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Securing the Right to Reimbursement Under the Education for All Handicapped Children Act

This term the Supreme Court can resolve a dispute dividing the circuits over the scope of “appropriate” monetary relief authorized under the Education for All Handicapped Children Act (“EHA” or “the Act”) and in the process safeguard the statutory rights of handicapped children. The Court has granted certiorari in Town of Burlington v. Massachusetts Department of Education to decide whether parents are entitled to reimbursement of the costs of private schooling of their handicapped child where they believed that the offered public schooling was inadequate and the parents’ decision is subsequently upheld in an administrative proceeding.

The EHA guarantees to all physically, mentally and psychologically handicapped children the right to a free and appropriate public education; the Act guarantees parents procedural rights to participate in and challenge school placements of their handicapped children. The EHA also gives state and federal courts the authority to review a school district’s placement decision and to “grant such relief as the court determines is appropriate.”

The First Circuit in Town of Burlington interpreted the EHA as allowing reimbursement of tuition and related expenses incurred by

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   In Town of Burlington, the parents of a learning-disabled child enrolled their son in a private school because they believed the alternative placement offered by the town to be inadequate. A state hearing officer upheld the private placement and ordered the town to reimburse the parents for past expenses and to commence funding the private schooling. A federal district court upheld this order, but on appeal the First Circuit remanded the case for consideration of the town’s claim that the order violated § 1415(e)(2) of the EHA. (For the contents of § 1415 (e)(2), see infra note 7). On remand, the district court reversed the state’s determination, holding that the town’s placement was proper and adequate. The parents were required to repay the town for all costs relating to the child’s private education. The First Circuit held that the town was required to reimburse the parents for the period from the state agency’s placement decision through the district court’s reversal and that the parents were not required to reimburse the town. The town’s appeal of this decision is now before the Court. The Massachusetts Department of Education and the parents are joined as respondents in this case.

parents pending the outcome of administrative and judicial reviews in their favor. It thus adopted a more expansive view of the relief contemplated under the Act than have other circuits. The courts have uniformly rejected claims for punitive damages under the Act, and most have also rejected claims for reimbursement. These latter courts have thereby limited their statutory role as ultimate guardians of the EHA-mandated right of handicapped children to “a free and appropriate public education.”

While EHA reimbursement disputes take a variety of forms, the following scenario distills many of their common characteristics:

Karen, age nine, suffers from severe academic and emotional difficulties. A team of educators and school psychologists diagnoses her to be learning disabled but not retarded. The school district has no program designed for children with Karen’s disability and therefore determines that she should be placed in a class for the mentally retarded. On the advice of private specialists, Karen’s parents argue that her learning disabilities demand a different educational setting and that placement in a program for the mentally retarded will cause her intellectual and emotional harm. They appeal the school agency’s decision, commencing a two-year process that involves multiple layers of administrative review up to the federal district court. Meanwhile, the parents face the choice of placing their daughter in what they consider to be the damaging setting of the public school class for the mentally retarded or of enrolling her at their own expense in a private program designed for children with her handicap. They opt for the latter. Two years later, the federal district court determines that the school district’s proposal was indeed inappropriate, that Karen properly belonged in the private program that she has since been attending, and that the EHA requires the school district to fund the private placement. Paradoxically, the court also determines that, although the school agency should have funded Karen’s private schooling from the start, her parents are not entitled to reimbursement for the sum that they have expended on her education. That is because they enrolled her in the private school without the agency’s consent prior to the completion of the judicial review.

This result would be even more unfair if Karen’s parents could

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not have afforded the private school tuition. Then they would have been forced to leave her in public school until the court determined two years later that they had been right all along. In such a case, Karen would probably be denied any compensation for the loss of an appropriate education, even if the school district had acted in bad faith to thwart an appropriate but costlier placement. The school would have saved two years of tuition, while Karen might have suffered significant educational losses. These examples, reflective of the law in nearly all the circuits, illustrate the federal courts' general unwillingness to fashion a reimbursement remedy under the EHA.  

Specifically, courts have relied on two of the Act's provisions in addressing the issue of retroactive monetary relief: § 1415(e)(2), 7 which provides state and federal courts with jurisdiction to hear EHA claims and gives them broad authority to grant "appropriate" relief, and § 1415(e)(3), 8 which provides that the child shall remain in his current classroom pending the outcome of an administrative or judicial review of his placement in a special program. Some circuits have adopted the position that § 1415(e)(2) allows reimbursement under only a few exceptional circumstances; 9 a few others

6. In the past, some handicapped plaintiffs avoided the monetary relief pitfall of the EHA by suing for relief under either the Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1982), or the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982). See, e.g., Quackenbush v. Johnson City School Dist., 716 F.2d 141 (2nd Cir. 1983), cert. denied 104 S.Ct 3457 (1984), may severely limit plaintiffs' opportunities to pursue either alternative route when the EHA also applies. See also Irving Indep. School Dist. v. Tatro, 82 L.Ed. 2d 664, 675 (1984) ("§ 504 is inapplicable when relief is available under the [EHA] to remedy a denial of educational services").


Any party aggrieved by the findings and decision made [by the state educational agency], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph 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.

Id. (emphasis added).

8. 20 U.S.C. § 1415(e)(3)(1982). The section states: "During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parent or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . .until all such proceedings have been completed." Id.

9. See, e.g., Anderson v. Thompson, 658 F.2d 1205 (damages available where child's health is in danger or school officials have acted in bad faith); Dept. of Educ., State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1983) as amended (1984) (reimbursement available where school failed to provide the least restrictive setting); Powell v. Defore,
have interpreted § 1415(e)(3) as an absolute bar to tuition reimbursement for any parents who have unilaterally removed their child from public school pending a review of his proposed placement, even if the placement recommended by the school is later determined to have been inappropriate.10

This Comment will argue that the First Circuit's view better fulfills both the substantive goals of the EHA and the judicial role envisioned by its authors. In addressing the issue of reimbursement, this Comment will first consider the Act's constitutional roots, substantive goals and procedural mechanisms. It will then analyze the circuit courts' conflicting interpretations of the EHA's relevant provisions in light of their legislative history. It will attribute the courts' generally restrictive views on reimbursement awards to their narrow readings of the Act and to their inattention to the adverse constitutional and policy consequences of denying plaintiffs some form of equitable compensation. In addition, this Comment will address the largely ignored problem of the handicapped child whose parents cannot afford to finance even temporarily the education that may later be found to have been improperly denied by the public schools. Finally, the Comment will propose a more equitable approach to the granting of reimbursement awards that takes into account the right of all handicapped plaintiffs—whether rich or poor—to receive monetary relief equal to the amounts saved by the school systems in improperly denying them a "free and appropriate public education." The Supreme Court can affirm this remedial scheme in its forthcoming review of Town of Burlington. However, should the Court reverse the First Circuit, the principles enunciated in this Comment provide the basis for a legislative clarification and expansion of the right to tuition reimbursements under the EHA.

I. The History, Goals and Structure of the EHA

The Education for All Handicapped Children Act was adopted in 1975 as the culmination of years of effort by advocates for the handicapped and by members of Congress11 to establish the right of


11. Congress first responded to the problem of education for the handicapped in

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handicapped children to public education. This right was to be implemented by federal funds with minimal educational guidelines to be imposed upon the states. The Act's firm foundation in the constitutional principles of due process and equal protection is revealed in its own legislative history and the history of special education in general.

Historically, the handicapped were largely excluded from public education. They were often considered to be uneducable and to possess fewer rights than the nonhandicapped. Then advocates for the handicapped, inspired by the struggle of other minorities for equal rights and by medical and educational advances, began in the 1960s to assert the fundamental right of handicapped children to adequate schooling. These advocates, faced with the inaction of school officials and their own political powerlessness, adopted a strategy of litigation to force comprehensive reform of special education. The resulting court cases asserted the constitutional rights of the handicapped to receive public schooling. These cases also illustrated the need for minimal national standards and for federal financial aid to the states to educate children with physical, mental and emotional disabilities.12

Congress responded to this litigation with the EHA. The accompanying Senate Report emphasized that passage of the Act "followed a series of landmark court cases establishing in law the right to education for all handicapped children."13 The Senate Report cited the Supreme Court's 1954 desegregation decision in Brown v. Board of Education14 as having established the principle that equal educational opportunity is guaranteed by the Constitution: "the opportunity of an education . . . is a right which must be made available to all on equal terms."15 In particular, the legislation was motivated by two subsequent district court decisions16 holding that the exclusion of handicapped children from public schools violated

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principles of equal protection and due process. In one of these pivotal cases, a District of Columbia district court had held that financial constraints did not justify depriving handicapped children of their right to a public education. The Senate Report rejected the argument that the federal government could mandate education for the handicapped only if it provided all necessary funding; instead, the Report emphasized "the states' primary responsibility to uphold the Constitution of the United States and their own state constitutions and state laws as well as the Congress' own responsibility under the fourteenth amendment to assure equal protection of the law."19

A second motivation behind enactment of the EHA was Congress' desire to secure the procedural rights of the handicapped, in addition to their substantive rights. Accordingly, the Act incorporated many of the procedures that the landmark cases had required the schools to follow in assigning handicapped children to appropriate educational programs. These procedural protections included notice requirements and the right to an impartial hearing. A commitment to the constitutional right of handicapped children to "equal access" to a free public education, and to the procedural due pro-


If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.
21. See Rowley, 458 U.S. at 200. The Court in Rowley rejected the view that Congress intended "to achieve strict equality of opportunity or services," 458 U.S. at 198, but did find that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child" 458 U.S. at 201 (footnote omitted). Although, as the Rowley Court noted, the equal protection clause of the Fourteenth Amendment does not require states to "expend equal financial resources on the education of each child," 458 U.S. at 199-200, it does, at a minimum, require "equal access" to a free and appropriate education. 458 U.S. at 200. Compare Brown, 347 U.S. at 493 (1954) (states that assume responsibility for educating some children must make education available to all). But cf. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education is not a right guaranteed by the Constitution). The Court in Plyler v. Doe, 457 U.S. 202 (1982), while following Rodriguez, also stressed that "education has a fundamental role in maintaining the fabric of our society." Id. at 221. The reasoning of the court in Plyler, while establishing the right to education of children of illegal aliens, also applies particularly well to the education of the handicapped:

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cess protection of that right, thus informed the design of the EHA. Any reading of the Act should square with these constitutional underpinnings.

Specifically, Congress sought in adopting the EHA:

to assure [the right of all handicapped children to]. . . a free appropriate public education. . . designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, [and] to assist States and localities to provide for the education of all handicapped children. . . .

The statute serves two main functions: 1) It offers substantial federal grants to state and local agencies to fund education for the handicapped, and 2) it establishes procedural safeguards for handicapped children and their parents, requiring that school systems allow parental involvement in the formulation of a child's individualized education program ("IEP"), comply with notice provisions, and establish an impartial due process hearing system.

The EHA's procedural safeguards are capped by a grant of jurisdiction to state or federal district courts to review final administrative decisions. This important provision, § 1415(e)(2) of the Act, states that "[i]n any action brought under this paragraph 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." Section 1415(e)(2), then, establishes a less deferential standard of judicial review than is traditionally afforded administrative decisions.

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. Id. at 222.


28. See Town of Burlington, 736 F.2d at 792 ("The traditional test of [administrative] findings being binding on the court if supported by substantial evidence, or even a pre-
The Supreme Court in *Board of Education of the Hendrick Hudson School District v. Rowley* held that judicial review under the EHA required a two-fold inquiry: 1) Did the state comply with the procedures of the Act? 2) "[I]s the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" This standard presumes that school officials will achieve satisfactory results if they comply with the EHA's procedures. However, the courts must still determine whether an IEP meets the particular needs of the child and, if it does not, must fashion a remedy accordingly. Thus, § 1415(e)(2) of the Act gives the courts responsibility for remedying "unreasonable" educational placements by supplying "appropriate" relief. The ambiguities inherent in such an open-ended prescription have invited a number of courts to define narrowly the reach of their remedial powers.

II. Section 1415(e)(2): The Scope of "Appropriate" Relief

The Seventh, Eighth, Ninth and Eleventh Circuits have all held that monetary awards, however limited, are ordinarily outside the scope of relief authorized by § 1415(e)(2). The Seventh Circuit in *Anderson v. Thompson* wrote the leading opinion restricting, albeit in dicta, a court's power to grant monetary damages to parents who unilaterally enroll their child in private school after the public school has made an incorrect placement decision. The court stated that monetary awards might be appropriate in two exceptional circumstances: 1) where the child's physical health would otherwise have been endangered, and 2) where the school agency acted in bad faith by failing to comply with the procedural provisions of the Act. The *Anderson* court examined the legislative history of the
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EHA to find no express authorization of a damages remedy and to find other factors that it considered conclusive evidence that damages were not intended. These factors included "an emphasis on procedural safeguards to ensure appropriate placements, a recognition that diagnosis of special education problems was difficult and uncertain, an awareness of severe budgeting constraints, and an acknowledgment that it would take time for all handicapped children to be helped." The court also relied on policy considerations to deny a general damages remedy. The Anderson court reasoned that such monetary relief would not serve the goals of the Act, since "educational programs for the handicapped will suffer if school officials, for fear of exposing themselves to monetary liability for incorrect placements, hesitate to implement innovative educational reforms." The Anderson court did not absolutely bar damage awards, despite such ostensibly overwhelming evidence that they were not within the scope of "appropriate" relief. Instead, the court apparently sought to draw some distinction between the majority of situations in which broad "monetary liability" was considered inappropriate and the few situations in which courts had found some form of compensation to be essential to the purposes of the Act:

In those [exceptional] situations it is likely that Congress, though generally requiring that a child remain in his current placement . . . would have intended that parents take action to provide the necessary services for their children without awaiting the outcome of lengthy administrative and judicial proceedings. Parents should then be compensated for the costs of obtaining those services that the school district was required to provide.

The Anderson opinion demonstrates the way in which many federal courts have narrowed their remedial authority to guarantee the rights of handicapped children under the Act. The broad lan-

school. Anderson, 658 F.2d at 1213-14. It derived the second exception from Congress's general intent in enacting procedural safeguards under the EHA. Id. at 1214. Cf. Monahan v. Nebraska, 491 F.Supp. 1074, 1094 (D.Neb. 1980), aff'd in part, rev'd in part 645 F.2d 595 (8th Cir. 1981) (tuition reimbursement available in circumstances of defendant's failure to comply with the procedural provisions of § 1415(e)(2) in an egregious fashion). The Anderson court suggested these two exceptions in dicta, finding that since neither exception existed in this case, no monetary award could be granted.

34. Anderson, 658 F.2d at 1213.
35. Id.
36. Id.
37. See generally Rowley, 458 U.S. at 183 ("Compliance [with the EHA] is assured . . . by the provision for judicial review"); Town of Burlington, 736 F.2d at 792 ("school systems have a set of affirmative obligations that are to be discharged under the scrutiny of state educational agencies, and only as a last resort, the federal and state courts").
guage of § 1415(e)(2) could just as readily be interpreted as affording tuition reimbursement when a parent has correctly defied the school’s placement recommendation. This provision interposes the courts as the crucial check on the traditionally wide discretion of state and local educators in determining “appropriate” educational placements.38 Section 1415(e)(2) grants federal district courts concurrent jurisdiction over EHA claims regardless of the amount in controversy,39 provides for judicial review of administrative decisions to determine whether the requirements of the Act have been met, and empowers the courts not merely to affirm or remand administrative decisions but rather to exercise their own judgment in fashioning needed relief.40 The Anderson court’s reading of the Act’s malleable legislative history is too little informed by the substantial role staked out for the courts by the provisions of the Act itself.

Although largely silent on the issue of remedies, the Act’s legislative history also indicates that monetary reimbursements would not be inappropriate. The conference committee, in forging a compromise between the Senate bill, which made no mention of the matter, and the House bill, which had a different version of the provision, phrased the bill in a form that imposed no limitation on the mode of relief. The conference committee version broadly states that: “the court. . .shall grant all appropriate relief.”41 The Anderson court dismissed this language as merely indicative of the courts’ freedom to formulate an appropriate educational program.42 This view, however, creates an artificial distinction between the power of a court to

38. The EHA strikes a balance between preserving state and local autonomy in the field of education and mandating minimal federal standards as a prerequisite to the receipt of federal funds. See, e.g., Rowley, 458 U.S. at 183 (“although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility”). The First Circuit characterized the federal-state relationship established by the Act as “cooperative federalism,” Town of Burlington, 736 F.2d at 784 (“while compliance with the minimum standards set out by the federal Act is mandatory for the receipt of federal financial assistance,. . .the Act does not presume to impose nationally a uniform approach to the education of children with any given disability”). See also Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies, 29 U.C.L.A. L. Rev. 1, 6 (1981) (“The [EHA] attempts to avoid usurping the rights of educators to determine and effectuate the content of educational programs”).


40. See Town of Burlington, 736 F.2d at 791 (“Congress intended courts to make bounded, independent decisions”).

41. S. REP. No. 455, 94th Cong., 1st Sess. 50 (1975) (emphasis added) See Boxall v. Sequoia Union High School Dist., 464 F.Supp. 1104, 1112 (N.D. Cal. 1979) (“This statement suggests very strongly that, when appropriate, compensatory damages may be awarded.”).

42. Anderson, 658 F.2d at 1211-12.
order a prospective placement at public expense and the presumed powerlessness of a court to determine that the past placement selected by the parents was appropriate and chargeable to the public coffers.43

Furthermore, Congress recognized in adopting the EHA that merely establishing the right of handicapped children to public education was not enough. Rather, access to courts with remedial powers was essential to enforcing the constitutionally-grounded rights of handicapped children. Senator Humphrey, a cosponsor of the EHA, asserted that the Act would "mandate provisions of full due process guarantees to all handicapped children and their parents." Citing the two landmark court decrees motivating enactment of the EHA, Senator Humphrey further asserted that "the progress toward establishing the right and the remedy for handicapped children has continued, leaving clear today that this right is no longer questioned."44 Absent a comprehensive remedial scheme that includes reimbursements, the handicapped child's fundamental statutory entitlement to a "free and appropriate public education" is called into question. Although Congress may have precluded punitive damages in recognition of the experimental nature of handicapped education and of the fiscal burden of providing education for all handicapped children,45 limited reimbursement awards grant individual plaintiffs nothing more than their fundamental statutory entitlement to a "free and appropriate public education."

The Anderson decision does, however, contain the seeds of a more

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43. Since the eleventh amendment immunizes states from retroactive monetary damages awards, Edelman v. Jordan, 415 U.S. 651, 678 (1974), plaintiffs are advised to seek recovery from lower level educational agencies. See, e.g., Miener v. Missouri, 673 F.2d at 980 (eleventh amendment bars actions for damages against the state and state agencies, but not against counties and school boards). Cf. Katherine D., 727 F.2d at 818 (state waived its eleventh amendment immunity when it chose to participate in the federally funded and regulated program).


45. Strong policy considerations militate against allowing tort liability damages under the EHA. See Loughran v. Flanders, 470 F.Supp. 110, 115 (D. Conn. 1979) (denying private damages remedy justified because otherwise "[i]nsulation of school officials from liability would take precedence over the implementation of innovative educational reforms"). The Act's legislative history reveals congressional sensitivity to this problem. 121 Cong. Rec. H25531 (1975) (statement of Rep. Lehman) ("no one really knows what a learning disability is"). However, it is important to distinguish between tort damages and reimbursement of amounts saved by schools: the latter would not hinder "innovative educational reforms" or impose an undue burden on public school systems. See also Hyatt, supra note 38, at 43-49. (delineating distinction between "Type I damages" (i.e., reimbursement for expenses of appropriate education) and "Type II damages" (i.e., compensation for the harm from deprivation of a "free and appropriate public education") and arguing that the former should be available under the Act).
generous judicial attitude toward the availability of monetary relief under the EHA. Despite concluding that only declaratory and injunctive remedies were intended by the drafters of the Act, the Seventh Circuit swiftly carved out two exceptions to this rule on the ground that Congress could not have intended such an otherwise harsh result. Implicit in these exceptions is the court’s recognition that, regardless of the inexplicit language and legislative history of § 1415(e)(2), monetary compensation may sometimes be the only fair remedy and that in such cases courts have the duty to grant such relief.

One circuit has claimed to follow the Anderson holding while expanding its indistinct borders. The Ninth Circuit has added a third exceptional circumstance allowing tuition reimbursements where a child was without explanation wrongly denied placement in the least restrictive classroom setting. In reaching this conclusion, the Ninth Circuit looked to the “fundamental scheme and purpose of the Act” to discover a strong congressional preference for “mainstreaming” handicapped children—that is, for placing them in classes with non-handicapped children. This congressional preference was held to justify the reimbursement of parents who unilaterally decided to enroll their daughter in private school rather than to keep her in the homebound program prescribed by the school system.

Even under an expansive reading of the Anderson doctrine, conditioning reimbursement on a finding of exceptional circumstances continues to produce inequities. First, parents must bear the burden of ascertaining whether their situation is so “exceptional” as to permit reimbursement. For example, they must divine when school officials’ conduct meets the legal definition of bad faith and hence justifies a private placement. Parents also have the burden of proving exceptional circumstances after the fact to the hearing officer or judge. Second, schools have little disincentive to put their costs ahead of the child’s needs in making placement decisions or to prolong the already lengthy review process before administrative agencies or courts. The school district often stands to gain financially by acting in everything short of demonstrably bad faith in delaying payment for an appropriate placement. Finally, the Anderson doctrine also unfairly differentiates between those handicapped children who

46. See supra note 33 and accompanying text.
47. Katherine D., 727 F.2d at 817.
48. Id.
49. See Doe v. Brookline School Comm., 722 F.2d 910, 920-21 (1st Cir. 1983).
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were the victims of bad faith and those who were not. Both classes of children, absent parental intervention, may suffer the same injuries from inadequate schooling.

III. Section 1415(e)(3): A Procedural Shackles?

Some courts have further narrowed the scope of what they consider “appropriate” relief by their interpretation of §1415(e)(3). This provision generally requires that children remain in their current setting pending review of the placement decision. The Fourth and Fifth Circuits have held that §1415(e)(3) is an absolute bar to recovery of tuition costs. For example, the Fourth Circuit refused in the oft-cited case of Stemple v. Board of Education of Prince George’s County to entertain a claim for tuition reimbursement because the parents had unilaterally removed their child from a disputed placement in public school. The court held that §1415(e)(3) creates a duty on the part of parents who avail themselves of the hearing and review provisions . . . to keep their child in his current educational assignment while the hearing and review provisions are pending. . . Of course, that duty may not be totally enforceable by the state, but it certainly negates any right on the part of parents, in violation of the duty. . ., to elect unilaterally to place their child in private school and recover the tuition costs thus incurred.

The court based its construction of §1415(e)(3) on a literal reading of the statutory language, buttressed by analogy to the familiar “concept of preserving the status quo. . . pending litigation at the administrative and judicial level.”

However, §1415(e)(3) should not determine the availability of tuition reimbursement for parents who have unilaterally and correctly placed their handicapped child in a private interim setting. The language of the section concededly indicates a strong congressional preference for maintaining the status quo pending final review. However, this section need not be read as an inflexible requirement that a parent acquiesce to an improper placement throughout the lengthy administrative and judicial appeal process. Such a reading would undermine the Act’s scheme of parental participation in safeguard-

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50. See supra note 10.
51. 623 F.2d 893 (4th Cir. 1980).
52. Id. at 897, followed in Rowe v. Henry County School Bd., 718 F.2d 115 (4th Cir. 1983).
53. Stemple, 623 F.2d at 898.
54. The Supreme Court pointed out in a footnote in Rowley that “[t]heir judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings.” Rowley, 458 U.S. at 186-87 n.9.
ing their child's right to a free and appropriate public education.\textsuperscript{55} The Act prescribes detailed procedural guidelines to be followed by local schools in involving parents in the placement process. In addition, parents who dispute a school's placement of their child are entitled to an independent placement evaluation at public expense unless the initial placement is upheld at a due process hearing.\textsuperscript{56} Thus, the Act encourages parents to protect their child's interests and even to take the initiative in challenging school placements. Indeed, the Act's procedural safeguards were primarily designed to "enforce legal entitlements and also [to] provide [parents] political leverage within the school."\textsuperscript{57} Effectively barring parents from enrolling their child in private school—when that is the only appropriate placement—precludes them from performing their statutory role in the protection of their child's educational rights.

There is little legislative history relating directly to § 1415(e)(3); however, the Conference Committee did report that:

\[\text{T}he \ provisions \ of \ existing \ law \ with \ respect \ to \ the \ binding \ effect \ of \ due \ process \ hearings \ and \ appropriate \ administrative \ and \ judicial \ review \ of \ such \ hearings \ are \ clarified \ and \ language \ is \ also \ adopted \ to \ require \ that \ during \ the \ pendency \ of \ any \ administrative \ or \ judicial \ proceedings \ regarding \ a \ complaint, \ unless \ the \ State \ or \ local \ educational \ agency \ and \ the \ parents \ or \ guardian \ of \ the \ child \ otherwise \ agree, \ the \ child \ involved \ in \ the \ complaint \ shall \ remain \ in \ his \ or \ her \ present \ educational \ placement. \ldots\textsuperscript{58}\]

The only additional reference to that section in the legislative history, although somewhat ambiguous, suggests that the section need not impose an absolute bar on reimbursement of a parent who has acted unilaterally. In explaining § 1415(e)(3), Senator Stafford, a conference committee member and the ranking minority member of the subcommittee on the handicapped, reported: "[W]e did feel, however, that the placement or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus, the conference adopted a \textit{flexible ap-}

\textsuperscript{55} See EHA § 1415(a)-(d). The EHA gives parents and guardians significant opportunities for participation throughout the administrative process. See also S. Rep. No. 168, supra note 13, at 12 (1975) (according to the Senate subcommittee on the handicapped, the "individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child"); Rowley, 458 U.S. at 209 ("parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act") (footnote omitted).

\textsuperscript{56} 34 C.F.R. § 300.503(b) (1984).

\textsuperscript{57} Tweedie, supra note 12, at 62.

\textsuperscript{58} S. Rep. No. 455, supra note 41, at 50.
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proach to try to meet the needs of both the child and the State." 59 This "flexible approach" thus allows for compromise between parents and school agencies in formulating an interim placement and recognizes a handicapped child's pressing need for education regardless of the status of the appeal. Consequently, § 1415(e)(3) assures both that the child can remain in his current placement at public expense even if the school agency disagrees with it and that the school need not fund a new program until it is finally determined to be appropriate for the child. This strikes a balance between the paramount need to provide an appropriate education to a handicapped child and the lesser need to prevent unnecessary expenditures of limited public funds. No public expenditure need be made where parents' unilateral placement decisions are proven wrong in administrative or judicial proceedings.

In addition, interpreting § 1415(e)(3) as foreclosing all such reimbursement infringes the parents' substantial constitutional interest in the upbringing of their child. The Stemple court's recognition that the duty to maintain the status quo "may not be totally enforceable by the state" is presumably a concession to the well-established constitutional principle that a parent's right to educate her child in private schools may not be abridged.60 In light of this principle, however, the court's use of the word "totally" is a troubling indication of its lack of regard for the value of parental discretion in acting to secure the best interests of a child.61 The court also emphasizes


60. Pierce v. Society of Sisters, 268 U.S. 510 (1925)(parents have right to enroll their children in private schools). See also Meyer v. Nebraska, 262 U.S. 390 (1922)(parents have right to enroll their children in private foreign language classes).

61. See generally Pierce, 268 U.S. at 535 (parents "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations"); Parham v. J.R., 442 U.S. 584, 602 ("Our jurisprudence historically has reflected western civilization concepts of the family as a unit with broad parental authority over minor children. . . [H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children"); Goldstein, Medical Care for the Child at Risk: On State Supervision of Parental Autonomy, 86 YALE L.J. 645, 645 (1977) ("To be an adult who is a parent is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for one's children"); J. CHAMBERS & W. HARTMAN, SPECIAL EDUCATION POLICIES 61 (1983) (referring specifically to the motivation behind creating the EHA's parental role: "The value of individualized planning depends on including an effective advocate for the child in the planning process and enforcing the child's plan. . .[s]o [policy makers] empowered parents to act in the child's interest."). But see Parham, 442 U.S. at 603 ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized"). Of course, the state is not constitutionally required to finance the schooling when a parent exercises her right to privately educate her child, unless a statute like the EHA mandates that an appropriate private placement for the child be publicly funded.
the importance of the Act’s procedural safeguards as “a generous bill of rights for parents, guardians, and surrogates of handicapped children.” However, its interpretation of § 1415(e)(3) in effect turns the Act’s “bill of rights” into a procedural shackle that unnecessarily restricts the parents of handicapped children. Under the rule expressed in Stemple, and reiterated by the Fifth Circuit, schools bear no monetary risk for prescribing an improper—even harmful—placement for a handicapped child; meanwhile, parents bear all the cost of providing their child with an appropriate education pending final vindication of their decision. Such a literal reading of § 1415(e)(3) ultimately deprives handicapped children of their right to appropriate schooling. This interpretation, as the First Circuit recognized, “exalts form over substance [and] treats these special needs children as though they were nonperishable commodities able to be warehoused until the termination of in rem proceedings.”

IV. A Better Approach to Reimbursement

The First Circuit has rejected both the absolute bar on reimbursements of the Stemple court and the special circumstances limitation on reimbursements of the Anderson court. Instead, the First Circuit has applied its own solution to the problem in a body of case law culminating in Town of Burlington. These cases establish that §§ 1415(e)(2) and 1415(e)(3) do not bar reimbursement of “interim educational and related expenses” to parents who correctly place their handicapped child in private school even absent the “exceptional circumstances” identified in Anderson.

63. See, e.g., Scokin, 723 F.2d at 439 (“parents are not allowed to recover costs incurred by actions in violation of § 1415(e)(3)’’); Marvin H. v. Austin Ind. School Dist., 714 F.2d 1348 (5th Cir. 1983). Cf. Zvi D. v. Ambach, 694 F.2d 904 (2d Cir. 1982). The court held in Zvi D. that § 1415(e)(3) acts as an automatic preliminary injunction, 694 F.2d at 906, but “express[ed] no view whether Zvi D. could recover his tuition costs as damages if judicial review determined that the recommended public placement was not appropriate.” 694 F.2d at 908 n.8.
64. Town of Burlington, 736 F.2d at 798.
66. Town of Burlington, 736 F.2d at 795-99. See also Brookline, 722 F.2d at 918 (§ 1415(e)(3) does not establish a duty that parents maintain the status quo).
67. Hurry, 734 F.2d at 883. See Doe v. Anrig, 728 F.2d 30 (1st Cir. 1984); Brookline, 722 F.2d at 920-21 (“the best approach to this issue is to require each party to bear the
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Allowing reimbursement in such cases will allocate the costs of education to the party who sought to provide the child with the appropriate schooling, not to the party who adhered more rigidly to an important, but not necessarily inflexible, set of procedures. This approach does not impose any undue financial burden on school systems, since the schools pay no more than they would have had the child been properly placed at the outset. The EHA's "fundamental" purpose—to provide children with an appropriate education regardless of their handicap—is thereby significantly advanced.

Even the First Circuit's rule fails to take into account the rights of all handicapped children. Under its rule, monetary relief is available only to parents who can afford the cost of private schooling pending judicial review of the placement decision. Denying monetary relief to parents who cannot meet these costs disregards the right of their children to equal treatment under the EHA. If monetary damages are based solely on the expenses that parents incur, school officials will have less incentive to fulfill their statutory responsibilities to low-income children than to more affluent children. Therefore, to protect the constitutional and statutory rights of all handicapped students, the courts should allow any child placed in an improper program to recover the amount that the school district saved through its own error. This remedy would apply to any child demonstrably harmed by the school's inappropriate placement.

This approach, consistent with the familiar doctrine of unjust enrichment, would not unduly burden budgets for handicapped education costs of its own errors of judgment in determining what a [free and appropriate public education] for a child requires in the pertinent circumstances. . .[P]ermitting reimbursement promotes the purpose and policy of the Act."

68. See Brookline, 722 F.2d at 921, and Hyatt, supra note 38, at 50.
69. See Hyatt, supra note 38, at 50. See also Hyatt at 48:

The resources possessed by parents who make other arrangements for their child are not limited to dollars but also include the possession of sophisticated information about the child's handicap, available educational services and alternative placements. Thus, the more well-to-do, knowledgeable parents will avoid injury to their child and will be able to recover their costs of doing so, while the child of poorer, less sophisticated parents suffers the harm and has no redress.

70. A Rhode Island district court applied the doctrine of unjust enrichment in a case where a school failed to provide a handicapped child transportation, so the child could not attend school. Hurry, 560 F.Supp. 500, rev'd 734 F.2d. 879. The court awarded the child the equivalent of the amount that the defendant school saved on tuition. Hurry, 560 F.Supp. at 508 ("The savings which accrued to Defendants are ill-gotten gains which should be denied them"). The First Circuit rejected this equitable remedy under the Act because: 1) of difficulties in calculating the amount saved, 2) the money paid to the plaintiff would decrease the amount available to other handicapped children rather than come out of the pockets of school officials, and 3) in cases like this one, the remedy would provide parents with an incentive to keep the child at home rather than seek a private placement. 734 F.2d at 885.
tion: The school system would lose only the money that it had saved by violating its legal duties. The money currently saved by denying poor handicapped children a "free and appropriate public education" most likely reverts to the general pool of funds for handicapped education. However, the individual handicapped child should not on the basis of her parents' income be forced to forgo her statutory and constitutional rights in order to benefit other handicapped children.

V. Conclusion

The EHA's fundamental goal of providing all handicapped children with a "free and appropriate public education," its emphasis on parental involvement in furthering that goal, and its broad grant of remedial authority to the courts justify the forms of relief proposed in this Comment. The Supreme Court should resolve the dispute among the circuits as to the availability of monetary relief in favor of the First Circuit and thereby make fully enforceable the right to a "free and appropriate public education." The reimbursement rule should also be extended to low-income children, who are, in the absence of such a remedy, handicapped by both disability and poverty. The EHA already provides a strong framework for securing the rights of the handicapped; however, if the current dispute is not resolved in favor of the proposed equitable solution, the burden will again fall to Congress, or conceivably to the state legislatures, to continue "the progress toward establishing the right and the remedy for handicapped children." 71

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71. See text accompanying note 44, supra (emphasis added). The Supreme Court's recent holding in Smith v. Robinson, 104 S. Ct. 3457 (1984) may bode ill for the First Circuit's position in Town of Burlington. The Court ruled in Smith that a plaintiff who asserted a valid claim under the EHA could not also proceed under § 504 of the Rehabilitation Act, 29 U.S.C. §§ 701-96 (1982), and that the plaintiff could not recover attorneys fees under either § 504 or 42 U.S.C. § 1988 (1982). This decision was followed in Georgia Ass'n of Retarded Citizens v. McDaniel, 740 F.2d 902 (11th Cir. 1984) (attorneys fees not available under EHA or Section 504). The application of the EHA in Smith to eliminate plaintiffs' access to attorneys fees indicates an unwillingness by the Supreme Court to extend the Act's scope in the related area of monetary reimbursement awards. Thus, action by Congress or state legislatures could prove necessary to secure the right to reimbursement in the wake of an adverse holding in Town of Burlington.