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Education of Students With Disabilities

BEVIN H. V. WRIGHT
666 F. SUPP. 71 (W.D. PA. 1987)

GENERAL RULE OF LAW: The Education for All Handicapped Children Act does not require that school districts provide private duty nursing services to handicapped children in order to enable the children to attend school.

PROCEDURE SUMMARY:

Plaintiff: Bevin H., a minor, by her parents Michael and Elizabeth H. (P)

Defendants: Wright, Acting Secretary of Education of Pennsylvania and the Pittsburgh School District (D)

U.S. District Court Decision: Held for Wright (D)

FACTS: Bevin (P) was a 7-year-old child with multiple physical and mental disabilities, which required her to breathe through a tracheostomy tube and to be fed and medicated through a gastrostomy tube. When Bevin began school, the Pittsburgh School District (D) agreed to admit her in a special curriculum for handicapped children with the stipulation that Bevin's parents bear the cost of the nursing services and related equipment that she required in order to attend school. The nursing services Bevin required were extensive, including having a nurse accompany her to and from school as well as throughout the school day. The nurse was responsible for the care and cleaning of the tracheostomy and gastrostomy tube, chest physical therapy, suctioning of the mucous from the lungs, and administering a continual supply of oxygen. If a mucous plug formed in her tracheostomy tube, it had to be cleared within 30 seconds in order to prevent serious injury. Because of this, a nurse needed to be with Bevin every moment of the school day.

An individualized education plan (IEP) was developed for Bevin and agreed to by her parents as the most appropriate and least restrictive educational plan for Bevin. Bevin was placed in a classroom with

six other handicapped children who all had a tracheostomy but who did not require the extensive nursing attention that Bevin required. They were each able to care for and clear their tubes without assistance. A teacher and two aides conducted the class, but there was no nurse assigned to the class.

The parents' health insurance paid for the cost of the nursing service. However, the insurance coverage had a limit of $500,000. With the prospect of exhausting Bevin's medical coverage, Bevin's parents requested that the school district assume the costs of Bevin's nursing services while Bevin was in school. When the school district refused, the parents instituted administrative proceedings. The hearing officer ruled in favor of Bevin's parents. Pennsylvania Secretary of Education (D) reversed the hearing officer, and Bevin's parents filed this action pursuant to the Act, 20 U.S.C. § 1415(e)(2).

ISSUE: Does the Education for All Handicapped Children Act require school districts to provide private duty nursing services to a handicapped child to enable the child to attend school?

HOLDING AND DECISION: (Weber, D. J.) No. When the nursing services that are required in order to enable a handicapped child to attend school are so extensive that private duty nursing services are needed, the school district is not required to provide such services. The Education for All Handicapped Children Act (EAHCA) provides funding to assist states in educating physically and mentally handicapped children. In order to receive federal assistance, the states must comply with various statutory and regulatory requirements in fulfilling the Act's purpose of providing "free appropriate education" to all handicapped children. The EAHCA defines a free appropriate education as special education and related services that are to be provided to a handicapped child without charge to the parents. "Related services" are further defined as transportation, and such development, corrective, and other supportive services (including pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

The EAHCA states that medical services, with the exception of those performed for diagnosis or evaluation, are not included in "related services." In determining whether the nursing care Bevin (P) required was a medical service and therefore not the obligation of the school district, the court looked to other courts that had addressed the subject of nursing services. The court found that when the other courts had decided the school districts were responsible for providing nursing services, the students involved only required intermittent nursing care that left the attending nurse free to care for other students at the same time. The extensive care that Bevin (P) required distinguished her case from the others previously addressed. The court described the services required by Bevin (P) as varied, intensive, and expensive and requiring the constant undivided attention of a nurse. Because of the extensive services Bevin (P) required, a school nurse, or other qualified individual with responsibility for other children within the school, could not safely care for Bevin (P).

The court also considered the standard of reasonableness that was set forth in the prior cases and determined that the school district is only required to make accommodations that are within reason. After a careful review of the nature and extent of the services required by the child and the impact on the school district, the court found that the nursing services required to enable Bevin (P) to attend school were more like that of a private duty nurse and "more in the nature of medical services." The court further found that these services were beyond the capabilities of a school nurse. Moreover, the court found that to place the burden of the services that Bevin (P) required on the school district "in the guise of 'related services'" would be inconsistent with the spirit of the EAHCA and the regulations.

COMMENT: The court noted that although all children are entitled to an education that is tailored to their individual needs, the district is not required to "provide the best possible education without regard to expense." Although no alternative educational programs were presented, the court stated that the EAHCA's requirements are not restricted to applications in a classroom setting and indicated that a non-classroom setting may have been the appropriate setting for Bevin.

Discussion Questions

1. Nursing services are often paid for by school districts. Why was this not the case here?
2. Why did the extensiveness of the nursing services result in their not being considered a "related service"?
3. Do you agree with this decision? Why or why not?

BROOKHART V. ILLINOIS STATE BOARD OF EDUCATION 697 F.2D 179 (7TH CIR. 1983)

GENERAL RULE OF LAW: A school district may require students with disabilities to pass a minimal competency test in order to receive a diploma as long as sufficient and timely notice of the requirement is given.

PROCEDURE SUMMARY:

Plaintiffs: Deborah Brookhart and 13 other handicapped elementary and secondary students (P)

Defendants: Illinois State Board of Education and the Peoria School District (D)

U.S. District Courts Decision: Held in favor of defendants

U.S. Court of Appeals Decision: Reversed

FACTS: In 1978, the Peoria School District (D) instituted a requirement that all students eligible for graduation in the spring of 1980 pass a Minimal Competency Test (M.C.T.) in order to receive a high school diploma. The test, which was given each semester, contained three parts: reading, language arts, and mathematics. In order to receive a diploma, a student had to score 70% on each part. Students who did not pass all parts of the test but who otherwise qualified to graduate received a Certificate of Completion and were permitted to continue to take the M.C.T. until they passed all three parts or until their 21st birthday. The school district (D) notified the students of the additional requirement 18 months prior to graduation. Fourteen handicapped elementary and secondary students (P) brought suit, claiming that the denial of diplomas violated state and federal statutes as well as the due process and equal protection clauses of the Fourteenth Amendment. A hearing was held before the Illinois State Board of Education, which found for the plaintiffs and ordered the school district (D) to issue diplomas to the plaintiffs. The school district appealed to the District Court, which held that there were no due process violations and reversed the order directing the school district to issue diplomas.

ISSUE: May school districts require students with disabilities to pass a minimal competency test in order to receive a diploma?

HOLDING AND DECISION: (Cummings, J.) Yes. School districts have the authority to impose reasonable additional standards for receiving a diploma, including minimal competency tests. A school district has the right to ensure the value of its diploma by requiring graduating students to attain minimal skills. Courts will not interfere with such educational policies unless it is necessary to protect individual statutory or constitutional rights. The students (P) claim that the denial of diplomas violates the Education for All Handicapped Children Act (EAHCA) because it denies an individual handicapped student a "free and appropriate public education." However, the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[1] The EAHCA mandates access to the specialized and individualized educational services for handicapped children, but it does not require specific results from these services. The students (P) argue further that the imposition of the test violates the act and the corresponding regulation's mandate that "no single procedure shall be the sole criterion for determining an appropriate educational program for a child." This argument must fail because the M.C.T. is not the only graduation requirement. Graduating students must also earn 17 credits and complete state requirements, such as a constitution test and a consumer education course, in order to receive a diploma.

The students (P) also claim that the M.C.T. constitutes unlawful discrimination under § 504 of the Rehabilitation Act of 1973: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." However, the court found no grounds on which the students (P) could argue that the content of the M.C.T. was discriminatory because the handicapped students could not pass the test.

Section 504 does not require a substantial modification of standards in order to allow handicapped students to pass. Rather, a student who is characterized as "otherwise qualified" is able to meet the requirements without modifications to the exam. If a student is not able to learn because of his handicaps, he is not an individual who is qualified in spite of his handicap. On the other hand, if an otherwise qualified student is unable to exhibit the degree of learning he possesses solely because of the test format or environment, then the student would be the object of discrimination solely on the basis of disability. In that instance, reasonable administrative modifications must be employed in order to minimize the discriminatory effects.

As to the students' (P) final argument, that the school district (D) failed to provide adequate notice of the M.C.T. requirement, the court agreed. According to Illinois state law, the students (P) had a right to receive a diploma if they met the requirements that were in place prior to the date on which the M.C.T. was imposed, which included completion of 17 course credits and fulfillment of the state's graduation requirements. By changing the diploma requirement, the school district (D) deprived the students of this right without due process. Therefore, the students (P) had a liberty interest sufficient to invoke the procedural protections of the due process clause. The record showed that although the students (P) were given notice a year before graduation, they were not exposed to as much as 90% of the materials that they were to be tested on. The record further showed that the students' individualized education plan (IEP) and the material to be tested were significantly different and that the students' programs were not developed to meet the goal of passing the M.C.T., but were focused on addressing the individual education needs. Because the students (P) and their parents only knew about the M.C.T. for 18 months prior to the date the

students were to graduate, they were not able to incorporate the M.C.T. into the IEPs over a period of years. The court held that in light of the students' (P) lack of exposure to a significant portion of the material on the M.C.T., 18 months was inadequate notice to enable the students to prepare properly for the test. The court ordered the school district (D) to issue high school diplomas to the 11 students who had satisfied the other graduation requirements.

COMMENT: The court of appeals agreed with the school district that the proper remedy for a violation of this kind would be to require the school district to provide free, remedial special education classes to ensure that the students are exposed to the material that is tested on the M.C.T. The court said that in the future, handicapped students should enroll in these courses. However, the court found that it would be unrealistic to assume that the present 11 students would not experience undue hardship and ordered the school district to award high school diplomas to the 11 plaintiffs who satisfied the remaining graduation requirements.

CLYDE V. PUYALLUP SCHOOL DISTRICT NO. 3 35 F.3D 196 (9TH CIR. 1994)

GENERAL RULE OF LAW: Schools can temporarily remove a handicapped student from a mainstream placement only if the child poses an immediate threat to the safety of himself or others.

PROCEDURE SUMMARY:

Plaintiffs: Clyde and Sheila K., parents of Ryan K., a handicapped child (P)

Defendant: Puyallup School District No. 3 (D)

U.S. District Court Decision: Held for the Puyallup School District (D)

U.S. Court of Appeals Decision: Affirmed

FACTS: Ryan K. is a 15-year-old student who has both Tourette's Syndrome and ADHD. Ryan received special education services while being "mainstreamed" in the Puyallup School District (D) as a student at Ballou Junior High School between mid-January and mid-March of 1992. Ryan frequently disrupted his classes by calling other students names and using profanity. Ryan also insulted teachers with vulgar comments and offended female students by using sexually explicit language. Additionally, Ryan would not follow directions and often battered classroom furniture. Ryan was suspended for one day for punching a fellow student in the face; he received a second suspension for pushing another student's head into a door. Finally, in March 1992, after assaulting a school staff member, Ryan was removed from school under an emergency expulsion order.

School officials, along with Ryan's parents, Clyde K. and Sheila K. (P), agreed that it was no longer safe for Ryan to remain at Ballou. Ryan's teachers and school administrators decided to place the boy temporarily in an off-campus, self-contained program called Students Temporarily Away From Regular School (STARS). On March 17, 1992, Ryan's parents (P) were notified that he would be placed in STARS temporarily

until he could be safely reintegrated into regular school programs. Ryan's parents (P) initially agreed with the placement, but 10 days later, after having second thoughts, requested a due process hearing in connection with the placement. On April 6, they formally rejected the placement at STARS until the individualized educational plan (IEP) could be drafted on Ryan's behalf. When efforts to draft the IEP failed, Ryan's parents (P) insisted that he be readmitted to Ballou.

ISSUE: Does a school district violate IDEA procedural requirements if it fails to draft a new IEP before attempting to temporarily remove a disabled child to an off-campus, self-contained facility, even though the parents initially agreed upon the new placement?

HOLDING AND DECISION: No. The school did not violate the IDEA's procedural requirements when it failed to grant a new IEP plan hearing before attempting to remove a disabled student to an off-campus program. In this case, the parents had initially agreed with the school's recommended placement *and* its determination that Ryan's current IEP could be implemented in the off-campus program. If the parents had not agreed to this off-campus placement, the holding may have been different.

Additionally, Ryan's parents also alleged various other procedural violations of the IDEA. On March 11, 1992, at the request of Ryan's doctor, the school district hired an aide to observe Ryan's behavior. Ryan's parents argued that this hiring constituted a change in Ryan's IEP. The district court ruled that the hiring did not change Ryan's educational program because the aide merely observed Ryan's behavior and did not provide educational services or any other type of assistance.

Ryan's parents also contended that the district court erred when it held that STARS was Ryan's "stay put" placement under 20 U.S.C., § 1415(e)(3). According to that statute, a child shall remain "in the then current educational placement" (the "stay put" placement pending any hearings pertaining to his or her IEP). Because Ryan's parents requested a due process hearing on March 27 — after Ryan had been placed at STARS with his parents' consent—STARS had already become the "stay put" placement under Section 1415(e)(3).

Finally, Ryan's parents contended that the district court erred in concluding that STARS was the least restrictive environment in which Ryan could be educated satisfactorily. They believed that Ryan could be educated in a mainstream environment if provided with a personal classroom aide. The courts have fashioned a four-part test to determine whether a disabled student's placement represents the "least restrictive environment."[2] The following four factors must be considered: (1) the academic benefits of placement in a mainstream setting with any supplementary aides and services that might be appropriate; (2) the nonacademic benefits of mainstream placement such as language and behavior models provided by nondisabled students; (3) the negative effects the student's presence may have on the teacher and other students in the mainstream environment; and (4) the cost of educating the student in a mainstream environment.

Upon considering the facts of this case in light of these factors, the *Clyde* court found that as of March, 1992, (1) Ryan no longer received any academic benefit from learning, and his academic achievement had declined during the 1991–1992 school year; (2) Ryan derived only minimal nonacademic benefits from Ballou (indeed, his doctor thought that Ryan had few friends and was socially isolated at Ballou); and (3) Ryan's presence in classes at Ballou had an overwhelming negative effect on both teachers and students. Ryan had displayed dangerously aggressive behaviors. Not only did he taunt other students and staff members with name-calling and profanity, he also directed sexually explicit remarks to female students. Public officials had an especially compelling duty to prevent such behavior.

COMMENT: The case is important because it was one of the first to deal with the combined disorders of Tourette's Syndrome and ADHD. It also clarified the duty of school officials to provide a free and appropriate education—even if it means changing a disabled student's placement because of behavioral problems that prevent both him and other students around him from learning. Although every case is decided on its specific facts, we nonetheless can draw some inferences concerning actions that may be taken in similar circumstances. Disruptive behavior that impairs to a significant degree the education of others suggests that a mainstream placement may no longer be appropriate. Clearly, schools have a statutory duty to ensure that disabled students receive an appropriate education, but they are not required to, nor should they, avoid taking action when a disabled student's behavioral problems prevent the student and those around him or her from learning.

The controversy surrounding ADHD in the classroom will continue to escalate. Each problem that presents itself to a school district will have to be handled on a case-by-case basis. Unfortunately (or fortunately, depending on how you look at the issue), a court of law is usually not the best venue in which to resolve IDEA problems. Here, the Puyallup School District sustained legal expenses of more than $100,000—a hefty sum of money in times of shrinking education budgets. Due process is a guaranteed right, but Ryan's experience is a poignant reminder that parents and school officials (and, of course, disabled children) are better served when differences are resolved though good faith compromise and cooperation rather than through an expensive and contentious process such as litigation.

Discussion Questions

1. If a child is acting in a dangerous manner and an IEP team cannot be assembled quickly, can a school official have law enforcement remove the child as a danger?
2. What is the four-part test that should be used to determine the "least restrictive environment"? Why is a court of law the nest place to make educational decisions for a child?

DELLMUTH, ACTING SECRETARY OF EDUCATION OF PENNSYLVANIA V. MUTH 491 U.S. 223, 109 S. CT. 2397 (1989)

GENERAL RULE OF LAW: The states' Eleventh Amendment immunity from suit in federal court may be abrogated by Congress only when the intention to do so is made unmistakably clear in a particular act.

PROCEDURE SUMMARY:

Plaintiff: Muth, the parent of a disabled child (P)

Defendant: Dellmuth, Acting Secretary of Education of Pennsylvania (D)

U.S. District Court Decision: Held for Muth (P), awarding damages for Dellmuth's (D) violation of the Act

U.S. Court of Appeals Decision: Affirmed

U.S. Supreme Court Decision: Reversed and remanded

FACTS: Congress passed the Education for All Handicapped Children Act to ensure that handicapped children received a free public education appropriate to their needs. It provided that parents of such children could challenge the appropriateness of their child's individualized education plan (IEP) in an administrative hearing followed by judicial review. Muth (P) challenged his child's IEP. While the proceedings were pending, Muth (P) placed the child in private school. The IEP was then revised and found appropriate in the administrative proceedings. Muth (P) filed suit, challenging both the appropriateness of the IEP and the validity of the administrative proceedings and seeking reimbursement for the child's private school tuition and attorney fees. The district court found that the states' Eleventh Amendment immunity was abrogated by the Act and entitled Muth (P) to damages because of the delay caused by the flaws in the administrative proceedings. The court of appeals affirmed, and Dellmuth (D) appealed.

ISSUE: May the states' Eleventh Amendment immunity from suit in federal court be abrogated by Congress only when its intention to do so is made unmistakably clear in a particular act?

HOLDING AND DECISION: (Kennedy, J.) Yes. Congress may abrogate the states' immunity only by making its intention unmistakably clear in the language of the statute. The Education for All Handicapped Children Act does not abrogate the states' Eleventh Amendment immunity from suit in federal court. The Act's preamble and judicial review provision and the 1986 amendment to the Rehabilitation Act evidence no such intention here. The Act makes no reference to the Eleventh Amendment or the states' sovereign immunity. The preamble has nothing to do with states' immunity. The 1986 amendment to the Rehabilitation Act did not clearly indicate whether Congress intended to abrogate states' immunity in 1975 when the Education for All Handicapped Children Act was adopted. The judicial review provision makes no mention of state immunity or abrogation, and abrogation is not "necessary" to achieve the Act's goals. The statutory language of the Act does not evince an unmistakably clear intention to abrogate the states' immunity from suit. Thus, Muth's (P) attempt to collect tuition is barred by the Eleventh Amendment. Reversed and remanded.

COMMENT: Dellmuth followed *Atascadero State Hospital v. Scanlon* (1985), in which the Court established that the states' immunity could only be abrogated by congressional intent made unmistakably clear by the language of a statute.[3] However, four dissenting justices were of the opinion that the majority was improperly applying the unmistakably clear test and that the history and language of the Act satisfied the test if properly applied, and, thus, state immunity was abrogated. For the dissenting justices, the 1986 amendment to the Rehabilitation Act providing that a state shall not be immune under the Eleventh Amendment for violations of that Act or any other federal statute prohibiting discrimination by recipients of federal assistance made clear once and for all the requisite congressional intent.

Discussion Questions

1. In *Dellmuth v. Muth,* the term "abrogate" is used throughout the case. What does "abrogate" mean?
2. Does the Education for All Handicapped Children Act take away the states' Eleventh Amendment immunity from suit in federal court?
3. Does this case have an impact on future special education cases?

DICK-FRIEDMAN EX REL. FRIEDMAN V. BOARD OF EDUCATION OF WEST BLOOMFIELD 427 F. SUPP.2D 768 (E.D. MICH. 2006)

GENERAL RULE OF LAW: Procedural safeguards provided by the IDEIA to allow parental involvement in the development of their child's IEP does not give parents the final decision-making authority on the child's classroom placement, and the court will defer to the school board's decision as long as it complies with the IDEIA.

PROCEDURE SUMMARY:

Plaintiff: Parent of a student with Down Syndrome (P)

Defendant: Board of Education of West Bloomfield School District and its director of Special Services (Board) (D)

Due Process Hearing Decision: Held in favor of Board (D)

Administrative Appeal Decision: Affirmed

State Trial Court Decision: Affirmed the decision of the due process hearing

FACTS: The Individuals With Disabilities Education Improvement Act (IDEIA) requires that school districts provide students with a "free appropriate public education" (FAPE) in the least restrictive environment. The student, Danny, was fully included in general education classes through elementary school. When he reached middle school, however, an Individualized Educational Plan (IEP) meeting was held, which recommended that he spend approximately half of his day in a segregated special education classroom to learn language arts, math, science, and social studies and the other half of the day in a general education classroom to learn elective courses for the purpose of socialization. At the time of the initial meeting, his mother agreed to the IEP; however, Ms. Friedman (P) saw Danny regress and felt he should be fully included in the general education classroom so he could learn from his non-disabled peers. Under IDEIA, a parent who disagrees with an IEP may challenge it at a due process hearing. Ms. Friedman (P) pursued a due process hearing and the local hearing officer determined that the IEP offered by the school district offered Danny a FAPE in the least restrictive environment, as required under IDEIA. On administrative appeal, the decision of the due process hearing was affirmed, finding that Danny would not benefit academically from taking the core courses in the general education classroom. Ms. Friedman (P) then filed suit in the United States District Court, Eastern District of Michigan.

ISSUE: Did the IEP provided by the school board meet the requirements of IDEIA?

HOLDING AND DECISION: (Battani, J.) Yes. In order for an IEP to comply with IDEIA, it must follow the procedures set out in IDEIA and be reasonably calculated to enable the child to receive educational benefits. Here, the Board (D) followed procedure by considering a wide variety of education options, as well

as Ms. Friedman's (P) concerns and potential negative consequences, to come up with an IEP that would benefit Danny. The IEP must also allow Danny to learn in the least restrictive environment appropriate, meaning that he should be included in regular education classes as much as is appropriate. Numerous school officials testified to the need for the placement specified in Danny's IEP for his academic success, and the court will defer to the Board's (D) decision. In Michigan, the IEP must also be designed to develop the student's maximum potential. This does not mean that the Board (D) was required to create an IEP that would fully include him in the general education classroom simply because his mother felt this was best. There are three factors that the Sixth Circuit looks at to determine whether an exception to the mainstreaming requirement exists: (1) whether the disabled student would benefit from inclusion in a general education classroom, (2) whether the benefits of a special education classroom outweigh the benefits of a general education classroom, and (3) whether the disabled child is disruptive in the general education classroom. The evidence presented at the due process hearing established that the benefits of Danny learning in a special education classroom far outweighed the benefits of learning in a general education classroom. The IEP did not violate the IDEIA.

COMMENTS: This case involves an issue of growing concern in dealing with children with disabilities: "inclusion." Although not formally developed in IDEIA, it has become the standard that most state programs serving children with disabilities must address. Just how much "inclusion" is appropriate for a child? That is, when should a child with a disability be placed in a regular classroom? Of course, this is a decision of the IEP team, but it has generated great concern and debate. And the debate will become even more intense because IDEIA has not clearly addressed this issue. To make a just decision regarding mainstreaming, schools must determine how much the child would benefit from being included with general education students. A second concern is whether the special education classroom might provide a better educational climate. Finally, there must be an analysis as to how disruptive placement in the general education classroom would be for regular students.

Discussion Questions

1. What is inclusion? How does it relate to the least restrictive alternative? How does it relate to mainstreaming?
2. Why would a parent challenge an IEP team decision regarding the extent that a child with a disability should be mainstreamed?
3. In reviewing an inclusion decision, what are the three factors that must be considered?

DOE V. DOLTON ELEMENTARY SCHOOL DISTRICT NO. 148 694 F. SUPP. 440 (N.D. ILL. 1988)

GENERAL RULE OF LAW: No otherwise qualified handicapped individual shall be excluded from participation in any program that receives federal assistance solely because he or she is handicapped.

PROCEDURE SUMMARY:

Plaintiffs: John and Mary Doe, as parents and guardians of Student No. 9387 (P)

Defendant: Dolton Elementary School District No. 148 (School District) (D)

State Trial Court Decision: Injunction issued prohibiting the School District (D) from excluding Student No. 9387 (P) from attending full-time curricular and extracurricular activities

FACTS: Student No. 9387 (Doe) was enrolled in Dolton Elementary School District No. 148, Cook County, Illinois (D). By 12 years of age, Doe (P) had undergone open-heart surgery on three occasions. In July 1986, he was diagnosed as infected with the human immunodeficiency virus (HIV), commonly referred to as the AIDS virus. Doe's (P) doctors concluded that he had contracted the virus through blood transfusions during one of his operations. By October 1987, at the time the underlying lawsuit was filed, Doe's (P) condition had deteriorated to what was then referred to as AIDS Related Complex (just short of full-blown AIDS).

On September 28, 1987, soon after being informed that Doe (P) was infected with the AIDS virus, the Board of Education of the School District excluded him from attending the school's regular education classes and all extracurricular activities. On October 8, 1987, Doe's (P) family filed an eight-count complaint alleging various federal and state constitutional and statutory violations.

Subsequently, a motion for a preliminary injunction was filed in which it was asserted that (1) the School District (D), as a recipient of federal aid, had violated Section 504 of the Federal Rehabilitation Act of 1973, and (2) it had violated Doe's (P) right to an "equal education in the free schools of the State of Illinois" pursuant to the Illinois state school code. By late October 1987, the School District (D) received the written medical reports of its physicians. In the reports, the physicians concluded that there was no known medical reason for excluding Doe (P) from school, given his condition at that time. On January 15, 1988, the School District's (D) clinical psychologist evaluated Doe (P). The psychologist indicated that Doe (P) was capable of regular classroom attendance and that his exclusion from the classroom was contributing to a loss of self-esteem.

ISSUE: Can a school district exclude a person with a contagious disease, such as Acquired Immune Deficiency Syndrome (AIDS), from participating in curricular and extracurricular activities at a public school?

HOLDING AND DECISION: No. A school district may not exclude a student with a contagious disease, such as AIDS, from attending full-time curriculum and extracurricular activities at a public school. Section 706 of the Rehabilitation Act of 1973 states, "No otherwise qualified handicapped individual in the United States, as defined in Section 706(7), shall solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Additionally, Sections 10–20.12 of the Illinois School Code guarantees a student's right to an equal education in the free schools of that state.

The court found that the plaintiffs had met their burden and ordered the following: (1) that a preliminary injunction be issued prohibiting the School District (D) from excluding Doe (P) from attending full-time curricular and extracurricular activities commencing with the Autumn 1988 term; (2) that the School District (D) follow the U.S. Centers for Disease Control guidelines for the regulation and care of students afflicted with AIDS; (3) that Doe (P) not engage in any contact sports sponsored by the school in either

its curricular or extracurricular programs; (4) that Doe (P) have monthly medical examinations performed by his own physician and that monthly reports of those examinations be filed under seal with the clerk of the court and sent to the appropriate School District (D) personnel and Doe's (P) attorneys, so long as Doe (P) is willing, eligible, and able to attend school; (5) that Doe (P) have weekly preliminary medical examinations performed by the School District's (D) nurse; 6) that Doe's (P) parents immediately report any open lesion or illness to appropriate School District (D) personnel; (7) that the school faculty and staff be informed of Doe's (P) identity, but keep that identity strictly confidential; (8) that the School District (D) inform and educate school staff and faculty regarding AIDS, including its etiology and known routes and risks of transmission; and (9) that copies of the court's order be distributed to all teachers and staff.

Clearly, Doe (P) presented evidence that feelings of inferiority were already evident and that irreparable harm, in an emotional and social sense, had already occurred (and would continue to occur if he were not allowed to return to a regular classroom environment). Therefore, the plaintiffs had met the burden of proving irreparable injury and the inadequacy of their remedies at law, as required by any party seeking injunctive relief.

COMMENT: Because Doe was diagnosed with AIDS, he became subject to Section 706 of the federal Rehabilitation Act (the Act). In *School Bd. of Nassau County, Florida v. Arline* (1987), the Supreme Court held that a person with a contagious disease is considered a "handicapped person" under Section 504 of the Act.[4] Section 706 defines a handicapped individual as any person who has a physical impairment that substantially limits one or more of his or her major life activities, has a record of such an impairment, or is regarded as having such an impairment. Because Doe was considered handicapped, the school district could not exclude him from a program or activity that received federal financial assistance.

Additionally, in *Chalk v. United States District Court Central District of California* (1988), it was held that an AIDS sufferer is, or is likely to be, considered handicapped under the Act.[5] The court in *Chalk* stated that the district court was in the best position, guided by qualified medical opinion, to determine what reasonable procedures could be implemented to ensure that plaintiff Chalk's continued presence in the classroom would not significantly increase the risk of transmission to others.

Such is also the case here. In granting injunctive relief, the court was cognizant of public safety concerns, given that AIDS is a fatal, communicable disease for which a cure has not been found. Each case must be decided according to its particular facts. Based on the facts presented here, the court determined that any "public hysteria" from Doe's reentry into the school population neither justified nor supported his exclusion from school. Nevertheless, orders of the court were carefully and specifically drawn so that procedures would be implemented to ensure that any potential risk of harm to Doe's classmates and teachers would be virtually eliminated. Therefore, the granting of a preliminary injunction did not disserve the public interest.

Discussion Questions

1. Can a school district exclude a person with a contagious disease, such as AIDS, from participating in curricular or extracurricular activities at a public school?
2. Does the Americans with Disabilities Act (ADA) protect an individual with a contagious disease such as AIDS?
3. How does the school district protect others from a contagious disease while providing for the educational needs of the student with the disease?

GRUBE V. BETHLEHEM AREA SCHOOL DISTRICT 550 F. SUPP. 418 (1982)

GENERAL RULE OF LAW: Section 504 of the Rehabilitation Act of 1973 states, "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

PROCEDURE SUMMARY:

Plaintiff: Richard William Grube, a minor, by his father Richard Wallace Grube (P)

Defendant: Bethlehem Area School District (D)

U.S. District Court Decision: Held for Grube (P)

FACTS: Richard William Grube (P) was a vigorous, athletically inclined high school student whose only physical problem was the absence of his right kidney, which had been removed when he was 2 years old as a result of a congenital malformation. Grube (P) was selected for the varsity football team in his senior year. He had played football for three years and was a member of the wrestling team. After the school physician concluded that it was "highly risky" for Grube (P) to play football, he was informed that because of his condition, he was ineligible to play, even though no substantial adjustments to the program were necessary to accommodate him. Grube (P) and his father agreed to sign a written release accepting all legal and financial responsibility in the event of an injury. Furthermore, because of a minor injury the previous season, Grube (P) obtained a specially designed protective "flack jacket." Grube (P), a collegiate-caliber athlete, was depending on a scholarship in order to attend college because his family lacked financial means. The Grubes (P) requested a preliminary injunction prohibiting the Bethlehem Area School District (D) from precluding Richard from participating as a member of the high school football team on the same terms and conditions as the other team members.

ISSUE: May school officials exclude a handicapped student solely on the basis of the handicap from participating in an extracurricular activity on the same terms and conditions as applied to all other members of the team?

HOLDING AND DECISION: No. Under Section 504 of the Rehabilitation Act of 1973, school officials cannot exclude a handicapped student solely by reason of handicap from participation in an extracurricular activity. In *Southeastern Community College v. Davis,* 42 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L.Ed.2d 980 (1979), the Supreme Court interpreted Section 504 as follows:

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped persons or to make substantial modifications to their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that the mere possession of a handicap is not permissible ground for assuming an inability to function in a particular context.[6]

As a recipient of federal funds, Bethlehem Area School District (D) was subject to the requirements of Section 504. Despite Grube's (P) handicap, physicians stated that harm to Grube (P) was no greater than that possible for any football player. The Grubes (P) demonstrated the possibility of irreparable harm by showing that a college scholarship for Grube (P) may depend upon whether he was allowed to play football in his senior year. There was no substantial justification to prohibit Grube (P) from playing varsity football. Therefore, the motion was granted and the Bethlehem Area School District (D) was enjoined from excluding Grube (P) from the Freedom High School football team on the same conditions and terms as the other players.

COMMENT: This case establishes that students cannot be prohibited from participating in extracurricular activities based solely on a handicap, even if the school district believes that they should not be allowed to participate. It would appear that some of the in loco parentis power of a school district to make decisions for students is usurped. However, according to *Poole v. South Plainfield Board of Education* (1980), the purpose of Section 504 is "to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them."[7] In this case, the handicapped individual, his parents, and a qualified physician decided that playing football did not present a risk. It should be remembered that a well-intended decision of school authorities in an equal protection complaint will usually be upheld. A handicapped student's desire to participate in athletics demands the balancing of both the student's and the school system's interests. While a student may want the most balanced, comprehensive education possible, the school has the duty to protect the physical well-being of the student. Here, the handicap issue prevailed in a situation in which the school's interests would have been controlling.

Discussion Questions

1. Who will be held liable if the handicapped student sustains a severe or fatal injury while participating in sports?
2. Can the courts step in and make a rule on a case that is not directly related to the education of the handicapped student?
3. Does the athletic program have to make any special accommodations for Grube to try to protect him?
4. Is the coach required to play the student if he is concerned for his safety?

HURRY V. JONES
734 F.2D 879 (1ST CIR. 1984)

GENERAL RULE OF LAW: Transportation is considered a "related service" within the Education for All Handicapped Children Act 's definition of a "free and appropriate public education," and the failure to provide transportation can lead to parental reimbursement for out-of-pocket expenses and the reasonable value of the parents' time and effort.

PROCEDURE SUMMARY:

Plaintiffs: George Hurry, along with his father and mother (P)

Defendant: Providence, Rhode Island Dept. of Education (D)

U.S. District Court Decision: Held for Hurrys (P)

U.S. Court of Appeals Decision: Affirmed in part and reversed in part

FACTS: George Hurry (George) (P) has cerebral palsy, mental retardation, and spastic quadriplegia, and he uses a wheelchair. Over the years, George attended various special education programs, and the City of Providence provided him with door-to-door bus transportation to and from school. However, by January of 1976, George had reached a weight of 160 pounds, and the bus drivers felt they could no longer safely carry him up and down the 12 steep concrete steps that led from the street to his front door. George's parents (P) took over the responsibility of transporting George to and from school in their van. Because Mrs. Hurry could not lift George or carry him up the steps without her husband's help, George had to wait in the van for several hours each day until his father came home from work. George often missed school when the weather was too hot or too cold for him to wait in the van, and he began to complain of pain in his legs from sitting for long periods in the van. In December of 1977, Mr. and Mrs. Hurry stopped transporting George to school.

The Hurrys (P) discussed their transportation problem with the Providence School Department (D), but the parties were unable to reach a resolution. However, by October 29, 1979, the parties had agreed on an individualized education plan (IEP) for George, which provided him with transportation to and from school. Nevertheless, the Hurrys decided to pursue claims for damages for the period during which they transported George to and from school themselves and for the period during which he did not attend school at all.

ISSUE: Do the remedies available under the Education for All Handicapped Children Act include compensation for the expenditure of time and effort and unjust enrichment?

HOLDING AND DECISION: (Coffin, J.) Yes and No. The court found that the Hurrys (P) were entitled not only to reimbursement for out-of-pocket expenses but also to the reasonable value of their time and effort. However, the court failed to expand the remedies available under the Education for All Handicapped Children Act (EAHCA) to include equitable relief. The EAHCA requires any state receiving federal assistance in the education of the handicapped to assure "all handicapped children a free appropriate education." Further, the act provides that aggrieved parties may bring a civil action and that the court hearing such an action may grant "such relief as the court determines is appropriate." The Rhode Island Board of Regents for Education's regulations to implement the EAHCA provided that handicapped children are to be given "door to door" transportation from the "street level entrance of dwelling."

The district court granted three separate damage awards to the Hurrys (P) pursuant to the EAHCA. First, it reimbursed Mr. and Mrs. Hurry (P) $1,150.00 for their out-of-pocket expenses for driving George to school. Second, the court awarded the Hurrys (P) $4,600.00 for their time and effort in driving George to and from school. Third, the court awarded George (P) $8,796.00 for the period during which he did not attend school at all. This award represented "the amount Defendants were not required to expend" on George's education.

The court, relying on an expansive view of reimbursement under the EAHCA, determined that the district court was correct in finding that the Hurrys (P) are entitled to reimbursement under the EAHCA for

the interim transportation services they provided until the parties agreed on an appropriate IEP for George. Further, the court found that the reimbursement available under the EAHCA is not limited to out-of-pocket expenses and that compensation may include the expenditure of time and effort. The court found the district court's award of $4,600.00 to be well within any reasonable estimate of fair reimbursement.

In the court's consideration of the award of $8,796.00 to George to compensate him for the period during which he was not able to attend school, the court found that to expand the EAHCA damage remedy to include equitable damages would be improper because the school did not benefit financially from the absence of one student. Further, to allow monetary damages to parents would be to provide the parents with an incentive to keep the child home rather than make an interim provision for his education. *The decision of the district court awarding the Hurrys $5,750.00 as reimbursement for transportation expenses and time and effort is affirmed. The decision awarding George Hurry $8,796.00 under the EAHCA is reversed.*

COMMENT: The district court also awarded George $5,000.00 as compensation for the physical and emotional hardships he endured during the transportation dispute. This claim was based on Section 504 of the Rehabilitation Act of 1973. The court of appeals determined that it is the EAHCA and the state and federal regulations promulgated under that act, not the Rehabilitation Act, that requires the department of education to provide George with door-to-door transportation. The court held that this action was properly brought under the EAHCA, and that plaintiffs may not avoid the EAHCA's limitations by seeking damages under the more general provisions of the Rehabilitation Act.

Discussion Questions

1. What was the court's rationale for awarding recovery for interim transportation services, for out-of-pocket expenses, and for the parents' time and effort?
2. Why was the $8,796.00 not awarded?
3. What do you think is meant by equitable relief? (Think about rewarding the parents for not sending their child to school.)

KRUELLE V. NEW CASTLE SCHOOL DISTRICT 642 F.2D 687 (3RD CIR. 1981)

GENERAL RULE OF LAW: Under the Education for All Handicapped Children Act, schools are required to provide a comprehensive range of services to accommodate a handicapped child's educational needs, including residential placement.

PROCEDURE SUMMARY:

Plaintiffs: Reverend and Mrs. Carl H. Kruelle (on behalf or their son, Paul) (P)

Defendants: New Castle County School District (NCCSD), Delaware State Board of Education, and other local and state school authorities (D)

U.S. District Court Decision: Held for Kruelle (P)

U.S. Court of Appeals Decision: Affirmed

FACTS: Paul Kruelle (P) is a 13-year-old boy who is profoundly retarded and suffers from cerebral palsy. He has an IQ below 30 and cannot walk, dress, or eat without assistance. He is not toilet trained, and he cannot speak. Along with Paul's physical challenges, he also has emotional problems that result in choking and self-induced vomiting when he is under stress. Between 1973 and 1977, Paul attended a public school in a mixed class with the trainable mentally retarded in Pennsylvania. By 1977, Paul's behavior had so deteriorated that he was vomiting and having frequent temper tantrums during school hours. Based on the severity and increased frequency of the vomiting, school officials and Paul's parents agreed that 24-hour residential placement was needed. Paul was subsequently placed in a Community Living Arrangement Program for multiply handicapped children that consisted of a combination school program and group home.

The Kruelle family subsequently moved to Delaware, where Paul (P) was enrolled in the Meadowood School and placed in respite care. Although the teachers and the respite caregiver observed that Paul was making progress under this plan, the Kruelles objected that Paul was not in a residential facility and they withdrew him from Meadowood. Paul's parents were granted an impartial hearing as required under the Education for All Handicapped Children Act (the Education Act). After the district hearing officer determined that the individualized education plan (IEP) proposed by Meadowood was appropriate within the meaning of the Education Act and that residential placement was "too restrictive," the parents appealed to the state educational agency. The state review officer agreed with the district hearing officer and found that the full-time services sought "were more in the nature of parenting than education." In October 1979, the Kruelles sought review of the administrative decision in district court. The district court found that Paul needed a greater degree of consistency and that the educational program provided by NCCSD was not a free appropriate education within the meaning of the Education Act.

ISSUE: Does the Education for All Handicapped Children Act require residential placement when full-time placement is necessary to implement a handicapped child's individualized education plan (IEP)?

HOLDING AND DECISION: (Adams, J.) Yes. When residential placement is needed in order for a handicapped child to benefit educationally from instruction, it must be provided by the school district at no cost to the parents. The Education Act provides a free appropriate education for every handicapped child "regardless of the severity of their handicap." Although the Education Act does not specifically mandate what should constitute each IEP, the Act does define what qualifies as a free appropriate public education (FAPE) and defines component parts of the Act relative to "special education" and "related services." Special education refers to "specially designed instruction at no cost to parents or guardians, to meet the unique needs of a handicapped child, including . . . instruction in institutions." Related services include any supportive services that may be needed to assist a handicapped child to benefit from special education. Regulations promulgated under the Act explicitly provide that if placement in a residential program is necessary in order to provide special education and related services to a handicapped child, the program must be at no cost to the child's parent.

The parties agreed that Paul needed full-time assistance beyond what is available in any day school program and that the Education Act provides for residential placement in certain situations. Thus, the focus was on whether Paul's need for full-time placement should be considered necessary for educational purposes, or whether the residential placement is a response to medical, social, or emotional problems that are separate from the learning process. In *North v. District of Columbia Board of Education* (1979), the court

was presented with nearly identical facts and the court addressed the same issue.[8] In *North,* the court found that the educational, social, emotional, and medical problems were so intertwined that it was virtually impossible for the court to separate them. Ultimately, the court determined that the unseverability of such needs served as the basis for holding that services are a necessary prerequisite for learning.

Before ordering residential placement, a court should weigh the mainstreaming policy included in the Education Act, which specifies placement of the child in the least restrictive environment. The district court's calculations resulted in it's finding that the past attempts to provide Paul in-home care and after-school instruction had been unsuccessful and had caused Paul to regress. Once a court concludes that residential placement is the only rational option, the question of "least restrictive" is resolved. It is only when alternatives actually exist that the court must address the issue of which option is least restrictive. If day school does not provide an appropriate education, it is not an option. Because of the combination of his physical and mental handicaps, Paul requires full-time care in order to learn. Affirmed.

COMMENT: The court found the trial court's decision—that Paul required more continuous care than the six-hour day provided by the Meadowood program—was supported by their reasoning in *Battle v. Commonwealth of Pennsylvania* (1980).[9] In *Battle*, the court held that the 180-school-day rule that is appropriate for nonhandicapped children cannot be presumed to satisfy the needs of the handicapped. The *Battle* court explained that the concept of education is necessarily broad with respect to persons with severe disability, so "where basic self-help and social skills such as toilet training, dressing, feeding, and communication are lacking, formal education begins at that point."

The court also determined that the Education Act places the burden for insuring an appropriate education for handicapped children on the State Board of Education. Thus, it is the State Board of Education's responsibility to insure that these children receive a proper evaluation and that an appropriate plan is implemented. The delegation of duties from state to regional and local levels is left up to the individual state's discretion. The Education for All Handicapped Children Act of 1975 (the Education Act or EAHCA) is now titled the Individuals With Disabilities Education Act (IDEA).

Discussion Questions

1. What is the difference between respite care and residential care?
2. Why did the court agree that full-time residential care was most appropriate?
3. Do you agree with this decision? Why or why not?

MAX M. V. ILLINOIS STATE BOARD OF EDUCATION 629 F. SUPP. 1504 (N.D. ILL. 1986)

GENERAL RULE OF LAW: (1) The Education for All Handicapped Children Act requires a school district to provide a handicapped child with recommended psychotherapy in order to enable the child to benefit from a free and appropriate education. (2) Parents are entitled to reimbursement for sums expended for a child's private psychotherapy when a school district fails to comply with the Education for All Handicapped Children Act.

PROCEDURE SUMMARY:

Plaintiffs: Max M., a handicapped child, and his parents (P)

Defendants: State defendants include Illinois State Board of Education (D) and several individual representatives of the board; Local defendants include the New Trier High School District and Board of Education (D)

U.S. District Court Decision: Plaintiffs' motion for reconsideration is granted and both parties' motions for summary judgment are granted in part and denied in part

FACTS: The Education for All Handicapped Children Act (EAHCA) is a federal statute that provides federal funds to participating states in order to assist them in providing educational and other related services to handicapped children. States receiving such funds are required to establish procedures that enable handicapped children and their parents to protect their right to a "free and appropriate public education." Max M. (P) is a handicapped child within the meaning of the EAHCA. Max suffers from anxiety, disorganization, and has difficulty writing. In his freshman year at New Trier West (D), a public high school in Northfield, Illinois, Max was referred to the Special Education department for evaluation. He was examined by Dr. Traisman, a consultant for New Trier, who recommended long-term "intensive psychotherapy." Dr Traisman based this recommendation on his finding that although Max was a bright child, he possessed a very poor self-image and that before Max's learning disabilities could be addressed, his self-image needed to be strengthened through long-term "intensive psychotherapy."

The school district followed Dr. Traisman's recommendation when preparing an individualized education plan (IEP) for Max to begin in his sophomore year. Although not specifically stated in the IEP, Max was offered two psychotherapy sessions a week with a New Trier social worker. Max, however, failed to attend these therapy sessions on a regular basis. By the end of Max's sophomore year, his academic and social behavior had seriously deteriorated and New Trier recommended that Max attend Central Campus Learning Center (CCLC), an off-campus facility designed for emotionally disturbed and behavior-disordered students. The summer after his sophomore year, Max began receiving psychotherapy from Dr. Robert Rosenfeld, a psychiatrist. Dr. Rosenfeld also served as an adviser to Max's parents with regard to Max's junior year placement and accompanied them when they met with New Trier to prepare an IEP for Max. The IEP was prepared with the understanding that if the CCLC placement did not work out for Max, the parents could initiate a due process hearing. However, because of the modifications in the regular CCLC program, Max experienced tremendous academic improvement, and by the end of the second semester at CCLC, Max was receiving all A's and B's.

During Max's junior and senior years, Dr Rosenfeld continued to provide private psychotherapy for Max but at Max's parents' expense. Due to the parents' financial constraints, the number of sessions was reduced from two times per week to one time per week. At the end of Max's senior year, New Trier sent Max's parents written notification that he had earned more than the required credits to graduate and informed them that Max's graduation marked a change in special education status. Max's parents then filed a request for a due process hearing. The parents were forced to discontinue Max's psychotherapy with Dr. Rosenfeld in order to fund the due process hearing. In October 1981, a due process hearing was conducted. Both the hearing officer and a subsequent opinion by the Illinois State Board of Education found that the school district had denied Max an appropriate education with related services because it failed to provide Max with intensive psychotherapy as recommended by the school district's psychologist.

ISSUE: (1) Does the Education for All Handicapped Children Act require a school district to provide recommended psychotherapy to a handicapped child in order to enable the child to benefit from a free and appropriate education? (2) Must the school district reimburse parents for their expenditures on private psychotherapy if a school district fails to provide recommended psychotherapy to a handicapped child?

HOLDING AND DECISION: (Bua, J.) Yes. The Education for All Handicapped Children Act (EAHCA) requires a school district to provide recommended psychotherapy if it will enable a child to benefit educationally and to receive a free and appropriate education. If a school district fails to provide recommended therapy, the school district will be required to reimburse the child's parents for their financial expenses in providing private psychotherapy. In deciding whether this requirement exists, a court must first determine whether the child was receiving a free and appropriate education under the EAHCA. In *Hudson District of Board of Education v. Rowley* (1982), the court developed a two-part standard to be utilized when determining whether a school district has met its obligations under the EAHCA.[10] In *Rowley*, the court determined that the EAHCA's requirement that the state provide a "free and appropriate public education" is met when a school district provides access to specialized instruction and related services that are designed to meet the unique needs of the handicapped child and the child benefits educationally from that instruction. This means that the student is entitled to instruction that provides an educational benefit, but it does not necessarily mean the student is guaranteed a particular level of educational benefit. In addition to the substantive requirement of the "free and appropriate education," the court also discussed compliance with the EAHCA's procedural requirements. States' compliance with EAHCA's procedures reflects Congress's intent to ensure parental involvement and creates a check on the substantive contact of the proposed program.

Applying the *Rowley* criteria to Max M.'s situation, the court found that although proper legal notice was never sent to Max's parents (P), they did have actual notice of their right to seek a due process hearing. The parents (P) were notified by Dr. Rosenfeld during Max's junior year of their right to seek review, and the school district (D) informed them they were entitled to review if the CCLC placement proved unsatisfactory. Additionally, the evidence showed that the parents (P) were involved with and approved Max's IEPs for his sophomore, junior, and senior years, thus reflecting the basic policy concern of the EAHCA' notice provision that the parents be involved in ensuring that proper educational and related services are provided to their child. Therefore, the court found no reason to hold that a free and appropriate education was denied Max (P) based solely on the school district's (D) procedural violations.

As to the substantive criteria of *Rowley,* the court found that the school district failed to provide Max (P) with intensive psychotherapy during his junior and senior year, thus depriving Max (P) of a free and appropriate education. The EAHCA is interpreted to include psychotherapy as a related service that is to be provided the child by the school district. The record showed that the school psychologist, Dr. Traisman, recommended intensive psychotherapy for Max. Yet, the facts are undisputed that the school district (D) provided no such therapy for Max after his sophomore year. Because of this, Max's parents were forced to bear the financial burden of private psychotherapy from Dr. Rosenfeld at a cost of $8,855.

This conclusion required the court to further determine the appropriate relief. The court based this part of its decision on the Supreme Court's decision in *Burlington School Committee v. Department of Education* (1985).[11] *Burlington* eliminated the requirement that parents must prove exceptional circumstances as a prerequisite to reimbursement. However, the court did not agree with the parents' (P) argument that the *Burlington* decision eliminated the reimbursement limitations under the EAHCA, specifically that services provided by a licensed physician are limited to diagnosis and evaluation. The court, relying on the plain language of the statute, found that a school district is only required to provide the minimum

level of health care personnel that is recognized as legally and professionally competent to perform the EAHCA required service. A school district's liability should, therefore, be computed from the amount that such qualified personnel would normally and reasonably charge for the EAHCA services. The school district has the burden of presenting the court with the normal and reasonable charge. Since the New Trier High School District (D) failed to present any evidence that the services could have been provided at a lower cost by New Trier personnel, the court ordered defendants to reimburse plaintiffs for the full amount of $8,855 with interest and costs.

COMMENT: This case was before this court on four prior occasions addressing plaintiffs' claims under EAHCA, including the claim for compensatory remedial educational services from all the defendants for the deprivation of Max's EAHCA benefits while he attended New Trier and an injunction to revoke Max's diploma and reinstate his eligibility under EAHCA. The court concluded that aside from the issue of psychotherapy, the school district provided Max with a free and appropriate education within *Rowley*'s guidelines. Once the defendants reimburse Max's parents for the private psychotherapy Max received during his junior and senior years, Max will have received a free and appropriate education with related service. Furthermore, with the reimbursement, Max's graduation was appropriate; therefore, Max is not entitled to further education at the public's expense. Even though there may have been other programs that would have provided a better education, the school district was only required to provide a program that would allow Max to benefit educationally. The school district did that.

Discussion Questions

1. Did Max need psychotherapy in order to successfully implement his IEP?
2. Why is psychotherapy a related service?
3. Why did the court select *Rowley* as the basis for its analysis in this case?

S-1 V. TURLINGTON
635 F.2D 342, 347 (5TH CIR. 1981)

GENERAL RULE OF LAW: An intellectually retarded child may not be expelled without a hearing to determine whether the basis for expulsion is related to the disability.

PROCEDURE SUMMARY:

Plaintiffs: S-1 and eight other anonymous high school students (P)

Defendants: Turlington and various other school officials (D)

U.S. District Trial Court Decision: Held for the students (P)

U.S. Court of Appeals Decision: Affirmed

FACTS: Nine students at a high school in Hendry, Florida, suffered from moderate to mild mental retardation. In separate actions, these students were expelled for various acts of misbehavior. Only one student, S-1 (P), was afforded a hearing to determine whether his handicap was related to his offense; the others made no such request. In S-1's (P) case, Turlington (D) had determined that because he was not seriously disturbed, his handicap could not be related to his conduct. A suit was brought in district court, contending that S-1 (P) had been denied his rights under the Education for All Handicapped Children Act (EAHCA) and seeking an injunction mandating readmission. The district court issued the injunction, and Turlington (D) appealed.

ISSUE: May an intellectually retarded child be expelled without a hearing to determine whether the basis for expulsion is related to the disability?

HOLDING AND DECISION: (Hatchett, J.) No. An intellectually retarded child may not be expelled without a hearing to determine whether the basis for expulsion is related to the disability. Under the EAHCA, a handicapped student may not be expelled from school for conduct that results from the handicap itself. This is true whether the handicap is physical, emotional, or mental. From this, it follows that any expulsion of a handicapped student must be accompanied by a hearing to determine this issue. It is no defense that a hearing was not requested; the EAHCA and its implementing regulations place an independent obligation upon the school, whether or not a hearing is requested. Handicapped students and their parents will often not have sufficient sophistication to understand their right to a hearing. In this instance, eight of the nine students involved had no hearing, so their EAHCA rights were violated. With respect to S-1 (P), the authorities (D) apparently assumed that only a serious emotional handicap would invoke the EAHCA. This was an incorrect reading of the Act; any handicap, if it relates to the misconduct at issue, prevents expulsion. Consequently, a rehearing would be necessary before S-1 (P) could be legitimately expelled. Affirmed.

COMMENT: The EAHCA provides that certain procedural protections shall accompany any change in educational placement. Consequently, the district court and the court of appeals had to decide as a threshold matter whether expulsion was a change in placement for purposes of the Act, which was silent on the issue. Both courts decided this in the affirmative, noting that a school could circumvent a handicapped child's right to an education in the least restrictive environment if the Act were otherwise construed. The guarantees recognized in this circuit court decision were later established by the Supreme Court in *Honig v. Doe* (1988).[12] The key in any disciplinary action involving the expulsion of a handicapped student is that the hearing must be conducted by the individualized education plan (IEP) team. The IEP team must make the determination as to the relationship between the misconduct and the handicap.

Discussion Questions

1. Does suspension or expulsion constitute a change in a disabled child's educational program?
2. Is the degree of severity of a child's emotional disability a factor in determining whether a child is protected under the Education for All Handicapped Children Act ?
3. Whose responsibility is it to call for a hearing before the expulsion of a child with disabilities?

NOTES

1. Board of Educ. v. Rowley, 458 U.S. 173 (1982).
2. See, e.g., Sacramento City Unified School District v. Rachel H., 14 F.3d 198 (9th Cir. 1994).
3. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S. Ct. 3142 (1985).
4. School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273 (1987).
5. Chalk v. United States District Court Central District of California, 840 F.2d 701 (9th Cir. 1988).
6. Southeastern Community College v. Davis, 42 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L.Ed.2d 980 (1979).
7. Poole v. South Plainfield Board of Education, 480 F. Supp. 948 (D. N.J. 1980).
8. North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979).
9. Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3rd Cir.1980).
10. Hudson District of Board of Education v. Rowley, 458 U.S. 176, 203 (1982).
11. Burlington School Committee v. Department of Education, 471 U.S. 359 (1985).
12. Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592 (1988).