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Michael S. Treppa

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THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT: TRENDS AND PROBLEMS WITH THE "RELATED SERVICES" PROVISION

I. INTRODUCTION

The Education for All Handicapped Children Act¹ (hereinafter the "Act") was designed to assure a "free appropriate public education" for all handicapped children.² The Act guarantees federal funding³ to assist state and local agencies in establishing and maintaining individualized educational programs ("IEP's")⁴ for handicapped⁵ public school students. An IEP must outline the educational goals of the child, as well as the instructional methods and supplementary ("related") services used in meeting

1. 20 U.S.C. §§ 1400-1461 (1982 & Supp. III 1985).

2. 20 U.S.C. § 1400(c) (Supp. 1986).

3. 20 U.S.C. §§ 1411-1414 (1982).

4. 20 U.S.C. § 1401(a)(19) (1982 & Supp. III 1985) provides:

The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short term instructional objectives, (C) a statement of the specific educational service to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

5. 20 U.S.C. § 1401(a)(1) (Supp. III 1985) provides: "The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services."

the goals.⁶

An IEP must be approved by the student's parent(s).⁷ If the IEP is unacceptable, the parent may request what is commonly referred to as a "due process hearing"⁸ with the local educational agency.⁹ If the hearing fails to resolve a dispute, the parent may ultimately commence an action in either state¹⁰ or federal court¹¹ to determine the IEP's validity.

An integral factor in the success of an IEP is the availability of "related services." Just as non-handicapped students may require bus transportation or the assistance of a school nurse, handicapped students require unique services such as physical therapy or speech instruction in order for them to take advantage of their educational opportunity.¹² Because acceptable related services are provided without cost to the parents of handicapped students, the determination of what constitutes a related service under the Act is critical.¹³

The statutory definition of "related services" includes such support services as limited medical care, physical and occupational therapy, as well as psychological counseling.¹⁴ Transporta-

6. 20 U.S.C. § 1401(a)(19) (Supp. III 1985).

7. *Id.*

8. 20 U.S.C. § 1415(b)(2) (1982). *See also* 20 U.S.C. § 1419 (1982). Each individual state develops its own laws to govern the education of the handicapped, yet the "federal" act must be complied with to obtain financial support.

9. 20 U.S.C. § 1415 (1982). The hearing ensures the following parental rights: 1) the right to be represented by counsel and be aided by experts in this field, 2) the right to present evidence and confront, cross examine, and compel the attendance of witnesses, and 3) the right to appeal.

10. 20 U.S.C. § 1415(e)(2) (1982).

11. *Id.* Note that suits regarding the availability of related services will not be determined under § 504 of the Rehabilitation Act of 1978: 29 U.S.C. section 794 (1982). *See Smith v. Robinson*, 468 U.S. 992 (1984). However, *Smith* involved questions regarding the awarding of attorneys fees in a proceeding to ensure a free appropriate public education for a handicapped child. For a detailed discussion regarding the procedural safeguards, see Comment, *The Education for All Handicapped Children Act Since 1975*, 69 MARQ. L. REV. 51 (1985).

12. 20 U.S.C. §§ 1400(b)-1400(c) (Supp. 1986).

13. *Id.*

14. 20 U.S.C. § 1401(17) (1982):

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

tion is specifically required,¹⁵ and some courts have found other practical concerns such as housing expenses to be included.¹⁶

This Comment will focus on the interpretation of related services used in IEP's, and will address the significant shortcomings of the related services mandate: lack of clarity and insufficient funding.¹⁷

II. THE HISTORY OF EDUCATING HANDICAPPED CHILDREN

Special education programs originated in the 1820's.¹⁸ With federal support yet to be established, students were dependent solely on their families for practical and financial support.¹⁹ From the early 1900's until the 1950's, federally funded programs were gradually emerging, but they were limited to specific handicapped groups such as the deaf.²⁰ Therefore, in an effort to publicize the needs of all handicapped students to lawmakers, two special interest groups were formed: The National Association for Retarded Citizens (NARC)²¹ and The Council for Exceptional Children (CEC).²²

In the early 1960's, NARC and CEC helped to increase public support for federally funded education for all handicapped children.²³ As a result, the Elementary and Secondary Education Act of 1965 (ESEA) was passed.²⁴ The ESEA resulted in limited Federal administrative assistance in organizing and maintaining special education programs.²⁵ However, it failed to provide the

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.

15. *Id.* See *infra* notes 94-102 and accompanying text.

16. *See infra* notes 103-09 and accompanying text.

17. 20 U.S.C. §§ 1400-1461 (1982 & Supp. III 1985).

18. E. LEVINE & E. WEXLER, PUBLIC LAW 94-142: AN ACT OF CONGRESS, at 12 (1981).

19. *Id.* at 14.

20. *Id.*

21. *Id.* at 15. NARC was established in 1950.

22. *Id.* at 16. While CEC was established in 1922, it did not obtain significant membership until 1950 when there were approximately 70,000 members. *Id.*

23. E. LEVINE & E. WEXLER, *supra* note 18, at 18.

24. Pub. L. No. 89-10, (1965).

25. In *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982),

supplemental services needed in order for most handicapped children to take advantage of the special education programs.²⁶

The following year, Congress added Title VI: Education of Handicapped Children to the ESEA.²⁷ In an attempt to improve the level of education available, this Act established the Bureau of Education for the Handicapped and the National Advisory Committee on the Handicapped.²⁸ The amendment was the first legislative act to result in federal funding for support services for handicapped students.²⁹ The amendment, however, failed to set specific guidelines for state use of the grant money.³⁰

In 1970, Title VI of the ESEA was repealed when the Education of the Handicapped Act (EHA) was adopted.³¹ The EHA authorized federal funding up to 1974, but again failed to specify criteria for the use of the money.³² Moreover, the EHA failed to dictate specific related services that would be available to handicapped students.

Between 1970 and 1975 three cases illustrated the increasing need for concrete statutory rules for educating handicapped children. Two federal district court decisions³³ found a constitu-

discussed *infra* notes 56-60 and accompanying text, the Court briefly reviewed the history of educational provisions for handicapped students.

26. E. LEVINE & E. WEXLER, PUBLIC LAW 94-142: AN ACT OF CONGRESS, at 20-24 (1981).

27. Pub. L. No. 89-750, 80 Stat. 1191 (1966).

28. *Id.*

29. *Id.*

30. *Hendrick Hudson Dist Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 (1982). Note the ESEA was further amended in 1968: Pub. L. No. 90-247, 81 Stat. 783 (1968), but only resulted in minor technical changes.

31. Pub. L. No. 91-230, 84 Stat. 121 (1970).

32. *Rowley*, 458 U.S. at 180.

33. See *Pennsylvania Assn. for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972). In what is commonly referred to as the PARC decision, the issue of whether handicapped children had a fundamental right to education was first raised. *PARC*, 343 F. Supp. at 281-82. In a consent decree, the state agreed to admit mentally handicapped students. *Id.* at 291. The Court noted that such agreement was, "an intelligent response to overwhelming evidence." *Id.* See also, *Mills v. Board of Educ. of Dist. of Columbia*, 348 F. Supp. 866 (D.C. 1972). In the *Mills* case, the district court held that the exclusion of handicapped students from public schools was unconstitutional. *Mills*, 348 F. Supp. at 878. In *Mills*, a class action was brought on behalf of students with mental and physical handicaps. *Id.* at 866-68. The claim was essentially the same as in PARC: that handicapped children were denied their right to education because of delays or avoidance of school districts to provide public (financial) support for their education. *Id.* at 867-70. The *Mills* court agreed. *Id.*

tionally protected right to public education. However, in *San Antonio Independent School District v. Rodriguez*,³⁴ the United States Supreme Court held that the right to education was not a "fundamental" right.³⁵ The Court rejected the claim that students have a right to an equal quality of education.³⁶

Despite *Rodriguez*, increased pressure for better education from NARC and CEC motivated Congress to authorize funding for 1974 and to initiate research on the particular unfulfilled needs of handicapped children.³⁷ This action seemed to indicate Congress was going to guarantee handicapped children an educational opportunity even though the *Rodriguez* Court apparently would not.³⁸

Thus in 1975 what is now The Education for All Handi-

at 878. It found that, under the fifth amendment's due process clause, every child in the District of Columbia shall receive, "a free and suitable publicly supported education regardless of a child's impairment." *Id.*

34. 411 U.S. 1 (1973). The plaintiffs claimed that Texas's financing system for public education was a violation of equal protection. *Id.* at 1-12. The system was based primarily on local property taxes. *Id.* Thus, students in lower income neighborhoods received less funding. *Id.* The plaintiffs argued that education was a fundamental right, and that inequalities in the distribution should be strictly scrutinized. *Id.* However, the Court rejected these claims. *Id.* at 35.

35. *Id.* at 35.

36. *Id.* at 6-12.

37. See *Burlington School Comm. v. Massachusetts. Dept. of Educ.*, 471 U.S. 359, 373 (1985) which provides:

The impetus for the Act came from two federal court decisions, *Pennsylvania Assn. for Retarded Children v. Commonwealth . . .* and *Mills v. Board of Educ. of Dist of Columbia* which arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from public schools. Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special education.

See Comment, *Equal Educational Opportunity: The Visually Impaired and Public Law 94-142*, 33 UCLA L. REV. 549 (1985) for a more detailed discussion of the history of educating handicapped children.

38. See 20 U.S.C. § 1400(b) (Supp. 1986) which provides: "Congress finds that: the special educational needs of such children are not being fully met; It is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure protection of the law." See also 20 U.S.C. § 1400(c) (Supp. 1986) which states: "It is the purpose of this chapter to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs."

capped Children Act was adopted.³⁹ It set forth detailed guidelines for most aspects of special education.⁴⁰ By specifically requiring the subsidization of "related services," more handicapped children have gained access to educational resources.⁴¹ The related services provision, however, is much less detailed than other provisions of the Act.⁴²

III. THE CURRENT STATUS

Perhaps because of the ambiguous wording of the related services provision, many different services have been rejected by the courts. Two United States Supreme Court decisions have established the test for determining what will be declared a related service under the Act.⁴³ In the leading case, *Irving Independent School District v. Tatro*,⁴⁴ an eight-year old student was unable to voluntarily empty her bladder and had to be catheterized every three to four hours.⁴⁵ The student was too young to perform the catheterization herself and needed a trained school nurse to assist her.⁴⁶ In a unanimous decision, the Court held that without the existence of this service, the student would be unable to attend class, and thus would not have access to the education she was entitled to receive.⁴⁷

39. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1461 (1982)).

40. *Id.*

41. Department of Education *Seventh Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, at 2 (1985). Each year Congress is presented a report on the implementation of the Act. The report primarily deals with statistical data indicating the number of students benefitting from the Act as well as general budgetary data.

42. See 20 U.S.C. §§ 1411-1414 (1982). In this section, for instance, a detailed formula is used to establish the percentage of funds attributable to each school district. However, note that the Act fails to specify acceptable "support services" available to handicapped children.

43. *Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984); *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). The United States Supreme Court has given an opinion on the interpretation of the Act only four times. Related services were of primary concern in the two cases mentioned above. The other two cases were *Burlington v. Department of Educ.*, 471 U.S. 359 (1985) (primarily dealing with the definition of a "free appropriate public education") and *Smith v. Robinson*, 468 U.S. 992 (1984) (dealing primarily with the awarding of attorneys' fees).

44. 468 U.S. 883 (1984).

45. *Id.* at 885. The child suffered from spina bifida, a disease which causes orthopedic problems and loss of muscle control.

46. *Id.* at 885, 894.

47. *Id.* at 895.

Tatro was one of only two United States Supreme Court opinions involving an express interpretation of related services.⁴⁸ The Court developed a two-part test to guide lower courts confronting the same issue:⁴⁹ 1) Is the service a “support service . . . which will assist the handicapped child in benefitting from special education?”⁵⁰ and 2) Is the service a medical service that goes beyond diagnosis or evaluation?⁵¹ Thus, a service which enables a handicapped child to simply remain in school during the day will be deemed a necessary aspect of their IEP.⁵²

In applying the test, the Court held that any health related activities which must be performed by a licensed physician were excluded.⁵³ Acceptable medical services under the Act, then, are those that can be conducted by a lay person or school nurse.⁵⁴ Clean intermittent catheterization was therefore declared to be a related service.⁵⁵

In *Hendrick Hudson District Board of Education v. Rowley*,⁵⁶ the Supreme Court held that the Act did not require an IEP to include a sign language interpreter.⁵⁷ The Court reasoned that the intent of the Act was to open the doors of public education to handicapped children, rather than to guarantee any particular level of competence once inside.⁵⁸ This opinion acknowledged that a “free appropriate public education” (which includes adequate related services) should merely confer a minimal educational benefit.⁵⁹ These two cases failed to specify what the expression “educational benefit” encompasses.⁶⁰ The result

48. See *supra* note 43 for a summary on the four cases in which the United States Supreme Court has interpreted any provision of the Act.

49. *Tatro*, 468 U.S. at 892-93.

50. *Id.*

51. *Id.*

52. *Id.* at 891.

53. *Id.* at 892-93.

54. *Id.* at 893.

55. *Id.* at 895. See also *Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443 (3rd Cir. 1981), which also found clean intermittent catheterization as a related service.

Tokarcik, 665 F.2d at 444-46.

56. 458 U.S. 176 (1982).

57. *Id.* at 210.

58. *Id.* at 192. The Court found the current services adequate because the child was making progress, even when compared to nonhandicapped children, without the aid of a sign language interpreter. *Id.* at 209-10.

59. *Id.* at 207-10.

60. *Id.* at 202. The Court stated, “We do not attempt today to establish any one test

has been increased litigation on the issue.

Currently four types of services have comprised the bulk of litigation in this area: medical services, therapeutic care, transportation and housing accommodations. The cases give some guidance as to how the *Tatro* test has been applied.

A. MEDICAL SERVICES

The *Tatro* standard limits medical services under the Act to those for evaluative and diagnostic purposes only.⁶¹ The Court stated that the high cost of health care is a major reason for this limitation.⁶²

In *Department of Education, State of Hawaii v. Katherine D.*⁶³ the Ninth Circuit Court of Appeals found that having someone available who is capable of executing tracheotomy tube reinsertion (in the event it became dislodged) was a related service.⁶⁴ As in *Tatro*, it was viewed as no less related to the effort to educate than services that enabled the child to reach, enter, or exit the school.⁶⁵

One recent case⁶⁶ involved a handicapped student who required constant monitoring to keep her lungs clear. Such monitoring requires full knowledge of cardio-pulmonary resuscitation.⁶⁷ The district court found such "constant" care to not be a service within the Act.⁶⁸

The district court stated that under *Tatro*, meaningful ac-

for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* Irving Independent School District v. *Tatro*, 468 U.S. at 883 (1984).

61. *Tatro*, 468 U.S. at 891.

62. *Id.* at 892. "Although Congress devoted little discussion to the 'medical services' exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive." *Id.*

63. 727 F.2d 809 (9th Cir. 1983) *cert. denied*, 471 U.S. 1117 (1985).

64. *Id.* at 813.

65. *Id.*

66. *Detsel v. Board of Educ. of Auburn Enlarged School Dist.*, 637 F. Supp. 1022, 1024 (N.D. N.Y. 1986).

67. *Id.*

68. *Detsel*, 637 F. Supp. at 1026-27. *But see Katherine D.*, 727 F.2d at 813 (knowledge of tracheotomy tube reinsertion was not seen as "constant" care).

cess to education must be afforded handicapped children, yet medical services which would entail great expense are not necessary.⁶⁹ It held that Congress did not intend to “maximize each handicapped child’s potential.”⁷⁰ Therefore the child’s claim failed the second prong of the *Tatro* test because the care would be complicated and require the skill of a trained health professional.⁷¹

B. THERAPEUTIC SERVICES

1. *Physical and Occupational Therapy*

Recently, the Sixth Circuit Court of Appeals held that a school district was not obligated to provide extracurricular physical activities, such as athletics and recreational activities to a handicapped child.⁷² The court noted that because of “sporadic behavior” and lack of interest, the child would receive no significant educational benefit from such activities.⁷³ Had some sort of “benefit” been proven, the activities would have been required.⁷⁴

Although these extracurricular activities were rejected, it is fairly clear that the Act requires some physical and occupational therapy.⁷⁵ The extent of these required services, however, was recently scrutinized.⁷⁶ The case involved a child who had significant physical problems resulting from a motorcycle accident.⁷⁷ The issue was whether three one-hour sessions of weekly individual physical therapy, and one half-hour session of weekly small group occupational therapy constituted related services.⁷⁸

Citing *Tatro* and *Rowley*, the hearing officer found that the student would obtain a significant educational benefit from the availability of these services.⁷⁹ The benefit would be the devel-

69. *Id.*

70. *Id.* at 1027, quoting *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199 (1982).

71. *Detsel*, 637 F. Supp. at 1026-27.

72. *Rettig v. Kent City Sch. Dist.*, 788 F.2d 328 (6th Cir. 1986).

73. *Id.* at 332.

74. *Id.*

75. 20 U.S.C. § 1401(a)(17) (1982).

76. *Mary H. v. Massachusetts*, 1984-85 EHLR DEC. 506:340.

77. *Id.*

78. *Id.*

79. *Id.* at 506:343.

opment of the ability to maintain balance and muscle functions necessary to function in a public school environment.⁸⁰ The therapist could also provide feedback to the school on the child's progress.⁸¹ The updated information would result in the most effective IEP for the child.⁸²

In *Maurits v. Board of Education of Hartford County*,⁸³ the district court imposed an upper limit to the extent of subsidized physical therapy. Because the student had already been "benefiting" from special education, and the therapy was to only maintain his physical strength, the court disallowed it from his IEP.⁸⁴ The student was doing well academically and the court felt that his impairment (mobility problems caused by hemophilia) did not affect his academic performance.⁸⁵

The physical therapy cases may be reconciled by the rationale in *Tatro*: Services enabling the child to gain access to special education are needed, but resources should not be depleted by attempting to reach anything more than a minimal benefit.⁸⁶

2. Psychotherapy

In *Doe v. Anrig*,⁸⁷ the district court proclaimed psychotherapy and group therapy to be related services. The child was severely handicapped and manifested symptoms of autism.⁸⁸ Psychotherapy was implemented to improve the child's ability to work in a one-to-one learning relationship by building self-esteem and developing competence in his areas of interest.⁸⁹ In applying the *Tatro* test, the court emphasized that the services need not be primarily for educational purposes, but may merely assist the child in benefitting from special education.⁹⁰

80. *Id.*

81. *Mary H.* 1984-85 EHLR DEC. 506:343.

82. *Id.* at 343.

83. No. B-83-1746 (M.D. Cir. September 16, 1983).

84. *Id.*

85. *Id.*

86. *See supra* notes 43-60 and accompanying text.

87. 651 F. Supp. 424, 431 (D. Mass. 1987).

88. *Id.* at 426.

89. *Id.* at 427.

90. *Id.* at 430.

Similar findings were reached in two cases involving children who were emotionally disturbed.⁹¹ The courts found that psychological services are required in order for mentally handicapped children to obtain an educational benefit.⁹² The cost of such services was to be provided by the state school boards and not by the child's parents.⁹³

Psychiatric services, however, have not been deemed a required service.⁹⁴ For example, in *Darlene L. v. Illinois State Board of Education*, the district court found that unlike psychologists and counselors, psychiatrists are licensed physicians.⁹⁵ Consequently, this medical service could not be provided because it would extend beyond evaluative or diagnostic purposes.⁹⁶

C. TRANSPORTATION

The Act expressly provides for transportation as a "related service."⁹⁷ In *Alamo Heights Independent School District v. State Board of Education*,⁹⁸ the Fifth Circuit Court of Appeals reaffirmed this point by requiring the school system to provide free transportation without regard to district boundaries. The student's parents worked, consequently there was no alternate means of transportation.⁹⁹ Unfortunately, the court failed to specify acceptable limits in concluding that, "Unless the transportation request is shown to be 'unreasonable,' the Act requires that such transportation be provided as a related service."¹⁰⁰

91. *T.G. v. Board of Educ.*, 576 F. Supp. 420, *aff'd*, 738 F.2d 420, (1983); *Papacoda v. Connecticut*, 528 F. Supp. 68 (D.C. Conn. 1981). In both cases, psychological services were deemed a necessary part of the young student's IEP's. Both students were emotionally disturbed. *T.G.*, 576 F. Supp. at 424; *Papacoda*, 528 F. Supp. at 71-72.

92. *T.G.* 576 F. Supp. at 424; *Papacoda* 528 F. Supp. at 72.

93. *T.G.* 576 F. Supp. at 424; *Papacoda* 528 F. Supp. at 72.

94. *Darlene L. V. Illinois State Bd. of Educ.*, 568 F. Supp. 1340 (N.D. Ill. 1983).

95. *Id.* at 1344.

96. *Id.* See also *McKenzie v. Jefferson*, 566 F. Supp. 412 (D.C. D.C. 1983), in which the public school was not required to finance an emotionally handicapped student's treatment in a psychiatric hospital. The treatment was deemed as medically related and went beyond evaluative and diagnostic purposes.

97. 20 U.S.C. § 1401(a)(17) (1982).

98. 790 F.2d 1153, 1161 (5th Cir. 1986). Not only was transportation required, but the court required the school district to provide a full summer program so the student would maintain his level of competence.

99. *Id.* at 1155.

100. *Id.* at 1160.

The transportation here involved a variance of only one mile from the normal bus route.¹⁰¹ The court never defined what a "reasonable distance" would be.

In *Pinkerton v. Moye*,¹⁰² which was cited in *Alamo Heights*, the court required subsidized travel over a distance of six miles from the student's home to the facility where his IEP took place.¹⁰³ No authority was cited that would act as a limit on the district court's allowing further transportation distances.

One court¹⁰⁴ refused to order reimbursement of the transportation costs to take a child to a treatment facility in an adjacent state over 400 miles away. The reimbursement was denied even though this facility was used to reach one of the goals set forth in his IEP.¹⁰⁵

The burden of federal funding seems to be the critical factor in this area. Reimbursement denials can only be justified in light of the "minimal benefit" that courts will require.¹⁰⁶

D. HOUSING ACCOMMODATIONS

Because of varied opinions, no clear trend has been established in the area of housing. The First Circuit Court of Appeals has allowed residential placement under the Act in two cases.¹⁰⁷

101. *Id.* at 1156.

102. 509 F. Supp. 107 (W.D. Va. 1981). The court noted that it was appropriate, in this situation, for the county to pay for the child's alternate transportation. *Id.* at 115. The child's regular school lacked the resources the child required, but a different school six miles away was sufficient. *Id.* at 110. Rather than pay for the child's public transportation, (which would take over 30 minutes per day) the first school district had to supply the direct transportation. *Id.* at 115.

103. *Id.* at 115.

104. *Cohen v. School Bd. of Dade County*, 450 So.2d 1238 (Fla. Dist. Ct. App. 3rd 1984).

105. *Id.* at 1239. The child's treatment facility was located in Georgia, but his family's home was in Florida.

Id. at 1239-40. One of the goals of his IEP was to develop satisfactory interpersonal relationships in the home. *Id.* However, the court refused to allow travel compensation under the Act. *Id.* Note that this case seems to directly contradict the *Tatro* standard of only allowing "access" to one's IEP. See *supra* notes 43-55 and accompanying text.

106. *Rowley*, 458 U.S. at 190. See *supra* notes 56-60 and accompanying text.

107. *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983) (residential housing was required to provide the student with the "least restrictive" learning environment); *Id.* at 227. *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982)

In *Abrahamson v. Hershman*,¹⁰⁸ residential placement was needed to provide the "least restrictive" learning environment for the child. Similarly, in *Doe v. Anrig*,¹⁰⁹ placement was provided after it was shown that the child would regress if removed from the facility. Though residential placement in a private school is among the services that states may be required to provide, if parents move the child from an acceptable public program to a private one, the state is not required to fund that placement.¹¹⁰

In a recent district court ruling,¹¹¹ the Act was held not to include the cost of placing a student in a private residence. The child suffered from dyslexia and was attending a day school.¹¹² Such placement, however convenient, was not necessary for the child to obtain an educational benefit.¹¹³ Therefore, it is crucial that the residential placement relate to an educational benefit rather than be a response to a medical or emotional problem.¹¹⁴

III. TRENDS AND ALTERNATIVES

Handicapped children face an array of social and economic obstacles to a quality education. Consequently, services such as transportation, basic health care needs, counseling and developmental programs become an integral part of an IEP. The benefits of the Act have been significant. Currently, federal grants to state educational agencies exceed one billion dollars annually.¹¹⁵ Over four million children nationwide are benefitting from the Act.¹¹⁶

Unfortunately, because of the vague wording of the related

(residential housing was required after it was shown that the child would regress if removed from the facility). *Id.* at 808.

108. 701 F.2d 223 (1st Cir. 1983).

109. 692 F.2d 800 (1st Cir. 1982).

110. *Ahern v. Keene*, 593 F. Supp. 902, 913 (D. Del. 1984).

111. *Adams v. Hansen*, 632 F. Supp. 858, 867 (N.D. Cal. 1985).

112. *Id.* at 860.

113. *Id.*

114. See *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985). See also *Christopher T. v. San Francisco Unified Sch. Dist.*, 553 F. Supp. 1107 (N.D. Cal. 1982). In both cases, the educational benefit/medical response distinction was the key issue.

115. Department of Education, *Seventh Annual Report to Congress on the Implementation of the Education of the Handicapped Act* at 2, 59 (1985).

116. *Id.* at 2.

services provision, school administrators, parents and students are unsure as to what services may be incorporated into a child's IEP. If the ambiguity is corrected, fewer conflicts in the establishment and modifications of a handicapped child's IEP would arise.

The two pronged *Tatro* test is one attempt to reduce the ambiguity.¹¹⁷ Meanwhile, the courts may use *Rowley's* minimum benefit standard if they feel a service is too costly or unnecessary.¹¹⁸

By allowing financial ramifications to impact their decisions,¹¹⁹ the United States Supreme Court seems to contradict the "findings" of Congress: that present financial resources are inadequate to meet the special educational needs of handicapped children.¹²⁰

Legislation which will enable school districts to tap alternative economic sources may help. In the meantime, state educational agencies have attempted to secure other state agencies' cooperation to expand the services available to local districts.¹²¹ Generally, the attempts have taken three forms: 1) increasing access to another service system's resources; 2) negotiating to secure third-party financing from the private sector; and 3) joint funding and cooperative programming arrangements with other human service agencies.¹²² The legislature could introduce incentives to ensure the success of these three fund raising supplements. The supplements would mitigate the financial burden placed on the public sector.

Recent legislation has been enacted that may reduce the long-term cost of educating handicapped children.¹²³ This provi-

117. See *supra* notes 43-55 and accompanying text.

118. See *supra* notes 56-60 and accompanying text.

119. See *supra* notes 58-60 and accompanying text.

120. 20 U.S.C. § 1400(b)(8) (Supp. 1986).

121. Department of Education, *Seventh Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, at 20-26 (1985).

122. *Id.* See also 20 U.S.C. § 1444 (Supp. 1986) which sets forth the following budgetary amounts that will be used for research in these and other areas: For fiscal year 1987: 18 million dollars; 1988: 19 million dollars; and 1989: 20.1 million dollars. This will not only help the related services problems, but the entire process of educating handicapped children.

123. See, 20 U.S.C. § 1471 (Supp. 1986).

sion offers financial assistance to states which develop an inter-agency program of early intervention services for handicapped infants, toddlers, and their parents.¹²⁴

Part of the policy behind this enactment was to reduce the educational costs to our society, including our nation's schools, by minimizing the need for special education and related services after handicapped infants and toddlers reach school age.¹²⁵ This law was passed at the end of 1986.¹²⁶ Therefore, its beneficial effect on the related services provision cannot be measured until today's handicapped toddlers become students.

IV. CONCLUSION

Has enough been done to guide educators, parents and students facing "related services" questions? A standard that calls for an "educational benefit" while keeping an eye on the price tag is not an adequate guideline. In addition, the legislative history of the Act does not indicate that congress intended these children to only gain minimal benefits.¹²⁷ The current system requires general services such as transportation and limited medical care. Such broad categories, as well as insufficient funding, create problems for those trying to establish an IEP that meets the unique needs of a handicapped student.

124. 20 U.S.C. § 1471(b) (Supp. 1986):

It is therefore the policy of the United States to provide financial assistance to States (1) to develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency program of early intervention services for handicapped infants and toddlers and their families, (2) to facilitate the coordination of payments for early intervention services from Federal, State, local *and private sources* (including public and private insurance coverage), and (3) to enhance its capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to handicapped infants, toddlers, and their families. [emphasis added]

125. 20 U.S.C. § 1471(a)(1) (Supp. 1986).

126. Pub. L. No. 99-457, Title I, Sec. 101(a), 1986, 100 Stat. 1145.

127. Hendrick Hudson Dist. Bd. of Educ., 458 U.S. 176, 212-16 (1982) (White, J., dissenting). The Act is "intended to eliminate the effects of the handicapped, at least to the extent that the child will be given an equal opportunity to learn." See also H.R. 332, 94th Cong., 1st Sess. 13 (1975) which provides: "Each child requires an educational plan tailored to achieve his or her maximum potential."

The significant options are as follows: 1) keep the present guidelines and decide which services should apply on an ad hoc basis; 2) request the legislature to reduce the ambiguity in the wording of the related services section of the Act; or 3) hope the Supreme Court develops a more specific test.

The ideal system, under the circumstances, seems to be one that is "service based" rather than "categorically based."¹²⁸ Under this plan, school districts receive certain funds for each special education class, development center, resource specialists, instructional hour for service specialists, as well as base funds for each handicapped student. After allocating these funds for an IEP, *any* services that can be paid for may be incorporated. Thus when determining which related services should be included in an IEP, the student's primary needs are resolved first. The "selection" of services would not be limited to a predetermined general category.

Such a program could make a *Rowley* analysis unnecessary: A sign language interpreter would be required if that was the primary need for the student. The service could not be denied on the grounds that it would be too beneficial for the student.

*Michael S. Treppa**

128. See A.B. 4040, 1974 Cal. Stat. 1532. This established the California Master Plan for Special Education. A service based system (whether mandated by Congress or the Court) would be ideal because it would make services available based on need, rather than from preexisting categories. Such a system allocates funding for an IEP initially, and then *any* services which can be paid for may be incorporated into the specific IEP. The result is that the students' primary service needs are met rather than limiting potential services to a predetermined list.

* Golden Gate University School of Law, Class of 1989.