

RESOLVING PLACEMENT AND FINANCING DISPUTES UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

The Education for All Handicapped Children Act (EAHCA)¹ provides state and local school boards with federal financial assistance in educating handicapped children.² EAHCA's primary goal is to ensure that every handicapped child³ receives a "free appropriate public education."⁴ The statute contemplates that in most situations an "appropriate" educational setting is a daytime, classroom program where handicapped and nonhandicapped children learn together.⁵ When a classroom placement is inappropriate for a particular child,⁶ EAHCA obligates a participating state⁷ to provide the child with a free "appropri-

1. Pub. L. No. 94-142, 89 Stat. 775 (1975) (codified as amended at 20 U.S.C. §§ 1401-61 (1982)).

2. Note, *Enforcing the Right of an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1103 (1979); see also S. REP. NO. 168, 94th Cong., 1st Sess. 6, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1431 (revealing congressional support for federal assistance in protecting the rights of handicapped children) [hereinafter cited as SENATE REPORT].

3. EAHCA defines "handicapped children" as follows: "The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or children with specific learning disabilities, who by reason thereof require special education and related services." 20 U.S.C. § 1401(1) (1982).

4. 20 U.S.C. § 1412(18) (1982).

The term "free appropriate public education" mean special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. See *infra* notes 23-25 and accompanying text (discussing statutory definitions and judicial interpretations of "special education" and "related services").

5. 20 U.S.C. § 1412(5)(B). The statutory requirement that school officials ensure that, to the maximum extent possible, handicapped and nonhandicapped children attend classes together is commonly known as the "least restrictive environment" or "mainstreaming" provision. See *infra* notes 33-34 and accompanying text (discussing statutory preference for "mainstreaming").

6. See *infra* notes 61-62 and accompanying text (discussing the appropriateness of residential and nonresidential placement alternatives).

7. Only New Mexico has elected not to participate in the EAHCA program. See *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 853 (10th Cir. 1982). The Tenth Circuit noted that New Mexico's failure to accommodate handicapped students may nevertheless constitute unlawful discrimination under § 504 of the Rehabilitation Act of 1973. *Id.* See *infra* notes 56 & 58 and accompanying text (discussing § 504).

ate" education in a residential⁸ setting.⁹

Disputes frequently arise between parents and school officials over financing the high costs of residential education.¹⁰ EAHCA provides a series of procedural safeguards for resolving placement and financing disputes.¹¹ This Note focuses on federal court review of state administrative decisions regarding placement of handicapped children in residential educational facilities. Part I summarizes the substantive and procedural rights of handicapped children under EAHCA.¹² Part II discusses the availability of publicly funded residential placements and related services.¹³ Part III examines financing disputes that accompany interim and final placement decisions.¹⁴ This Note concludes that conventional methods of resolving placement and financing disputes are inconsistent with EAHCA's substantive guarantees¹⁵ and that the equitable approach of *Doe v. Brookline School Committee*¹⁶ is better-suited to balance the substantial interests of school officials, parents, and children.¹⁷

I. EAHCA

Two federal court decisions predating EAHCA's enactment established that handicapped children have a substantive constitutional right to public education.¹⁸ These decisions, however, neither defined the obligation of school officials to provide handicapped children with public ed-

8. The term "residential placement" means placement in a publicly or privately operated educational facility that provides handicapped children with 24 hour care. See 34 C.F.R. § 300.302 (1984).

9. 45 C.F.R. § 84.33(c)(3) (1984); see *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136, 139 (D.D.C. 1979).

10. In 1985 the cost of maintaining an emotionally disturbed child at the Edgewood Children's Center in Webster Groves, Missouri, was \$86.95 per day for a residential program that included special education.

11. See 20 U.S.C. § 1415(b)-(d) (1982) (providing for resolution of placement and financing disputes by local educational agencies); *id.* § 1415(e) (providing for state and federal court review of administrative decisions).

12. See *infra* notes 18-60 and accompanying text.

13. See *infra* notes 61-68 and accompanying text.

14. See *infra* notes 69-111 and accompanying text.

15. See *infra* notes 112-18 and accompanying text.

16. 722 F.2d 910 (1st Cir. 1983).

17. See *infra* notes 119-30 and accompanying text.

18. See *Mills v. Board of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279, 282-83 (E.D. Pa. 1972). The constitutional significance of these two cases is, however, limited. See Note, *supra* note 2, at 1104 & n.11; Comment, *The Handicapped Child's Right to a Free Appropriate Education: Defining the Limits of Responsibility*, 27 VILL. L. REV. 567, 571-76 (1982). *PARC* and *Mills* decided only that the exclu-

ucation nor provided procedures to protect this right to a public education.¹⁹ Congress enacted EAHCA in 1975 to remedy these deficiencies.²⁰

A. Substantive Provisions

EAHCA provides local school boards with funding for the education of handicapped children.²¹ The statute's fundamental substantive requirement is that states provide each handicapped child with a "free ap-

sion of handicapped children from public schools violated their due process rights; they did not establish standards or procedures to enforce these rights. See *infra* note 19 and accompanying text.

The Supreme Court's decision in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), further limited the constitutional impact of *PARC* and *Mills*. In *Rodriguez*, the Court rejected the argument that the right to a public education is a fundamental interest. *Id.* at 36; see Comment, *supra*, at 575-76. Thus, a state seeking to exclude handicapped children from public schools may defeat an equal protection challenge simply by establishing a rational basis for the exclusion.

In *Fialkowski v. Sharp*, 405 F. Supp. 946 (E.D. Pa. 1975), the state of Pennsylvania argued that on the basis of *Rodriguez* it could permissibly exclude mentally retarded children from its public schools. The court rejected this narrow interpretation of *Rodriguez*, holding that there exists a constitutional right to a certain minimum level of education. *Id.* at 958.

The court in *Fialkowski* addressed the interaction of two distinct issues: the right of handicapped children to a public education, and the right of mentally retarded children to equal protection of the law. With respect to the latter problem, the court suggested in dictum that retarded children may be a suspect class and that courts must "strictly scrutinize" laws that treat them unequally. *Id.* at 958-95 (dictum). The court further suggested that there may not be a rational basis for providing education to most children while denying retarded children beneficial instruction. *Id.* at 959 (dictum).

Courts generally have declined in later decisions to hold that mentally retarded persons constitute a suspect class. See, e.g., *Anderson v. Banks*, 520 F. Supp. 472, 512 (S.D. Ga. 1982). Historical patterns of discrimination against the mentally retarded, however, justify heightened or intermediate-level scrutiny of classifications discriminating against mentally retarded persons. *Cleburne Living Center, Inc. v. City of Cleburne, Texas*, 726 F.2d 191, 196-98 (5th Cir.), cert. granted, 105 S. Ct. 427 (1984); *accord Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473, 490 (D.N.D. 1982).

19. Comment, *supra* note 18, at 577-78. The court in *PARC* ignored the issue of financing altogether. The *Mills* court found that a lack of sufficient funds did not relieve the school district of its constitutional obligation. The court ruled that "[t]he 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 the normal child." *Mills v. Board of Educ.*, 348 F. Supp. at 876.

20. See SENATE REPORT, *supra* note 2, at 1431-33 (observing that lack of financial resources had prevented states from complying with court decisions recognizing rights of handicapped children to an appropriate education and concluding that federal assistance is necessary).

21. EAHCA's principal funding section is 20 U.S.C. § 1411(a)(1) (1982). This section provides annual payments to each participating state equal to 40% of the national average per pupil public school expenditures for each handicapped child receiving special education and related services in the state. *Id.* § 1411(a)(1)(B)(v). The statute also authorizes grants to states for such purposes as training teachers and research projects. See, e.g., *id.* §§ 1432-36, 1441-44.

propriate public education,"²² meaning "special education and related services."²³ "Special education" is instruction designed "to meet the unique needs of the handicapped child."²⁴ "Related services" are services "required to assist a handicapped child to benefit from special education."²⁵

The Supreme Court narrowly interpreted the requirement of a "free appropriate public education" in *Board of Education v. Rowley*.²⁶ The Court examined the legislative history of EAHCA and concluded that Congress merely intended states to provide handicapped children with meaningful access to public education and did not intend to assure any particular level of education.²⁷ The Court therefore held that EAHCA requires only that a participating state provide personalized instruction and related support services.²⁸ Lower federal courts have determined that these services include necessary medical services that may be performed by school nurses.²⁹ Some courts have also held that school dis-

22. *Id.* § 1412(1); see *supra* note 4 (defining "free appropriate public education").

23. 20 U.S.C. § 1401(18) (1982); see *supra* note 4 (quoting § 1401(18)).

24. 20 U.S.C. § 1401(16) (1982). "The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." *Id.*

25. *Id.* § 1401(17).

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be 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.

Id.

26. 458 U.S. 176 (1982).

27. *Id.* at 192 (citing SENATE REPORT, *supra* note 2, at 11).

28. *Id.* at 203. In particular, the *Rowley* Court concluded that EAHCA did not obligate the state of New York to provide a sign language interpreter to assist a deaf child who had progressed easily from grade to grade, but was not learning as much as she would with the interpreter's assistance. *Id.* at 185-86. The Court limited its holding to the facts of the case and found Amy Rowley's academic progress, considered in light of the special services and "professional consideration" afforded by the school administrators, to be dispositive. *Id.* at 203 n.25. For thorough discussions of *Rowley*, see, e.g., Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983); Comment, *Board of Education v. Rowley: Handicapped Children are Entitled to a Beneficial Education*, 69 IOWA L. REV. 279 (1983).

29. See *Tatro v. Texas*, 625 F.2d 557 (5th Cir. 1980), *aff'd sub nom.* Irving Indep. School Dist. v. *Tatro*, 104 S. Ct. 3371 (1984). In *Tatro*, the parents of a four-year-old girl suffering from myelomeningocele, a birth defect commonly known as spina bifida, sought administration by school personnel of a procedure known as Clean Intermittent Catheterization (CIC). CIC is a simple pro-

tricts must extend the duration of instruction for handicapped children beyond 180 days if a normal school calendar would prevent the proper formulation of educational goals³⁰ for handicapped children.³¹

If a handicap is so severe that the child can benefit only from an educational program offered in a residential environment, EAHCA obligates the state and the local school district to provide the program at no cost to the child's parents or guardians.³² EAHCA discourages residential placement by establishing a rebuttable presumption that handicapped children can benefit from classroom education.³³ This presumption may

cedure for manually draining the bladder and requires only 30 minutes of training. *Id.* at 558-59 & n.3. The court held that CIC is a "related service" under EAHCA. *Id.* at 563-64.

The court established the following criteria for determining whether medical services qualify as "related services" that must be performed by public schools: (1) the child must be handicapped and require special education; (2) the service must be one that has to be performed during school hours in order for the child to benefit from special education; and (3) the service must be one that a school nurse or other similarly qualified person can perform. *Id.* at 562-63 (citing 45 C.F.R. § 121a.13(b)(4), (10) (1979)). The regulations cited by the *Tatro* court are now codified at 34 C.F.R. § 300.13(b)(4), (10) (1984); *see also* Tokarcik v. Forest Hills School Dist., 665 F.2d 443 (3d Cir. 1981) (following *Tatro*). Both *Tokarcik* and *Tatro* addressed the availability of free educational services in the context of classroom settings. For a discussion of related services in residential programs, *see infra* notes 64-68 and accompanying text.

30. The formulation of educational goals is a part of the Individualized Educational Program (IEP) process. *See infra* notes 36-39 and accompanying text (discussing the cooperative IEP process).

31. Crawford v. Pittman, 708 F.2d 1028, 1035 (5th Cir. 1983) ("Mississippi's policy of refusing to consider or provide special education programs of duration longer than 180 days is inconsistent with its obligations under [EAHCA]."); Battle v. Pennsylvania, 629 F.2d 269, 280 (3d Cir.), *cert. denied*, 452 U.S. 968 (1980) ("inflexibility of [Pennsylvania's] policy of refusing to provide more than 180 days of education [is] incompatible with [EAHCA's] emphasis on the individual"); *see also* Tilton v. Jefferson County Bd. of Educ., 705 F.2d 800, 804 (6th Cir. 1983) (transfer from year-round program to 180 day program constituted an impermissible change of placement under EAHCA); *cf.* Stanton v. Board of Educ. of Norwood Cent. School Dist., 581 F. Supp. 190, 194 (N.D.N.Y. 1983) (allegation that school board failed to provide special summer services for handicapped children who required a twelve-month educational program was actionable under EAHCA); *see generally* Note, *Application of Pennsylvania Department of Education's 180 Day Maximum School Year Policy to Class of Handicapped Students Exhibiting "Regression-Recoupment" Phenomenon Violated "Free Appropriate Public Education" Mandate of Education for All Handicapped Children Act of 1975*, 54 TEMP. L.Q. 145 (1981) (discussing *Battle*); Note, *Refusal to Provide Mentally Handicapped Children with More than 180 Days of Education Per Year Violates Right to Appropriate Education Under the Education for All Handicapped Children Act*, 26 VILL. L. REV. 876 (1981) (similar).

32. 45 C.F.R. § 84.33(c)(3) (1984); *see* North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 139 (D.D.C. 1979).

33. Turnbull, Brotherson, Wheat & Esquith, *The Least Restrictive Education for Handicapped Children: Who Really Wants It?*, 16 FAM. L.Q. 161, 172-74 (1982) [hereinafter cited as *Who Really Wants It?*]; *see* 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (1982); 34 C.F.R. § 300.550-.556 (1984); *see generally* Turnbull, Brotherson, Czyewski, Esquith, Otis, Summers, Van Reusen & De Pazz-Conway, *A Policy Analysis of "Least Restrictive" Education of Handicapped Children*, 14 RUTGERS

be rebutted by demonstrating that classroom education is not appropriate for the particular child.³⁴ A court or state agency determination that a residential placement is the only appropriate program for a child, however, is conclusive evidence that the placement is the "least restrictive environment."³⁵

Individualized education of handicapped children is one of EAHCA's principal goals. The child's individualized education program (IEP) implements this goal.³⁶ As envisioned by Congress, the IEP is more than a document describing a final program;³⁷ it is the culmination of a series of negotiations between the child's parents and the school district.³⁸ The parties to IEP negotiations set annual goals for the handicapped child and establish a program for attaining those goals.³⁹

B. Procedural Provisions

EAHCA provides specific procedures for resolving disputes between

L.J. 489 (1983) (discussing relationship between educational, legal, and fiscal policies concerning least restrictive education of handicapped children) [hereinafter cited as *A Policy Analysis*].

The statutory preference for mainstreaming has several bases: constitutional arguments, educational policy arguments, and economic arguments. The due process and equal protection clauses of the fourteenth amendment limit the power of a state or local government to act "in any way that curtails a citizen's liberty any more than necessary to accomplish its purposes." *Who Really Wants It?*, *supra*, at 164; see *A Policy Analysis*, *supra*, at 505-08. Mainstreaming arguably enhances a handicapped child's educational experience. See *Who Really Wants It?*, *supra*, at 169; *A Policy Analysis*, *supra*, at 522-25; Comment, *The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and Analysis*, 13 GONZ. L. REV. 717, 758-59 (1978). In addition, mainstreaming is less expensive than residential placement. *Id.* at 759-60.

34. *Who Really Wants It?*, *supra* note 33, at 173; see also *Hessler v. Maryland Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983) (holding that parents challenging the placement of their child in a public school must demonstrate that the challenged placement is inappropriate within the terms of EAHCA). An educational placement, however, is not inappropriate simply because another placement would be more appropriate. *Id.* at 139; see *infra* notes 61-62 and accompanying text (discussing the appropriateness of residential and nonresidential placement alternatives).

35. *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 695 (3d Cir. 1981).

36. See 20 U.S.C. § 1414(a)(5) (1982); 34 C.F.R. § 300.533(b) (1984). For a thorough discussion of the IEP process, see Note, *Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN'S L. REV. 81 (1981).

37. Note, *supra* note 36, at 96.

38. *Id.*; see 34 C.F.R. § 300.340-349 (1984).

39. Note, *supra* note 36, at 97. The Department of Education described the cooperative IEP process as follows:

There are two main parts of the IEP requirement, as described in the Act and regulations: (1) the IEP meeting(s), at which parents and school personnel jointly make decisions about a handicapped child's educational program, and (2) the IEP document itself, which is a written record of the decisions reached at the meeting.

Id. at 96 n.112 (quoting 46 Fed. Reg. 5460, 5462 (1981)).

parents and school officials over the proper placement and program for the child.⁴⁰ The school district must notify parents in advance of any decision affecting the child's education,⁴¹ and it must provide the parents with an opportunity to object to that decision.⁴² EAHCA entitles objecting parents to a hearing conducted by the school district.⁴³ Either party may appeal an unsatisfactory decision to the state educational agency,⁴⁴ which must render a final decision within thirty days of the date of appeal.⁴⁵

EAHCA explicitly provides for judicial review by a state or federal court.⁴⁶ Generally, an "aggrieved" party must exhaust all available state administrative remedies before seeking review by a federal district court.⁴⁷ Courts do not strictly require exhaustion of remedies, however, and frequently waive the requirement if an administrative challenge appears futile.⁴⁸

Appeals from a state agency decision to a state court typically must comply with a thirty-day statute of limitations.⁴⁹ Most federal courts

40. See 20 U.S.C. § 1415 (1982) (codifying the procedural due process rights of handicapped children); *infra* notes 41-55 and accompanying text.

41. 20 U.S.C. § 1415(b)(1)(C) (1982).

42. *Id.* § 1415(b)(1)(E); 34 C.F.R. § 300.504-.505 (1984).

43. 20 U.S.C. § 1415(b)(2) (1982); 34 C.F.R. § 300.506-.508 (1984).

44. 34 C.F.R. § 300.512(b) (1984).

45. 20 U.S.C. § 1415(c) (1982); 34 C.F.R. § 300.509-.510 (1984); see also *John A. v. Gill*, 565 F. Supp. 372, 380 (N.D. Ill. 1983) (30-day deadline protects the handicapped child's right to a "free appropriate public education" by limiting the time the child must remain in an allegedly inappropriate placement). The 30-day statute of limitations, however, does not affect the period for appealing final agency decisions to federal courts. See *infra* note 49-51 and accompanying text.

46. See 20 U.S.C. § 1415(e)(2) (1982); 34 C.F.R. § 300.511 (1984).

47. *E.g.*, *Smrcka v. Ambach*, 555 F. Supp. 1227, 1234 (E.D.N.Y. 1983); see generally Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 30-35 (1981) (discussing exhaustion of administrative remedies doctrine under EAHCA).

48. 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams) (courts should not require exhaustion if futile either as a legal or practical matter); see *Christopher T. v. San Francisco United School Dist.*, 553 F. Supp. 1107, 1115-16 (N.D. Cal. 1982) (court did not require exhaustion when facts revealed a consistent refusal by the local school district to comply with provisions of EAHCA); see also *Monahan v. Nebraska*, 645 F.2d 592, 597 (8th Cir. 1981) (court did not require exhaustion when administrative remedies available could not provide plaintiffs with an adequate means for redressing their grievances); cf. *Riley v. Ambach*, 668 F.2d 635, 641 (2d Cir. 1981) (court required exhaustion when possibility existed that additional administrative proceedings would not prove futile). But see *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770, 774-75 (1st Cir. 1981) (case remanded to agency despite futility of additional administrative proceedings).

49. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1982-83) (Administrative Procedure and Texas Register Act). EAHCA does not address the timing of appeals of local agency decisions to state or federal courts.

hold that such a restrictive statute of limitations is inconsistent with EAHCA's policy of encouraging parental involvement in planning the child's educational program⁵⁰ and instead apply the state statute of limitations governing claims of negligent or wrongful acts.⁵¹

Federal court review of state administrative decisions must examine both the extent of the state's compliance with EAHCA's procedural requirements and the substance of the IEP.⁵² EAHCA provides a reviewing court with broad remedial powers to fashion an appropriate educational program for the child⁵³ if the IEP fails to satisfy EAHCA's minimum procedural requirements.⁵⁴ If the IEP meets these requirements, a reviewing court will not judge the desirability of the program.⁵⁵

Parents asserting the rights of their handicapped children to a beneficial, publicly funded education may also file suit under section 504 of the Rehabilitation Act of 1973⁵⁶ and section 1983 of the Civil Rights Act of 1871.⁵⁷ Section 504 prohibits discrimination against any "otherwise

50. See *Scokin v. Texas*, 723 F.2d 432, 436 (5th Cir. 1984); *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 447-56 (3d Cir. 1981); *Monahan v. Nebraska*, 491 F. Supp. 1074, 1084-85 (D. Neb. 1980), *aff'd in part, rev'd in part on other grounds*, 645 F.2d 592 (8th Cir. 1981); *cf.* *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355 (1977) (Supreme Court refused to bar an enforcement action under the Equal Employment Opportunity Act filed after federal and state statutes of limitations had expired). A 30-day period for appealing an administrative decision would give parents insufficient time to evaluate and appeal the agency's decision. *Tokarcik v. Forest Hills School Dist.*, 665 F.2d at 452.

51. See *Scokin v. Texas*, 723 F.2d 432, 436 (5th Cir. 1984); *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 454 (3d Cir. 1981) (dictum).

52. *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). The Supreme Court established a two-part test for courts to employ in resolving suits brought under EAHCA. First, the state must have complied with the procedures set forth in the Act. Second, the negotiated IEP must have been reasonably calculated to enable the child to receive educational benefits. *Id.* at 206-07.

53. 20 U.S.C. § 1415(e)(2) (1982); see *Hyatt*, *supra* note 47, at 9. Specifically, section 1415(e)(2) permits a reviewing court to "grant such relief as it determines is appropriate" after reviewing the record of the agency proceedings and hearing "additional evidence at the request of a party." 20 U.S.C. § 1415(e)(2) (1982).

54. *Board of Educ. v. Rowley*, 458 U.S. 176, 207-08 (1982).

55. *Id.*; see *Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir. 1983).

56. Pub. L. No. 93-112, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. § 794 (1982)). Section 504 provides in part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title 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

29 U.S.C. § 794 (1982).

57. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1982)). Section 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of

qualified handicapped individual” in the administration of “any program or activity receiving federal financial assistance.”⁵⁸ Section 1983 protects the due process and equal protection rights of the handicapped child and provides a remedy for any deprivation of rights, privileges, and immunities under federal law.⁵⁹ EAHCA’s specificity in guaranteeing both the substantive and procedural rights of handicapped children in educational matters, however, gives it primary importance in this area.⁶⁰

any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

A person seeking to recover monetary damages in a private action may, with varying success, use either § 504 or § 1983. See Hyatt, *supra* note 47, at 51-61.

58. 29 U.S.C. § 794 (1982); see *supra* note 56 and accompanying text; see also John A. v. Gill, 565 F. Supp. 372, 384 (N.D. Ill. 1983) (enumerating the elements of a cause of action under § 504).

For cases recognizing that private damages under § 504 are consistent with the purpose of EAHCA and are therefore not foreclosed by the existence of a remedy under EAHCA, see *Meiner v. Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982); *Christopher N. v. McDaniel*, 569 F. Supp. 291 (N.D. Ga. 1983); *Patsel v. District of Columbia Bd. of Educ.*, 530 F. Supp. 660 (D.D.C. 1982); see also *Recent Case, Damages are Available under Section 504 of the Rehabilitation Act as a Necessary Remedy for Discrimination Against an Otherwise Qualified Handicapped Individual; Damages are not “Appropriate Relief.” However, Under the Education for All Handicapped Children Act*; *Meiner v. Missouri*, 51 U. CIN. L. REV. 697 (1982). But see *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340 (N.D. Ill. 1983) (no § 504 remedy available where defendants have not violated EAHCA); *Manecke v. School Bd. of Pinellas County, Florida*, 553 F. Supp. 787 (M.D. Fla. 1982) (no § 504 remedy available because there is relief available under 45 C.F.R. § 80.3 (1982) in the form of termination of funding to institutions guilty of discrimination).

59. 42 U.S.C. § 1983 (1982).

Plaintiffs have traditionally fared very poorly under § 1983 in obtaining monetary damages in educational placement disputes. Courts have generally refused to recognize § 1983 actions seeking enforcement of EAHCA’s provisions, holding that EAHCA’s more comprehensive scheme indicates a congressional intent to preclude enforcement suits brought under § 1983. *Rollison v. Biggs*, 567 F. Supp. 964, 970 (D. Del. 1983); see *Scokin v. Texas*, 723 F.2d 432, 440-41 (5th Cir. 1984); *Anderson v. Thompson*, 658 F.2d 1205, 1217 (7th Cir. 1981). The court in *Christopher N. v. McDaniel*, 569 F. Supp. 291 (N.D. Ga. 1983), however, suggested that it would have awarded monetary relief if the plaintiff had established a § 1983 cause of action. *Id.* at 298; see also Hyatt, *supra* note 47, at 24-29 (§ 1983 contemplates a cause of action for deprivation of rights, privileges and immunities secured by federal “laws” such as EAHCA); *cf. Maine v. Thiboutot*, 448 U.S. 1 (1980) (permitting petitioner who challenged state AFDC benefits decision under § 1983 to recover attorney’s fees under 42 U.S.C. § 1988). For a discussion of the availability of attorney’s fees under § 1983 and § 504, see *infra* note 60.

60. *Rollison v. Biggs*, 567 F. Supp. 964, 970 (D. Del. 1983). The *Rollison* court denied the plaintiff’s request for attorney’s fees under § 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b) (1982), noting that the relief sought by the plaintiffs under § 504 was available under EAHCA. 567 F. Supp. at 970; *accord Smith v. Robinson*, 104 S. Ct. 3457 (1984) (Rehabilitation Act attorney’s fees provision inapplicable if remedy is available under EAHCA). With respect to the plaintiffs’ § 1983 claim, the court agreed with the plaintiffs that EAHCA, as a law of the United States, comes within

II. THE HANDICAPPED CHILD'S SUBSTANTIVE RIGHT TO A RESIDENTIAL EDUCATIONAL PLACEMENT

A school district must finance a residential educational placement for a handicapped child upon a showing by the child's parents that such a placement is the only "appropriate" placement.⁶¹ The court will not consider residential alternatives if a nonresidential educational placement satisfies EAHCA's guarantee of a "free appropriate public education."⁶²

A demonstration that a handicapped child cannot benefit from a non-residential education does not obligate the school district to pay all the costs of a residential placement. EAHCA requires only that the school district pay for "special education"⁶³ and "related services."⁶⁴ Furthermore, the school district may refuse to pay for the residential placement

the ambit of § 1983. *Id.* (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980)); *see supra* note 59. The court held, however, that EAHCA's comprehensive remedial scheme indicates a congressional intent to preclude enforcement suits pursuant to § 1983. 567 F. Supp. at 970 (citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1982)); *see generally* Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183 (1982).

Parties to § 504 and § 1983 actions have on occasion persuaded courts to award attorney's fees, which are not generally available under EAHCA. *Rollison v. Biggs*, 567 F. Supp. 964, 967-68 (D. Del. 1983); *see Hyatt, supra* note 47, at 61-64. For cases awarding attorney's fees in § 504 actions, *see Rollison v. Biggs*, 567 F. Supp. at 968-69 (party may recover attorney's fees only when the § 504 claim is more than a mere restatement of the EAHCA claim); *Patsel v. District of Columbia Bd. of Educ.*, 530 F. Supp. 660, 666 (D.D.C. 1982). *But see* *Department of Educ. v. Katherine D.*, 727 F.2d 809, 820-21 (9th Cir. 1983); *Hines v. Pitt County Bd. of Educ.*, 497 F. Supp. 403, 409 (E.D.N.C. 1980). Parties to § 1983 actions have been less successful in recovering attorney's fees. For cases denying attorney's fees for § 1983 actions, *see Department of Educ. v. Katherine D.*, 727 F.2d at 819-20; *Rollison v. Biggs*, 567 F. Supp. at 970-72. *But see Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983).

61. *Hessler v. Maryland Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983); *see supra* note 33 and accompanying text (discussing EAHCA's rebuttable presumption that mainstreaming is "appropriate"). The Supreme Court emphasized this point in *Board of Educ. v. Rowley*, 458 U.S. 179 (1982), holding that EAHCA only guarantees a handicapped child a beneficial education, not an optimal educational program. *Id.* at 201; *see supra* notes 26-28 and accompanying text. Accordingly, a court will order a residential placement only when the child cannot benefit from any other educational program.

Department of Education regulations contemplate the availability of alternative educational placements ranging from regular classes to instruction in hospitals and institutions. 34 C.F.R. § 300.551 (1984); *see also* 34 C.F.R. § 300.14 (1984) (describing alternative placements).

62. 20 U.S.C. § 1412(1) (1982); *see Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 104 S. Ct. 196 (1983).

63. 20 U.S.C. § 1401(18) (1982); *see supra* notes 23-24 and accompanying text (quoting statutory definition).

64. 20 U.S.C. § 1401(18) (1982); *see supra* notes 23 & 25 and accompanying text (quoting statutory definition).

altogether if services that do not qualify for funding constitute the principal reason for the child's placement.⁶⁵

Disputes over whether a particular residential program satisfies EAHCA's requirement of an "appropriate public education" generally focus upon the program's related services. Many related services necessitating a residential program are noneducational.⁶⁶ Some courts recognize that therapeutic services addressing the child's medical, social, and emotional needs are critical components of the learning process and thus are not severable from educational services.⁶⁷ The severability of noneducational and educational services depends upon whether the particular placement is the product of educational necessity or medical, social, or emotional problems that are not related to the learning process.⁶⁸

65. See *McKenzie v. Jefferson*, 566 F. Supp. 404 (D.D.C. 1983). The court in *McKenzie* addressed the question whether a school district had to fund a residential facility placement for a child who had suffered a mental breakdown. Because the reasons for the child's placement were primarily medical, not educational, the court held that the school district did not have to finance the placement. *Id.* at 412-13.

66. For example, medical services only qualify as related services when provided for "diagnostic and evaluative purpose." 20 U.S.C. § 1401(17) (1982). Furthermore, only a licensed physician may render "medical services." 34 C.F.R. § 300.13(4) (1983).

These definitional limitations often lead courts to seize upon subtle or unrealistic distinctions in resolving placement disputes. Thus, while a psychologist's therapeutic efforts constitute "related services," a psychiatrist's services do not. See *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340, 1344 (N.D. Ill. 1983); *McKenzie v. Jefferson*, 566 F. Supp. 404, 409-11 (D.D.C. 1983). While the practices of the two professions differ substantially—for example only a psychiatrist may prescribe medication—both can treat many conditions with equal success. Given the clarity of the statutory language, it remains for Congress to devise a more realistic approach, one that predicates state funding of a child's treatment on the nature of his or her condition, rather than on the professional background of the therapist.

67. See *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 694 (3d Cir. 1981); *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136, 141 (D.D.C. 1979).

68. *Kruelle v. New Castle County School Dist.*, 642 F.2d at 693. The distinction between educational and noneducational services obviously is vague, given the close relationship of the handicapped child's medical, social, and emotional problems to his or her educational problems. See *id.* at 694; *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136, 141 (D.D.C. 1979). Therapy addressing emotional and social problems is frequently a prerequisite to learning. See *Christopher T. v. San Francisco Unified School Dist.*, 553 F. Supp. 1107, 1119-20 (N.D. Cal. 1982); *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. at 140-41. The court in *North* observed that Ty North's combination of needs deserved the attention of two separate agencies: the Board of Education and the Department of Human Resources. Because the antiquated laws of the District of Columbia prevented the court from apportioning the financial obligation according to the child's needs, the court resolved this bureaucratic dispute by invoking EAHCA's requirements and placing the entire financial burden on the local school board. *Id.* at 141. Still, effective interagency cooperation to remedy and prevent problems such as the one in *North* remains possible. Stoppleworth, *Mooney &*

III. ASSIGNING FINANCIAL RESPONSIBILITY FOR A RESIDENTIAL PLACEMENT IN A DISPUTED CASE

A. *Initial Financial Responsibility: During the Pendency of Judicial Review*

Section 1415(e)(3) requires that a handicapped child remain in his or her "then current educational placement" during the pendency of administrative or judicial review.⁶⁹ This provision prevents a legal dispute over placement from disrupting the child's educational program.⁷⁰

Most courts interpret section 1415(e)(3) as providing an "automatic stay," which terminates public funding to parents who change the placement of their handicapped child without the approval of school officials.⁷¹ Courts adopting this interpretation will not order the school district to finance an unapproved placement during the pendency of litigation between school officials and parents over the proper placement of the child. These courts will, however, order the school district to continue paying for the education of a handicapped child of parents who resist the efforts of school officials to revise the child's IEP to provide for a different placement.⁷² Parents who unilaterally place their child in an unapproved setting must therefore bear the total cost of educating the child until the school district acquiesces in the unapproved setting⁷³ or a state educational agency or a reviewing court resolves the placement dispute.

The "automatic stay" theory frequently presents parents with a diffi-

Arronson Revisited: A Less Than Solomon-Like Solution to the Problem of Residential Placement of Handicapped Children, 15 CONN. L. REV. 757, 764-65 (1983).

The need for cooperation among different agencies will increase in the future. Advances in medical science save the lives of many children with multiple disabilities that would have been fatal a few years ago. "The result is a lesser proportion of children with a single, uncomplicated disability and a greater proportion of children whose development is complicated by a number of handicaps." S. KIRK & J. GALLAGHER, EDUCATING EXCEPTIONAL CHILDREN 417-18 (4th ed. 1983).

69. 20 U.S.C. § 1415(e)(3) (1982).

70. See, e.g., *Doe v. Anrig*, 692 F.2d 800, 810 (1st Cir. 1982).

71. See *Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1350 (5th Cir. 1983); *Stacey G. v. Pasadena Indep. School Dist.*, 695 F.2d 949, 953-54 (5th Cir. 1983); *Smrocka v. Ambach*, 555 F. Supp. 1227, 1234 (E.D.N.Y. 1983). But see *Doe v. Brookline School Comm.*, 722 F.2d 910, 919 (1st Cir. 1983) (rejecting "automatic stay" theory in favor of a more equitable approach); *infra* notes 78-84 and accompanying text.

72. See *Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir. 1982). Courts do not consider the child's initial placement unapproved if the school district unilaterally attempts to revise the child's IEP to provide for a new placement. The child's parents may demand that the school district continue to fund the initial placement pending final arrangements. *Id.*

73. See *Jacobsen v. District of Columbia Bd. of Educ.*, 564 F. Supp. 166 (D.D.C. 1983).

cult choice. Parents dissatisfied with a state-funded placement must either leave their child in an educational setting they consider inappropriate or unilaterally enroll their child elsewhere and risk assuming the costs of his or her education during ensuing litigation.⁷⁴ Parents opposing the school district's efforts to move the child from a residential facility to a nonresidential facility may simply file an appeal and thus obtain a temporary continuation of a perhaps inappropriate publicly financed placement.⁷⁵ In either event, the automatic stay subverts the cooperative IEP process⁷⁶ and undermines Congress' goal of a "free appropriate public education" for all handicapped children.⁷⁷

The First Circuit recently rejected the "automatic stay" theory in favor of a more sensible approach to allocating interim placement costs during judicial review of the child's IEP. The court in *Doe v. Brookline School Committee*⁷⁸ suggested that the party wishing to move the child from an approved placement should ask for a preliminary injunction.⁷⁹ Relying on its equitable powers to fashion "appropriate relief,"⁸⁰ a court

74. Once litigation over the child's educational placement has concluded the parents may, under strictly limited circumstances, win reimbursement of interim educational expenses. See *infra* notes 86-87, 94-102, & 105-11 and accompanying text.

75. See *Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir. 1982); *supra* note 72 (discussing *Vander Malle*).

76. See *supra* notes 36-39 and accompanying text (Congress envisioned the IEP process as a series of negotiations between parents and school officials and did not intend for any one party to dominate the proceedings). The court in *Doe v. Brookline School Comm.*, 722 F.2d 910 (1st Cir. 1983), characterized the unilateral efforts of parents to defeat the cooperative IEP process as a "private appropriation of public monies." *Id.* at 916.

77. During the pendency of litigation, parents must therefore choose between either a "free" or an "appropriate" education for their handicapped child, despite EAHCA's substantive guarantees.

78. 722 F.2d 910 (1st Cir. 1983).

79. *Id.* at 919. This "preliminary injunction" theory represents the logical continuation of earlier decisions exhibiting similar equitable approaches, see *Stacey G. v. Pasadena Indep. School Dist.*, 695 F.2d 949, 955 n.5 (5th Cir. 1983); *Town of Burlington v. Department of Educ. of Mass.*, 655 F.2d 428, 432-34 (1st Cir. 1981) (*Burlington I*), and a repudiation of *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982) (*Anrig I*), which employed the "automatic stay" theory.

In *Anrig I*, the parents of a handicapped child successfully challenged the school district's efforts to move their child from a residential program to a public school program. The First Circuit held that EAHCA did not authorize reimbursement of the parents' expenses in maintaining their child in the residential program during the litigation and accordingly remanded the case to the district court. *Id.* at 813. In *Brookline*, however, the First Circuit held that reimbursement of interim placement costs is appropriate in circumstances such as those in *Anrig I*. *Doe v. Brookline School Comm.*, 722 F.2d at 921. On remand, the district court in *Anrig* thus awarded reimbursement to the child's parents. *Doe v. Anrig*, 561 F. Supp. 121 (D. Mass. 1983) (*Anrig II*). The First Circuit affirmed. *Doe v. Anrig*, 728 F.2d 30, 32 (1st Cir. 1984) (following *Brookline*).

80. See 20 U.S.C. § 1415(e)(2) (1982); *supra* note 53 and accompanying text.

then may employ traditional standards in ruling on the motion.⁸¹ The court's ruling will establish the child's appropriate interim educational placement and obligate the school district to finance this placement while litigation on the merits of the dispute is pending.

This "preliminary injunction" theory protects the cooperative IEP process by denying either party the improper advantage that might result from an automatic stay of all placement and financing obligations.⁸² Furthermore, the *Brookline* approach prevents "private appropriation of public monies"⁸³ and avoids misuse of EAHCA's procedural guarantees⁸⁴ by enabling courts to resolve placement disputes on the basis of the child's interests, rather than a narrow reading of statutory language.

B. Ultimate Financial Responsibility: Reimbursement and Compensation

Interim placement and financing decisions have no bearing on the ultimate disposition of placement costs.⁸⁵ Some courts hold that EAHCA neither provides for nor bars reimbursement of interim costs after litigation over the child's placement has concluded. In the absence of explicit statutory language, these courts have looked to alternative sources of relief, such as section 504 and section 1983, and have concluded that EAHCA does not bar reimbursement of most interim costs to parents who successfully challenge the placement of their child.⁸⁶ The only circumstance precluding reimbursement arises when parents unilaterally move their child from a public to a private placement.⁸⁷

81. 722 F.2d at 917. A court ruling on a motion for a preliminary injunction usually considers both the likelihood that the moving party will win on the merits and the likelihood that the moving party will sustain irreparable harm absent injunctive relief. *Id.* See *Town of Burlington v. Department of Educ. of Mass.*, 655 F.2d 428, 432-34 (1st Cir. 1981).

82. 722 F.2d at 921; see *supra* notes 74-77 and accompanying text (discussing the problems arising under the "automatic stay" theory).

83. 722 F.2d at 916; see *supra* note 76 and accompanying text.

84. See *supra* notes 75-77 and accompanying text.

85. *Christopher N. v. McDaniel*, 569 F. Supp. 291, 298 (N.D. Ga. 1983). The type of theory applied in determining the educational placement of the handicapped child during the pendency of appeal proceedings is irrelevant to the problem of assigning ultimate financial responsibility.

86. See *Meiner v. Missouri*, 673 F.2d 969, 978 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982); *Christopher N. v. McDaniel*, 569 F. Supp. 291, 298 (N.D. Ga. 1983); see also *supra* notes 56-60 and accompanying text (describing causes of action under § 504 and § 1983).

87. See *Scokin v. Texas*, 723 F.2d 432, 438 (5th Cir. 1984); *Hessler v. Maryland Bd. of Educ.*, 700 F.2d 134, 138 (4th Cir. 1983); *Cain v. Yukon Pub. Schools, Dist. I-27*, 558 F. Supp. 605, 610 (W.D. Okla. 1983); *Smrcka v. Ambach*, 555 F. Supp. 1227, 1234 (E.D.N.Y. 1983). The First Circuit adopted a flexible approach to this issue in *Brookline*, noting that a party may forfeit its right to

Courts generally hold that EAHCA does not authorize an award of damages.⁸⁸ First, EAHCA does not contain a general damages provision. Second, courts construe the language of section 1415(e)(2), providing for "such relief as the court determines is appropriate,"⁸⁹ as justifying only prospective injunctive relief.⁹⁰ Third, the legislative history contains no indication that Congress intended a damages remedy under EAHCA.⁹¹ Finally, damage awards would force school districts to expend a large share of their limited resources for noneducational purposes.⁹² Many courts similarly interpret EAHCA to preclude damage awards under sections 504 and 1983.⁹³

Some courts recognize narrow exceptions to the general rule precluding damages under EAHCA. The Seventh Circuit held in *Anderson v. Thompson*⁹⁴ that at least two exceptional situations warrant a damage award: (1) when the placement offered by the school district would have endangered the child's physical health;⁹⁵ and (2) when the school district acted in bad faith by failing to comply with EAHCA's procedural provisions.⁹⁶ Parents successfully invoking one of these exceptions are entitled to reimbursement for the cost of services that the school district should have paid.⁹⁷ The Ninth Circuit has added a third exception in situations

reimbursement by unilateral action that *seriously violates* EAHCA's procedural provisions. 722 F.2d at 921. Nevertheless, in *Town of Burlington v. Department of Educ.*, 736 F.2d 773 (1st Cir. 1984), *cert. granted*, 105 S. Ct. 562 (1984) (*Burlington II*), the court explained that *Brookline* "implicitly recognized . . . the validity of parents making a unilateral move to fund educational services pending review and of the parents' right to receive reimbursement at final judgment if they are held to have acted appropriately." *Id.* at 797.

88. See, e.g., *Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983) ("appropriate relief" under § 1415(e)(2) does not include damages). *But see* *Ezratty v. Puerto Rico*, 648 F.2d 770, 775-76 (1st Cir. 1981) (administrative agencies may grant monetary relief in some circumstances); *infra* notes 94-99 and accompanying text (exceptions to the no damages rule).

89. 20 U.S.C. § 1415(e)(2) (1982); see *supra* note 53 and accompanying text.

90. See, e.g., *Marvin H. v. Austin Indep. School Dist.*, 714 F.2d at 1356. *But see* *Doe v. Brookline School Comm.*, 722 F.2d 910, 912 (1st Cir. 1983); *infra* notes 103-107 and accompanying text (holding that § 1415(e)(2) authorizes retroactive reimbursement of interim placement costs to prevailing party).

91. *Anderson v. Thompson*, 658 F.2d 1205, 1211 (7th Cir. 1981).

92. *Id.* at 1212-13 (citing 121 CONG. REC. 25,531 (1975) (statement of Rep. Quie)).

93. See cases cited *supra* note 60.

94. 658 F.2d 1205 (7th Cir. 1981).

95. *Id.* at 1213-14; see *Tatro v. Texas*, 625 F.2d 557 (5th Cir. 1980), *aff'd sub nom.* *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 3371 (1984); see also *supra* note 29 (discussing *Tatro*).

96. *Anderson v. Thompson*, 658 F.2d at 1214; see *Doe v. Anrig*, 561 F. Supp. 121, 128-29 (D. Mass. 1983), *aff'd*, 728 F.2d 30 (1st Cir. 1984) (*Anrig II*).

97. The *Anderson* court explicitly rejected the possibility that EAHCA authorizes tort damages. 658 F.2d at 1213 n.12.

when the school district inexplicably fails to offer a classroom placement to a child who has clearly demonstrated his or her ability to function in a classroom environment.⁹⁸ Under this exception, parents may recover the costs of private education that accrued before the parties devised an appropriate educational program.⁹⁹

The court in *Thornock v. Evans*¹⁰⁰ rejected these narrow exceptions and created an "equitable catch-all" exception to the rule that EAHCA does not authorize an award of damages.¹⁰¹ In *Thornock*, the court ordered a school district to pay for a teaching assistant. The court relied upon an "equitable catch-all" exception to extend retroactively the school district's financing obligation to the date the proceedings commenced.¹⁰² This broad exception to the no-damages rule is a sensible approach to the question of reimbursement to parents for the costs of providing an "appropriate education" for their child during review of a school district's decision not to provide a necessary service.

In *Doe v. Brookline School Committee*,¹⁰³ the First Circuit went a step beyond *Thornock* and rejected *Anderson*.¹⁰⁴ The *Brookline* court held that a party who loses on the merits in a dispute over a child's educational placement must reimburse the prevailing party for its interim placement costs.¹⁰⁵ The court observed that section 1415(e)(2) not only creates a private right of action for "aggrieved" parties, but also explicitly authorizes "such relief as the court determines is appropriate."¹⁰⁶ According to the First Circuit, "appropriate" relief includes reimburse-

98. *Department of Educ. v. Katherine D.*, 727 F.2d 809, 815-17 (9th Cir. 1983).

99. *Id.*

100. No. 78-709 (Idaho Dist. Ct. April 4, 1983), 7 MDLR 236-37 (1983).

101. *Id.*

102. *Id.*

103. 722 F.2d 910 (1st Cir. 1983).

104. *Id.* at 919; *see supra* notes 94-102 and accompanying text (discussing exception to the no damages rule).

105. 722 F.2d at 921. The First Circuit rejected its earlier decision in *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982) (*Anrig I*), which denied reimbursement to parents who later prevailed on the merits of their case. *Id.* at 812; *see supra* note 79.

In *Town of Burlington v. Department of Educ.*, 736 F.2d 773 (1st Cir. 1984), *cert. granted*, 105 S. Ct. 562 (1984), the First Circuit authorized reimbursement of interim placement costs to the prevailing party even though the parents unilaterally moved their child from an approved placement to an unapproved placement. The court observed that the parents and the local school district agreed that the child's initial placement was inappropriate and disagreed only over the proper setting of an appropriate program. *Id.* at 779; *see supra* note 87.

106. 722 F.2d at 919; *see supra* note 53 and accompanying text.

ment of interim costs.¹⁰⁷

Permitting reimbursement to the prevailing party promotes EAHCA's purpose and policy.¹⁰⁸ The prospect of reimbursement will encourage parents to protect their child's rights assiduously.¹⁰⁹ At the same time, the parties to the dispute will know in advance that they will bear the costs of impulsive, unfounded actions or excessive recalcitrance.¹¹⁰ Thus, the *Brookline* approach strikes an effective and appropriate balance.

Courts have prudently limited reimbursement to costs actually incurred by the prevailing party.¹¹¹ Judicial recognition of a general damages remedy would be inconsistent with EAHCA's role as a compromise between the needs of disabled children, the inherent difficulties in educating children with special needs, and the budgetary constraints facing school districts.

IV. CONCLUSION

The conventional approach to financing residential education for handicapped children during judicial review of their IEPs requires major reform. Courts employing the "automatic stay" theory¹¹² in determining the child's educational placement during the pendency of review simply lock the child into a placement at an arbitrary moment, regardless of that placement's appropriateness.¹¹³ When the placement is inappropriate, the "automatic stay" interpretation may obstruct enforcement of

107. 722 F.2d at 919. The court observed that such an interpretation provides courts with "maximum flexibility" to effectuate EAHCA's remedial objective. *Id.* See SENATE REPORT, *supra* note 2, at 1430 (purpose of EAHCA is to provide maximum benefits to handicapped children and their families).

108. 722 F.2d at 921. If parents are incorrect in their claim that the IEP provides an inappropriate education for their child, they, like parents of nonhandicapped children, should bear the financial burden of giving their child a private education. If, however, the school board's decision to place the child in a classroom setting was inappropriate, then reimbursement restores parents to the position Congress intended. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 920; see *Anderson v. Thompson*, 658 F.2d 1205, 1213 n.12 (7th Cir. 1981) (rejecting tort damages under EAHCA); *supra* note 97. Possible eleventh amendment problems exist with requiring the state to reimburse parents. *Ezratty v. Puerto Rico*, 648 F.2d 770, 775-76 (1st Cir. 1976). *But see* *Department of Educ. v. Katherine D.*, 727 F.2d 809, 819 (9th Cir. 1983) (a state waives its eleventh amendment immunity when it chooses to participate in a federally funded program such as EAHCA).

112. See *supra* notes 71-73 and accompanying text.

113. See *supra* notes 69-70 and accompanying text.

EAHCA's substantive requirements for several years.¹¹⁴ Such a delay could inflict irreparable harm upon children who must maximize the use of their limited period of eligibility¹¹⁵ to obtain some measure of personal independence.¹¹⁶ Furthermore, courts that order reimbursement for the child's interim educational expenses only in exceptional circumstances¹¹⁷ narrowly interpret EAHCA as guaranteeing a "free appropriate public education" only when parents and school officials agree from the commencement of negotiations on the appropriate educational placement for the child. When the parties disagree, courts following *Anderson* and its progeny hold that the ultimate financial responsibility for the child's education during review of his or her IEP rests upon the party who happened to be paying for the child's placement when the dispute arose.¹¹⁸

The *Brookline* approach is much more sensible.¹¹⁹ A court employing this approach will invoke its statutory grant of equitable powers¹²⁰ in an attempt to ensure that the child's educational placement during review will be sustained upon a full review of the merits.¹²¹ This approach respects EAHCA's preference for maintaining the child's placement¹²² by requiring the party seeking to change the child's placement to bear the substantial burden of demonstrating the need for a preliminary injunction.¹²³ The availability of injunctive relief to remedy a patently inappropriate educational placement will also reduce the problems raised by parents who abandon the cooperative IEP process and unilaterally place

114. See *supra* notes 74-77 and accompanying text.

115. A handicapped child is eligible for government-funded treatment and educational services under EAHCA between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1411(a)(1)(A) (1982).

116. Courts and commentators have suggested that Congress' ultimate goal in enacting EAHCA was to enable handicapped children to achieve self-sufficiency and independence whenever possible. *Armstrong v. Kline*, 476 F. Supp. 583, 603 (E.D. Pa. 1979); see Comment, *Self-Sufficiency Under the Education for All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516. But see *Board of Educ. v. Rowley*, 458 U.S. 176, 192 (1982) (Congress merely intended states to provide handicapped children with meaningful access to public education); *supra* notes 26-28 (discussing *Rowley*).

117. See *supra* notes 94-99 and accompanying text.

118. That courts created two new *Anderson*-type exceptions to the no-damages rule in 1983, see *supra* notes 96-99 and accompanying text, further indicates that the conventional approach to awarding reimbursement for the cost of a child's interim placement requires revision.

119. See *supra* notes 78-84 & 103-07 and accompanying text.

120. See *supra* note 53 and accompanying text.

121. See *supra* note 81 and accompanying text.

122. See *supra* notes 33-34 and accompanying text.

123. See *supra* note 79 and accompanying text.

their child in an unapproved setting.¹²⁴ The *Brookline* “prevailing party” rule¹²⁵ permits a court to assign financial responsibility for the child’s interim placement costs on the basis of EAHCA’s substantive provisions, in accordance with Congress’ intent. This rule also encourages thoughtful action by parents and school officials both prior to and during a placement dispute by ensuring that each party will bear the costs of its own poor judgment.¹²⁶

Judicial resolution of a dispute over the proper educational placement of a handicapped child has a major impact on the interests of the parents, the school district, and the child. The enormous costs of providing a beneficial education to a child who requires a residential placement could quickly bankrupt a typical family.¹²⁷ These costs could also disrupt the efforts of a school district to educate all of its students properly. Most importantly, because handicapped children must overcome exceptional obstacles in the few years during which they are eligible for state-funded educational services,¹²⁸ theirs is truly a case in which justice delayed is justice denied.¹²⁹ The *Brookline* framework is far more effective than other conventional approaches in providing courts with the flexibility to resolve the tensions between these competing interests and thus make meaningful Congress’ promise to the nation’s handicapped children.¹³⁰

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124. See *supra* note 71 and accompanying text.

125. See *supra* notes 105-07 and accompanying text.

126. See *supra* note 110 and accompanying text.

127. See *supra* note 10.

128. See *supra* note 115.

129. “[D]elay in resolving matters regarding the education of a handicapped child is extremely detrimental to his development. The interruption or lack of the required services can result in a substantial setback to the child’s development.” 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams).

130. “[EAHCA] promises handicapped children the educational opportunity that has long been considered the right of every other American child.” 121 CONG. REC. 37,410 (1975) (statement of Sen. Randolph).

