

DOCUMENT RESUME

ED 232 252

EA 015, 798

AUTHOR Turner, Donald G.
TITLE Legal Issues in Education of the Handicapped. Fastback 186.
INSTITUTION Phi Delta Kappa Educational Foundation, Bloomington, Ind.
SPONS AGENCY Phi Delta Kappa, Los Angeles. Univ. of Southern California.
REPORT NO ISBN-0-87367-186-4
PUB DATE 83
NOTE 35p.
AVAILABLE FROM Publications, Phi Delta Kappa, Eighth and Union, Box 789, Bloomington, IN 47402 (\$.75; quantity discounts).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Reports - Descriptive (141) -- Viewpoints (120)
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Compliance (Legal); *Court Litigation; *Disabilities; Discipline Policy; *Educational Discrimination; Elementary Secondary Education; Expulsion; Federal Legislation; Legal Responsibility; Student Placement; *Student Rights
IDENTIFIERS *Education for All Handicapped Children Act; *Rehabilitation Act 1973 (Section 504)

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This booklet looks at selected recent court cases dealing with a number of questions regarding P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973: (1) What is meant by "free appropriate" education? (2) Which services are considered "related services" and thus obligatory upon schools? (3) What procedural protections must be available when parents disagree with school district employees concerning classification, initial placement, or changes in placement of handicapped children? (4) What happens to the children while disputes are being heard? (5) If the school district can't provide an appropriate educational program, must it (or may it) contract with an outside agency or institution? (6) When must the school district, rather than the parents, pay for such "outside" programs? (7) What special provisions, if any, must be made for disciplinary measures used with handicapped children? From the cases, the author extracts guidelines educators may find helpful in attempting to meet the educational needs of handicapped children within the parameters established by law. The author concludes that the ultimate question educators must ask themselves is whether it is too expensive to provide the handicapped their due rights. (JM)

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Legal Issues in Education of the Handicapped

Donald G. Turner

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Series Editor, Derek L. Burseson

Legal Issues in Education of the Handicapped

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Library of Congress Catalog Card Number 82-063059

ISBN 0-87367-186-4

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Bloomington, Indiana

This fastback is sponsored by the University of Southern California Chapter of Phi Delta Kappa, which made a generous contribution toward publication costs.

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Introduction

In a period from October 1981 through July 1982, some 1,100 court cases involving education were reported. Add to these the number of unreported cases related to education that are settled in state courts below the appellate level and those federal cases at the district court level that go unreported, and it is possible to get some notion as to the number of education cases being tried in our judicial system.

Clearly, we live in a litigious society. Everybody appears to be suing everybody! Teachers, building administrators, central office administrators, and board members are being called into courtrooms in such alarming numbers that many school boards now retain legal counsel on a continuing basis and would not consider passing any policy of importance without consulting their attorneys. In addition, a "deep pocket" syndrome exists. It says, in effect, sue everybody in sight—especially school boards—for astronomical amounts of money in the hope that the court will award more than it would have had the suit been for some smaller amount.

Of the 1,100 cases mentioned above, approximately 90 had to do with education of the handicapped; thus, special education is receiving considerable attention in the courts. In a decade we have gone from a society that refused to face up to (or ignored) its responsibility to provide a suitable education for handicapped children to one in which federal and state statutes provide for a free appropriate education for all such children.

Especially important in this transition were two major federal legislative acts: Public Law 94-142 (The Education for All Handicapped

Children Act of 1975) and Section 504 of the Rehabilitation Act of 1973. These legislative acts had their roots in two earlier court cases brought on behalf of handicapped children.

Invoking the equal rights clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, the Pennsylvania Association of Retarded Children (PARC) brought suit against the Commonwealth of Pennsylvania in 1971 in an attempt to secure equal educational opportunities for handicapped children (*PARC v. Pennsylvania*). Under then-existing state laws, school district employees could exclude "uneducable" children without even notifying their parents or allowing them a hearing. A federal court sustained a consent agreement reached by the parties involved. Under the agreement, a handicapped child and his or her parents were granted a right to prior notice and an opportunity to speak in a formal hearing before any change could be made in the child's educational classification or when there was a disagreement concerning the classification.

At about the same time, in *Mills v. Board of Education*, a federal court in the District of Columbia held that due process under the law mandated that prior notice, right to a hearing, and periodic reassessment of a handicapped child's classification must be offered before he or she could be assigned, reassigned, suspended, or expelled.

These two federal court cases, while a major step toward inclusion of the handicapped in education, did not specify procedures to be followed in order to protect the rights of such children in educational classification, placement, reassignment, disciplinary action, etc. Section 504 of the Rehabilitation Act of 1973 did assure, among other things, that "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." However, Section 504 did not allocate additional federal funding for compliance.

Following a year of increased federal funding under interim legislation, Congress enacted The Education for All Handicapped Children Act (P.L. 94-142) in 1975. P.L. 94-142 provided for federal funding to help cover the additional costs of programs designed to meet the educa-

tional needs of the handicapped. In addition, it spelled out procedural safeguards that must be included in the approved legislative plan of any state receiving funds under the Act. At the very least, such plans must address such basic components as notice, consent, hearing, and appeals. Since its passage, implementation of P.L. 94-142 has resulted in an enormous body of regulations from the Bureau of Education for the Handicapped and from other sources. Interpretation and implementation of such regulations have produced much litigation.

In general, P.L. 94-142 requires that all states receiving funds under it must provide a "free appropriate public education" for all handicapped children. "Free appropriate public education" is defined in the Act as special education and related services, provided at public expense, that meet the standards of the state educational agency. It includes the appropriate preschool, elementary, or secondary school education that is required to provide an Individualized Education Program (IEP) for each student.

Many of the court cases having to do with special education address the problem of defining what constitutes a "free appropriate" educational program for a specific child or a classification of children. Further questions arise in courts as to just what "related services" include. The Act defines them as those supportive services that may be necessary in order for a handicapped child to benefit from the special education he or she is to be provided. Courts are asked to distinguish between services that are educationally necessary and services that are medically necessary. A great deal of ambiguity exists concerning this issue.

In the Act "special education" is defined as a program of instruction specially designed "to meet the unique needs of a handicapped child." Other provisions stipulate that such education be provided to handicapped children without charge to their parents or guardians. Many of the cases being brought to the courts involve the question of what should be provided to the children without cost to the parents. Sometimes parents seek remuneration for educational services they have paid for when their children are in private institutions. Sometimes parents attempt to force the school district to provide educational services that district officials feel are beyond their obligation under the law or that are beyond the district's financial ability.

As is frequently the case, implementation of such sweeping legislation has resulted in many court cases. Some have been initiated by school districts faced with the financial burden of providing the mandated services; and some have been initiated by parents on behalf of their children. Many of the court cases deal with the following recurring questions:

1. What is meant by "free appropriate" education?
2. Which services are considered "related services" and thus obligatory upon schools?
3. What procedural protections must be available when parents disagree with school district employees concerning classification, initial placement, or changes in placement of handicapped children?
4. What happens to the children while disputes are being heard?
5. If the school district can't provide an appropriate educational program, must it (or may it) contract with an outside agency or institution?
6. When must the school district, rather than the parents, pay for such "outside" programs?
7. What special provisions, if any, must be made for disciplinary measures used with handicapped children?

In this fastback we shall look at selected, recent court cases that deal with these questions. From the cases we can discern guidelines that educators will find helpful in attempting to meet the educational needs of handicapped children within the parameters established by law. The guidelines suggested here should not be construed as being legal advice. If specific questions concerning the legal issues discussed herein should occur, the reader is urged to seek legal counsel.

Legal Aspects of Classifying Handicapped Students

Disputes frequently arise between school authorities and handicapped children or their parents concerning their classification and subsequent assignment to a special education program. Obviously, a child must be classified accurately before an appropriate educational program can be provided. P.L. 94-142, its subsequent revisions, administrative regulations concerning its implementation, and state laws enacted to comply with it have resulted in a complex system for identifying and classifying handicapped children while providing due process protection for their rights. Nevertheless, despite all the agency regulations that spell out criteria and procedures to be used in making such determinations and adjudicating disputes, questions concerning the accuracy of classification and placement or the procedures used in such classification or placement often find their way into the courts.

In what is regarded as a landmark decision (*Larry P. et al. v. Wilson Riles et al.*), the Ninth Circuit Court of Appeals reviewed a U.S. district court decision from California involving questions of racial discrimination on the basis of using I.Q. tests in the classification and placement of black children. Six black elementary students were allegedly mislabeled as mentally retarded and placed and retained in Educable Mentally Retarded (EMR) classes because they had scored under 75 on intelligence tests. Their parents objected to their classification and placement on the grounds that the tests were culturally biased and thus in violation of the Fourteenth Amendment. Although only 28.5% of students in the district were black, EMR classes were 66% black.

The federal district court enjoined the school district from placing blacks in EMR classes on the basis of I.Q. tests if such placement resulted in racial imbalance. The Ninth Circuit Court of Appeals affirmed the decision.

Sometimes there is disagreement among authorities themselves when classifying youngsters by handicap. For example, in a Montana case (*In re "A" Family*), school authorities classified "A" as mildly retarded and accordingly placed him in a special education program. The parents, who disagreed, had him examined at an evaluation clinic in Denver, Colorado. The examiners there found him to be functionally retarded as a result of a severe emotional disturbance, a schizophrenic condition, and recommended that he be placed at a residential institution in California for psychotherapy and instruction.

The school authorities again tested the child and again classified him as mentally retarded. The parents sued in a Montana district court and won. Eventually, the Montana Supreme Court heard the case, affirmed the lower court decision, and ordered the school district to pay for the residential school.

Pleas by school district officials that they cannot afford special programs and services for particular students do not sway the courts in their interpretation of P.L. 94-142. The courts clearly place the responsibility on the schools as the following cases illustrate.

In a North Carolina case (*Hines v. Pitt County Board of Education*), a U.S. district court ruled that the school district had to pay the cost of providing residential care for a 10-year-old, emotionally handicapped boy, despite the school district's argument that the cost was more than it could afford.

In an earlier case (1972) in New York (*In the Matter of Marc H. Leitner, the County of Westchester, Appellant v. the State of N. Y., et al.*), a state court ruled that county and state funds be spent to provide a suitable program for a 12-year-old, severely handicapped boy, even though he had to be placed in an out-of-state institution.

Sometimes, as a result of conflicts between parents and school officials, parents remove their handicapped youngsters from the special programs provided by the school and place them in another institution, often a private one. Later, the parents seek reimbursement for tuition,

transportation, or other costs. For example, in *Frankel v. Commissioner of Education, et al.*, parents alleged that the school district failed "to properly and timely identify their child and to provide him with an appropriate education." The federal district court hearing the case agreed that the parents' allegations were true and granted them remuneration. The district had to pay for the private placement.

In a similar case in the District of Columbia (*North v. District of Columbia Board of Education*), another federal district court found against the school district. In this case, a multiply-handicapped child had been abandoned by its parents. All agreed that the most appropriate placement was in a residential school, but the school district contended that the costs were not its responsibility. The district court ordered the school district to pay.

The same federal court, in another case (*Patsel v. District of Columbia Board of Education*), awarded attorneys' fees to parents who had successfully obtained a due process hearing under P.L. 94-142.

In *Jose Pea v. Ambach*, a U.S. district court appointed a special master to determine a remedy for a state's and a city's failure to evaluate and to place handicapped children in appropriate programs in timely fashion. The court then enforced the master's remedy and awarded attorneys' fees against the state and the city. The state commissioner of education appealed, but the Second Circuit Court of Appeals affirmed the lower court's decision.

A federal court in *Papacoda v. State of Connecticut* ruled that where residential placement of an emotionally disturbed child in a special education school was necessary for the education of that child, the state would be required to provide for all the costs of such education, including room and board.

However, in cases involving classification and placement, awards are not *always* made in favor of parents. In *Jaworski v. Rhode Island Board of Regents for Education*, a U.S. district court ruled for the board. In this case, parents of a child with dyslexia felt that the local school committee had failed to provide a free appropriate education within the local public school system. They placed the child in a private school and sought remuneration for expenses. The court held that since the parents had declined the advice given by school officials, following decisions

made in internal hearings that would have resulted in satisfactory placement in the public school system, they could not gain remuneration.

In *Foster v. District of Columbia Board of Education*, another U.S. district court ruled against a plaintiff parent who sued for tuition reimbursement. A mother had withdrawn her learning disabled child from public school. The court held that even though she had acted out of frustration with bureaucratic delays regarding requests for transfer, she forfeited her rights to tuition reimbursement. She should have demanded an immediate due process hearing and then sued if it was not forthcoming.

Another classification case (*Ruth Anne M. v. Alvin Independent School District*) concerns Gordon M. He progressed well for three years in special education classes in a school district in Texas, but he was then transferred from the special education program and placed in regular classes (mainstreamed). He finished elementary school in the regular program and advanced to junior high. Although he was passed along from grade level to grade level, his work, according to his parents and his teachers, was far below his potential. He developed a seizure disorder, later attributed to mod-hypoglycemia.

Gordon's parents withdrew him from the district schools and placed him in a private residential facility for medically and emotionally impaired children. They later withdrew him from that facility and placed him at another private facility that was far from satisfactory for him. After hospitalization following a suicide attempt, Gordon returned to the public school district. Authorities there identified him as handicapped and developed an Individualized Education Program (IEP) for him. His parents found the program unacceptable and sued the school district in a federal district court. That court refused to award damages, stating that for such damages to be awarded in such cases, either of two conditions must exist:

1. The services in dispute are necessary to protect the physical health of the child and also are services that should be provided by the school district but are not.
2. The school district authorities act in bad faith by failing to comply with the procedural provisions of the statute (P.L. 94-142).

Guidelines for Classification and Placement

In the classification and placement of children under P.L. 94-142, school officials would be most prudent to follow to the letter the provisions of that statute as they have been interpreted in court decisions and in agency regulations. In addition, it is extremely important that parents be involved in the classification and placement process itself, whenever possible. At the very least, parents should be kept informed concerning decisions that affect their children. Also, parents must be made aware of their rights to hearings, and any requests for such hearings should be attended to in a timely fashion. Neglect of any of these admonitions could lead to serious consequences for the school district and for individuals involved.

An essential step in the classification and placement process is the development of the IEP. The IEP for a handicapped child consists of a document written by a qualified representative of the local education agency in collaboration with the teacher, the parents or guardian of the child, and, where appropriate, the child. It includes at least such components as the following:

1. A statement as to the level(s) of the child's present educational performance.
2. A statement of annual goals, including short-term instructional objectives.
3. A delineation of the special educational services to be provided to the child and a statement concerning the extent to which the child will be able to participate in regular educational programs.
4. A timetable, including a date for the initiation of the program and the projected duration of the services called for in the program.
5. Appropriate objective criteria and evaluation procedures and schedules for determining (at least annually) whether or not instructional objectives are being achieved.

Legal Aspects of Appropriate Education for Handicapped Students

Since questions concerning appropriateness arise largely from P.L. 94-142, a federal law, much of the court action surrounding those questions has arisen in federal courts. Some of the cases call into question the content of IEPs; others question the processes followed in classifying and assigning the children. Still others, like *Lora v. Board of Education of the City of New York*, combine such questions.

In *Lora*, the parents alleged that the school's placement policy violated their child's rights to due process, that the program provided in the special school was inadequate, and that it violated both constitutional and statutory rights to treatment. The federal district court in this case found in favor of the plaintiffs, stating that the special school provided a "restrictive atmosphere" that segregated the emotionally handicapped from their peers and resulted in stigma. This case and many others have led to widespread acceptance of the concept that in order for an educational program to be appropriate it must be provided in the least restrictive environment.

A related case is *Mallory v. Drake*. In this Missouri case, the parents of a severely handicapped child were dissatisfied with her reassignment to a special state school for the severely handicapped and sought, instead, to get her assigned to the special program in her original school district or to a neighboring district. They withdrew the child from the state school and filed a formal complaint and a request for a hearing. The hearing panel ruled on the basis of "least restrictive environment"

and suggested she be placed in a public school with others like her. The state circuit court and the state court of appeals subsequently affirmed that decision.

In a most interesting 1981 case in Virginia (*Bales v. Clark*), a federal district court opined that "appropriate" education is not synonymous with "best possible" education. That court recognized that even the most affluent school districts lack resources to enable every child to achieve his or her full potential.

In a recent case in Iowa (*Buchholtz v. Iowa Department of Public Instruction*), parents of a learning disabled child objected to a decision that he be retained in third grade and that he attend a resource room for learning disabled children. The parents had him tutored over the summer in an adjoining school district where he was enrolled as a fourth-grader. The parents then attempted to get the boundary lines between the two districts changed in such a way that their farm would be in the adjoining district. The local board refused to accommodate their wishes. A hearing panel, the state board of education, and a state trial court respectively affirmed the local board's decision. The Iowa Supreme Court reviewed the lower court's action in the case and affirmed it, holding that Iowa law does not require "the best" or "a maximum" program, but one that is "appropriate."

Another interesting question has arisen concerning the "appropriateness" of providing educational services to the handicapped for only a certain number of days per year. As most educators know, state funding for public schools is usually predicated upon having schools in operation for a specific number of days, typically around 180 days. Most of the fiscal aspects of operating the schools are geared to the academic year rather than to 12 months. At least two important cases have been heard concerning whether or not handicapped youngsters should be provided with year-round programs under P.L. 94-142.

In *Matter of Scott K.*, a New York case, a suit was filed in a state court to compel a school district to pay for 12-month residential school placement. In other words, parents were asking that the district pay not only for the normal school year, but for two out-of school summer months as well. In this case, the parents were successful, and the school district had to pay.

In another case (*Armstrong v. Kline*), which reached the appellate level in the federal court system and thus serves as a wider judicial precedent, parents brought a class action suit on behalf of profoundly mentally impaired students and severely emotionally disturbed students, seeking year-round provision of educational services. A U.S. district court in Pennsylvania ruled that, because of the natural regression experienced by such children during the summer months, public school authorities of that state must provide continuing programs throughout the year.

Armstrong v. Kline was appealed to the U.S. Court of Appeals, Third Circuit, as *Battle v. Commonwealth of Pennsylvania, et al.* This appellate court upheld the idea of extending the educational program beyond 180 days but differed somewhat in its interpretation of the ruling. Although this court rejected the idea that P.L. 94-142 requires programs to make every handicapped child as self-sufficient as possible, it did hold that the state (i.e., district school boards) must decide for each child, even those *not* among the most severely handicapped, whether or not he or she requires more than 180 days of educational services. The U.S. Supreme Court, on 22 June 1981, refused to hear further appeal of *Battle*. The Court let stand the circuit court's ruling that Pennsylvania's 180-day limit on the school year violates P.L. 94-142.

Recent legislation in some states requiring the successful completion of basic competency tests for promotion from grade to grade or for graduation from high school has resulted in some interesting legal questions concerning the appropriateness of such requirements for handicapped students. In a New York case (*Board of Education v. Ambach*), two special education students completed their IEPs and were issued local high school diplomas. Neither student had met the testing requirements for graduation. The state commissioner of education notified the local board that any students who had not successfully completed the testing program were holding invalid diplomas and must be notified to that effect. The board sought relief from the order, and the New York Superior Court granted an injunction halting the commissioner's order.

In a similar case that originated in Georgia (*Anderson v. Banks*), action was taken challenging the institution of an exit-examination re-

quirement by a county school district. The case was heard in a U.S. district court. The plaintiffs argued that the requirement of successful completion of a test in order to receive a diploma foreclosed any possibility that mentally retarded students might obtain diplomas. Another claim, not so germane to this discussion, was that school officials had erroneously classified some of the pupils as mentally retarded.

Although the district court found that the institution and the administration of the exit examination did not violate the Fourteenth Amendment, the implementation in this case had some serious flaws. For example, as in several other cases that involved nonhandicapped students, the requirement could not be constitutionally imposed upon students who had attended classes prior to the abolishment of a dual school system with separate schools for whites and for blacks. Another decisive flaw existed because the school officials did not demonstrate that items included in the test were actually taught in the schools.

The court ordered the school authorities to award diplomas to all those who would have received them had it not been for the test policy. Further, the court ruled that no exit-examination policy can be used until it is demonstrated that the examination covers material that is taught in the students' curricula.

An Illinois case involved 11 handicapped high school students who had met all graduation requirements except the exit examination required by state law. The students requested and were granted a due process hearing before the state board of education. The state superintendent of public instruction ruled that the law requiring such an exit examination was valid but that 18 months was not enough "lead time" for handicapped pupils to prepare for the test. Thus, the procedure in question violated the students' rights to due process. He ordered that diplomas be issued.

The U.S. district court that later heard the case supported both the testing program and the implementation procedures. The court reversed the superintendent's order to issue diplomas. However, the case was appealed, and in January 1983 the U.S. Court of Appeals for the Seventh Circuit reversed the decision of the federal district judge on narrow due process grounds affecting only the 11 students involved. But more

important, this court did uphold the policy of the Peoria School District to require all students to pass minimal competency tests to receive diplomas. This represents the only federal ruling to date that upholds the denial of diplomas to handicapped children who fail to pass an exit examination.

In a recent decision (28 June 1982), the U.S. Supreme Court, in *Rowley v. Board of Education of Hendrick Hudson Central School District*, disagreed with the district court's decision that the school district should furnish a sign language interpreter in the classroom for a deaf student. In reaching that decision, the Supreme Court agreed with the reasoning cited earlier in *Bales v. Clarke* and ruled that local school authorities are not legally required to provide handicapped children with the "best possible" education to help them realize their full potential.

In the 6-3 *Bales* decision, the Supreme Court justices disagreed with the district court's view that required that "the potential of the *handicapped* child be measured and compared to his or her performance, and that the remaining differential or 'shortfall' be compared to the shortfall experienced by *non-handicapped* children" in order to test whether or not a free appropriate public education is being provided (emphasis added). Rather, said the Supreme Court justices, a court need only check to see if the criteria of a "free appropriate public education," as defined in P.L. 94-142, are being adhered to. The criteria are that:

1. Educational instruction be provided that is specially designed to meet the unique needs of the handicapped child and supported by such services as are necessary to permit the child to benefit from the instruction;

2. Such instruction be provided at public expense and under public supervision;

3. Such instruction meet the state's educational standards, approximate the grade levels used in the state's regular educational program, and comport with the child's IEP.

If the criteria listed above are being met, then the child is receiving a "free appropriate public education" as defined by P.L. 94-142. In *Rowley*, the Court found that the criteria were being met as evidenced by the fact that the child was performing satisfactorily with the aid of

special services already in place. In this case, passing marks and advancement from grade to grade seemed to the Court to be evidence of satisfactory performance. Thus, it would seem that a school district need provide only enough special help and personalized instruction to enable handicapped students to progress satisfactorily.

Another point worthy of note is that in *Rowley* the Supreme Court went to great lengths to explain that the main intent of Congress in passing P.L. 94-142 was to provide *access* to adequate public education for the handicapped, not to maximize each handicapped child's potential. In the dicta for this case, the justices stated:

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided non-handicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. (50 L.W. 4932)

Until the *Rowley* decision has had a chance to affect subsequent lower court rulings and, of course, school practices in compliance with such rulings, the impact of the decision cannot be accurately assessed. But it would appear that its effects will be sweeping and that it will become a landmark case in special education.

One immediate change brought about by the *Rowley* decision will be a switch from a focus on "appropriateness" to a focus on "adequacy" in evaluating special programs for the handicapped. However, those who were looking for clear-cut definitions from the Supreme Court may feel that the Court has succeeded only in substituting one set of ambiguities for another.

Guidelines for Determining Appropriateness

Following are some guidelines that may be helpful to educators when questions arise pertaining to "appropriateness" or "adequacy":

1. Subsequent to assessment of a child's present educational level(s) of achievement, potential, etc., a placement committee, made up of

school employees and, preferably, of other appropriate persons who are not employees of the school, must draw up an IEP specifically for that child in accordance with the provisions of P.L. 94-142.

2. Any review committees or other hearing bodies should be made up of "non-biased" individuals; i.e., individuals not connected with the schools. Courts are questioning whether school officials and board members selected as hearing officers can be objective.

3. If a dispute arises concerning a child's placement or the appropriateness of the program to which he or she is assigned, continue his or her current placement until the dispute is resolved. Further, seek early resolution of the problem. Courts are talking more and more about the lack of timeliness in the educational bureaucracy.

4. Notify parents promptly and involve them in any decisions concerning their child's placement or reassignment. While candid communication between school officials and parents won't completely eliminate all potential for litigation, it could serve to reduce it.

5. Mainstreaming is not required unless it results in the most appropriate program in the least restrictive environment. Sometimes, for the good of the child, appropriateness is more important than the degree of restriction in determining the child's assignment.

Legal Aspects of Providing Related Services to Handicapped Students

Frequently courts are called upon to decide whether or not certain services are "related" as defined in P.L. 94-142. The Act defines related services as those supportive services necessary for a handicapped child to benefit from the special education he or she is to be provided. Do those services necessary to maintain the very life of the child qualify under the Act? Is there some distinction to be made between education/instructional services and those that are more medical or therapeutic in nature? Only courts can provide the answers.

In *Rowley* the U.S. Supreme Court ruled that it was not necessary for school authorities to provide a sign-language interpreter for a deaf youngster because they were providing other kinds of services that allowed her to progress satisfactorily from grade to grade. Obviously the *Rowley* decision will have far-reaching implications for lower courts and for schools concerning the question of related services.

Let us look at some of the decisions courts have made on that question prior to the U.S. Supreme Court decision in *Rowley*.

An important decision concerning related services was made by a U.S. district court in Texas (*Tatro v. State of Texas*). This case involved a 5-year-old whose physical handicap required that catheterization be administered several times a day in order for the child to urinate. School officials maintained that they had no obligation to provide that service since they alleged that it was purely medical in nature. An impartial due process hearing officer ruled for the parents upon their appeal. The state commissioner of education affirmed that decision, but the state

board of education reversed it, finding that the school district did not have to provide catheterization.

The parents then turned to the courts. A U.S. district court dismissed the case. The parents lodged an appeal to a U.S. court of appeals, which found in their favor. Although there was subsequent dispute concerning administrative questions, the importance of this case lies in the court's determination that if a medical service can be established as a "related service," the district must provide the service under P.L. 94-142 and the Rehabilitation Act of 1973. Likewise, in *Tokarcik v. Forest Hills School District*, the Third Circuit Court of Appeals found that intermittent catheterization does indeed fall within the statutory definition of "related services" and must be provided by the school district.

In a recent case in Hawaii (*Department of Education, State of Hawaii v. Katherine D.*), a U.S. district court refused governmental immunity to the school district under the Eleventh Amendment and awarded private school tuition and attorneys' fees to a child suffering from cystic fibrosis. The child needed special attention, requiring the services of trained personnel, to her tracheotomy tube during the day. Thus, it would seem that if a service is found by the court to be "related," the school district is financially responsible for providing that service, even though it must turn to other agencies or specialized personnel to do so.

Guidelines for Related Services

The best advice this author can give school authorities concerning related services is that if such a question arises, seek legal counsel before making a decision as to whether or not you will provide the service in question. Even then, the courts may have to make the final determination if either party is dissatisfied.

Legal Aspects of Discipline Policy for Handicapped Students

Another issue confronting educators and the courts is the apparent conflict between those provisions of P.L. 94-142 that require a free appropriate education in the least restrictive environment for handicapped children and the conventional school policy of removing children from the classroom when they behave in a disruptive manner. It is not the intent of P.L. 94-142 that a seriously disruptive handicapped child be allowed to interfere with the learning environment or to cause physical harm to himself or to others. However, implementation of that statute has led to a number of regulations and court decisions designed to protect such youngsters from arbitrary or discriminatory removal from their prescribed educational programs.

Generally, courts are holding that long-term suspensions or expulsions of handicapped students constitute a change in assignment for them and thus must be subject to all the procedural restrictions called for in any other change of assignment. That is, the assigning committee must agree to the "new assignment," notify parents and receive their approval, provide an opportunity for a hearing, etc. Adherence to such restrictions obviously takes considerable time and thus compromises the effectiveness of suspension or expulsion as a method of discipline.

Let us now look at some of the court cases dealing with the suspension or expulsion of handicapped students that might provide some direction for school authorities in establishing policy in this area.

In *Stuart v. Nappi*, in 1978, a U.S. district court in Connecticut concluded that school authorities would, indeed, have to conform to the

procedural safeguards of P.L. 94-142 when excluding a handicapped child from school. In reaching its decision, the court listed four rights established by P.L. 94-142 with respect to Ms. Stuart's suspension and expulsion: 1) the right to an appropriate public education, 2) the right to remain in her present placement until the resolution of her special education complaint, 3) the right to an education in the least restrictive environment, and 4) the right to have all changes of placement effectuated in accordance with prescribed procedures.

A year later, in a similar case in Indiana (*Doe v. Koger*), another federal district court refined the *Nappi* holding somewhat by declaring that a handicapped child is protected from a school district's "usual disciplinary measures" only when it can be shown that the disruptive behavior is related to his or her handicap. If such a relationship is shown, said the court, a change in educational placement is indicated; if the relationship does not exist, the use of formal expulsion procedures is appropriate.

In a 1981 case (*S-I v. Turlington*), the Fifth Circuit Court of Appeals was called upon to decide whether or not nine emotionally handicapped students were denied rights to due process and to an appropriate education when they were expelled under charges of willful defiance of authority, insubordination, vandalism, use of profane language, masturbation, and sexual acts against fellow students.

The court further clarified principles regarding expulsion of handicapped students: 1) Before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his or her handicapping condition; 2) An expulsion is a change in educational placement, thereby invoking the procedural protections of P.L. 94-142 and Section 504; 3) Expulsion is a proper disciplinary tool under P.L. 94-142 and Section 504 but a complete cessation of educational services is not. In other words, some alternative form of educational services must be provided if the student is expelled.

Where there is imminent danger for others or for the disruptive handicapped student, courts uphold removal of that student from the schools as a temporary measure regardless of whether or not the disruptive behavior is related to the handicapping condition. The duration of the

removal may determine the rigor with which school officials have to prove danger. In *Reineman v. Valley View Community School District #365-U. et al.*, a federal district court in Illinois upheld the suspension and subsequent dismissal of a handicapped high school student from whom a knife had been confiscated under duress and who later was arrested for alleged delivery of marijuana at a high school. The court supported school authorities in this case, even though there were some questions as to whether or not due process rights had been violated.

In *Board of Education v. Illinois State Board of Education*, another federal district court in that same state upheld the local board's suspension of an eleventh-grade handicapped student and rejected the ruling by the state superintendent that the district board would have to prove the student dangerous. The court ruled that such a regulation would apply only in a situation involving expulsion or complete termination of educational services.

Guidelines for Discipline Policy

Based on these court decisions and others and on regulations and rules promulgated by agencies in implementing P.L. 94-192 and Section 504, school authorities should consider the following guidelines when using suspension or expulsion as disciplinary measures for handicapped students:

1. It appears that in most court jurisdictions short-term emergency suspensions (up to three days) can be imposed on special education students without a prior hearing and without a formal determination as to whether or not they are being punished for misbehavior related to their handicapping conditions.

2. At least one federal court has held that special education students can be suspended for nonemergency causes for up to 10 days without the suspension being considered a change in placement requiring use of procedural safeguards. I would recommend that school authorities not impose a suspension of that length without first determining whether or not the misbehavior is related to the student's handicapping condition and without making some provision for alternative educational services.

3. Most courts have held that expulsion constitutes a change in educational placement. I suggest that expulsion of handicapped students be

imposed only after school authorities have followed all the procedural safeguards required by P.L. 94-142 and Section 504. A pupil placement team, which includes broader representation than just school administrators and board members, should determine that such expulsion is imposed for behavior not related to the handicapping condition. If expulsion is imposed, the school district should provide some alternative form of educational services, such as tutorial instruction in the home.

4. If the disruptive behavior of a handicapped student results in imminent danger to himself or herself or to others, school authorities have a right (and even a duty) to remove that student on a temporary basis until other measures can be taken.

Legal Aspects of Negligence and Liability with Handicapped Students

Courts are hearing more and more special education cases that involve plaintiffs who seek monetary damages as well as remuneration for expenses incurred in trying to attain appropriate classification and placement. For example, in *D.S.W. v. Fairbanks North Star Borough School District*, an Alaska state court heard a tort action (seeking damages) for negligent classification, placement, and teaching of two students suffering from dyslexia. D.S.W. claimed that school officials had discovered his condition in the first grade but had given no assistance until the fifth grade. In the same case, L.A.H. contended that from kindergarten through sixth grade, district authorities had provided courses to help him for a while, but that they had negligently discontinued them.

The state's Fourth Judicial District Court dismissed the case; the Supreme Court of Alaska subsequently affirmed that action, based on the uncertainty of the existence of injury to the plaintiffs and on the lack of a perceptible connection between the district's actions and any injury that might have occurred.

A state court in Louisiana, in hearing a case that involved the off-campus death of a special education student (*Foster v. Houston General Insurance Company*), emphasized the fact that supervision off campus must be even more rigorous than on campus, especially for retarded students.

Traditionally, school officers (i.e., board members and superintendents) have been protected by governmental immunity from tort

liability suits. Principals and teachers have not generally enjoyed the protection of that immunity, although there are occasional instances where principals seem to be protected. Many state legislatures have enacted "save harmless" laws, which say, in effect, that school employees (including teachers and principals) are safe from liability as long as they are performing their duties in good faith and without gross negligence. Teachers and administrators should find out their liability status under laws in their states.

There is one other source of liability that might well become the basis for much special education litigation. Under Section 1983 of the 1871 Civil Rights Act, governmental officers may be held *personally* liable if they deprive an employee (extended through later court interpretation to include pupils) of his or her constitutional rights when they know or should know that the deprivation is occurring. Educators should be aware that implementing Section 1983 could result in many lawsuits concerning education of the handicapped.

Conclusion

Without question, P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973 have opened the door to public education for many handicapped students, who for generations have found it closed. We are now serving thousands of handicapped children whose education would have been neglected had it not been for these statutes and for the case law that has resulted from them.

The schools have had to take on new professional and financial responsibilities to serve the handicapped: educating the handicapped is costly. What effects a depressed economy will have on special education programs already in place and on future programs is impossible to predict, but certainly competition for limited tax revenues will increase. Financial relief is provided to some extent in the U.S. Supreme Court decision in the *Rowley* case, which might be interpreted as allowing school districts to settle for an *adequate* program rather than to offer the *best possible* program. The moral dilemma that decision presents to educators is one with which they will have to wrestle in the years ahead. For now, it is safe to say that educating the handicapped will continue to challenge the energies and resources of educators, state and federal legislators, and the courts. In the final analysis, we have to ask ourselves whether it is too expensive to provide the handicapped their due rights.

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