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Administrative Law - Administrative Exhaustion Or Private Rights of Action: Priorities In Educating Students With Disabilities

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ADMINISTRATIVE LAW

ADMINISTRATIVE EXHAUSTION OR PRIVATE RIGHTS OF ACTION: PRIORITIES IN EDUCATING STUDENTS WITH DISABILITIES

I. INTRODUCTION

In *Dreher v. Amphitheater Unified School Dist.*,[1] the Ninth Circuit held that a school district need neither provide nor bear the cost of providing certain individualized educational services to students with disabilities.[2] A school district must furnish only those services outlined in an individualized education plan (hereinafter "IEP"), developed annually by the local educational agency, for each individual with a disability.[3] Required to supply a free appropriate education by federal law, a school district must offer the special education and related services necessary to meet the unique needs of the individual.[4] However, a school district has no responsibility to render or pay for any special education or related services beyond those specified in the IEP.[5]

Additionally, with regard to education for children with disabilities, the Ninth Circuit ruled that until a party exhausts available administrative remedies provided by federal law,

1. Dreher v. Amphitheater Unified Sch. Dist., 22 F.3d 228 (9th Cir. 1994) (per Leavy, J. with whom Alarcon, J. and Kleinfeld, J. joined).
2. *Id.* at 230.
3. 20 U.S.C. § 1414(a)(5-6) (1988 & Supp. V 1993).
4. *See* 20 U.S.C. § 1401(a)(18)(D) (1988).
5. *Dreher*, 22 F.3d at 233.

courts lack subject matter jurisdiction to review complaints.[6]

II. FACTS AND PROCEDURAL HISTORY

Kristy Dreher, a 7-year old student, registered in the Amphitheater Unified School District (hereinafter "Amphitheater") for the 1989-90 school year.[7] Amphitheater placed her at the Arizona School for the Deaf and Blind.[8] Dreher has been profoundly deaf since birth.[9] Her parents wanted her to learn to read lips and speak, rather than rely on sign language for communication.[10]

In 1989, Amphitheater evaluated the effects of various education methods on Dreher's ability to learn.[11] The district found that an educational program which focused exclusively on oral methods would not work well for Dreher.[12] Therefore, her individualized education program (hereinafter "IEP")[13] emphasized sign language instruction, but called for "oral methods with augmentative communication," including sign language, lip reading and oral training.[14]

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6. *Id.* at 235.

7. Dreher v. Amphitheater Unified Sch. Dist., 797 F. Supp. 753, 755 (D. Ariz. 1992).

8. *Id.* at 755.

9. *Id.*

10. Dreher v. Ampitheater Unified Sch. Dist., 22 F.3d 228, 228 (9th Cir. 1994). Since the 19th century, educators have disputed the best method of teaching deaf children to communicate. Because sign language has a different structure from that of English, advocates of the spoken word maintain that "oralism" helps deaf persons assimilate into society. Oralists believe speaking and lip reading English is essential to success in the hearing world. This approach relies on using the English language and being able to speak, understand, read, and write in English. *See* Judith Randal & William Hines, *The Deaf Speak Out; New Power for a Divided Minority*, WASHINGTON POST, March 29, 1988, Health, at 15.

11. *Dreher*, 22 F.3d at 230.

12. *Dreher*, 797 F. Supp. at 755. Amphitheater based this conclusion on extensive testing of Dreher's learning methods and her performance in a 2-year speech therapy program which used only oral/auditory methods.

13. Local school districts must develop an individualized education plan [hereinafter "IEP"] which is a personalized plan designed to meet the unique educational needs of the child. 20 U.S.C. § 1414(a)(5).

14. *See Dreher*, 797 F. Supp. at 756. "Oral training" involves teaching the communicator to speak. Many hearing impaired persons with hearing aids have achieved functional and recognizable speech. However, persons who have been profoundly deaf from birth (as is Kristy Dreher) have no concept of the sounds they create or those they wish to, and generally fail to attain the proficiency nec-

Attempting to eliminate the sign language component of Dreher's IEP, her parents appealed the district's choice of teaching methods through the administrative hearing process made available by Amphitheater.[15] Amphitheater held due process hearings in December 1989 and January 1990.[16] The hearing officer determined that Amphitheater's proposed methodology was appropriate.[17] Dreher's parents appealed this determination to the Arizona Department of Education, which subsequently upheld the hearing officer's decision.[18]

Dreher's parents, rather than allow Dreher to remain in the public school system and learn sign language during the two-month administrative appeals process, removed her from the Arizona Center for the Deaf and Blind and enrolled her in St. Joseph's Academy (hereinafter "the Academy").[19] The Academy is a private school that forbids the use of sign language and provides speech therapy specifically designed to teach lip reading and speaking.[20]

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essary to communicate orally with the hearing world. *See* Barbara Mathias, *A Way of Hearing So to Speak*, WASHINGTON POST, April 7, 1989, Style, at 5.

15. *Dreher*, 797 F. Supp. at 755. In 20 U.S.C. § 1415(b)(2) and (c) (1988), the administrative remedies an educational agency must make available to appeal an IEP are outlined.

> Whenever a complaint has been received . . . the parents . . . shall have an opportunity for an impartial due process hearing . . . conducted by the State educational agency or by the local educational agency or the intermediate educational unit, as determined by State law or by the State educational agency.
>
> [. . . .]
>
> If the hearing required in [. . .] this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review."

Dreher, 22 F.3d. at 231 n.3 (ellipses in original) (citations omitted).

16. *Dreher*, 797 F. Supp. at 755.

17. *Id.*

18. *Id.* Federal law permits an appeal to a state educational agency. *See* 20 U.S.C. § 1417 (1988).

19. *Dreher*, 22 F.3d at 230.

20. *Id.* Until the 1970's most deaf students learned to communicate orally, and were discouraged from using sign language. Today, factions of the deaf community advocate various communication methods including: American Sign Language (stan-

Dreher's parents paid private school tuition at the Academy from January 1990 to September 1990.[21] They requested reimbursement from Amphitheater for the cost of Dreher's speech therapy provided at the Academy and payment for the costs of any oral method speech therapy necessary to Dreher's education in the future.[22] Amphitheater contended that it had no obligation to pay for the special services, since speech therapy in lieu of other methods conflicted with Dreher's IEP.[23] Amphitheater claimed it offered Dreher the educational services specified in her IEP at public expense, had the family chosen to avail themselves of those services.[24] The district further argued that it provided all of the services required by law by making the program specified in Dreher's IEP available at no cost to the family.[25]

The administrative appeal, conducted by the Arizona Department of Education, resulted in two determinations.[26] First, the hearing officer found that the IEP met the school's responsibility to provide Dreher with a "free and appropriate public education."[27] Dreher's IEP would therefore not be changed to eliminate instruction using sign language.[28] Second, the hearing officer ruled that the school district need not grant Dreher a due process hearing to determine financial responsibility for the cost of the oral methods training at the Academy.[29]

Following the final determination by the Arizona Department of Education in June 1991, Dreher appealed to the United States District Court for the District of Arizona, Tucson

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dardized hand movements with a grammatical base unrelated to English), Signed English (a precise translation of English using signs and fingerspelling), Oralism (*see supra* note 10 for definition), or Total Communication (a combination of oral methods, lipreading, signing and fingerspelling). *See* Randal & Hines, *supra* note 10.

21. *Dreher*, 797 F. Supp. at 755.
22. *Dreher*, 22 F.3d at 233.
23. *Id.*
24. *See id.*
25. *Id.*
26. *Dreher*, 797 F. Supp. at 761.
27. *Id.*
28. *Id.*
29. *Id.* at 762.

Division.[30] The District Court held that the school district was not required to pay for the special services provided by the Academy, and that Dreher acted properly by exhausting the administrative remedies prior to bringing a civil action.[31] The District Court entered summary judgment in favor of Amphitheater.[32] Dreher then appealed the District Court's ruling to the United States Court of Appeals, Ninth Circuit.[33]

III. BACKGROUND

A. THE CONTROVERSY OVER DEAF EDUCATION

Deafness isolates individuals in a way unlike that faced by any other disabled population.[34] Language and communication are basic parts of education, and, as a result, deaf children historically were considered uneducable.[35] Students who enter school without a competent language base find themselves in a restricted environment that fails them linguistically, culturally and educationally.[36] Proponents of educating deaf and hearing children separately have argued that isolation from one's own linguistic and intellectual potential is much more serious than physical isolation from able-bodied peers.[37]

To minimize the potential isolation from peers and family members, deaf children must develop language.[38] "Educators of deaf and hearing-impaired children want the same thing: 'to

30. *See generally Dreher*, 797 F. Supp. 753. The Individuals with Disabilities in Education Act provides that "[a]ny party aggrieved by the findings and decision" of the state administrative hearings may bring a "civil action [in] any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." 20 U.S.C. § 1415(e)(2) (1988).

31. *Dreher*, 797 F. Supp. at 762.

32. *Id.*

33. *Dreher*, 22 F.3d at 230.

34. Suzanne J. Shaw, *What's "Appropriate?": Finding a Voice for Deaf Children and Their Parents in the Education for All Handicapped Children Act*, 14 U. PUGET SOUND L. REV. 351 (1991).

35. *Id. See* Oliver Sacks, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF 9 (1989).

36. *See* Shaw *supra* note 34 at 369.

37. *Id.* at 370.

38. Elizabeth New Weld, *Teaching the Deaf: 2 Schools of Thought Methods Differ on How to Give 'Priceless Diamond of Language'*, BOSTON GLOBE, November 11, 1990, North Weekly, at 1.

give deaf children the priceless diamond of language at the earliest possible moment'. . . . But they differ on how to do that."[39] Language is often considered a conduit of culture, and parents of deaf children must decide which language and which culture to embrace at first.[40] Two opposite approaches dominate the controversy: oralism and sign language.[41]

Sign language includes two basic components: American Sign Language (hereinafter "ASL") and Signed English.[42] American Sign Language, a manual language with its own grammar and syntax, has been declared an official foreign language to fulfill college requirements in some states.[43] Signed English, in which the manual ASL signs follow an English-based word order, is not viewed as a true language by ASL proponents.[44] Rather, it combines ASL and English to assist deaf students to become more proficient in English.[45]

At the other end of the spectrum is the oral philosophy, which descended from Alexander Graham Bell.[46] Bell, who could sign well,[47] argued against teaching children to join a deaf culture that isolates them from the hearing world.[48] Advocates of the oral method argue that students who are taught to read lips and talk are better equipped to study in the mainstream of regular classrooms with hearing children.[49] They contend that it is easier to learn sign language later in life than to learn English.[50]

The controversy between oralists and sign language proponents continues today.[51] Parents and educators are at odds

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39. *Id.*
40. *Id.*
41. *Id.*
42. *See* Weld, *supra* note 38.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Sound & Fury*, LOS ANGELES TIMES, November 21, 1993, Magazine, at 44.
47. *Id.* Bell used sign language to communicate with his wife and mother, both of whom were deaf. *Id.*
48. *Id.*
49. Daniel Ling, Ph.D., *Modes of Communication in Educational Settings*, RIGHTS OF THE HEARING IMPAIRED 48 (1990). *See* Weld, *supra* note 38.
50. *Id.*
51. *Id.*

over which method is best for educating deaf children.[52] The issue becomes whether a government entity or an individual's parents should have the authority to decide what language will be used in educating a child.[53]

B. INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT

Congress enacted the Individuals with Disabilities in Education Act[54] (hereinafter "IDEA") in 1975 as the Education for All Handicapped Children Act (hereinafter "EAHCA").[55] EAHCA originated as an amendment to the Education for the Handicapped Act of 1970.[56] Following a semantic trend, Congress changed the name of EAHCA to IDEA in 1990.[57] However, the original 1975 EAHCA language outlined many of the provisions present in the current IDEA.[58]

In the IDEA, Congress explained the need for the legislation.[59] The IDEA states that education is to be: (1) provided to all age eligible children with disabilities;(2) offered in the least restrictive placement appropriate; (3) provided at no cost; and (4) individualized for each student.[60] To receive federal funds under IDEA, a state must develop and implement a policy of providing free appropriate public education to all children with

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52. *See, e.g.,* Dreher v. Amphitheater Unified Sch. Dist., 22 F.3d 228 (9th Cir. 1994).

53. *Id.*

54. Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended in scattered sections of 20, 25, and 42 U.S.C.).

55. 20 U.S.C. §§ 1400-61 (1988 & Supp. V 1993); *see* Pub. L. No. 94-142, Sec. 1 (1975).

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

57. Education of the Handicapped Act Amendments of 1990 § 901(a)(3), Pub. L. No. 101-476 (1990). In the 1980's, the words "handicapped" and "disabled" as descriptive language began to be replaced by "people with disabilities" as more politically correct terminology. This semantic trend paralleled a growing civil rights movement which brought heightened social consciousness and acceptance of people with disabilities as a class in need of protection from discrimination under the law. *See generally* JOSEPH P. SHAPIRO, NO PITY (1993) (providing a detailed history of the disability rights movement). *See also* Jonathan C. Drimmer, Comment, *Cripples, Overcomers and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 U.C.L.A. L. REV. 1341 (1993).

58. *See* Pub. L. No. 91-230, 84 Stat. 121 (1970).

59. 20 U.S.C. § 1400(b) (Supp. V 1993).

60. LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW (1992).

disabilities within that state.[61]

1. *An Appropriate Public Education*

The IDEA defines "free appropriate public education" as: "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 . . . education in the State involved, and (D) are provided in conformity with the individual education program . . . ."[62]

The IDEA mandates that each local educational agency is responsible for establishing, reviewing, revising, implementing and keeping IEP records for every student with a disability.[63] The IEP is to be developed at a meeting of the interested parties, including "a representative of the local educational agency . . . who shall be qualified to provide, or supervise the provision of, specially designed instruction . . . , the teacher, the parents or guardian . . . and, whenever appropriate, [the] child . . . ."[64]

One objective of the IDEA is to provide an appropriate education tailored to the individual needs of each child.[65] The Supreme Court recognized that "[t]he educational opportunities provided by our public school systems undoubtedly differ from student to student, depending on a myriad of factors that might affect a particular student's ability to assimilate information presented in a classroom."[66] One plan for all students with disabilities or a generalized plan for each disability would be inappropriate, since each individual has different needs.[67]

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61. 20 U.S.C. § 1412(1) (Supp. V 1993); 34 C.F.R. § 300.110 (1994).

62. 20 U.S.C. § 1401(18) (1988); 34 C.F.R. § 300.401 (1994).

63. 20 U.S.C. § 1412(4),(6) (Supp. V 1993).

64. *Id. See* ROTHSTEIN, *supra* note 60, at 106 n. 175. *See* Johnson v. Lancaster-Lebanon Intermediate Unit, 757 F. Supp. 606, 620 (E.D. Pa. 1991) (curriculum created for hearing impaired student must be tailored to meet individual needs).

65. *Johnson*, 757 F. Supp. at 617.

66. Board of Education v. Rowley, 458 U.S. 176, 198 (1982).

67. *See* ROTHSTEIN, *supra* note 60, at 107.

Beyond the requirement that educational programming be individualized, details regarding content limits and related services within the definition of "appropriate" remain undetermined in the statute.[68] The Supreme Court has held that the primary responsibility for choosing the educational method most suitable to a child's needs is left to state and local educational agencies in cooperation with the child's parent or guardian.[69] However, clarification of ambiguity in individual cases is left to the courts.[70]

To evaluate whether an IEP is adequate and appropriate, courts must determine the answer to a central question, namely whether the IEP "addresses the child's education needs so as to assure [some educational benefit to the child] in the least restrictive environment consistent with that goal."[71] The IEP need not reflect the only appropriate choice nor the parents'choice nor the best choice, but only that which meets the minimum federal standards.[72]

In developing an IEP, schools must find a compromise between the minimum federal standards and the best means available to educate the individual.[73] Parent participation in the development of an IEP can help elucidate the best means of educating a particular child.[74] Based on experience and familiarity, a parent often knows the type of stimulus or reinforcement to which the child will respond and can learn.[75] Because of the value of this information in the IEP process, IDEA regulations provide detailed assurances for maximizing parental involvement.[76]

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68. *See* 20 U.S.C. § 1401(18).

69. *Rowley*, 458 U.S. at 207.

70. *See* ROTHSTEIN, *supra* note 60, at 108-14.

71. Roland M. v. Concord Sch. Comm'n, 910 F.2d 983 (1st Cir. 1990). *See also Rowley*, 458 U.S. at 198.

72. G.D. v. Westmoreland Sch. Dist., 930 F.2d 942 (1st Cir. 1991) (minimum standards require providing services which guarantee a reasonable probability of educational benefit).

73. *See id.* at 948-49.

74. *Id.* at 948.

75. *See* ROTHSTEIN, *supra* note 60, at 107.

76. *Id.* These requirements include providing sufficient notice to parents and scheduling meetings at a mutually agreeable time and place. 34 C.F.R. § 300.345(d).

2. *A Free Public Education*

The term "free" in "free appropriate public education" means that the educational program must be provided at public expense.[77] If a school district is unable to provide appropriate education services to fulfill an IEP utilizing its existing staff, outside resources are often used.[78] Where a child is referred to a private agency by a school system, it is the state educational agency's responsibility to ensure that the program is provided at no cost to the parents.[79] When a school system offers to provide an appropriate education, as defined in the student's IEP, at the expense of the public, then it has furnished a free appropriate public education.[80] However, parents who choose to place their child in a private school generally are not entitled to receive reimbursement or payment for that private education from the public education system.[81]

3. *Exhaustion of Administrative Remedies*

The IDEA requires exhaustion of administrative remedies before a private right of action accrues.[82] Exhaustion generally is required to prevent premature judicial interference with agency processes, so that, among other reasons, the agency may function efficiently and have an opportunity to correct its own mistakes.[83] Administrative exhaustion is based on the

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300.345(d).

77. 20 U.S.C. § 1401(18); 34 C.F.R. § 300.401. *See* Parks v. Pavkovic, 557 F. Supp. 1280, 1287 (N.D. Ill. 1983) (collecting a portion of special education costs from parents violates federal law).

78. *See* ROTHSTEIN, *supra* note 60 at 115.

79. 20 U.S.C. § 1413(a)(4)(B); 34 C.F.R. § 300.401. *See Johnson*, 757 F. Supp. at 621 (district must reimburse parents for past speech therapy determined to be educationally necessary).

80. 20 U.S.C. § 1401(a)(18)(D).

81. 34 C.F.R. § 300.403. Courts have identified a limited exception when families, exercising a first amendment right to freedom of religion, place a child with a disability in a parochial school. In such cases, the public education system must provide the child with services necessary to fulfill the IEP in a parochial school setting. *See* Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190, 1194 (9th Cir. 1992).

82. *See* 20 U.S.C. § 1415 (1988 & Supp. V 1993) (detailing the administrative procedure and safeguards in the IDEA).

83. Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

idea that "agencies, not the courts, ought to have primary responsibility for the programs that Congress directed them to administer."[84] Because administrative procedures were designed to simplify and make more uniform grievance procedures, they are presumed to be an appropriate vehicle to challenge government agency action.[85] Exhaustion of the administrative process allows agencies to exercise their discretion and expertise, furthers the development of a complete factual record and promotes judicial efficiency by giving agencies an opportunity to correct errors prior to judicial involvement.[86]

IV. THE COURT'S ANALYSIS

In *Dreher v. Amphitheater Unified Sch. Dist.*,[87] the Ninth Circuit noted that Amphitheater had developed an IEP specifically designed to meet Dreher's needs, as required by federal law.[88] Amphitheater offered Dreher a free appropriate public education had the parents chosen to accept the IEP.[89] The court found the special education services provided to Dreher at the Academy inconsistent with the IEP, because they did not meet her educational needs as determined by Amphitheater.[90]

According to the IDEA, should parents wish to modify an IEP, they must bring an appeal through a specific hearing process, and exhaust all administrative remedies prior to judicial review.[91] Although Dreher's parents exhausted an administrative review of the 1989-90 IEP, they did not pursue the two subsequent IEPs, against which they offered identical com-

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84. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1302 (9th Cir. 1992) (quoting McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992)).

85. *Id.* at 1302-04.

86. *Id.* at 1302. *See generally* McKart v. United States, 395 U.S. 185, 193-95 (1969) (discussing policies regarding exhaustion of administrative remedies).

87. 22 F.3d at 228 (9th Cir. 1994).

88. *Id.* at 230. *See* 20 U.S.C. §§ 1400-61 (1988 & Supp. V 1993).

89. *Dreher,* 22 F.3d at 231.

90. *Id.*

91. 20 U.S.C. § 1415 states, in relevant part: "Whenever a complaint has been received . . . the parents . . . shall have an opportunity for an impartial due process hearing which shall be conducted by the state educational agency or by the local educational agency or the intermediate educational unit, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(b)(2).

plaints, through the process outlined in the federal law.[92] The Ninth Circuit found that it lacked subject matter jurisdiction to review issues arising from the subsequent IEPs.[93]

The court reviewed the original complaint and held that the school district need not pay for services related to the education of a student with a disability when those services do not conform to the student's IEP.[94] Since educational services provided to Dreher at the Academy conflict with those outlined in her IEP,[95] the court denied Dreher's claim for reimbursement of her speech therapy fees at the Academy, and found in favor of Amphitheater.[96]

The court refused to consider the merits of the issue, raised for the first time on appeal, that Amphitheater violated the IDEA by failing to call a meeting between the parents, the private school and the district to formulate her IEP.[97] The federal regulations require Amphitheater to initiate a meeting with the parents and a representative of the private educational institution which the child attends.[98]

Although the Ninth Circuit recognized that no such meeting took place, the court held that administrative remedies had not been exhausted regarding this issue since Dreher failed to appeal the IEPs for the 1990-91 and 1991-92 school years.[99] Because Dreher appealed the IEP for 1989-90, the court noted that the family was aware of the availability of such review, and failed to pursue it.[100] Reversing the lower court's determination, the Ninth Circuit ruled that the Drehers were bound to exhaust this issue through the administrative appeals process prior to filing a private judicial action.[101] The Ninth Circuit ruled that, due to Dreher's failure to exhaust available

92. *Dreher*, 22 F.3d at 235.
93. *Id.*
94. *Id.* at 231.
95. *Id.* at 234.
96. *Id.*
97. *Dreher*, 22 F.3d at 234-35.
98. *Id.* at 234-35. (referring to 34 C.F.R. § 300.349).
99. *Id.*
100. *Id.* at 230.
101. *Id.*

administrative remedies, the court lacked jurisdiction, and declined to reach the merits of the claim.[102]

V. CRITIQUE

The Ninth Circuit held that since Dreher failed to appeal the 1990-91 and 1991-92 IEPs, the administrative remedies had not been exhausted.[103] Therefore, the court found that it lacked jurisdiction to reach the merits of Dreher's new claims.[104]

Dreher challenged only the 1989-90 IEP through the administrative process and appealed that determination through the federal courts.[105] The 1989-90 IEP called for sign language instruction, the educational program component with which the Drehers disagreed.[106] The two subsequent IEPs also specified sign language instruction.[107] Rather than reiterate identical complaints by appealing the later IEPs, the Drehers focused their appeal on the original IEP.

By noting Dreher's omission, the Ninth Circuit indicated that a complainant is required to challenge every IEP developed by a school district and exhaust administrative remedies for each one before a right to a judicial remedy accrues.[108] Under this logic, a complainant might not gain timely access to the courts, as a new IEP must be developed for each student every school year.[109]

However, when Dreher's original complaint reached the federal courts, a new issue was raised on appeal.[110] Dreher contended that Amphitheater violated the IDEA by failing to invite either the parents or a representative of the Academy to

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102. *Dreher*, 22 F.3d at 230.
103. *See Dreher*, 22 F.3d at 235.
104. *Id.*
105. *Id.* at 230.
106. *Id.*
107. *Dreher*, 22 F.3d at 230.
108. *See id.* at 235.
109. 20 U.S.C. § 1414(a)(5) (Supp. V 1993).
110. *Dreher*, 22 F.3d at 234-35.

participate in developing the 1990-91 or 1991-92 IEP.[111] The Ninth Circuit found that Dreher failed to meet the exhaustion requirement regarding the parental involvement issue, since she appealed only the 1989-90 IEP regarding sign language instruction.[112]

This seems a correct application of the exhaustion requirement, since Amphitheater had not been afforded an opportunity to correct its own mistake in an administrative hearing.[113] Had the Ninth Circuit applied the exhaustion requirement to find that Dreher had no right to challenge the sign language component of the IEPs, it would have contradicted the U.S. Supreme Court holding in *Board of Education v. Rowley*.[114] The court stated in *Rowley* that "[t]he District Court retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition. . . ."[115] If the educational program component being challenged is repeated from year to year, requiring exhaustion of each IEP seems fruitless.[116] Sign language had been repeated as the appropriate education method for Dreher in all three of the IEPs.[117] Therefore, the exhaustion requirement regarding the sign language issue had been met.[118]

The Supreme Court also held in *Rowley* that courts may review an IEP after a school year has ended, and, presumably after a new IEP has been developed.[119] An IEP does not become automatically moot when a new IEP is developed.[120] "Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preced-

111. *Id.* at 235.
112. *Id.*
113. *See* Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1302 (1992). *See supra* notes 85-87 and accompanying text for discussion of the exhaustion requirement.
114. Board of Education v. Rowley, 458 U.S. 176, 186 (1982). Had the court held that an IEP becomes moot once a new IEP is developed, regardless of the program component being challenged, the procedural safeguards built into the IDEA would be compromised.
115. *Id.*
116. *Id.*
117. *Dreher*, 22 F.3d at 230.
118. *Id.* at 231.
119. *Rowley*, 458 U.S. at 186.
120. *Id.*

ing state administrative hearings. In *Honig v. Doe*,[121] the Supreme Court acknowledged plaintiff's contention that a party seeking review under section 1415(e)(2) of the IDEA must exhaust "time-consuming administrative remedies."[122]

However, the Court provided a method by which complainants may bypass the administrative process in certain instances.[123] The Court found situations in which it is inappropriate to require the use of the procedural safeguards set out in the IDEA before filing a lawsuit, including complaints that: "(1) it would be futile to use the due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies."[124]

Applying the futility approach, the District Court did not require Dreher to exhaust the administrative remedies by appealing the 1990-91 and 1991-92 IEPs regarding sign language instruction.[125] Subsequent challenges to the sign language component would have been futile since Amphitheater had already determined that the oral method of speech therapy provided at the Academy was inconsistent with Dreher's IEP.[126]

VI. CONCLUSION

In *Dreher v. Amphitheater Unified Sch. Dist.*,[127] the Ninth Circuit held that until a party exhausts available administrative remedies regarding the education of children with disabilities, courts lack jurisdiction to review complaints.[128] School districts must provide a free appropriate public education, individualized for each student with a disability.[129] The

121. Honig v. Doe, 484 U.S. 305 (1988).
122. *Id.* at 186-87 n.9 (citing *Honig*, 484 U.S. at 327).
123. *Id.*
124. *Dreher*, 797 F. Supp. at 762. *See Honig*, at 326-27.
125. *Id.*
126. *Dreher*, 797 F. Supp. at 761-62.
127. 22 F.3d 228 (9th Cir. 1994).
128. *Id.* at 231.
129. 20 U.S.C. § 1401 (a)(18)(D) (1988).

development of an appropriate individualized education program for a student must include participation of the parents and a representative of any private educational institution from which the student receives services.[130] However, the final decision about the education methodology to be offered by a public school system lies with the school district.[131]

Parents may challenge a school district's IEP through an administrative hearing process containing certain procedural safeguards required by federal law.[132] Once the administrative process has been exhausted, appeals may be brought in the federal courts.[133]

In *Dreher*, the Ninth Circuit identified two distinct applications of the exhaustion requirement.[134] With regard to an issue raised for the first time on appeal, the court declined to reach the merits of the claim due to the complainant's failure to exhaust the administrative remedies regarding that issue.[135] However, the Ninth Circuit held that appropriate exhaustion of the remainder of the claims had been attained, and reached a final determination regarding those issues.[136]

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130. 34 C.F.R. § 300.343, 300.349.
131. *Rowley*, 458 U.S. at 207.
132. 20 U.S.C. § 1415 (a)-(d) (1988 & Supp. V 1993).
133. *Id.*
134. *Dreher*, 22 F.3d at 231.
135. *Id.* at 235.
136. *Id.* at 234.

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