.

was grounded in the "or laws" language of the statute. Reading it literally, the violation of any federal statute securing a "right" could form the basis of a section 1983 claim.[83] Thus, an EHA plaintiff could bring an action based on section 1983 by alleging a violation of the right to a free appropriate public education secured by the EHA or the right to be free from discrimination under section 504, as well as a denial of constitutional rights.[84]

The failure of the EHA to address the remedial issues provided the greatest impetus for advocates to proceed with claims under all three statutes. It was clear that of the three statutes, the EHA's guarantees provided the most specific and comprehensive basis for a case "on the merits."[85] By contrast, neither section 504 nor section 1983 offered any provisions which would expand those substantive rights. What these two statutes lacked in substance, however, was easily made up for in remedial benefits. Both section 504[86] and section 1983[87] have cognate provisions for the awarding of attorney's fees to prevailing parties. In addition, both section 1983[88] and, to a lesser extent, section 504[89] offered the possibility for an award of money damages to plain-

83. The literal reading of section 1983 which accounts for this result was affirmed by the Supreme Court in Maine v. Thiboutot, 448 U.S. 1 (1980), which extended the availability of section 1983 to violations of the Social Security Act. Shortly thereafter, the Court recognized that there must be an exception to this holding or else litigants could circumvent some very elaborate administrative enforcement schemes by taking their complaints directly to court under section 1983. The exception was characterized either by the statement that section 1983 would not be available where Congress intended that the underlying statute be the exclusive remedy, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984), or by the statement that section 1983 would not be available where the underlying statute provides its own comprehensive enforcement scheme, Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981).

84. An example of meticulous lawyering in a case in which the plaintiff alleged each and every possible claim in an appeal from a special education dispute is Department of Education v. Katherine D., 727 F.2d 809, 819 (9th Cir. 1983).

85. The "merits" dimension of a special education claim was a subject of great dispute until the Supreme Court's ruling in Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982), in which the phrase "free appropriate public education" was elucidated. *See infra* notes 201-22 and accompanying text.

86. 29 U.S.C. § 794(a) (1988).

87. 42 U.S.C. § 1988 (1988).

88. The language of section 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343 (1988), expressly provides that persons who cause a deprivation of rights secured by federal law shall be liable to the injured party in an action at law. Nominal, compensatory, and punitive damages are available in appropriate cases, although the Supreme Court has been careful to require proof of harm specifically caused by the civil rights violation at issue. Carey v. Piphus, 435 U.S. 247, 263-64 (1978). For a more detailed description of the damage possibilities offered by section 1983 and defenses thereto, see Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1 (1981); Wegner, *supra* note 76, at 679-89 (pt. 2).

89. The availability of damages under section 504 has been in doubt because courts had to begin under that statute by asking whether a private right of action could be implied. This effort required analysis under the Supreme Court's ambiguous and artificial tests of Cort v. Ash, 422 U.S. 66 (1975), and reference to section 504's statutory analogs, Title VI and Title IX. Although the Supreme Court has not specifically implied a private right of action under section 504, it has done so under Title IX. Cannon v. University of Chicago, 441 U.S. 677 (1979). Lower courts have generally implied the right. *See* Miener v. Missouri, 673 F.2d 969, 974 (8th

tiffs who could demonstrate injury. Finally, plaintiffs could proceed under section 504 or section 1983 in order to avoid the EHA's mandated due process procedures and exhaustion requirements.[90]

In seeking effective remedies for violations of handicapped children's rights, plaintiffs have faced a variety of procedural obstacles. If, for example, a plaintiff sought prospective injunctive relief, damages for past deficiencies, and attorney's fees under all possible theories, the first courts hearing such cases were required to examine, evaluate, discuss, and determine nearly a dozen distinct issues.[91] Traditional doctrine dictated that the resolution of these types of issues was dependent upon legislative intent, evidence of which, in the case of these particular statutes, was notable for its scarcity. Furthermore, the issues were not very well refined in the early cases arising under the EHA, and sometimes important arguments were not timely made.[92] It is not surprising then that the courts' analyses were often cursory and in conflict

Cir.), *cert. denied*, 459 U.S. 909 (1982); Kling v. County of Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980), *rev'd*, 474 U.S. 936 (1985); Davis v. Southeastern Comm. College, 574 F.2d 1158, 1159 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *see also* Wegner, *supra* note 76, at 675-79 (pt. 2). Resolution of implication questions has long been a thorny issue. The Supreme Court appears to be losing patience with the Congressional silence which foists the task on the courts, especially in cases involving the enforcement of regulatory laws. The Court does, however, deal more expansively with private rights of action involving "civil" or new property-type rights. *See* Stewart & Sunstein, *supra* note 31, at 1307-08.

90. Once the due process provisions of the EHA were incorporated into the section 504 regulations, courts required exhaustion under that statute as well. *See* Harris v. Campbell, 472 F. Supp. 51 (E.D. Va. 1979); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1110 (N.D. Cal. 1979). *See generally* Hyatt, *supra* note 88, at 29-42. Section 1983, on the other hand, has a longstanding tradition of providing a vehicle whereby the exhaustion of administrative remedies can be avoided. Patsy v. Florida Bd. of Regents, 457 U.S. 496, 516 (1982); Monroe v. Pape, 365 U.S. 167, 182 (1961), *overruled on other grounds*, Monell v. Department of Social Servs., 436 U.S. 658 (1978). More recently, however, when dealing with federal regulatory schemes, the Supreme Court has been more interested in protecting the integrity of complex administrative enforcement mechanisms. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). Thus, in order to maintain an exhaustion requirement, the Court has had to conclude that the underlying statutes are exclusive and that section 1983 is simply not available. *See* Smith v. Robinson, 468 U.S. 992, 1011 n.14 (1984). For a current treatment of these issues, see Wegner, *supra* note 76, at 445-53 (pt. 1).

91. For example, courts would have to address the following questions: Does the EHA allow the recovery of damages? Does the EHA allow the recovery of attorney's fees? Does section 504 provide a private cause of action? If so, does that cause of action include damages? Does it include attorney's fees? Does it allow avoidance of the EHA's administrative remedies? Does section 1983 lie to redress violations of the EHA which might also be violations of the Constitution? Does section 1983 lie to redress violations of the EHA? If a claim under section 1983 is cognizable, can damages be awarded? Can attorney's fees be awarded? For a discussion of these questions at the time they were first arising, see Hyatt, *supra* note 88.

92. The most notable confusion concerned the issue of damages. In some cases where school districts had failed to provide an appropriate program, parents secured private services for children at their own expense. After invoking due process and prevailing on the issue of the district's default, the parents sought "damages" in the form of reimbursement for the cost of the private services. Some courts treated these restitutionary claims as though they were claims for educational harm or educational malpractice and denied them on policy grounds. *See, e.g.*, Miener v. Missouri, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982); Anderson v. Thompson, 658 F.2d 1205, 1213-14 (7th Cir. 1981).

with each other.[93]

By 1984, the case law was in chaos. EHA litigants who conscientiously sought relief for their clients under all possible theories found: (1) there was general agreement that the EHA itself did not provide attorney's fees[94] or compensatory damages;[95] (2) there was some authority for the recovery of attorney's fees[96] and perhaps some types of damages under section 504;[97] (3) the courts were split as to whether a section 1983 claim was even cognizable for EHA litigants;[98] and (4) those courts which were willing to address section 1983 claims were divided as to the availability of remedies pursuant to that claim.[99]

Lawyers pursued these procedural issues not out of some perverse desire for complexity, but out of a very practical need to bring the remedies into consonance with the rights apparently granted by the EHA. As soon as parents became part of the special education system, they would be ceremoniously advised (several times and in writing) about their child's rights to a free appropriate education, their right to notice, their right to participate in the preparation of their child's individualized educational program, their right to a due process hearing with respect to disputes, and their right to go to court.[100]

If a dispute arose, however, it soon became clear that the rights were somewhat illusory: if the school district wrongly placed a learning-disabled child in a program for emotionally disturbed children, the parents would be forced to embark on a long, expensive series of unpleasant confrontations with people who were entrusted with educating the child.[101] If the parents failed to

93. *See* cases cited *infra* notes 94-99.

94. *Miener*, 673 F.2d at 979-80; *Anderson*, 658 F.2d at 1205; Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983).

95. Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1354 (5th Cir. 1983); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983); *Anderson*, 658 F.2d at 1206.

96. Tatro v. Texas, 703 F.2d 823, 833 (5th Cir. 1983); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 57 (N.D. Ala. 1981).

97. *Miener*, 673 F.2d at 977; David H. v. Spring Branch Indep. School Dist., 569 F. Supp. 1324, 1331 (S.D. Tex. 1983).

98. Quackenbush v. Johnson City School Dist., 716 F.2d 141, 148 (2d Cir. 1983) (ruling that section 1983 claim is cognizable in EHA action); *Powell*, 699 F.2d at 1082 (deciding that section 1983 claim is not cognizable in conjunction with EHA action); McGovern v. Sullins, 676 F.2d 98, 99 (4th Cir. 1982) (ruling that section 1983 claim is not cognizable in conjunction with claim under EHA); William S. v. Gill, 536 F. Supp. 505, 512-13 (N.D. Ill. 1982) (deciding that section 1983 claim may be stated in conjunction with EHA action); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1113 (N.D. Cal. 1979) (finding that section 1983 claim is cognizable in conjunction with EHA claim).

99. *Quackenbush*, 716 F.2d at 148-49 (upon proper showing, compensatory and punitive damages are available for violation of constitutional procedural due process); *Marvin H.*, 714 F.2d at 1357 (damages available under section 1983, but only if intentional discrimination is shown); *William S.*, 536 F. Supp. at 512 (finding that general damages claim may be stated under section 1983).

100. *See supra* notes 52-66 and accompanying text.

101. *See infra* note 219.

achieve satisfaction at the local and state levels,[102] they could file a civil action in federal court, which would take at least a year. The only relief that they would be relatively certain to gain was prospective injunctive relief. There still remained the risk, however, that the school district might not have an appropriate program in place at that time,[103] or that a new placement might be undermined in the next annual IEP review. There was no guarantee that attorney's fees would be recovered and little hope of recovering compensation for the child's inappropriate placement. The use of the rhetoric of "rights" in the face of this reality appeared particularly absurd.[104]

Throughout this chaotic period, however, the hope remained that more courts would make the struggle worthwhile by exercising their discretion to award significant remedies, or at least legal fees. This result would have to be reached from the back door — that is, through the application of section 504 or section 1983 and their remedies to EHA disputes. In 1984, however, the Supreme Court foreclosed these possibilities when it decided *Smith v. Robinson*.[105] That decision and its impact are discussed in the next Section.

## III. *SMITH V. ROBINSON*

The Supreme Court temporarily[106] resolved many of these conflicts in *Smith v. Robinson*.[107] In that case, the school district threatened to discontinue funding Tommy Smith's private placement, arguing that under Rhode Island law, the state mental health department, and not the school district, was responsible for children with Tommy's handicaps.[108] Apparently, at no time did the parties disagree about the substantive appropriateness of Tommy's placement, nor dispute that some public agency would have to pay

102. It is difficult to define what constitutes a "victory" in special education hearings. Comparing what the parents requested to the outcome, it appears that parents are completely successful in only four percent of the cases. Kirp & Jensen, *What Does Due Process Do?*, 73 PUB. INTEREST 75 (1983). Parents in another study won at least partial victories in 35% of the cases. Kuriloff, *Is Justice Served by Due Process? Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 LAW & CONTEMP. PROBS. 89, 99 (1985).

103. It has been said that a legal right exists only when there is minimal discretion involved in determining its distribution and if it can be granted to each person claiming it. Friedman, *Social Welfare Legislation: An Introduction*, 21 STAN. L. REV. 217 (1969). In special education, for example, a judge might find a particular private placement to be appropriate, but that finding can be subject to the availability of a slot in the program, or the fortuity of the program's continued existence.

104. *See* J. HANDLER, *supra* note 14, at 74 ("The substantive rules are not only indeterminate; on close examination they turn out not to be legal rights in any practical sense. . . . Hearing rights are supposed to enable people to enforce substantive rights. With special education, this turns out not to be true."). As Professor Tushnet suggests, in order for rights to be fully realized facts of social life and not mere rhetoric, rights-holders must have the material and psychological resources which allow them to exercise them. This may require fundamental social change. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

105. 468 U.S. 992 (1984).

106. The enactment of the Handicapped Children's Protection Act in 1986 effectively overruled *Smith v. Robinson*. *See infra* text and accompanying notes 119-41.

107. 468 U.S. 992 (1984).

108. *Id.* at 997.

for at least a portion of it.[109] The problem was a conflict between Rhode Island law and the EHA,[110] although the state was receiving EHA money. Tommy was caught in the middle, and the only way for Tommy's family to keep him in his appropriate program at no cost was to hire a lawyer to secure and maintain court orders to do so. After several trips to court, financial responsibility for Tommy's placement was finally lodged with the local school district.[111] Attorney's fees amounted to more than $40,000.[112]

When the case finally arrived in the Supreme Court, certiorari was granted "[b]ecause of confusion in the circuits over the proper interplay among the various statutory and constitutional bases for relief in cases of this nature, and over the effect of that interplay on the provision of attorney's fees."[113] The result of the Court's holding was to eliminate all but the EHA as a basis for claiming the right to a free appropriate public education. Plaintiffs were no longer allowed to use section 1983's remedies for EHA violations, because, as Justice Blackmun stated, Congress intended the EHA to be the exclusive avenue for relief.[114] Furthermore, claims could not be made under section 504 in order to garner more favorable procedures or remedies, because that section added nothing substantive to the EHA claim.[115] Justice Blackmun examined the legislative history of the EHA and attempted to explain the absence of attorney's fees and damages[116] remedies under the EHA itself. He

109. *Id.*

110. Under the relevant state law, children with emotional problems serious enough to require mental health care could be entrusted to the state mental health department, which required that patients pay some of the costs of their treatment on a sliding scale. R.I. GEN. LAWS § 40.1-7-8 (1984). Under the EHA, responsibility for educating all handicapped children was placed with the school district, and, if the "treatment" was part a child's education, then it had to be at no cost to the parents.

111. Tommy and his parents went to the federal district court in November 1976 and first secured a temporary restraining order and then a preliminary injunction ordering the school district to continue payments to the private facility. *Smith*, 468 U.S. at 996. An administrative hearing was held, and, at the state level, the conflict between state law and the EHA was acknowledged. The state hearing officer decided, however, that he had no power to resolve the conflict. *Id.* at 997. The parents went back to the district court, which certified some confusing state law questions to the Rhode Island Supreme Court. *Id.* at 998-99. In June 1980, that court issued an opinion reconciling state law with the EHA and lodging financial responsibility with the school district. *Id.* at 999. The Smiths then filed amended complaints in the district court, adding claims under section 1983 and section 504 and seeking attorney's fees. The district court entered orders consistent with the Rhode Island opinion, and thus the Smiths prevailed in the litigation. The First Circuit Court of Appeals affirmed the decision in an unpublished opinion filed in January 1982. The school district by agreement had paid those fees attributable to the initial preliminary injunction ($8000), and the district court eventually found the state defendants liable for the fees generated by the administrative proceedings and ensuing court proceedings ($32,109). The court of appeals, in Smith v. Cumberland School Comm., 703 F.2d 4 (1st Cir. 1983), reversed that decision, finding that fees were not available under the EHA and that neither section 1983 nor section 504 could substitute for what were really EHA claims.

112. *See supra* note 111 (school district and state defendants liable for $8000 and $32,109, respectively).

113. *Smith*, 468 U.S. at 1004.

114. *Id.* at 1009.

115. *Id.* at 1021.

116. It is unclear why Justice Blackmun discussed the damages issue in this case along

decided that, while the subject was not specifically addressed, Congress must have been more concerned with reducing the financial burden on the schools and with ensuring that the available resources were used as much as possible to benefit handicapped children directly.[117] Thus, Tommy Smith's parents, who initiated court proceedings only to prevent their child's removal from a program whose propriety was never questioned, were denied fees.

By closing off the alternative avenues for relief, the decision in *Smith v. Robinson* certainly simplified litigation under the EHA. Yet by denying EHA litigants attorney's fees, it also ensured that only those parents able to afford the significant expenses of litigation could mount a serious challenge to an inappropriate placement. There was little incentive for school districts to submit to the unfavorable decisions of hearing officers or to litigate expeditiously. If, for example, the parents were seeking an expensive private placement for the child, the school district could save tuition money by resisting. There was no disincentive for this course of conduct.[118] Even if the parents ultimately won, the district would simply be ordered to begin funding the new placement as of the date of the decision. Thus, *Smith* left advocates for the handicapped bereft: there appeared to be an enforceable right, but, in reality, all that remained was merely advisory.

## IV. THE HANDICAPPED CHILDREN'S PROTECTION ACT

Congress reacted to the decision in *Smith v. Robinson*[119] three years later by enacting the Handicapped Children's Protection Act of 1986 [hereinafter HCPA][120] which amended the EHA. One new section, enacted expressly to counteract the *Smith* decision, established the availability of attorney's fees to prevailing parents or guardians;[121] parents would thus be able to collect fees arising from their efforts under the EHA, including due process hearings.[122]

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with the attorney's fees question. The Smiths had never sought damages. Furthermore, the two issues flow from different doctrinal lines: The question of attorney's fees under a federal statute begins with the presumption that, if Congress has not specifically provided therefor, no fees should be available. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). There was no valid argument that fees could be awarded under the EHA itself (thus generating the need to use section 1983 and section 504). By contrast, there was no presumption that the absence of a specific damages remedy under the EHA indicated that damages would be unavailable, particularly because of the broad language of 20 U.S.C. § 1415(e)(2) (1988) (the court may grant such relief as it deems "appropriate"). Justice Blackmun acknowledged this fact in a footnote. *Smith*, 468 U.S. at 1020 n.24. Nonetheless, in the text he made such sweeping statements as: "Congress did not explain the *absence of a provision for a damages remedy and attorney's fees* in the EHA," and "we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on § 504 for otherwise *unavailable damages or... attorney's fees.*" *Id.* at 1020, 1021 (emphasis added).

117. *Smith*, 468 U.S. at 1020.

118. *See infra* note 173.

119. 468 U.S. 992 (1984).

120. Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified at 20 U.S.C. §§ 1415(e)(4)(B), (f) (1988)).

121. 20 U.S.C. § 1415(e)(4)(B) (1988).

122. An important issue has arisen regarding the ability of parents under the HCPA to

The Chairman of the House Committee on Education and Labor rather disingenuously stated on behalf of the bill that Congress had intended attorney's fees to be available to EHA litigants all along, and that *Smith v. Robinson* had the effect of repealing those rights.[123] The rest of the legislative history is predictable: the proponents of the bill were the same advocates who lobbied for a highly legalized structure in the original act,[124] and the opponents were the agencies and institutions against whom fees might be awarded.[125]

A second new section added by the HCPA,[126] reintroduced into EHA litigation some of the possible claims which existed prior to *Smith v. Robinson*. The Court in *Smith* held that Congress intended the EHA to be the exclusive avenue of relief for those with claims to a free appropriate public education. Where the plaintiff was able to assert a right under the EHA, based either on the EHA itself or on the equal protection clause of the fourteenth amendment, she could not resort to either section 504 or section 1983 to supplement her EHA remedies.[127] The new section provides, however, that nothing in the EHA's procedural provisions "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, [section 504,] . . . or other Federal statutes protecting the rights of handicapped children and youth."[128] The new section does, however, require the exhaustion of EHA due process procedures before going to court for "relief which is also available

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bring an *independent* action for fees. If the parents win at the hearing level and the action is not appealed to a court, can the parents recover fees for the administrative process? The language of the HCPA states that, "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to . . . the prevailing party." *Id.* The referenced subsection is that which authorizes court review of due process hearings, and there is no authority granted for attorney's fees awards to be made by hearing officers. On the other hand, the legislative history is fairly clear that Congress intended the HCPA to be interpreted according to the decision in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), which noted that under Title VII's fee award statute, it would be anomalous to award fees to those unsuccessful in obtaining state or local remedies, but to deny awards to those who succeed. *Id.* at 66. This issue is given thorough scrutiny in Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: Of* Carey, Crest Street, *and Congressional Intent*, 60 TEMP. L.Q. 599 (1987).

123. *Handicapped Children's Protection Act of 1985: Hearings on H.R. 1523 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 7 (1985) (statement of Chairman Williams) ("The Court's decision last year in Smith v. Robinson had the effect of repealing important statutory rights Congress had intended to be available to handicapped children."). However, the doctrine of Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), which ruled that attorney's fees are not available for actions enforcing statutory rights, unless Congress explicitly provided so, was well known in Congress.

124. Chief proponents of the bill included, for example, the Council for Exceptional Children, the Consortium for Citizens with Developmental Disabilities, the American Civil Liberties Union, and the Association for Persons with Severe Handicaps.

125. Opponents of the amendment included, for example, the American Association of School Administrators and the National School Boards Association.

126. 20 U.S.C. § 1415(f) (1988).

127. *Smith*, 468 U.S. at 992; *see supra* text accompanying notes 106-18.

128. 20 U.S.C. § 1415(f) (1988).

under [the EHA]."[129] Thus, to the extent that the HCPA provides the attorney's fees sought by litigants prior to *Smith*, there is no longer any need to join section 504 or section 1983 to an EHA claim for that purpose. However, to the extent that these statutes provide other remedial benefits not available under the EHA, they are now explicitly resurrected as avenues of relief.[130]

One of the most controversial questions about remedies is whether the HCPA enables a plaintiff to recover compensatory damages such as those for emotional injuries, for loss of earning power, or for loss of opportunity. No court has allowed claims for compensatory money damages under the EHA,[131] and there is Supreme Court dicta indicating that the remedial language of the EHA does not provide for compensatory damages.[132] By contrast, both section 504 and, to a greater extent, section 1983 have been interpreted to provide for compensatory damages in appropriate cases.[133]

It is not as clear whether non-constitutional section 1983 claims also may be used to seek damages for EHA violations. The Supreme Court noted in *Smith*,[134] and has held in other contexts,[135] that where Congress has created a statutorily enforceable right, litigants may not rely on section 1983's "and laws" language to state a claim in addition to that based on the underlying substantive statute. The underlying statute will be considered the exclusive remedy when it contains a detailed enforcement scheme of its own. The language of the HCPA is somewhat ambiguous as to whether EHA-based section 1983 claims are available to litigants after they exhaust the EHA's administrative remedies. However, the conference committee on the bill indicated that section 1983 was intended to be "included" in the section discussing additional procedures and remedies.[136]

Additionally, the swiftness of the congressional response to *Smith* supports arguments that more generous remedies are available under the EHA. Justice Blackmun stated that the holding in *Smith* was narrow,[137] but his analysis inlcuded broad language relevant to the question of damages availability

129. *Id.*

130. Only the political process explains why Congress would want to raise the potential for damage awards in this oblique manner. Section 1983 has always provided damages (including punitive damages) for constitutional violations, and if Congress so chose, it could simply have amended the EHA to provide so expressly. Instead, EHA claimants may now assert section 1983 to enforce the EHA so long as administrative remedies are exhausted first. For a thorough examination of the murky legislative history of the HCPA, see Schreck, *supra* note 122.

131. *See infra* notes 278-88 and accompanying text.

132. Smith v. Robinson, 468 U.S. 992, 1021 (1984). Although the majority opinion recognized that there was ambiguous case law in the lower courts, and although damages were not at issue in the case, there were several references to damages as being "unavailable" under the EHA. *See* quotations cited *supra* note 116.

133. *See supra* notes 78-85 and accompanying text.

134. 468 U.S. at 1008 n.11.

135. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 14-15 (1981) (environmental protection statutes).

136. H.R. CONF. REP. NO. 687, 99th Cong., 2d Sess. 7, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 1807, 1809.

137. 468 U.S. at 1021.

generally, even though damages were not an issue in that case.[138] In considering section 504, for example, Justice Blackmun stated, "we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on § 504 for otherwise *unavailable damages* or for an award of attorney's fees."[139]

By allowing awards of attorney's fees and reopening the door to other avenues of relief, the HCPA has made the rights guaranteed by the EHA more accessible. Furthermore, the prospect of enforcement by parents who are not affluent is more likely. Despite arguments that the HCPA perpetuates and intensifies the already misguided legalized approach to special education,[140] the HCPA serves a significant function by putting school districts on notice that they may be liable for damages where a child is denied free appropriate public education.

The HCPA, however, does not resolve all the remedial problems of EHA litigation. Although Congress provided for fee awards (generating the inevitable satellite litigation on that issue[141]), the HCPA does not address the availability of other forms of relief. The courts, therefore, have continued to play a more significant role in this arena. The judicial wrestling with remedial issues is examined in the next Section.

## V. REMEDIES IN THE COURTS: EARLY DECISIONS

Beyond injunctive relief, the courts have found that reimbursement for parents who have had to provide for their children's educational needs due to a school district's default has been the remedy easiest to justify. Parents who challenge a placement offered by a school district and request a hearing may choose not to accept the school's placement during the pendency of the proceedings.[142] Although section 1415(e)(3) of the EHA provides that the child

138. *See supra* notes 111-16 and accompanying text.

139. *Smith*, 468 U.S. at 1021 (emphasis added).

140. Zirkel, *The Full Employment for Attorneys Act*, 69 PHI DELTA KAPPAN 165 (1987); *see* Hill, *supra* note 14, at 143 n.76 (citing C. Hassel, A Study of the Consequences of Excessive Legal Intervention on the Local Implementation of P.L. 94-14255 (1981) (dissertation, University of California, Berkeley, with San Francisco University)); Note, *supra* note 25.

141. *See* Wegner, *supra* note 76; *see also* Annotation, *Award of Attorneys' Fees Pursuant to § 615(e)(4) of the Education of the Handicapped Act (20 USCS § 1415(e)(4)), as Amended by the Handicapped Children's Protection Act of 1986*, 87 A.L.R. FED. 500 (1988) (discussing relevant case law).

142. Sometimes the child is already in a private placement, and the school district wishes to remove her to a public and less expensive program. In these cases, the child has the full benefit of 20 U.S.C. § 1415(e)(3), which requires that the child be allowed to remain in the current placement until due process proceedings are complete. *See, e.g.*, Spielberg v. Henrico County Pub. Schools, 853 F.2d 256 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1131 (1989). It is notable that section 1415(e)(3), like many other provisions of the EHA, has played a more significant role in cases involving high financial stakes than in cases where more expensive private placements are not an issue. It is likely, however, that the drafters of this section were concerned less about these conflicts and more about those children, especially minorities, who were being wrongfully classified as behaviorally disordered and segregated from the regular classroom or excluded from school altogether. The section ensured that these children would

is to remain in the "then current" educational placement during due process proceedings, this provision is not enforceable as such against a parent.[143] Thus, the parent may choose to forego the publicly financed program by placing the child in a private setting at personal expense. In other situations, the parent might not seek an entirely new placement, but may incur the expense of additional services[144] for a child which the school district refuses to provide. If the decision is ultimately one in the parent's favor, holding that the program offered by the school district does not provide the child with a free appropriate public education and the parent's placement does, the parent may then seek reimbursement for the expense incurred.

The early cases dealing with this issue largely denied reimbursement.[145] The most influential case in this regard was the Seventh Circuit's decision in *Anderson v. Thompson*.[146] Its influence can be attributed both to its timing[147] and its willingness to address issues not directly before it and thus provide what appeared to be broadly definitive and easy-to-apply standards. The *Anderson* case involved a handicapped child whose parents were not satisfied with the school district's recommended placement.[148] The child was enrolled in a private facility, and her parents instituted due process proceedings to challenge the district's recommendation to move her to a public facility.[149] When it was determined ultimately that the proposed placement was not appropriate,[150] the district court ordered that the child remain in private school, and that the costs of the private placement be borne by the school district prospectively.[151] While the district court found that the parents were prevailing parties, it denied reimbursement for the tuition costs incurred during the pendency of the administrative hearing and the court action.[152] The Seventh

not be removed while the parents challenged the classification. *See also* Honig v. Doe, 484 U.S. 305, 311 (1988) (holding that the EHA establishes various procedural safeguards that guarantee parents both opportunity for meaningful input into all decisions affecting their children's education and right to seek review of any decision they think inappropriate).

143. Monahan v. Nebraska, 645 F.2d 592 (8th Cir. 1981), *cert. denied*, 460 U.S. 1012 (1983); *see also infra* text accompanying notes 155-59.

144. *See* Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986) (expenses for summer program and transportation costs ultimately found to be the responsibility of the school district); Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985) (tutor for dyslexic child); Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984) (transportation costs); Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Va. 1981) (transportation costs).

145. *See, e.g.*, Stemple v. Board of Educ., 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).

146. 658 F.2d 1205 (7th Cir. 1981).

147. Although several lower courts had addressed the issue, *see, e.g.*, Miener v. Missouri, 498 F. Supp. 944 (E.D. Mo. 1980), *aff'd in part, rev'd in part*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982); Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979). *Anderson* was the first opinion by a federal appeals court to do so.

148. 658 F.2d at 1207.

149. *Id.*

150. *Id.* at 1208.

151. *Id.*

152. Anderson v. Thompson, 495 F. Supp. 1256, 1270 (E.D. Wis. 1980). The dispute about Monica Anderson's placement began when she entered the school system. *Id.* at 1258.

Circuit affirmed, holding that damages,[153] however limited, were not within the scope of relief authorized by section 1415(e)(2), absent exceptional circumstances.[154]

The most significant stumbling block to the recovery of reimbursement-type damages, according to *Anderson*, was the "stay-put" provision of section 1415(e)(3) under which the child remains in the "then current" placement during proceedings unless the school district agrees otherwise.[155] By unilaterally moving the child to a more expensive, private placement, the parents violate section 1415(e)(3),[156] which then bars a claim for reimbursement except under the two "exceptional circumstances" recognized by the court: when the child's health would be endangered by leaving the child in the public program,[157] or when the school district acted in bad faith and failed to afford the due process mechanisms through which the parent could enforce the substantive provisions of the Act.[158] These exceptions would only be available for reimbursement claims; under no circumstances, the court stated, did Congress intend compensatory damages.[159]

The holding of *Anderson* was grounded on the notion that the EHA is primarily a funding statute. The court stated that Congress recognized the difficulty, expense, and uncertainty involved in diagnosing and developing programs for handicapped children.[160] Congress further believed that, when a school district made a good faith effort to provide a child with an appropriate education, requiring the payment of "money damages" if it later turned out that a different program decision should have been made was not sound policy.[161] Because of the sometimes speculative nature of special education placement decisions, the court reasoned that disagreements would arise and errors would be made.[162] If school officials act out of fear of exposure to monetary

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The parents declined the public school's placement recommended for the 1974-75 school year. *Id.* In 1976, a hearing was held, which took place over 21 evenings. *Id.* The hearing officer's decision was made in favor of the school district, and the appeal at the state level affirmed. *Id.* An action was filed in the district court which modified the hearing officer's decision in 1980, vindicating the parent's position. *Id.* at 1256. The substance of that decision was affirmed by the Seventh Circuit. *Anderson*, 658 F.2d at 1205-06. Thus, after more than five years of litigation (and out-of-pocket tuition and legal expenses), the parents prevailed yet received only prospective injunctive relief.

153. The court in *Anderson* used the terms "damages" and "money damages" to refer to reimbursement-type recoveries. 658 F.2d at 1213 n.12.

154. *Id.* at 1213-14.

155. *Id.* at 1209.

156. *See supra* notes 142-43 and accompanying text.

157. *Anderson*, 658 F.2d at 1213-14. For discussions of the relationship between preliminary injunctive relief and section 1415(e)(3), see Honig v. Doe, 484 U.S. 305 (1988); *see also* Doe v. Brookline, 722 F.2d 910 (1st Cir. 1983); Monahan v. Nebraska, 645 F.2d 592 (8th Cir. 1981), *cert. denied*, 460 U.S. 1012 (1983); Cox v. Brown, 498 F. Supp. 823 (D.D.C. 1980); Hyatt, *supra* note 88, at 33.

158. *Anderson*, 658 F.2d at 1214.

159. *Id.* at 1213 n.12.

160. *Id.* at 1212.

161. *Id.* at 1213.

162. *Id.*

liability for incorrect placements, they might hesitate to implement innovative educational reforms.[163] Implying a damages remedy from the EHA would, therefore, hinder rather than help the children for whose benefit the statute was enacted.[164]

The court's reluctance in *Anderson* to grant remedies may have also resulted from the ambiguity of the right protected by the statute. The meaning of a free appropriate public education, at the time *Anderson* was decided, was a matter of much dispute.[165] It was not until one year later that the right was narrowly defined by the Supreme Court in *Board of Education v. Rowley*,[166] and courts could more easily identify remedies which appeared consonant with the substantive right.[167]

Until that time, however, the *Anderson* holding was popular and was adopted by several circuits.[168] It became increasingly difficult, however, to see why the two exceptions noted above were singled out. Neither exception was pertinent to the facts of these cases, and certainly other circumstances deserving of special treatment could easily have been identified. For example, in *Department of Education v. Katherine D.*,[169] the Ninth Circuit followed *Anderson*'s basic formula but added another exception: parents would be entitled to reimbursement for private school tuition when the only program proposed by the school district was a home-bound program, denying the child her right to special education in the least restrictive environment.[170]

It also became apparent that the court's reasoning in *Anderson* applied particularly to general tort damages, but did not resonate with the plea for reimbursement. The First Circuit was one of the first to part company with the *Anderson* approach.[171] In *Doe v. Brookline School Committee*,[172] the court stated that reimbursement for interim tuition costs promoted the purposes and policies of the EHA by encouraging parents to be assiduous in protecting their children's rights and providing an incentive for local school districts to make correct placements in the first instance.[173]

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163. *Id.*

164. *Id.* at 1211-13.

165. *See infra* text accompanying notes 201-14.

166. 458 U.S. 176 (1982).

167. *See infra* notes 218-26 and accompanying text.

168. *See, e.g.*, Mountain View - Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983); Hessler v. State Bd. of Educ., 700 F.2d 134 (4th Cir. 1983); Stacey G. v. Pasadena Indep. School Dist., 695 F.2d 949 (5th Cir. 1983); Miener v. Missouri, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982); Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982).

169. 727 F.2d 809 (9th Cir. 1983).

170. *Id.* at 811.

171. The First Circuit had initially adopted the *Anderson* approach. *See* Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983).

172. 722 F.2d 910 (1st Cir. 1983).

173. The court stated, "The Seventh Circuit, however, we respectfully observe, 'failed adequately to note the difference between general damages, which could be a very serious matter, and reimbursement for tuition.' " *Id.* at 920, *quoting* — v. —. The court went on to recognize the need to create the appropriate incentives for school district compliance.

It was the First Circuit's approach which gave rise to the case in which the Supreme Court adopted reimbursement as a remedy, *School Committee of Burlington v. Department of Education*.[174] The Court's denial of certiorari in *Anderson* implied that the remedial expansion sought by the First Circuit would be reversed. This speculation, however, turned out to be incorrect.

## VI. *BURLINGTON* AND THE IDEA OF REIMBURSEMENT

The Supreme Court's decision in *School Committee of Burlington v. Department of Education*[175] is notable in many respects. First, the entire Court joined the opinion, making it one of the few unanimous decisions of the 1984-85 Term. Second, the opinion is spare and does not discuss any of the numerous and conflicting appellate decisions on reimbursement.[176] Finally, *Burlington* is notable for its reliance on common sense. Section 1415(e)(3), the "stay-put" provision, is read as having little relationship to the issue of a reimbursement remedy.[177]

The child in *Burlington*, Michael, began experiencing learning difficulties in first grade.[178] The program offered at one public school ended after third grade and the school district offered an IEP and a continuing public school placement for the fall of 1979, which Michael's father rejected.[179] On the recommendation of specialists, Michael was enrolled at a state-approved private school at his parents' expense.[180] A due process hearing was held by the Mas-

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> We do not impugn the conduct or dedication of these officials by recognizing that the expense of special education programs may perhaps, even unconsciously, lead them to be less than zealous in ensuring the child's right to a free and appropriate education. If school systems are forced to pay interim tuition eventually, however, greater incentive exists for making the initial placement the correct placement.

*Id.* at 921 (citations omitted).

174. 471 U.S. 359 (1985), *aff'g* Town of Burlington v. Department of Educ., 736 F.2d 733 (1st Cir. 1984).

175. 471 U.S. 359 (1985).

176. Only the First Circuit had approved generally of a reimbursement-type remedy. *See* Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984); Doe v. Brookline School Comm., 722 F.2d 910 (1st Cir. 1983). The Ninth Circuit had followed the basic approach of *Anderson*, allowing reimbursement only in exceptional cases. *See* Mountain View - Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983). The Ninth Circuit then added another exception. *See* Department of Educ. v. Katherine D., 727 F.2d 809, 811 (9th Cir. 1983). The other circuits which had addressed the issue generally denied reimbursement on one of two theories. Some courts considered reimbursement as tantamount to damages and, thus, unavailable under the EHA. *See* Powell v. Defore, 699 F.2d 1078 (11th Cir. 1983); Miener v. Missouri, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982). Other courts found that placement by the parents in a private school was considered to be a waiver of any claim, including reimbursement. *See* Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348 (5th Cir. 1983); Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982); Stemple v. Board of Educ., 623 F.2d 893 (4th Cir. 1980).

177. The reasoning of the majority of the circuits on this issue was thus tacitly rejected. *See supra* notes 155-76 and accompanying text.

178. Michael Panico was named John Doe during most of the proceedings. *Burlington*, 471 U.S. at 361.

179. *Id.* at 362.

180. *Id.*

sachusetts Bureau of Special Education Appeals [hereinafter BSEA] during the fall, and in January 1980 the BSEA rendered a decision in favor of the private placement.[181] The BSEA held that the school district's IEP was inadequate and inappropriate for the child's special needs.[182] The BSEA also ordered the district to pay Michael's tuition at the private placement for the 1979-80 school year, including reimbursement to his parents for their expenditures to date.[183] The school district refused to comply with the order and appealed to federal court seeking to reverse the decision of the BSEA.[184] After being ordered by the federal court, the district paid the expenses for the 1980-81 school year, but did not reimburse the parents for the 1979-80 term.[185] Ultimately, after a four-day trial in August 1982, the district court overturned the BSEA decision, holding that the school district's proposal was the appropriate placement for Michael for the 1979-80 school year.[186] The court held that all of the costs should be borne by the parents, who were ordered to reimburse the district for its expenditures on Michael's behalf during 1980-81 and 1981-82.[187]

The parents appealed to the First Circuit, which in May 1984, reversed and remanded.[188] The court held, inter alia, that the district court failed to give "due weight" to the BSEA hearing officer's findings.[189] The court did not attempt to resolve the placement issue on the merits but did announce that reimbursement would be an appropriate remedy in order to provide guidance for the future.[190]

Despite the complexity of the facts and the myriad issues in the case,[191] the Supreme Court granted certiorari on only two issues: (1) whether the potential relief available under section 1415(e)(2) included reimbursement to parents for private school tuition and related expenses, and (2) whether section 1415(e)(3) barred such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school

181. *Id.* at 363.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 363-64.

186. *Id.* at 364-65.

187. *Id.* at 365. This ruling occurred after consolidation with Doe v. Anrig, 561 F. Supp. 121 (D. Mass. 1983).

188. Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984).

189. *Id.* at 792.

190. *Id.* at 795.

191. The First Circuit also addressed, inter alia, the following issues: the propriety of the notice given to the parents under state law; the propriety of the hearing officer's consideration of Michael's education in years prior to the EHA; the application of state law to EHA proceedings where the state law is more stringent than the federal law; the appropriateness of Michael's educational program; the proper scope of the district court's review of the administrative hearing; the propriety of reviews and revisions to IEPs during the pendency of due process proceedings; and the propriety of requiring the parents to reimburse the town during a period in the proceedings where the town had been ordered to pay the tuition. *Id.* at 780-802.

authorities.[192]

Justice Rehnquist's opinion was brief and clear. He noted that the ordinary meaning of the words "appropriate relief," as used in section 1415(e)(2), gave the courts broad discretion in fashioning a remedy.[193] Absent any other guidance from Congress, the only possible interpretation was that the relief is to be " 'appropriate' in light of the purpose of the Act," which is to provide handicapped children with a free appropriate public education.[194] Acknowledging the long review processes triggered by challenges to proposed IEPs, the Court stated that parents should not have to choose between a free education and an appropriate one by having to litigate toward an "empty victory" where a court several years later states that they were right about their child's placement but cannot be reimbursed.[195] Congress, the Court stated, could not have intended such a result.[196]

The Court made it clear that such reimbursement was not to be characterized as "damages." Instead, the order "merely requires the [school district] to pay belatedly expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[197] If reimbursement were not allowed, "the child's right to a *free* appropriate public education, the parents' right to participate fully in the developing a proper IEP, and all of the procedural safeguards would be less than complete."[198]

The Court used the same reasoning to overcome the hurdle of section 1415(e)(3). The Court stated that to hold that a parental "violation" of this section constitutes a waiver of reimbursement would defeat the purposes of the Act in the same manner as if reimbursement were never available.[199] The parents would have to choose between leaving the child in what may ultimately be found to be an inappropriate educational placement or obtaining an appropriate placement only by sacrificing any claim for reimbursement. Thus, section 1415(e)(3) should not be considered a bar to reimbursement if the parents ultimately prevail. Of course, the parents who act without the agreement of the school district acts at their own financial risk: if the school district's placement is ultimately upheld, the parents will be barred from reimbursement.[200]

192. School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 367 (1985).
193. *Id.* at 368.
194. *Id.* at 369.
195. *Id.* at 370.
196. *Id.*
197. *Id.*
198. *Id.* at 370-71 (emphasis in original).
199. *Id.* at 372.
200. *Id.* at 373-74. This interpretation was later buttressed by the Court's decision in Honig v. Doe, 484 U.S. 305 (1988), where the Court found that section 1415(e)(3) prevented schools from unilaterally expelling even dangerous disabled students without approval by the court. *Id.* at 323. The Court noted the extent to which schools had used disciplinary measures to bar emotionally and behaviorally disordered children from the classroom, linking this evil to the purpose of the "stay-put" provision. *Id.* at 324.

This result appears to be entirely consistent with the statutory scheme as a whole even though it requires a conscious decision to ignore the ordinary meaning of the language found in section 1415(e)(3), which unequivocally states that during the pendency of the review process, the child shall remain in her then-current educational placement. However, as the Court noted, the provision in question says nothing about financial responsibility. The meaning of this section is clearer when viewed within the context of one of the EHA's original goals: to forbid the public schools' discriminatory practice of excluding or expelling children from a school after classifying them as handicapped. The "stay-put" provision explicitly prohibited this pernicious practice, not decisions by parents to place their children in alternative settings.

## VII. SUBSTANCE, PROCEDURE, AND THE REMEDIES GAP

The EHA has three components: it grants a substantive right to "free appropriate public education," prescribes the process for enforcing the right, and gives the courts the power to provide "all appropriate relief." The procedural segment, however, is the only component clearly delineated. The substantive right and the available relief are poorly defined, and the ambiguities have generated a large volume of litigation and commentary. Much of the commentary has focused on the difficulty in interpreting the right to free appropriate public education.[201] The following analysis attempts to demonstrate the relationship between the substantive right and the remedy. It further examines the impact of the remedial defects on the overall implementation of the EHA.

The indeterminacy of the substantive right (free appropriate public education) is difficult to avoid.[202] Many factors necessitate a broadly worded description and definition of the substantive right, including the myriad of handicapping conditions, the variety of possible educational responses to those conditions, the desire to keep educational decision making at the local level, and the impossibility of legislating or even regulating the substantive content of an individual child's educational program. Although the EHA's legislative and regulatory guidelines[203] help illuminate the parameters of the substantive

201. *See, e.g.*, Beyer, *A Free Appropriate Public Education*, 5 W. NEW ENG. L. REV. 363 (1985); Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961 (1977); Wegner, *supra* note 8; Zirkel, *Building an Appropriate Education from* Board of Education v. Rowley*: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983).

202. Free appropriate public education is defined as

> special education and related services that (A) have been provided at public expense under public supervision and direction and without charge to the parent or guardian, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary education in the state involved, and (D) are provided in conformity with the individualized education program required under § 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18) (1988). The terms "special education" and "related services" are defined above, *supra* notes 42-43.

203. *See supra* notes 41-43.

right, these guidelines have proven to be insufficient to resolve difficult educational disputes.

Prior to 1982, lower courts had great difficulty applying the law to resolve disagreements about the appropriateness of an individual child's educational program.[204] In 1982, the United States Supreme Court decided *Board of Education v. Rowley*,[205] in which it adopted a narrow construction of the substantive provisions of the EHA. The Court held that a state satisfies its responsibility to provide a child with an appropriate education if it affords "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[206] Read alone, this definition describes only the most "basic floor of opportunity,"[207] especially when contrasted with other possible interpretations, such as one which guarantees educational opportunity equal to that of non-handicapped children,[208] or one which seeks to maximize each child's potential.[209] The Court, however, further held that a free appropriate public education must also meet the state's educational standards, comport with the child's IEP,[210] and be available in accordance with the procedural protections of the Act.[211]

204. *See* Wegner, *supra* note 8, at 179-81. Some courts used the rhetoric of equal educational opportunity which they believed to be Congress' purpose, but the application of that test in individual circumstances was unpredictable. *Compare* Age v. Bullitt County Pub. Schools, 673 F.2d 141 (6th Cir. 1982) (a program is not appropriate if it impairs a child's progress while an alternative program, both nearby and available, would promote the child's progress) *with* Rowley v. Board of Educ., 632 F.2d 945 (2d Cir. 1980) (an appropriate education must give each handicapped child an opportunity to achieve her full potential commensurate with the opportunity provided other children), *rev'd* 458 U.S. 176 (1982).

205. 458 U.S. 176 (1982).

206. *Id.* at 201.

207. Justice Rehnquist stated in *Rowley* that, "[a]ssuming that the Act was designed to fill the need identified in the House Report — that is, to provide a 'basic floor of opportunity' consistent with equal protection — neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access." *Id.* at 200.

208. The Second Circuit in *Rowley* had affirmed the lower court's interpretation of the right such that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided other children." Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980) (citing Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1125-26 (1979)), *aff'd*, 632 F.2d 945 (2d Cir. 1980).

209. *See* H.R. REP. NO. 332, 94th Cong., 1st Sess. 13, 19 (1975). Interestingly, some states have statutory definitions like this. *See* MASS. ANN. LAWS ch. 71B, § 2 (Law. Co-op. Supp. 1990); MO. ANN. STAT. § 162.670 (Vernon Supp. 1990). For other comparisons between the EHA and the states' formulations, see Note, *State Response to the Education for All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 275 (1985).

210. While IEPs can be manipulated to fit the child into existing programs, it is difficult to formulate policies which overtly limit what would otherwise be appropriate educational programming. For example, in Battle v. Pennsylvania, 629 F.2d 269, 276 (3d Cir. 1980), *cert. denied*, 449 U.S. 1109 (1981), the court held that the general state policy of providing only 180 days of instruction per year for all children prevented the proper formulation of individual educational goals for handicapped children who sometimes require longer periods of school and, thus, was a violation of the EHA.

211. Justice Rehnquist stated in *Rowley*:

When the elaborate and highly specific procedural safeguards embodied in § 1415 are

All these requirements, read together, ensure that the Court's definition of appropriate education could not be satisfied (as Justice White feared) by simply providing a hearing impaired child with a loud-voiced teacher.[212]

The Court in *Rowley*, moreover, placed a greater emphasis on the procedural requirements than the substantive right, stating that "adequate compliance with the procedures prescribed [by the EHA] would in most cases assure . . . what Congress wished in the way of substantive content in an IEP."[213] The emphasis on procedure and the indeterminate substantive right increase formalism.[214] *Rowley* thus provides a rather cynical lesson for school districts: if they are meticulous about procedural compliance, the substance will probably take care of itself.

The impact of *Rowley* on the delivery of special educational services has been considered extensively elsewhere.[215] The decision is significant for the

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contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

458 U.S. at 205-06.

212. *Id.* at 215 (White, J., dissenting).

213. *Id.* at 206.

214. *Id.* at 206-07. Justice Rehnquist set out the following questions into which a reviewing court must inquire: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* (citations omitted).

215. James, *The Education for All Handicapped Children Act of 1975: What's Left after* Rowley*?*, 19 WILLAMETTE L. REV. 715 (1983); Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley*: Utter Chaos*, 12 J.L. & EDUC. 235 (1983); Zirkel, *supra* note 201; Note, *Are Handicapped Children Entitled to Equal Education Opportunities?*, 20 CAL. W.L. REV. 132 (1983); Note, *A Child's Right to an Appropriate Education*, 12 CAP. U.L. REV. 439 (1983); Note, Board of Education v. Rowley*: Landmark Roadblock or Another Signpost on the Road to State Courts*, 16 CONN. L. REV. 149 (1983); Note, *Handicapped Children Are Entitled to a Beneficial Education*, 69 IOWA L. REV. 279 (1983-84); Note, *The Substantive Requirements of "Free Appropriate Public Education" Under the Education for All Handicapped Children Act of 1975*, 59 N.D.L. REV. 629 (1983); Note, *The Education for All Handicapped Children Act Entitles Handicapped Children to Individually, Beneficially, Designed Education Program: Reviewing Court to Determine Reasonableness of Program Formulation and Procedural Compliance with Act*, 13 SETON HALL 575 (1983); Note, *Defining Appropriate Education for the Handicapped: The* Rowley *Decision*, 27 ST. LOUIS U.L.J. 685 (1983); Note, *Special Education - Supreme Court's Strict Construction of All Handicapped Children Act of 1975 Restricts Opportunities for the Handicapped*, 17 SUFFOLK U.L. REV. 823 (1983); Note, *The Meaning of Appropriate Education to Handicapped Children Under the EHCA: The Impact of* Rowley, 14 SW. U.L. REV. 521 (1984); Note, *The Education for All Handicapped Children Act of 1975 Requires Beneficial, Not Equal, Educational Opportunity*, 14 TEX. TECH. L. REV. 631 (1983); Note, *Attack on the EHA: The Education for All Handicapped Children Act After* Board of Education v. Rowley, 7 U. PUGET SOUND L. REV. 183 (1983); Note, *The Education for All Handicapped Children Act: What is a "Free Appropriate Public Education?"*, 29 WAYNE L. REV. 1285 (1983); Note, *The Supreme Court Limits the Rights of the Handicapped by Narrowly Construing Federal Statutes Intended to Assist Them*, 5 WHITTIER L. REV. 435 (1983).

purpose of this Article in the following respect: *Rowley* maximizes the importance of procedural compliance in a setting where the procedures have proven to be ineffective and manipulable.[216] In order to avoid confrontations, teachers have routinized and bureaucratized the IEP process by substituting formal procedures for the individual assessments and parental involvement envisioned by the statute. Such formalism further alienates the parents who are supposed to use the IEP process to their advantage.[217] By encouraging reliance on the defective process as the guarantor of the substantive right, *Rowley* has contributed to the pathologies of legalization under the EHA.

*Rowley*, however, indirectly benefited handicapped children by helping to clarify the remedial provisions of the EHA. Section 1415(e)(2) states only that courts may grant such relief as is appropriate,[218] thus giving the courts authority to determine their own remedial powers. Prior to *Rowley*, courts were reluctant to impose broad-based remedies even in those cases where school districts were guilty of gross malfeasance with respect to their EHA obligations.[219] The highly uncertain nature of the right being asserted contributed

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216. The studies which attempt to examine the effectiveness of parental participation in IEP conferences, the level of satisfaction with IEPs, the frequency of due process hearings, the results thereof, and similar questions are reviewed in Clune & Van Pelt, *supra* note 12, at 35-38. Although some studies may be flawed, it appears to be widely accepted that:

> Few parents . . . participate effectively enough in the IEP process even to raise a complaint. Even if parents have the skill and knowledge to raise complaints at the IEP conference, they may not have enough to succeed at a hearing. The relative handful of parents who do make it to a hearing must increasingly face the education agencies' winning documentation and procedural compliance strategy. . . . Even favorable results frequently [are] of little comfort to parents. Some education agencies compl[y] with the hearing officer's directives immediately; others [wait] until a few adverse decisions accumulated. On the other hand, there [are] many opportunities for procedural gamesmanship and non-compliance.

*Id.* at 35-36. Some of the studies which support conclusions such as these are M. BUFODD & A. ORENSTEIN, *supra* note 17; J. HANDLER, *supra* note 14, at 62-76; R. WEATHERLY, REFORMING SPECIAL EDUCATION: POLICY IMPLEMENTATION FROM STATE LEVEL TO STREET LEVEL (1979); Kirst & Bertken, *supra* note 22; Kuriloff, *supra* note 102; Lynch & Stein, *Perspectives on Parent Participation in Special Education*, 3 EXCEPTIONAL EDUC. Q. 56 (1981); Note, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 WIS. L. REV. 1469, 1517-21.

217. Weatherly & Lipsky, *supra* note 14, at 188-89. Professor Hill makes this statement about the impact of *Rowley*: "In effect, the Court dismantled the apparatus necessary for the parents to have any power within the IEP while justifying this dismantling by reference to the very parental participation that has been made ineffective. It is a result of the approach to equality through procedure rather than effect . . . ." Hill, *supra* note 14, at 164-65.

218. 20 U.S.C. § 1415(e)(2) (1988).

219. *See, e.g.*, Parks v. Pavkovic, 753 F.2d 1397, 1408 (7th Cir.) (finding that the school district clearly violated the EHA by requiring payment from parents for expenses incurred by their handicapped child at a private facility, yet ordering the district to pay only that amount needed to clear outstanding bills with the private school that, unless paid, would result in the child's expulsion), *cert. denied sub nom.* Belletire v. Parks, 473 U.S. 906 (1985); Hurry v. Jones, 734 F.2d 879, 884-85 (1st Cir. 1984) (affirming the district court's award to father of a handicapped child of $4600 for out-of-pocket expenses and expenditure of time and effort, but reversing an award of $8796 for the school's alleged unjust enrichment during the time the child did not receive education services; child confined to a wheelchair was denied transportation to and from school because bus drivers deemed it unsafe to carry the 160-pound boy up and down the

to this reluctance. Courts had difficulty imposing harsh remedies where the defendant was not able clearly to define its duties in the first instance.

After *Rowley* clarified and narrowed the duty owed by school districts,[220] courts became more likely to expand the remedies available for violations as sustainable charges would be fewer and less frequent.[221] The development of special education law thus has exhibited an interesting paradox. When the substantive right is broad and indefinite, courts are reluctant to provide meaningful remedies, even where the right is clearly infringed. When the substantive right is narrow and defined, courts are more likely to award significant remedies.[222] By narrowing the definition of an appropriate education, *Rowley* contributes to the utility of the EHA for those parents, no fewer in number, who can show a violation.

The next task is to demonstrate how section 1415(e)(2)[223] contributes to failures in implementing the EHA. The ambiguous language of this section has been a source of much litigation. Under the statute, federal courts are without guidance as to what forms of relief are available in cases where a special education dispute reaches adjudication and a violation is revealed. Beyond prospective injunctive relief, all other forms were generally denied, primarily on the grounds that Congress did not intend the EHA to be a vehicle for compensating plaintiffs for past deficiencies.[224] The courts based this con-

steep steps from his door to the street and, as a result, did not attend school for two years); Colin K. by John K. v. Schmidt, 715 F.2d 1, 8-10 (1st Cir. 1983) (finding that, although the school district had failed to develop an appropriate program, no damages would be awarded to the father of two children with profound genetic and developmental disabilities who rejected the school's IEP, kept his children at home for one year, and gave them only home-tutoring in math for four hours a week for six weeks); Miener v. Missouri, 673 F.2d 969, 980 (8th Cir.) (holding that the only relief available was prospective, injunctive relief for child with serious learning and behavioral disabilities who resided in a mental health facility, received no educational services from 1977 to 1980, and suffered physical attacks by residents and staff), *cert. denied*, 459 U.S. 909 (1982); .

220. *See supra* notes 205-14 and accompanying text.

221. This tendency was revealed in a number of cases including Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981). *Anderson* held that while the EHA generally does not provide a damage remedy for an incorrect placement, there exist certain exceptions where damages might be appropriate. *Id.* at 1213-14; *see supra* text accompanying notes 146-59.

222. *Compare* Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) (pre-*Rowley* case where parents not compensated) *with* Doe v. Brookline School Comm., 722 F.2d 910 (1st Cir. 1983) (post-*Rowley* case where school system required to pay private tuition).

223. This section states that the court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2) (1988).

224. *See, e.g.*, Colin K. by John K. v. Schmidt, 715 F.2d 1, 3 (1st Cir. 1983); Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1356 (5th Cir. 1983); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983); Miener v. Missouri, 673 F.2d 969, 980 (8th Cir. 1982); *Anderson*, 658 F.2d at 1213. These cases hold that the EHA was not intended to remedy past deficiencies and that compensatory damages are therefore inconsistent with the EHA scheme. Other courts, however, began to distinguish between compensatory damages and reimbursement claims, allowing for the latter when the parents secured educational services at their own expense in the face of school district default. Even these claims, however, were denied in the courts which first heard them. *See, e.g.*, Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982)

clusion, in part, on their understanding that the EHA was a funding statute; although there is a background of constitutional violations of the rights of the handicapped, all of the "rights" flowing from the EHA originate in connection with the receipt of federal funds by the states. This fundamental characteristic of the law allowed courts to find that the purpose of the EHA is to enhance educational opportunities for the handicapped, not to create enforceable standards of conduct on the part of school officials. Despite the EHA's forceful rhetoric of redressable rights, the courts interpreted the EHA merely as a paternal exercise in social engineering.

Without a remedial scheme consonant with the statute's rhetoric, the studies of the EHA's implementation naturally have revealed much failure.[225] On its face, the statute appears to create a traditional rights/remedies system which should result in generally observable compliance with litigation instituted in the hard cases. Instead, one finds widespread bureaucratic autonomy with litigation too onerous and unavailing to be worth the effort.[226] This is not the inevitable result of legalization itself, nor is it adequately explained by the imposition of legalization in a discretionary arena. The next Section examines the effect of the remedies gap on implementation of the EHA.

## VIII. THE REMEDIES GAP AND EHA COMPLIANCE

While the EHA is perceived as a highly legalized system, it is, in fact, incomplete and defective due to its lack of adequate remedies. The following discussion explores how legalization can result in benefits when accompanied by competent remedies and how remedies can thus improve special education delivery.

The fundamental advantage of legalization is its ability to equalize the balance of power between the individual and the institution. Legalization provides the mechanism by which the collectivity must respond to the rights asserted by individuals.[227] The EHA establishes rights to individualized special education, notice with respect to special education decisions, and an opportunity to contest the educator's decisions. The EHA also requires schools to institute certain organizational routines, such as IEP conferences which require schools to give individual attention to each handicapped child.[228]

Why is there such widespread noncompliance with respect to these

(granting reimbursement for interim placement where the facility originally assigned was removed from the list of approved facilities); Stemple v. Board of Educ., 623 F.2d 893 (4th Cir. 1980) (denying reimbursement for tuition where parents unilaterally moved child to private facility).

225. *See* studies cited *supra* notes 14, 22-23.

226. *See supra* notes 15-18 and *infra* notes 242-48 and accompanying text.

227. *See* Clune & Van Pelt, *supra* note 12, at 39-42; Kirp, *supra* note 7, at 849 (asserting that due process hearings promote institutional self-evaluation, public scrutiny, and notions of fairness in the decision making process); Tweedie, *supra* note 7, at 64, 68 (noting that the availability of litigation provides leverage to parents and education advocates and thereby helps to equalize power).

228. *See supra* text accompanying notes 44-51.

rights? Professor Schuck, in his thoughtful work on the impact of remedies on compliance, posits four reasons for bureaucratic failure to comply with valid legal directives: the lack of comprehension, capacity, motivation, and care.[229] Professor Schuck suggests that compliance requires that officials understand the directive, that they have the capacity to comply with it, that they have the proper motivation to comply, and that they care enough to do so.[230] The analysis of these sources of official misconduct is not dependent on whether or not the failure to comply is intentional. Analyzing EHA implementation by reference to this framework sheds some light on implementation problems and helps to demonstrate the importantance of properly directed remedies to a regime of compliance.

First, officials must understand the legal requirements with which they are asked to comply.[231] Due to the ambiguity of the law and the continually changing standards of quality education, officials reasonably find it difficult in some situations to comprehend the "correct" course of action in an individual case. Questions of judgment, differences in educational philosophy, and an ever-changing state of knowledge about the best way to address some handicapping conditions are inevitable under the law. There is probably little that can be done to alleviate these uncertainties. Disputes, however, do not often arise over these kinds of issues. Rather, the most widespread noncompliance that has been documented is the failure to individualize the instruction program for each child.[232]

Second, school officials must have the capacity to comply with the law, in terms of time, budget, and decision-making flexibility. In the context of special education, insufficient financial resources have a great impact on official incapacity to perform. The actual expense of educating severely and profoundly handicapped children and the need for costly private placements are significant considerations.[233] Scarce resources may also translate into overworked teachers and insufficient staff to handle the paperwork and time-con-

229. P. SCHUCK, *supra* note 29, at 3. The following discussion in this Article of the nature of bureaucratic behavior draws upon Professor Schuck's work.

230. *Id.* at 3-13.

231. *Id.* at 4-6.

232. J. HANDLER, *supra* note 14, at 52 (asserting that while the EHA contemplates services tailored to individual needs, the "most important determinate for the placement of handicapped students is the availability of programs"); David & Greene, *supra* note 14, at 126, 132 (arguing that while there is general compliance, individualization of instruction is thwarted by the traditional practice of classifying such instruction on the basis of services available or by the type of disability); *see also* Clune & Van Pelt, *supra* note 12, at 53 ("One of the conspicuous failures of the Act was the ideal of an individually appropriate education. What occurred instead was the establishment of routinized special programs.... Another casualty was the ideal of effective participation by individual parents."). It has also been found that in order to avoid confrontations, the IEP process has been bureaucratized by substituting formal procedures for the individual assessments and parental involvement envisioned by the EHA. Weatherly & Lipsky, *supra* note 14, at 182.

233. A residential placement may cost thousands of dollars per year. *See* Clevenger v. Oak Ridge School Bd., 744 F.2d 514, 517 (6th Cir. 1984) (ordering a placement which cost $88,000 per year).

suming procedural mandates of the statute. As more children need to be "processed" through the complex system of identification, evaluation, and placement, there is mounting pressure to generalize, label, routinize, and categorize children into pre-existing programs.[234]

There is little doubt that *some* problems in special education can be ameliorated by the infusion of more resources. Yet nothing in the literature suggests any difference in EHA implementation or compliance between so-called "rich" and "poor" school districts. Additionally, identifying or overstating a relationship between resources and compliance ignores the EHA's dependency on private, parent-initiated complaints for implementation. When parental dissatisfaction is silenced due to parental co-optation, ignorance, lack of litigation resources, or intimidation,[235] the defense of inadequate resources is a hypothetical one. The role of cost in achieving compliance cannot really be evaluated.

A third source of noncompliance involves officials' motivations or incentives to comply with legal directives.[236] While some officials may avoid their legal duties out of a belief in the undesirability or illegitimacy of the law (such as when police officers fail to obey *Miranda* directives), it is unlikely that those involved with the education of handicapped children act consciously to subvert special education. The EHA does, however, require educators to share decision-making authority with parents. This dilution of authority can threaten their autonomy and professional self-image.[237] As Weatherly and Lipsky point out, many special education teachers have managed to avoid the requirement for parental participation in IEP conferences, thereby preserving their professional routines and independence.[238] Moreover, it is apparent that compliance with the EHA is simply more time-consuming and troublesome than noncompliance. To the extent teachers already perceive themselves as "overworked and underpaid," so-called institutional imperatives militate toward routinization.

Additionally, where resources are scarce, or perceived as scarce, fashioning an expensive, individualized program for one student may mean that fewer resources are available for other students,[239] and individual teachers may be unaware of the general allocation of resources. Thus, even if money is available for a special placement or service, teachers may be reluctant to recom-

234. The most important determinate for the placement of handicapped students is the availability of programs. The existence of particular programs means that students eligible to fill those slots will be identified, evaluated, and placed in those slots. If particular slots are not available, then those eligible for those programs will not be identified, evaluated, and placed.
J. HANDLER, *supra* note 14, at 52.

235. *See supra* notes 15-18 and accompanying text.

236. P. SCHUCK, *supra* note 29, at 8-12.

237. *Id.* at 9.

238. Weatherly & Lipsky, *supra* note 14, at 181-82.

239. Bartlett, *supra* note 34, at 7; Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477 (1982).

mend it out of fear of setting an expensive precedent or a concern for the preservation of resources in general. Rules can be disregarded in an atmosphere relatively free of sanctions, where violations are seldom challenged and where the harm (if any) is hard to measure. For example, school officials in the inner city may not have much incentive to make needed distinctions between children with learning disabilities and behavioral disorders.

Finally, Professor Schuck suggests that some bureaucratic misconduct is due to the negligence of officials charged with carrying out certain duties.[240] While there is no way to guarantee against harms caused by "human frailty,"[241] proper oversight, training, and motivation may reduce the incidence of neglect-based illegality.

The foregoing analysis suggests the obvious: we would have better special education if school officials were well versed in the requirements of the law and if they had ample resources to carry out such requirements. Thus, implementation of special education programs can be improved by providing educators with not only an understanding of the law, but the resources to carry it out. The *motivation* of those charged with educating the handicapped, however, is not often questioned, on the theory that everyone involved in the enterprise is inherently assiduous about their responsibility. This is probably true about individual teachers in a narrow sense, but does not take into account the institutional motivations which constrain individual decision making. The motivation, care, and attention with which school officials approach their duties may be greatly influenced by the perceived likelihood and effectiveness of parental enforcement and by the perceived possibility that existing deterrents will be implemented and penalties imposed. The following discussion explores the role of these factors in EHA compliance.

As noted above, the primary enforcement/deterrent mechanism built into the EHA is the litigation entitlement, that is, the right to demand from the school district the services and procedures which comprise the substantive right. If the demand for services is not met, parents may then embark on legalized adversarial proceedings. This "right to fight" can provide parents with the leverage needed to combat risk averse officials who fail to honor their obligations.

The litigation entitlement, nevertheless, is largely ineffective in guaranteeing compliance with the EHA.[242] The rate of complaint is quite low[243] despite

240. P. SCHUCK, *supra* note 29, at 12.

241. *Id.*

242. School administrators often profess to dread involvement in the legal process and to avoid litigation because it is a draining and time-consuming distraction from their professional duties. *See* Note, *supra* note 25, at 1178 n.146. Perhaps this fear of hearings is a reflection of the supposed deterrent effect of parental access to courts. This deterrent effect is hypothetical at best as the link between aversion to lawsuits and compliance has not been convincingly demonstrated. Rather, aversion to lawsuits probably encourages autocratic and pre-emptive IEP meetings which aim to silence complaints in the first instance. Moreover, this professed fear of hearings has not lessened the negative effects of organizational pressures such as limited budgets and administrative convenience, which defeat most parental claims. The parents who do go to

widespread dereliction,[244] and the ideals of meaningful parental participation and individualized programming have not been fully realized.[245] The failures of private enforcement have been attributed to a number of factors. Some commentary focuses on the failure of the litigation entitlements of the EHA to address the imbalance of power between the individual and the school district.[246] It has also been noted that the relationship between parents and the school district discourages vigorous private enforcement.[247] Further, there exists an imbalance of litigation resources typical of suits brought by individuals against institutions.[248] Also, parents may become frustrated by the uncer-

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hearings tend to be white and middle class; they are often requesting a private school placement. J. HANDLER, *supra* note 14, at 69-70; Neal & Kirp, *supra* note 7, at 78. When the school district is managing scarce resources, its decision to resist this sort of demand is based primarily on cost. Its decision may also be based on administrative convenience. *See, e.g.*, Tatro v. Texas, 625 F.2d 557, 562-64 (5th Cir. 1980), *reaff'd following remand*, 703 F.2d 823 (5th Cir. 1983), *aff'd in part and rev'd on other grounds*, 468 U.S. 883 (1984). In *Tatro*, it was abundantly clear that the school district resisted the parents' claims purely to protect a "principle." It took the position that clean intermittent catheterization was a medical procedure and ran the gamut of expensive federal court litigation in order to protect that position. In other instances, an administrator may deliberately engage the legal process so that a court will order her to do some legally mandated but otherwise unpopular act.

243. Only 0.03% of the 4.2 million students identified as handicapped bring appeals through formal due process hearings. 131 CONG. REC. H9969 (daily ed. Nov. 12, 1985) (statement of Rep. Biaggi).

244. *See supra* notes 14-18 and text accompanying note 4. A General Accounting Office study of 456 IEPs found 65% failed to contain at least one of 10 required elements. COMPTROLLER GENERAL, REPORT TO THE CONGRESS OF THE UNITED STATES, UNANSWERED QUESTIONS IN EDUCATING HANDICAPPED CHILDREN IN LOCAL PUBLIC SCHOOLS 60 (1981).

245. *See supra* notes 14-18 and accompanying text. As one commentator has shared:

> Despite the statute and regulations calling for the IEP to be a product of the meeting, the common practice of school personnel is to meet among themselves and draft a program that is presented to the parents for their consent. The very structure of the IEP discourages parental participation. Parents are usually outnumbered, and the dynamics of small group interaction work against them exerting any influence. . . . As one parent stated: "[T]he way the meetings are organized, parents are presumed to know nothing, and people who had met my child for an hour were lecturing me about her problems, and when I disagreed with them and said that their program wasn't working, the discussion stopped."

Hill, *supra* note 14, at 144.

246. *See* Clune & Van Pelt, *supra* note 12.

247. Parents who know that their children will have to deal with the local school district personnel for twelve years are understandably reluctant to resort to legal action, with all the anxieties that such undertakings generate, except in the most serious cases. The opportunities for reprisal even after an outcome favorable to the parents and the difficulties of enforcing such a decision in the face of an intransigent school district pose too great a risk.

Neal & Kirp, *supra* note 7, at 78. This structural difficulty has also been noted in Note, *supra* note 216, at 1522:

> Parents of handicapped children and education agencies have a well-defined structural relationship which they bring to the cooperative venture mandated by the [EHA]. They are involved in an on-going relationship . . . . After a placement decision or dispute, [they] must continue to "live together." Parents are also, in relation to their economic status, education, and access to private special education services, dependent upon the education agency's professional expertise in special education services.

248. In Professor Galanter's referents, the school districts are "repeat players," possessing

tainty of a beneficial outcome. Even after the adversarial process has ended, a permanent resolution of the dispute can remain elusive.

In many other statutory rights-based claims, the liabilities which attach when the bureaucracy errs have greater deterrent potential. For example, when a court determines that welfare payments have been wrongfully withheld, it will order that both future and missed payments be awarded.[249] Similarly, employees fired for unlawful reasons are entitled to reinstatement *and* backpay.[250] The courts have even redressed past wrongs in school segregation remediation: the ordering of compensatory educational programs is almost routine in modern desegregation cases, even when the victims of segregation have long since left the school district.[251] Other regulatory systems, such as antitrust and securities law, provide for public prosecution, fines or penalties, private damage suits, or some combination of these remedies. The EHA's complex enforcement scheme is unique in that it originally appeared to provide only prospective injunctive relief.[252]

While the deterrent effect of compensatory remedies is not easily measured,[253] much of our legal system relies on the notion that conduct is deterred by liability. Moreover, if the benefits of legalization are to be realized, then *all* the accoutrements of legalization ought to be present, not just those which organize the fact-finding and decision-making process. A strong remedial scheme creates an attitude favoring compliance, while a situation in which noncompliance is actually rewarded should not be tolerated.[254] If additional

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advance intelligence with respect to the processes and resources attendant to grievances. The educational agencies are more likely to develop facilitative, informal relationships with knowledgeable attorneys, experts, and hearing officers. They may also have legal counsel familiar with and experienced in this area of the law and have the ability to engage in strategies aimed at building a record or long-term precedent. By contrast, the parents of a handicapped child are "one-shotters," often disadvantaged by their lack of familiarity with the system, their lack of resources, expertise, and access to legal assistance. They are invariably focused on an immediate outcome strategy, and, as claimants, they have the option of returning to the status quo ante whenever their stamina or money is exhausted. Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

249. 45 C.F.R. § 205.10(a)(18) (1989).

250. 42 U.S.C. § 2000e-5(g) (1988).

251. In Milliken v. Bradley, 433 U.S. 267 (1977), the Supreme Court upheld a federal court order requiring the state of Michigan to pay $5,800,00 to fund educational components in a desegregation decree.

252. *See* cases cited *supra* note 224.

253. "Deterrence is a highly specialized, problem-specific, context-sensitive business; those who design public tort remedies - principally legislatures and courts - are for the most part singularly ill-equipped to master its intricate and decidely particularized technologies." P. SCHUCK, *supra* note 29, at 103.

254. A not uncommon scenario involves a multiply handicapped child who could be served either in a local program or in an expensive but more appropriate private placement. The local program is barely adequate and subject to challenge, even under the narrow standard of *Rowley*. The school district places the child in the local program. If the parents acquiesce, the matter is ended. If the parents object and invoke due process, however, they have little bargaining power since the worst outcome for the district is a much delayed court order to place the child in the preferred setting sometime in the future. While the process is pending, the parents may give up, move from the district, or the child's needs may change. Without the

remedies can result in better implementation of the goals of the EHA, then they should be adopted so as to give meaning to the substantive right. The following Section describes the various forms of relief associated with special education litigation and analyzes them in light of their potential for regulating official misconduct.

## IX. ACHIEVING REMEDIAL JUSTICE

The recent enactment of the HCPA and the Supreme Court's decision in *School Committee of Burlington v. Department of Education* are compelling evidence of the trend toward remedial justice under the EHA. To continue this trend, competent remedies are needed to enhance implementation of the EHA's goals. In the following discussion, various possible remedies are examined with respect to their current doctrinal bases and their potential effects on implementation. Each remedy's disadvantages are noted, with special attention paid to whether such deficits result from the statutory scheme or reflect normative judgments and value choices.

### *A. Attorney's Fees*

The ability to recover attorney's fees, now possible under the HCPA,[255] is arguably the most significant step yet taken toward improved compliance by school districts. Access to legal services helps empower parents and puts them on a more equal footing with the school district's "repeat players"[256] who litigate these issues frequently. It encourages parents to prevent inappropriate placements and enables them to raise issues that do not involve reimbursable private placements by making such challenges less costly.

Fee awards also encourage the development of a knowledgeable and experienced bar.[257] This is vitally important to effective implementation; lawyers must be versed in the complexities of special education diagnosis, testing, theory, and methodology in order to be effective. They must be familiar with the experts in the community and with their specialities. What little empirical evidence there is points to the quality of representation as a predictor of success at hearings.[258]

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threat of compensatory damages or some other concrete disincentive, such as attorney's fees, the school district has little incentive to agree to the preferred placement. This is especially true if the costs of that placement will exceed the district's own attorney's fees.

255. 20 U.S.C. § 1415(e)(4)(8) (1988).

256. *See* Galanter, *supra* note 248.

257. *See generally* Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535, 538-39 (1989-90) (discussing importance of attorney's fees to development of civil rights bar).

258. The quality of lawyers has had a very important impact on hearing results. M. BUDOFF & A. ORENSTEIN, *supra* note 17, at 227, 233-34. Budoff and Orenstein, through studying Massachusetts hearings, determined that although less than two-thirds of the sample used lawyers or advocates, almost all said they would advise other families to use them. The parents cited reasons such as their own feelings of inadequacy for the task, the existence of legal loopholes, snags and technicalities, and the need to counteract the adversariness of the school dis-

Lawyers or other advocates can serve as buffers between parents and educators, thereby reducing the parents' discomfort at challenging directly those who deal with their children on an ongoing basis. Greater access to legal services also ensures that an appropriate individualized education is available to all handicapped children, not just those who can afford a lawyer.

The arguments against fee awards and the resulting increased presence of lawyers are few but compelling. First, there is the obvious burden on scarce resources and the potential diversion of funds away from children with special needs and into the pockets of lawyers. This undesirable diversion, however, should not obscure the potential to encourage settlement and compliance.[259] Additionally, Congress has rejected this criticism. The enactment of a fees provision in the HCPA represents the conclusion that these expenses must simply be added into the equation when figuring the cost of special education.

Second, there is a tendency to deplore the presence of lawyers in the EHA process altogether as contrary to our more sentimental notions of the educational enterprise. Critiques of due process often characterize hearings as a perversion of an otherwise good idea. These commentators seem to suggest that increased lawyering is inconsistent with the legislative scheme. Hearings do not work, it is said, because they "increasingly [have] *moved away* from . . . informality. . . . [They] *have become* less like informal dispute resolution and have *taken on* characteristics of judicial procedures."[260] It had also been said that "[l]awyers *aggravate* the situation, rendering proceedings more legalistic".[261]

These critiques assume that the EHA's original provisions have been distorted by the presence of lawyers, when in fact the statute clearly was designed at the outset to create a formal, judicial process. The law as written did not contemplate informal dispute resolution. From its inception the language of section 1415 has provided for the presence of attorneys, a discovery process,

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trict. *Id.* at 91-97. At the Senate hearings concerning the HCPA, a parent and several attorneys testified vigorously in favor of the need for legal counsel at the administrative level. *Handicapped Children's Protection Act of 1985: Hearing on S. 415 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. 7, 21, 38-39 (1985).

Those parents reporting that they did not need or like the lawyer that represented them complained about the lawyer's lack of knowledge about special education testing materials, procedures, and jargon. This could be due to the fact that in the early cases it was difficult to find a lawyer familiar with the system. Some parents complained about the lawyer's unpreparedness or failure to become familiar with all the facts of the case. M. BUDOFF & A. ORENSTEIN, *supra* note 17, at 91-97.

259. School districts face the prospect of fee awards if the parents prevail at the due process hearing, even if the case never goes to court. *See, e.g.*, Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988); Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988). Thus, the parents have increased leverage in the initial bargaining stages. As Budoff and Orenstein reported, "Even in informal mediation sessions, parents reported feeling coerced to 'bargain' and to be 'reasonable' so as to attain an agreement; thus, even there, they may need legal help to withstand these pressures." M. BUDOFF & A. ORENSTEIN, *supra* note 17, at 234.

260. Clune & Van Pelt, *supra* note 12, at 37 (emphasis added).

261. Neal & Kirp, *supra* note 7, at 79 (emphasis added).

expert witnesses, cross-examination, the right to compel the presence of witnesses, a written decision, and a full range of trial-like accoutrements.[262] The hearing contemplated by the EHA, and the kinds of technical fact finding necessary to resolve disputes are familiar territory for lawyers. Denigrating the lawyer's role actually weakens the system if parents are persuaded to avoid attorneys by overly solicitous school officials.[263] Those parents, attorneys, and school officials who choose to act more informally may be following good instincts in particular cases. But the availability and presence of knowledgeable lawyers in the system is one of the few mechanisms for equalizing power between the individual and the institution.[264]

If the EHA were functioning well, the introduction of lawyers into the process would be unnecessary. However, no one has yet suggested that due process works as it was intended to under the EHA. There are persuasive arguments that special education should never have been cast in such a highly legalized form at the outset.[265] But after accepting legalization as a given and the ongoing violation of educational rights of handicapped children as likely, attention should be directed toward strengthening the system and realizing more of its benefits. Urging incremental delegalization by discouraging the participation of lawyers has the wrong effect. If the present system intended attorney participation (as is clearly the case in the trial-type hearings of the EHA), then advocating the avoidance of attorneys can only diminish whatever power parents might gain from their presence.

Third, it has been argued that lawyers will provide no benefits at all. According to this argument, parental control over results is limited not by their powerlessness in the procedural regime, but by resource factors. That is, "once all the necessary concessions are made to school functions,"[266] the most parents can hope for is to choose between a few routinized programs and organizational responses. Thus, while increased legal services might markedly improve parental satisfaction, no change in overall compliance would result.

A well mounted challenge to an overly routinized bureaucracy, however, may very well result in fewer concessions to a school's "necessary" functions and prove that sometimes organizationl imperatives must bow to individual rights. While this conclusion assumes the normative superiority of the formal goals of the EHA over the reality of implementation, working toward improvement of the system is preferable to accepting a defective status quo.

Finally, liability for fee awards presents many of the same problems of

262. *See supra* text accompanying notes 60-66.

263. J. HANDLER, *supra* note 14, at 146.

264. *Id.* at 137-41. As one commentator stated, "If informalism grants additional offensive weapons to those already endowed with disproportionate legal resources while depriving the legally disadvantaged of the protection of formal defenses, it also denies the latter the sword of formality while assuring the former that they can continue to invoke formality as a shield." Abel, *The Contradictions of Informal Justice*, in THE POLITICS OF INFORMAL JUSTICE 297 (R. Abel ed. 1982).

265. Neal & Kirp, *supra* note 7.

266. Clune & Van Pelt, *supra* note 12, at 55.

governmental liability that any other sort of monetary award would present. In particular, the fear of liability is said to chill vigorous decision making. These difficulties will be examined below in connection with compensatory damages.[267]

### B. Compensatory Educational Services

Compensatory educational services [hereinafter CES] are designed to remedy past deficiencies in a child's educational programming caused by the school district's violation of the EHA.[268] They might include more frequent remediation sessions, extra tutorials, schooling beyond age twenty-one, or other special services. CES can compensate for some educational harms without bankrupting the resources available to other handicapped children. It may improve the bargaining position of parents[269] and can satisfy the rudimentary desire to make the schools do what they should have done: provide an appropriate education for the child. School districts may find CES a more acceptable remedy than money damages, which cost more and tend to imply that the school is being fined or punished.

CES is not, however, the complete answer. First, the remedy may be illusory: the time, context, and age-appropriateness of educational services may be much more important than their quantity.[270] Moreover, CES that is

267. *See infra* notes 294-301 and accompanying text.

268. Courts expressed some early reservations about this remedy. *See* Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983) (stating that CES is the same as a claim for damages); Miener v. Missouri, 673 F.2d 969, 979-80 (8th Cir.) (treating CES as damages), *cert. denied*, 459 U.S. 909 (1982). However, the salutary impact of CES on EHA implementation is explored thoroughly in Note, *supra* note 216. The author, Mark Van Pelt, argues persuasively that when a child has not been provided with appropriate educational services, the courts ought to be able to order the school district to make up for the education the child lost between the time she entered into the challenged placement and the time the appropriate placement began. Since this note appeared and School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985), was decided, several courts have indicated the acceptability of this type of relief. Burr by Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988), *vacated*, 109 S. Ct. 3209 (1989); Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988); Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986).

269. *See* Note, *supra* note 217, at 1522-26. How much additional leverage parents will have as a result of the availability of CES, however, is an open question. All of the attributes which make CES "preferable" to money damages (less costly, administrative ease of accomodating students into ongoing programs, *etc.*) make it less effective as a deterrent to noncompliance.

270. Commentators have suggested that CES should be provided for an amount of time equal to the time during which appropriate services were denied. Wegner, *supra* note 76, at 673; *see* Note, *supra* note 217, at 1474. This symmetry seems unnecessary if CES is viewed as a means for compensating and making whole the child who has been misplaced or misdiagnosed. Although it is difficult to measure the extent of a child's educational harm, and the *Rowley* standard seems only to require services which are of some benefit to the child, CES should be fashioned to rectify a past deficiency, that is, to bring the child up to the level at which she would have been but for the noncompliance. For example, only six months of speech therapy may be necessary for a child who was denied such service for two years during the appeals process. In other cases, the child may need intense remediation for several years, even if the appeals process only took a year.

not properly tailored to the particular child in question may not address many types of dereliction. For example, compensatory education at age sixteen can hardly rectify an elementary school placement which was not in the least restrictive environment. Further, CES does not address the injuries which can occur beyond those resulting from statutory noncompliance such as the emotional harm experienced by a learning disabled child who is not identified as handicapped.

It is not clear how much impact CES would have on overall implementation. CES does provide parents with some remedy if their child is not provided with appropriate services. School officials, however, are not likely to consider seriously future CES when they are making their initial evaluation and placement decisions. A potential court-ordered monetary award would seem to weigh more heavily in the decision-making process.

Despite these shortcomings, CES is a useful tool in the remedial arsenal of the EHA, particularly because it is currently accepted by some courts.[271] As courts become accustomed to ordering this remedy when faced with noncompliance, they will more easily view the EHA as a traditional rights/remedies system.

### *C. Reimbursement*

When affluent parents expend sums for the education of their child while the school district is in default, the Supreme Court's decision in *School Committee of Burlington v. Department of Education*[272] assures that they may recover those expenses if they ultimately prevail. In his opinion in *Burlington*, Justice Rehnquist indicated that EHA litigation is to be viewed in the same light as more conventional rights/remedies systems which grant reimbursement to prevailing plaintiffs. Denying reimbursement would put parents in the untenable situation of having to choose between an inappropriate free education and an appropriate education at their own expense. It would grant an "empty victory"[273] to parents who choose the latter course, that is, those "conscientious parents who have adequate means and who are reasonably confident of their assessment."[274]

In refusing to characterize reimbursement as damages, Justice Rehnquist stated that "[r]eimbursement merely requires the [school district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."[275] By focusing both on the child's right to a free education and on the educational agency's duty to make and fund appropriate placements, *Burlington* enforces the adversarial character implicit in the language and procedures of the statutory scheme. It tells us

271. *See* cases cited *supra* note 268.
272. 471 U.S. 359 (1985); *see supra* text accompanying notes 175-200.
273. *Burlington*, 471 U.S. at 370.
274. *Id.*
275. *Id.*

that parents' "victories" should not be empty ones and that school districts ought to pay when they fail in their obligations. Similarly, the Court also stated that, without reimbursement, the parents' right to participate in the IEP and all of the procedural safeguards "would be less than complete."[276]

The tenor of *Burlington* recognizes that meaningful enforcement is essential to the EHA's proper implementation. The opinion does not dwell on the same broad policy matters which plagued the lower courts,[277] nor does it find that the EHA must be treated differently from other rights/remedies systems simply because it involves schools. It focuses rather on the litigants' incentives to achieve compliance with the substantive right. It also recognizes that even loving and conscientious parents will be discouraged from their task if their victory is empty. So long as implementation of the EHA depends upon private enforcement, the potential benefits outweigh the burdens, costs, and risks of that enforcement. The reimbursement remedy does much to facilitate private enforcement, but only for those who have the means to suffer out-of-pocket losses.

### *D. Compensatory Damages*

This is the most controversial remedy associated with EHA and no court has yet made a purely compensatory monetary award.[278] The doctrinal bases are available, however, and only value choices prevent such awards.

There are two legal bases which could support damage awards in special

276. *Id.* This is a crucial observation. Because the *Rowley* standard merely requires that the education be of some benefit to the child, few cases actually reject the educational programming offered by school officials. However, if school officials are less than conscientious about procedural matters, reimbursement may still be appropriate. *See* Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988), *rev'd on other grounds sub nom.* Dellmuth v. Muth, 109 S. Ct. 2397 (1989). In that case, the original IEP was found by the hearing officer to be inadequate in October 1983; a new IEP was not devised until June 1984. 839 F.2d at 118. The child was enrolled in a private placement during the 1983-84 school year. *Id.* The school was ordered to reimburse the parent, not because the public school was unable to provide an appropriate program, but because "the process, taking a course not contemplated by the federal model, bogged down for a substantial period of time; and the IEP ultimately found to be acceptable did not even come into existence until May of 1984." *Id.* at 127; *see also* Hall by Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985) (finding that under "Rowley, . . . failures to meet the [EHA's] procedural requirements are adequate grounds by themselves for holding that the school failed to provide" the child with an appropriate education and awarding tuition reimbursement).

277. *See, e.g.*, Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984), *aff'd sub nom.* School Comm. of Burlington v. Department of Educ., 471 U.S. 359 (1985); Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).

278. "Compensatory monetary award" is used here to reflect recoveries for unliquidated damages payable for such losses/injuries as emotional distress or suffering (such as that occasioned by the negligent diagnosis and placement of a hearing impaired child as retarded), reduction in potential earnings, or loss of economic opportunity. For an in-depth discussion of the sorts of conduct which can give rise to EHA violations and awards, see Rothstein, *Accountability for Professional Misconduct in Providing Education to Handicapped Children*, 14 J. L. & EDUC. 349, 353-67 (1985).

education disputes. First, the EHA itself permits federal courts to grant such relief as they determine is appropriate.[279] In *Burlington*, Justice Rehnquist stated that this broad and ambiguous language should be interpreted to mean " 'appropriate' in light of the purposes of the Act."[280] While *Burlington* went on to distinguish the reimbursement remedy from damages and to permit the recovery of the latter, nothing in the opinion precludes a broader construction. Aside from precedent, there is no language or related legislative history which dictates that damages cannot be awarded as part of the appropriate relief available under the EHA itself.[281]

The HCPA provides a second basis for the recovery of damage awards. As discussed above,[282] the HCPA restored section 1983 and section 504 as concurrent claims in EHA type disputes. Thus, once parents exhaust the administrative processes, they may append their section 504 and section 1983 claims to their EHA appeal to district or state court.[283] This method will yield damages for some sorts of school district dereliction but fails to delineate the precise definition of monetary relief.[284] Rather than tie EHA recoveries to the vagaries and uncertainties of these statutes,[285] the responsibility for remedial justice should originate from the statute which promises the relevant right. No purpose is served by providing a damages remedy for EHA disputes through the back doors of section 1983 and section 504. Only by giving paren-

279. 20 U.S.C. § 1415(e)(2) (1988). One recent unfortunate development is the Supreme Court's decision in Dellmuth v. Muth, 109 S. Ct. 2397 (1989). In that case, the school district failed to provide an appropriate education for a period of time during which the parents secured alternate programming. *Id.* at 2399. A reimbursement award was upheld, but the state argued that it was immune from such an award under the eleventh amendment. *Id.* The Supreme Court agreed, stating that although the structure of the EHA "lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA," the statute contained no "unequivocal declaration" of intent to abrogate the state's immunity. *Id.* at 2402. Thus, the local school district alone would be liable for the reimbursement award.

280. 471 U.S. at 369.

281. Justice Blackmun's opinion in Smith v. Robinson, 468 U.S. 992 (1984), contained dicta to the effect that damages were unavailable under the EHA, although damages were not sought in that case. *Id.* at 1021. The HCPA, however, was enacted expressly to reverse *Smith*. *See supra* notes 119-30 and accompanying text.

282. *See supra* notes 119-39 and accompanying text.

283. 20 U.S.C. § 1415(f) (1988).

284. *See supra* notes 88-90 and accompanying text.

285. See the discussion of these limitations in Wegner, *supra* note 76, at 675-89 (pt. 2). A major difficulty is presented by section 1983's tortured immunity doctrines. These doctrines generally place the liability for official misconduct on individual persons, and the principle of respondeat superior is not operative. Owen v. Independence, 445 U.S. 622 (1980). As Professor Schuck argues, this is precisely the wrong approach to take if one seeks to encourage a regime of compliance with legal directives. P. SCHUCK, *supra* note 29, at 82-99. Holding official entities, like school districts, accountable for educational harms is at least as sensible as holding businesses liable for the safety of their premises. Section 1983 is beset by other procedural quirks. Recently, for example, the Supreme Court abrogated years of accepted practice by deciding that states and state officials acting in their official capacities cannot be defendants in section 1983 actions because they are not "persons" under that statute. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989).

tal access to remedies through the EHA itself can courts control the parameters of the remedy and avoid unintended or accidental results.

The conceptual framework of *Burlington* provides the clearest foundation for damage awards under the EHA. The Court's approval of reimbursement as "appropriate relief" indicates that the Court considers disputes arising under the EHA as subject to traditional adversarial litigation, where prevailing plaintiffs do not have "empty victories" and the losing defendants must pay when they make mistakes.[286] Justice Rehnquist was careful to distinguish reimbursement from damages, but nonetheless described the reimbursement remedy as one which should be sought by "conscientious parents with adequate means" to provide for interim educational services.[287] This description immediately raises the specter of parents, conscientious or otherwise, *without* adequate means who may be forced to allow their children to languish in inappropriate placements for the duration of the litigation. If, after they prevail, compensatory educational services are appropriate and available, then these plaintiffs have at least some remedy. If, however, CES is not appropriate, the absence of relief for the educational harm suffered provides a glaring example of a right without a remedy — a condition not easily tolerated by the courts. In the post-*Burlington* cases, courts have emphatically stated that there is a need for remedial justice.[288]

Preliminary injunctions[289] may help to fill this remedy gap. If courts are willing to make interim placements and order their funding, then the potential educational harm to the child might not occur. However, at least three obstacles discourage the use of this remedy. First, if parents go directly to court for a preliminary injunction when they are displeased with the child's placement, the purpose of the due process hearings would be lost. Second, section 1415(e)(3) itself acts as a preliminary injunction, requiring that the child remain in her "then current" educational placement. Finally, the HCPA explicitly affirmed the necessity for exhaustion of other remedies and procedures. This requirement was imposed in connection with the preservation of section 1983 and section 504 as concurrent avenues for relief.[290] Of course, there are

286. School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 370 (1985).

287. *Id.*

288. *See, e.g.*, Burr by Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988), *vacated*, 109 S. Ct. 3209 (1989):

> We do not believe that Congress intended to create a right without a remedy. If . . . we do not allow an award of compensatory education, then Clifford's right to an education . . . is illusory. Clifford cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.
>
> Furthermore . . . a child should not be wholly deprived of education because his parents could not afford to pay for an appropriate education at a private school while waiting for the state or local agency to litigate the issue of a proper placement.

*Id.* at 1078; *see also* Miener v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986) (finding "that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs") (emphasis in original).

289. FED. R. CIV. P. 65.

290. 20 U.S.C. § 1415(f) (1988).

exceptions to the exhaustion doctrine,[291] but only a few cases have granted preliminary relief without regard to those doctrines.[292]

Expanded use of preliminary injunctions is appealing since they could eliminate the need for any compensatory remedy at all. But the drawbacks are significant. First, preliminary injunctions would involve the courts in many more individual educational programming decisions, a function which they are ill-equiped to handle without a full record. Second, there would be situations where the injunction decision is ultimately overturned, requiring further dislocation of the child. Finally, making preliminary relief routinely available would probably overburden school officials. If each educational decision were subject to immediate judicial review, the potential for parental abuse might be too great. To preserve the administrative process, compensatory remedies could be provided so as to ensure that no educational injury is "irreparable." School officials live in fear of lawsuits, but the system should put them on notice that they will be accountable for those decisions which violate the statute.

If the preliminary injunction is not to be routinely available to parents, then the situation in which only the affluent can prevent educational harm remains troublesome. Parents with means are already over-represented in special education challenges.[293] Their ability to secure appropriate services for their children and to secure reimbursement for the cost of those services sets them apart from those with lesser means.

Assuming that damages relief should be available, serious policy issues must be discussed. For instance, recovery for what appears to be "educational malpractice" has never been well received. Over the years, this cause of action has been raised in various forms and has been rejected uniformly by the courts as against public policy.[294] Plaintiffs, however, were in essence asking the

291. Professor Wegner has identified four kinds of exceptions to the exhaustion doctrine in the EHA context: (1) where system-wide rules or policies are challenged obviating the need for individualized, expert decision making, Wegner, *supra* note 76, at 449; (2) where the administrative process is seriously defective or non-existent, *id.* at 450; (3) where utilization of the administrative process would be futile, *id.* at 451-52; and (4) where utilization of the administrative process would be dangerous to the health of the child or irreparably injurious. *Id.* at 453.

292. A few early cases allowed parents to come to court without going through the hearing process on the ground that the child would be irreparably harmed by an inappropriate placement. *See* Cox v. Brown, 498 F. Supp. 823 (D.D.C. 1989); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979). These cases found the injury of the inappropriate placements to be "irreparable" in part because of the lack of a damages remedy under the applicable statutes.

293. *See supra* note 17.

294. For example, in Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976), the court rejected a non-handicapped child's claim for damages for an inadequate education on the ground that (1) no workable standard of care exists in the area of classroom methodology, 131 Cal. Rptr. at 857-60; (2) it could not be established with a reasonable degree of certainty that plaintiff had been injured as that term is used in the law of negligence, *id.* at 860-62; and (3) even if injury were found, it could not be established with a reasonable degree of certainty that such injury was the proximate result of the school district's conduct. *Id.* In addition to the tort analysis, the court also concluded that public policy would

courts in those cases to expand common law tort liability to teachers and school districts. The courts' reluctance to do so is understandable in light of the difficulty of establishing a duty and a standard of care or reasonableness in a wide variety of communities and school systems. The antipathy toward educational malpractice in general, however, is harder to justify in the face of a national, congressionally-created statutory regime which prescribes educational rights, duties, and enforcement procedures.[295] While it may appear anomalous to provide only handicapped children with compensation for certain kinds of educational harm and leave non-handicapped children without recourse, the EHA and HCPA clearly indicate that Congress intended to create a legalized, rights-based structure for handicapped children.

Since the primary problem presented here is the disparity of outcome between rich and poor, some of the traditional objections to educational malpractice actions might be avoided by capping recoveries at a level representing reimbursement costs. In other words, the plaintiff who could not afford interim services might be allowed to recover the costs of those services even though they do not represent out-of-pocket losses. This remedy would approximate what Justice Rehnquist termed the "expenses that it [the school district] should have paid all along and would have borne in the first instance had it developed a proper IEP."[296] Limited in this fashion, a "saved-costs" remedy serves the deterrent function more visibly, and encourages the school district to consider its placement decisions without regard to whether the parents will be able to afford interim services.[297] This cap on damage awards has an important additional advantage. The administrative process so essential to the EHA scheme is not particularly well suited to unliquidated damage calculations for dignitary and other non-economic losses.[298] An administrative hearing officer could, however, calculate per pupil costs for various educa-

militate against courts interposing themselves in the educational and administrative province of the schools. *Id.* at 861. *See generally* K. ALEXANDER, SCHOOL LAW ch. 12 (1980); Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U.L. REV. 641 (1978); Comment, *Educational Malpractice*, 4 GEO. MASON L. REV. 261 (1981).

295. In another case where the plaintiff sought relief for an inadequate education, the New York Court of Appeals found that the state constitutional provision establishing a public school system was never intended to create a right in the child or duty by the state. It concluded that no student is entitled to compensatory damages even if the failure to obtain a minimal educational level is demonstrated. Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979). This argument simply cannot be made in the case of handicapped students under the statutory regime created by Congress and by the states in response.

296. School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 371 (1986).

297. *Id.* at 370.

298. *See* Rothstein, *supra* note 278, at 363-66. Professor Rothstein argues persuasively that harms from all sorts of educational misconduct ought to be addressed through the common law tort system rather than through EHA remedies. This Article is concerned only with those harms caused by what Professor Rothstein characterizes as "special education malpractice." Although the administrative hearing process cannot always perform all potential remedial functions, we already have examples of administrative hearing officers making reimbursement awards in accordance with *Burlington*, *see* Hudson by and Through Tyree v. Wilson, 828 F.2d

tional services and arrive at a figure which could help compensate the child for educational harms.

Damages in the educational setting have traditionally been rejected also on the basis that the fear of liability has a detrimental effect on official behavior, especially in connection with discretionary decision making. Fear of liability supposedly causes officials to become risk averse, to concentrate on formalistic procedures rather than contextual results, to maintain elaborate records, and to avoid exercising their discretion altogether.[299] Closely examined, however, these problems are the very ones which have been ascribed to the legalized EHA since its inception, even in the absence of a strong remedial scheme.[300]

Thus, irrespective of a damages remedy, school officials still tend toward favoring proceduralism and formalism. In the case of the EHA, this legalistic behavior is not associated with the fear of liability, but more probably with the fact that substantive compliance is expressly measured by procedural compliance. As Justice Rehnquist stated in *Rowley*, "adequate compliance with the procedures prescribed [by the EHA] would in most cases assure . . . what Congress wished in the way of substantive content in an IEP."[301] School officials do not have to create a formalistic approach as a way to protect themselves against risk. Such behavior was already mandated by the statute and is inevitable due to the indeterminacy of the substantive right. If damages are available for EHA violations, the present formalism will cease to be a shield against substantive errors.

## CONCLUSION

If handicapped children had never been excluded or segregated from mainstream public education, the legalized structure of the EHA probably would not have developed. It exists in its present form because some — even most — school bureaucracies did not undertake the responsibility of educating the handicapped without resistance. In a few cases this resistance may have been caused by a lack of concern with the children's well-being. For the most part, however, educators balked because they had neither the money nor the expertise to do the job. Their expertise has improved markedly, but the resources to provide the best services are still scarce. Difficult allocative decisions must still be made. Some children have greater needs than others and are in a position, sometimes due to their parents' affluence, to extract a large share of the pie. Other children, with similar needs, have been safely ignored, because no one has the capability to speak for them. It is this latter group for

1059 (4th Cir. 1987), and awarding compensatory educational services in appropriate cases, *see* Burr by Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988).

299. P. SCHUCK, *supra* note 29, at 68-74.

300. *See supra* notes 14-23, 242-48 and accompanying text.

301. Board of Education v. Rowley, 458 U.S. 176, 206 (1982); *see supra* notes 52-66 and accompanying text.

whom the EHA has been least effective. The trend toward competent remediation for educational deficiencies can encourage parental action to prevent inappropriate programming, and can suppress the natural inclination of the schools toward collective and routinized, rather than individualized, programming.

In the regime of liberal legalism, the creation of a new "right" is the central event from which many procedural and remedial consequences typically, if not invariably, flow. The right to special education is in fact defined and informed by its attributes of due process, adversarial dispute resolution, and judicial review. However, the criticism that legalization and special education are largely incompatible leaves inquiry into its implementation at a standstill. The operational consequences of that conclusion would require either that special education be "downgraded" to something less than a "right" in order to relieve it of its procedural baggage, or that people (of good faith) ignore the congressional scheme and substitute their own dispute resolution techniques. Neither of these alternatives is acceptable; each provides too much room for entrenched institutions to disempower further those least able to make their voices heard. Moreover, the "de-legalization" of special education is highly unlikely; there are no instances in which a right, once devolved by Congress, has been subsequently withdrawn. Filling the remedies gap with appropriate relief, therefore, is an important step in the statute's evolution.