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Congress' New IDEA In Special Education: Permitting A Private Right of Action Against State Agencies

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Congress' New IDEA In Special Education: Permitting A Private Right of Action Against State Agencies

*In sum, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.*¹

I. INTRODUCTION

In 1981 the Supreme Court reaffirmed its position that public education is not a fundamental "right" granted to individuals by the Constitution despite the fact that denial of education to some extraordinary group of children may "pose an affront to one of the goals of the Equal Protection Clause."² Forty years earlier, the Court held that segregation of the races in public schools violated equal protection. When a state undertakes the task of educating its children, a right to education is created in those children which must be made available to all children on equal terms.³ The long and arduous path of the 1960s civil rights movement sought for the distant dream of equality and fairness. In fruition of the movement's quest, federal laws were passed against intentional discrimination in work,

1. *Plyler v. Doe*, 457 U.S. 202, 221 (1981) (Brennan, J.); *See also* *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (Warren, C.J.) ("Today, education is perhaps the most important function of state and local governments [T]he great expenditures for education . . . demonstrate our recognition of the importance of education to our democratic society.").

2. *Plyler*, 457 U.S. at 221-22.

3. Furthermore, the Court in *Brown* stated:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on *equal* terms.

347 U.S. at 493 (emphasis added).

school, employment and other areas based on race or gender, thus vindicating "equal treatment" in America.⁴

Federal legislation in the 1990s continues the equal rights movement in an effort to liberate public education, but directs exceptional attention to a single class of children at the expense of the majority. Congress requests "special treatment" for children historically denied fair and equal access to education because of their inequalities.⁵ Thus, even though "[p]ublic education is not a 'right' granted to individuals by the Constitution,"⁶ federal lawmakers have clothed it as a governmental "benefit" which cannot be denied to disabled children. The most recent federal legislation concerning special education, the Individuals with Disabilities Education Act (IDEA),⁷ arms the parents of disabled children with power to enforce special education through lawsuits against schools, school districts and states. IDEA also allows substantial remedies such as injunctive relief, damages, attorneys' fees and costs. Moreover, it takes the concept even further by heightening the responsibility of teachers and administrators in states where special

4. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 42 U.S.C. (1983 & Supp. 1990)) (prohibiting discrimination based on race); Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified at 20 U.S.C. §§ 1681-1688 (1990 & Supp. 1991)) (prohibiting discrimination based on sex or blindness).

5. The most recent findings of inequality are articulated thus:

The Congress finds that . . . (3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity; (4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers; (5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected

20 U.S.C. § 1400(b) (1990 & Supp. 1991) (listing Congressional findings and declarations concerning the status of handicapped children in the United States).

6. *Plyler*, 457 U.S. at 221 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

7. Pub. L. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400-1485 (1991)). Originally called the Education of the Handicapped Act Amendments of 1990, § 901 of the official session laws technically renamed the short title of the 1990 Act the "Individuals with Disabilities Education Act." *Id.* § 901(a), 104 Stat. at 1142 (1990) (codified as amended at 20 U.S.C. § 1400(a) (1990)) ("Any other Act and any regulation which refers to the Education of the Handicapped Act shall be considered to refer to the Individuals with Disabilities Education Act.").

educational programs to diagnose student's disabilities at an earlier age are underway.⁸

Part I of this article will examine Congress' latest enactment of law on the subject and suggest its local impact. Part II discusses broadly the structure and interrelationship of federal, state, and local financing which make up the fiscal pie of public education. Part III discusses how federal law requires teachers and administrators to diagnose and educate disabled children. This part also explains how the newly added requirements expose administrators, and the administrative bodies which review their actions, to legal action. Part IV discusses the disabled child's right to sue for denial of an appropriate special education and the kinds of relief available. Finally, part V explains how new amendments to special education law hurt poorer school by making state agencies, once immune from suit, liable for money awards in lawsuits.

II. FISCAL RESPONSIBILITY FOR PUBLIC EDUCATION AT THE FEDERAL, STATE AND LOCAL LEVELS

A. *Administrative Bodies*

Public education is largely administered through state and federal administrative bodies varying in size, degree, and function. Federal agencies generally determine the national educational agenda in their administrative capacities. The U.S. Department of Education oversees and administers distribution of grant monies to state educational agencies. In addition, federal agencies require state and local school systems to comply with laws governing federal education assistance programs in order to continue receiving such monies.⁹

States have regulatory agencies to oversee disbursement

8. 20 U.S.C. § 1412(2)(B) (1991) ("a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the state . . .").

9. See, e.g., *id.* § 2791 (1990) (providing financial assistance to state and local educational agencies to meet the special needs of such educationally deprived children at the preschool, elementary, and secondary levels under the Elementary and Secondary Education Act of 1965); *Id.* § 1203 (1990) (authorizing the Secretary of Education to make grants to states to assist them in funding adult education programs, services and activities under the Adult Education Act of 1966).

of grant monies and monitor compliance with federal requirements.¹⁰ Often, the states promulgate rules of their own, independent of the federal agencies. Each state has its own particular administrative hierarchy. Typically, a state creates three entities or bodies—a state chief officer of education, a state board of education, and a state department of education.¹¹ Each has its own function and area of decision-making power. State boards generally debate policy, in contrast to state departments, which implement policy decisions and deal with day-to-day ministerial tasks.¹² The state chief officer, often referred to as the Commissioner or Superintendent acts as the public figurehead, or “liaison officer” between the two.¹³

These state agencies control the policies and rules governing administration of special education funds. They exercise broad control ranging from advisory and planning services, to regulatory and supervisory control over policy-making and dispute resolution at lower levels.¹⁴ Additionally, state agencies generally see that policies contained in federal legislation are implemented by helping in research, record-keeping and managerial assistance to regional and local education agencies.¹⁵

Local school districts are governmental entities created by the states to establish and manage public schools within their jurisdictions.¹⁶ Local school districts implement the policies, rules, and regulations set forth by the state agencies. They perform quasi-legislative and quasi-judicial tasks.¹⁷

B. Making the Pie at Three Levels

The pocketbook of public education is not located in any

10. *Id.* §§ 1413-1414 (1990 & Supp. 1991).

11. 1 WILLIAM D. VALENTE, *EDUCATION LAW, PUBLIC AND PRIVATE*, § 3.2, at 35 (1985 & Supp. 1989).

12. *Id.* at 36.

13. *Id.* § 3.4, at 37 (The Commissioner “acts as the executive officer of the State Board of Education, and/or chief administrative officer of the State Board of Education [He] exercise[s] quasi-legislative powers; and personally conduct[s] quasi-judicial review of school board decisions”).

14. *Id.* § 3.3, at 36.

15. *Id.* § 3.4, at 37.

16. *Id.* § 3.7, at 39.

17. *Id.* § 3.13, at 51.

Distribution of these funds to is limited by law to those local school districts which conscientiously ensure appropriate public instruction. Hence, state and local governments must construct an administrative system wherein students can be heard in order to protect their entitlements as beneficiaries of federal monies.²³ A state agency that fails to regulate public education risks being denied federal funding. Yet, rarely has any state been refused federal special education funding for lack of agency supervision or failure to create procedural safeguards. Thus, the risk of losing federal funding is relatively low compared to the risk of losing funding from state appropriations or local revenues which may fluctuate.

While states will argue these grants are not enough, the magnitude of these funds can be significant where public education is under-funded. When the amount of monies sent to each state is based on the national average expenditure per pupil, states which spend less than that average will reap a greater benefit than states which spend more than the average.²⁴ Even though the dollar-per-pupil sent to each state may be equal for every state, in the under-funded states it will represent a larger portion of the funds available to pay for public education. In this respect, federal appropriations may loom large in the overall picture of financing public education.

2. State appropriations

The second source, state funds, is equally important in the scheme of public education finance. States are autonomous in how much or how little they choose to spend on

23. 20 U.S.C. § 1412 (1990 & Supp. 1991).

24. See generally *id.* § 1411 (1990)(a) (stating the formula for determining maximum state entitlement). Concerning the amount of federal funds, it has been said:

[The Education for All Handicapped Children Act of 1975] established a payment formula based upon a gradually escalating percentage of the national average expenditure per public school child times the number of handicapped pupils receiving publicly financed special education and related services in each state. That percentage was scheduled to escalate on a yearly basis until 1982, when it was to become a permanent 40 percent for that year and all subsequent years. Yet, regardless of the dollars generated under this formula, they are potential dollars only. The entitlements become reality only if Congress actually appropriates the money.

JAMES A. SHRYBMAN, DUE PROCESS IN SPECIAL EDUCATION 24 (1982).

public education. These spending decisions are controlled by state legislatures which act under the specific mandates or prohibitions contained in states constitutions.²⁵

As in the federal model, state budgets designate funds for education. This means that state revenues from income and sales taxes are the major sources. Pursuant to fiscal planning and estimates of operational expenses, local public schools are given a slice of the fiscal pie which funds all state operations.²⁶ When the governor presents his budget to the general assembly for approval, it includes a figure to be spent statewide to support and maintain construction projects, special programs, operational expenses, teachers salaries and the like. This represents the state's contribution to education to be distributed to local districts.²⁷ Budget funds offset cost increases due to growth, inflation, technological change, and other expenses local districts cannot raise from taxes nor afford on existing funds. In summary, state appropriations are subject to political controversy and, economic fluctuations.

3. *Local appropriations*

The third source, local funds, make up the greatest portion of funds to reach the public schools. it also represent the greatest tax burden on citizens. Local governments

25. Most state constitutions mandate the legislature to establish, provide, and maintain a uniform system of free public schools. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. IX, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KAN. CONST. art. VI, § 1; KY. CONST. art. XII, § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MINN. CONST. art. VIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.J. CONST. art. IV, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. One state calls education a "primary obligation" of the state. GA. CONST. art. VIII, § 1, ¶ 1. Some states do not mandate but "encourage" education to be "cherished." IOWA CONST. art. IX, 2d., § 3; MASS. CONST. ch. V, § 2; N.H. CONST. pt. 2, art. 83; VT. CONST. ch. II, § 68.

26. 2 VALENTE, *supra* note 11, § 20.11, at 281.

27. *Id.* §§ 20.21-22, at 282-89.

are responsible for establishing and maintaining local schools by virtue of the obligation delegated by the state. The power to raise revenues necessarily follows this obligation. Cities, municipalities and towns raise the bulk of their revenues from real and personal property taxes, excise taxes, value-added taxes, bonds, fees, and special charges.²⁸ Typically, a state statute mandates that local school districts raise most of their operational funds through county property taxes.²⁹ In some states, the constitution permits school districts to supplement these revenues by directly charging student fees.³⁰

Notwithstanding these authorizations, the power to tax is limited. For example, a state constitution might declare that the power of a county to levy a tax on property may not exceed one-tenth of one-thousandth on the assessed valuation of the property in question unless voted on by the citizens.³¹ Furthermore, a city or county may not tax state or federal property.³² At the far extreme, a state may invalidate a property tax on the grounds that it taxes contrary to the limits of the state constitution.³³

28. *Id.* §§ 20.23-.30, at 289-304.

29. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1647 n.33 (1989) ("The exception is Hawaii where the state takes all state and local revenues and then distributes it to the local schools.")

30. *E.g.*, KAN. CONST. art. VI, § 6(b) ("The legislature shall make suitable provision for finance of the educational interests of the state. No tuition shall be charged for attendance at any public school to pupils required by law to attend such school, *except such fees or supplemental charges as may be authorized by law . . .*") (emphasis added); UTAH CONST. art. X, § 2 ("Public elementary and secondary schools shall be free, *except the Legislature may authorize the imposition of fees in the secondary schools.*") (emphasis added); 1 VALENTE, *supra* note 11, § 2.2, at 14.

31. *See, e.g.*, DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 19 (3d ed. 1983) (discussing Article 8, Section 10 of the Michigan Constitution as cited in *Oakland County Taxpayers' League v. Board of Supervisors*, 94 N.W.2d 875 (Mich. 1959)).

32. 2 VALENTE, *supra* note 11, § 20.23, at 291 n.46.

33. Robert F. Williams, *Equality and State Constitutional Law*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 71, 72-73 (Bradley D. McGraw ed., 1985) (discussing *Robinson v. Cahill* (Robinson I), 303 A.2d 273 (N.J.), *cert. denied*, *Dickey v. Robinson* (Robinson II), 414 U.S. 976 (1973)); Thro, *supra* note 29, at 1653-56 (discussing *Robinson*, where the New Jersey Supreme Court found state system with two-thirds of school expenditures financed from local taxation contrary to the New Jersey Constitution). *See also* *Levine v. Institution and Agencies Dept.*, 418 A.2d 229 (N.J. 1980).

III. FEDERAL LEGISLATION GIVING SPECIAL TREATMENT TO DISABLED CHILDREN

A. Mandating Compliance With Administrative Guidelines

In the late 1960s and early 1970s, the nation became aware that millions of school age children with physical, mental, and emotional handicaps were routinely being excluded from public schools. Congress responded by enacting federal laws granting federal assistance to the states in an effort to promote better educational treatment of the handicapped and non-English speaking.³⁴ The original Education of All Handicapped Children Act (EHA)³⁵ did more than just encourage special education, it created a comprehensive statutory law ensuring that states receiving federal monies provide an education to all qualified handicapped children at no cost. Unlike prior legislation which only mandated that states receiving federal funds maintain a policy of educating handicapped children, the EHA requires that states seeking federal funds for special education have an approved plan meeting specified guidelines. As a result, states have enacted statutes to assure compliance with the guidelines of the Act.³⁶

34. Some of the earliest federal grant programs merely encouraged special education such as Title VI of the Elementary and Secondary Education Act, Pub. L. 98-750, 80 Stat. 1191 (1966). Then such laws were amended by the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484 (1974) requiring special education. See generally LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 1-12 (1990).

35. Pub. L. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1401-1461 (1990 & 1991)).

36. Thirty-nine states have passed legislation on special education. ALA. CODE §§ 16-39-1 to -12, 39A-1 to -3 (1975 & Supp. 1991); ALASKA STAT. §§ 14.30.180-.350 (1962 & Supp. 1991); ARIZ. REV. STAT. ANN. §§ 15-761 to -766 (1991); ARK. CODE §§ 6-41-101 to -302 (Michie 1987 & Supp. 1991); CAL. EDUC. CODE §§ 56000-56875 (West 1989 & Supp. 1991); COLO. REV. STAT. §§ 22-20-101 to -115 (West 1988 & Supp. 1990); FLA. STAT. ANN. §§ 228.041-.051, .093 (West 1989 & Supp. 1990); GA. CODE ANN. §§ 20-2-152, -1160 (Michie 1987 & Supp. 1991); HAW. REV. STAT. §§ 301-21 to -28 (1985 & Supp. 1989); IDAHO CODE §§ 33-2001 to -2009 (1981 & Supp. 1991); ILL. REV. STAT. ch. 122, para. 14-1.01 to -15.01 (Smith-Hurd 1989 & Supp. 1991); IND. CODE ANN. §§ 20-1-6-1 to -22 (Burns 1985 & Supp. 1991); IOWA CODE ANN. §§ 281.1-.15 (West 1988 & Supp. 1991); KY. REV. STAT. ANN. §§ 157.200-.290 (Michie/Bobbs-Merrill 1987 & Supp. 1990); LA. REV. STAT. ANN. §§ 17:1941-:1958, :1971-:1979 (West 1982 & Supp. 1992); ME. REV. STAT. ANN. tit. 20-A, §§ 7001-7257, 7702-7805 (West 1982 & Supp. 1992); MASS. ANN. LAWS ch. 71B,

Most litigation under the EHA does not question the adequacy of a state's statute authorizing federal funding but rather arises as an individual's challenge to a state's lack of compliance with EHA guidelines.³⁷ The EHA codified due process for parents challenging any alteration, denial, or exclusion of their handicapped child from state special education.³⁸ It also contains features giving a handicapped child a right to relief when due process has been violated.³⁹ Relief includes injunctions such as a stay of educational placement during administrative proceedings,⁴⁰ or a reimbursement of private tuition while the proceedings are pending.⁴¹

§§ 1-14 (Law. Co-op. 1982 & Supp. 1991); MICH. COMP. LAWS ANN. §§ 380.1701-.1766 (West 1988 & Supp. 1991); MINN. STAT. ANN. §§ 120.03, .17-.18, .182 (West 1960 & Supp. 1992); MISS. CODE ANN. §§ 37-23-1 to -517 (1990 & Supp. 1991); MO. ANN. STAT. §§ 162.670-.999 (Vernon 1991 & Supp. 1992); MONT. CODE ANN. §§ 20-7-401 to -463 (1991); NEV. REV. STAT. §§ 388.440-.520 (1990); N.M. STAT. ANN. §§ 22-13-5 to -8 (Michie 1986 & Supp. 1991); N.Y. EDUC. LAW §§ 4401-4410 (McKinney 1981 & Supp. 1992); N.D. CENT. CODE §§ 15-59-01 to -10 (1981 & Supp. 1991); OKLA. STAT. ANN. tit. 70, §§ 13-101 to -129 (West 1989 & Supp. 1991); PA. STAT. ANN. tit. 24, §§ 13-1371 to -1382 (1962 & Supp. 1991); R.I. GEN. LAWS §§ 16-24-1 to -17 (1988 & Supp. 1991); S.C. CODE ANN. §§ 59-33-10 to -100 (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. §§ 13-37-1 to -31 (1991); TENN. CODE ANN. §§ 49-10-101 to -1001 (1990 & Supp. 1991); TEX. EDUC. CODE ANN. § 21.501-.512 (West 1987 & Supp. 1992); UTAH CODE ANN. §§ 53A-15-301 to -304 (1989 & Supp. 1991); VT. STAT. ANN. tit. 16, §§ 2941-2973 (1989 & Supp. 1991); VA. CODE ANN. §§ 21.1-213 to -221 (Michie 1985 & Supp. 1991); WASH. REV. CODE ANN. §§ 28A.150.390, .155.010-.140 -160.030 (West 1982 & Supp. 1991); W. VA. CODE §§ 18-20-1 to -9 (1988 & Supp. 1991); WYO. STAT. §§ 21-2-501 to -502, -21-101 to -104 (1986 & Supp. 1991). Eleven states have comprehensive statutes implementing the EHA guidelines. CONN. GEN. STAT. ANN. §§ 10-76a to -76cc (West 1986 & Supp. 1991); DEL. CODE ANN. tit. 14, §§ 3101-3143 (1981 & Supp. 1990); KAN. STAT. ANN. § 72-961 to -981 (1985 & Supp. 1990); MD. EDUC. CODE ANN. §§ 8-101, -301 to -416 (1989 & Supp. 1991); NEB. REV. STAT. §§ 79-3301 to -3365 (1987 & Supp. 1991); N.H. REV. STAT. ANN. §§ 186-C:1 to -:28 (1989 & Supp. 1991); N.J. STAT. ANN. §§ 18A:46-1 to -43 (West 1989 & Supp. 1991); N.C. GEN. STAT. §§ 115C-106 to -146.4 (1991); OHIO REV. CODE ANN. §§ 3323.01-.17 (Anderson 1990 & Supp. 1990); OR. REV. STAT. §§ 343-035 to -534 (1991); WIS. STAT. ANN. §§ 115.76-.89 (West 1991 & Supp. 1991).

37. A LEXIS search using the terms related to the EHA revealed that four-fifths of the reported cases dealt with a handicapped child's suit against an educational institution.

38. See generally Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979).

39. *Smith v. Robinson*, 468 U.S. 992, 1010-11 (1984) (observing that the EHA "establishes an elaborate procedural mechanism to protect the rights of handicapped children").

40. *Honig v. Doe*, 484 U.S. 305, 328 (1984).

41. *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 370

A. *Definitions of Disabilities and the Interpretive Quagmire*

The Individuals with Disabilities Education Act of 1990 (IDEA),⁴² requires "specially designed instruction, at no cost to parents or guardians, to meet the unique needs⁴³ of a child with a disability"⁴⁴ Congress' new "IDEA" broadens the scope of disabilities to include, among others, children with serious emotional disturbance,⁴⁵ traumatic brain injury,⁴⁶ and specific learning disabilities.⁴⁷ Furthermore, it permits elusive conditions such as attention deficit disorder, hyperactivity, and impulsivity to qualify as disabilities under the catch-all category of "other health impaired conditions."⁴⁸

However, IDEA, despite its praiseworthy goal to help more students, magnifies problems facing teachers and administrators who must prepare and plan special education programs. Teachers lack the specific technical training necessary for special educational programs. Moreover, qualified special education instructors are overworked. Administrators who manage teachers find it increasingly difficult to hire qualified special education instructors on their budgets. Hence, increasing the number and type of disabled children that schools must educate increases teachers' workloads, thus aggravating deficiencies.

According to government statistics, the year 1989 saw the largest increase in special education enrollments since 1981.⁴⁹ At the same time, state and local school districts

(1985).

42. 20 U.S.C. §§ 1400-1485 (1990 & Supp. 1991).

43. H.R. REP. NO. 410, 98th Cong., 1st Sess. 19 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2088, 2106 (clarifying that "the term 'unique education needs' be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs.").

44. 20 U.S.C. § 1401(a)(16) (1990 & Supp. 1991).

45. *Id.* §§ 1401(a)(1)(A), (a)(15). According to government figures, 3% of school age children suffer from the disabling condition of serious emotional disturbance. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, CHILDREN'S MENTAL HEALTH: PROBLEMS AND SERVICES, A BACKGROUND PAPER 18 (1986). *See generally* 34 C.F.R. § 300.5(b)(8)(i)-(ii) (1990).

46. 20 U.S.C. §§ 1401(a)(1)(A), (a)(15) (1990 & Supp. 1991).

47. *Id.*

48. *Id.* § 1401(a)(1)(A).

49. U.S. DEPT OF LABOR, TWELFTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION OF THE HANDICAPPED ACT 20 (1989) (totalling new special education enrollments as 93,090 out of 4,500,000 current enrollees for

were experiencing a shortage of certified special education teachers.⁵⁰ Moreover, while more teachers can be hired, assuming school districts could afford them, current special education instructors will need continuing education to instruct them in finding, diagnosing, and treating newly protected disabilities. In addition, according to the Committee on Labor and Education, teachers must be educated, and in some cases retrained, to recognize the characteristics of "attention disorder deficit" and will need training in the educational management of children with this disorder and standard medical and psychological treatments.⁵¹ Not only will teachers need to be taught to recognize these disabilities, but their training will be ongoing as administrators must be ever aware of the constant changes in regulatory definitions.

Increasing the number of disabilities deserving special treatment means teachers must sift through more rules and regulations. Schools cannot begin to understand which children are "disabled" until state agencies publish regulations interpreting Congress' intent. School administrators must then read the regulatory agency's report about a particular disability—first in the Federal Register, a weekly government publication, and later in the Code of Federal Regulations.⁵² Of course, any benefits from technical guidelines presupposes that administrators and teachers have access to those guidelines. The guidelines are published in volumes of the Code of Federal Regulations. However, this assumes the average classroom teacher or administrator can readily comprehend the mass of information provided.

Federal regulations are technical in nature and often written in "legalese" rather than plain English. Few can unravel the Gordian knot federal agencies create in promulgating regulatory guidelines. For the most part, the average

an abnormally high 2% rise).

50. H.R. REP. NO. 544, 101st Cong., 2d Sess. 20 (1990) *reprinted in* 1990 U.S.C.C.A.N. 1723, 1742 (referring to the *Twelfth Annual Report to Congress on Implementation of the Education of the Handicapped Act*)

The same report indicates that 29,774 additional teachers were needed to fill vacancies and replace uncertified staff for students with disabilities . . . during the 1987-1988 school year. During the same time period, states reported needing 15,571 additional staff other than teachers, an increase of 27.1% over the number needed in 1986-87.

Id.

51. *Id.* at 1728.

52. See generally 34 C.F.R. §§ 300.1-.754 (1990).

teacher or administrator may feel the need to ask a colleague or legal counsellor for an opinion.

To illustrate the point, the following is an official description of "serious emotional disturbance" as described in the regulations:

I. [Attention deficit disorder] means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

- (a) an inability to learn which cannot be explained by intellectual, sensory or health factors;
- (b) an inability to build or maintain satisfactory interpersonal relationships with peers or teachers;
- (c) inappropriate types of behavior or feelings under normal circumstances;
- (d) a general pervasive mood of unhappiness or depression, or
- (e) a tendency to develop physical symptoms or fears associated with personal or school problems.⁵³

A child with an inexplicable inability to learn, not attributed to mental or physical handicaps, may warrant some form of special education. A child who exhibits strange moods, fears, or who lacks interpersonal skills may represent the average school child suffering from problems the agency may find deserving of exceptional attention. Practically speaking, the teacher may not be able to distinguish "inappropriate behavior" meriting special treatment from common day-dreaming or inattention typical of many youth. Perhaps more frustrating, the department of education further states that serious emotional disturbance "does not include children who are socially maladjusted."⁵⁴ The agency seems to want teachers to wade through yet another quagmire of interpretive rules to find a befuddling definition for "social maladjustment." In summary, the average teacher cannot reasonably be expected to discriminate among her students so as to make any sure determination of disability without the aid of a trained professional. Even then it is questionable whether the professional's determinations are

53. 34 C.F.R. § 300.5 (b)(8) (1990). See also *A.E. v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 474 (10th Cir. 1991) (denying parents' claim for a declaratory action that their child qualified as seriously emotionally disturbed).

54. 34 C.F.R. § 300.5 (b)(8) (1990).

ad hoc, given the over-inclusive and vague definitions illustrated above.

IV. A DISABLED CHILD'S RIGHT TO DUE PROCESS

A. *The Individualized Education Program and Procedural Safeguards*

Implementation of IDEA is based upon a specially formulated "individualized education program" (IEP) developed by teachers in consultation with parents and social workers, nurses, or therapists who have contact with the child. Usually, the IEP is a written document

prepared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child. . . . [T]he IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.⁵⁵

The IEP specifies both the desired goals for the child during the next school period for physical, mental, emotional and social growth, and prescribes the specific means to be employed to meet those goals.⁵⁶

In addition, the IEP is the means by which a child's progress is recorded and monitored thus providing a written record which must be consulted before altering any current instructional plans or methods.⁵⁷ All discussions and suggestions among professional educators and administrators regarding the child, along with parent-teacher conferences or other formal and informal proceedings, must be recorded in the IEP. Quite literally, the IEP is the "record" of the formal proceedings between school administrators and parents upon which most of the administrative and judicial authori-

55. 20 U.S.C. § 1401(a)(19) (1990 & Supp. 1991); *Honig v. Doe*, 484 U.S. 305, 311 (1988).

56. See *Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1685 (1991).

57. Stephen W. Smith, *Individualized Education Programs (IEPs) in Special Education—From Intent to Acquiescence*, 56 EXCEPTIONAL CHILDREN 6 (1990) (In the context of special education, the individualized education program is the *sine qua non* of the program. There is "no document more significant to districts, agencies, administrators, teachers, parents . . . and students" than the IEP.).

ties rely to resolve claims made by aggrieved parties that a right to a free, appropriate education has been violated.

When a disagreement arises over a child's disability, current placement, program, or the like, the law provides a mechanism of resolution. Under the IDEA, states must establish administrative procedures and provide for a hearing by an independent officer. The hearing must be a final administrative decision and findings made by hearing officers cannot be overruled by a state board. During the hearing the child must remain in her current placement⁵⁸ unless she substantially threatens the health or safety of others. Parents must receive adequate notice of hearings and any change in their child's placement upon the decision rendered at the hearing's conclusion.⁵⁹ Furthermore, the officer or board presiding at a hearing must reach a decision within a reasonable time period, usually within forty-five days, or else due process has been violated.⁶⁰

These elaborate procedural safeguards are not free. Resorting to administrative proceedings imposes a economic cost not only on the parents but also on the state school districts that must provide them. These costs include payment to the hearing officer, the cost of tape-recording or transcribing the proceedings, and the cost of sending copies of the fact findings to the parents.⁶¹ At the review level, the state agencies must cover the overhead to provide for a proper administrative review by a higher official or panel. Schools where funding is tight find themselves at a disadvantage when deciding to grant a parent's request for a new service or program. Some schools may fail to provide due process to a deserving parent simply because of to economic constraints.

B. *A Disabled Child's Right to Go to Court*

When Congress passed laws governing the administra-

58. 34 C.F.R. § 300.513 (1990).

59. See *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985) (explaining that a school board's consistent failure to provide notice to parents violates procedural safeguards under the EHA).

60. *Honig v. Doe*, 484 U.S. 305, 311 (1988) (explaining that Congress enacted the procedural safeguards in order to "guarantee parents . . . an opportunity for meaningful input into all decisions affecting their children's education.").

61. ROTHSTEIN, *supra* note 34, at 184 (citing 34 C.F.R. §§ 300.506 & 508 (1990)).

tion of federal funds to encourage special education at the state level, it also enacted procedural safeguards to ensure state compliance. Specifically, parents of an improperly placed disabled child must exhaust their administrative remedies by first requesting an impartial hearing.⁶² If the parents are dissatisfied with the findings or decision of the hearing they must appeal to the state educational agency which makes impartial reviews of such hearings.⁶³ However, Congress afforded parents the right to bring a civil action in state or federal district court in cases when no right to review by a state educational agency was available,⁶⁴ or when the final decision of such agency was allegedly erroneous and the parents had exhausted their administrative review options.⁶⁵ By federal statute, a court may exercise judicial review over the records of the administrative proceedings of the aggrieved parents' claim and hear additional evidence presented in court.⁶⁶ More importantly, the court decides the parents' case based on a preponderance of the evidence and grants "such relief as the court determines appropriate."⁶⁷

While the statute does not provide for a "damage" remedy,⁶⁸ courts have been awarding the practical equivalent by compensating and vindicating the abused rights of disabled claimants under the EHA. "Damages" usually connotes money awards which may be the appropriate remedy for a disabled child denied rights under other federal statutes.⁶⁹

62. 20 U.S.C. § 1415(b)(2) (1990).

63. *Id.* § 1415(c).

64. *Id.* § 1415(e)(2).

65. *Id.* § 1415(e)(1).

66. *Id.* § 1415(e)(2).

67. *Id.*

68. *Mark R. v. Bremen Community High Sch. Dist.*, 546 F. Supp. 1027 (D.C. Ill. 1982), *aff'd*, 705 F.2d 462 (7th Cir. 1983) (explaining that the EHA does not give a disabled child an action in tort for money damages for a school's willful failure to provide special education).

69. The EHA is one of three federal statutes applicable in the areas of special education. The other two are section 1983 of the Civil Rights Act of 1871 and section 504 of the Rehabilitation Act of 1973. Congress amended the EHA in 1986 so that the EHA no longer provides the exclusive avenue through which a parent may assert an EHA claim:

(f) Effect on other laws. Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. §§ 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities

The EHA and case law interpreting its provisions limit remedies available to a disabled child to injunctive relief⁷⁰ in the form of compensatory education or money awards in the form of tuition reimbursements,⁷¹ and, in most cases, attorneys' fees and costs.⁷²

1. *Compensatory education*

One form of "appropriate relief" parents may ask for is a court order requiring the state agency to place the disabled child in an adequate special education program. This may also include an order requiring the state agency to provide a remedial curriculum to compensate for the learning the child lost "between the time the child entered into the challenged placement and the time the appropriate placement began."⁷³ This form of relief is injunctive in nature and usually requires a showing that the disabled child has been harmed by the delay.

2. *Tuition reimbursements*

A second form of relief parents may ask for is actual reimbursement of money spent on private education when their child should have been receiving state-funded special education.⁷⁴ This remedy is non-injunctive relief, similar to damages, which compensates for expenses reasonably related to the special needs of the child.

20 U.S.C. § 1415(f) (1990 & Supp. 1991).

However, the courts are split. The Court of Appeals for the Second Circuit subsequently stated that "[s]ection 504 . . . may be used as [a remedy] to enforce EHA educational rights, subject to the Act's existing exhaustion requirements." *Mrs. W. v. Tirozzi*, 832 F.2d 748, 751 (2d Cir. 1987). The Court of Appeals for the Eleventh Circuit denied that both Rehabilitation Act claims and EHA claims could be granted in the same case. *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651 (11th Cir. 1990).

70. *Geis v. Board of Educ.*, 774 F.2d 575 (3d Cir. 1985) (school district ordered to continue private placement of handicapped child).

71. *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990) (school board required to pay for counseling services during which a child is subject to short-term medical hospitalization).

72. *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188 (9th Cir. 1990) (school board required to pay attorneys' fees for speech-impaired child).

73. Mark H. Van Pelt, Comment, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 Wis. L. REV. 1469, 1473.

74. *Delmuth v. Muth*, 491 U.S. 223 (1989) (tuition reimbursement awarded against school district).

3. Attorneys' fees and costs

Not only are public entities liable for the full amount of these damage awards, but they must also pay for the other side's attorneys' fees and costs, where the court finds them appropriate.⁷⁵ The original federal legislation dealing with handicapped children had no provision for attorneys' fees. Despite the lack of an attorneys' fees provision, claimants under the EHA sought such fees by drawing upon other federal legislation in the civil rights context. When the Supreme Court put an end to this "backdoor" approach,⁷⁶ Congress apparently changed its mind and added an attorneys' fees provision to the EHA.⁷⁷ Currently, Congress has acted to expand attorneys' fees in other areas where a private claimant seeks remedies for discrimination against a disability.⁷⁸

Additionally, courts make it relatively easy for attorneys' fees to be awarded. Even a technical victory where the re-

75. 20 U.S.C. § 1415(e)(4)(B) (1990 & Supp. 1991).

76. *Smith v. Robinson*, 468 U.S. 992 (1984) (denying attorneys' fees to handicapped claimant relying on such provisions in other federal legislation such as 20 U.S.C. § 1988 and § 504 of the Rehabilitation Act).

77. Congressional sentiment after the Supreme Court's decision in *Smith v. Robinson* was one of dissatisfaction and mild hostility. Proponents of the 1986 amendments argued that low income families with handicapped children would not be able to pursue their rights to a decent education for their children. Yell and Espin, in their recent article dealing with the 1986 Amendments to the EHA, credit Senator Stafford as declaring "a law that mandates a free and appropriate education to handicapped children, that at the same time denies the awarding of legal fees incurred to uphold that mandate is a hollow promise at best and it hurts the families most, that can least afford it . . ." Mitchell L. Yell & Christine A. Espin, *The Handicapped Children's Protection Act of 1986: Time to Pay the Piper?* 56 EXCEPTIONAL CHILDREN 396, 400 (1990) (quoting Senator Stafford during hearings on S. 415 before the subcommittee on the Handicapped of the Committee of Labor and Human Resources United States Senate, 99th Cong., 1st Sess., May 16, 1985).

78. Supporting the trend is the Americans with Disabilities Act (ADA) which expressly gives the court or an agency discretion to award reasonable attorneys' fees to the prevailing party. Section 505 of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12205 (1988 & Supp. 1991)), states:

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Id.

sult of the litigation is de minimis in nature does not prevent a court from making the state pay.⁷⁹ This is not to say that where the claimant has prevailed on the merits any sort of fees are permissible. The fees must be "reasonable." But though the court may limit recovery to "reasonable" attorneys' fees, it is not uncommon in some cases for fees to rise to stifling proportions. In cases where a handicapped party takes legal recourse to enforce special education—properly exhausting all administrative remedies and prevailing in a final judicial hearing—attorneys' fees may far exceed the initial tuition, transportation, and medical care at issue. For example, in one unreported case that was settled before trial, a federal district court in New York approved an attorney's fees award of \$204,728, plus \$105 per hour for the subsequent time the attorney would spend in monitoring the decree.⁸⁰ More troubling are situations where the fees themselves grossly exceed the damages awarded. In one case, a federal court in Delaware refused to reduce attorney's fees of approximately \$78,000, even though the tuition and transportation relief at issue amounted to only about \$5,000.⁸¹

In summary, under the EHA, an inadvertent procedural flaw or delay in the administrative process can result in a court ordering the reinstatement of a proper educational plan for the child and a substantial monetary award for tuition, attorneys' fees and costs. Even more disturbing is the IDEA's provision which authorizes courts to grant these awards against state entities previously considered immune under the Eleventh Amendment.

79. See *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188 (1990) (parents of speech-impaired child were entitled to additional fees their counsel incurred as a result of school district's appeal); cf. *Moore v. District of Columbia*, 886 F.2d 335 (D.C. Cir. 1988) (EHA does not award attorneys' fees to parties who prevail in administrative proceedings in a judicial action solely to obtain fees for services rendered in those proceedings).

80. Perry A. Zirkel, *'Backlash' Threatens Special Education*, EDUC. WK., Aug. 1, 1990, at 64.

81. *Id.*

V. OVERTURNING *DELMUTH V. MUTH* AND EXPOSING THE STATES TO SUIT

A. *Removing the Barriers of Sovereign Immunity*

The doctrine of sovereign immunity dates back to the old English common law belief that "the king can do no wrong." Simply put, it means that a citizen cannot sue the government because the entity that upholds the laws cannot violate the laws.⁸² American courts have articulated this rationale in various cases supporting decisions barring suits for injunctions and damages. Suits seeking to force the federal government to specifically perform or cease doing some action are dismissed since they threaten to impermissibly stop the government in its tracks.⁸³ Furthermore, the Eleventh Amendment has long prevented suits against states for money damages where such awards were to be paid from public funds in the treasury.⁸⁴

However, states can be sued despite sovereign immunity. Most states have changed their law in recognition of their responsibility to compensate injured parties when states are at fault.⁸⁵ Generally, the umbrella of sovereign immunity covers states and their subdivisions involved in policy-making. This includes agencies, departments, boards, special districts, and commissions. Local governments such as cities, municipalities, school districts, and towns are generally outside the umbrella.⁸⁶ Counties are also considered an "arm of the state" but depending upon the powers they have been granted from state law, they may be more affiliated with local government and thus open to suit.⁸⁷

82. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.) ("A sovereign is exempt from suit, not because of any formal conception of an obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.")

83. *Larson v. Domestic Foreign Corp.*, 337 U.S. 682, 704 (Vinson, J.) ("The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.")

84. *Edelman v. Jordan*, 415 U.S. 651, 663 (1973).

85. 2 VALENTE, *supra* note 11, § 19.27, at 218-21.

86. BETTY VAN DER SMISSEN, *LEGAL LIABILITY AND RISK MANAGEMENT FOR PUBLIC AND PRIVATE ENTITIES* § 4.233, at 202 (1990); 2 VALENTE *supra* note 11, at § 19.29, at 224-28.

87. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1976) (finding the board not entitled to 11th Amendment immunity under Ohio law because "[o]n

Federal law can take away the states' sovereign immunity. Federal law protecting the rights of the people is the supreme law of the land. Thus, acting pursuant to Section 5 of the Fourteenth Amendment, Congress can abrogate the states' immunity despite the language of the Eleventh Amendment where it clearly expresses its intent to do so.⁸⁸ In the IDEA, Congress unequivocally says any state can be sued under the EHA by a disabled child denied due process in special education. Title 20, Section 1403 now reads:

(a) A State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter.

(b) In a suit against a State for a violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public entity other than a State.⁸⁹

This law is Congress' response to the Supreme Court's recent decision in *Delmuth v. Muth*⁹⁰ which refused to open the states to suit. There, the Court did not believe Congress intended to grant an enforceable right to education to children with handicaps, despite states being logical defendants for due process violations in special education administration. Congress had not made "unmistakably clear" in the statute itself that states must answer in lawsuits.⁹¹ Congress answered *Delmuth* quickly with a new law—states and

balance the record before us indicates that a local school board such as petitioner is more like a county or city than that it is like an arm of the State").

88. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

89. 20 U.S.C. § 1403(a)-(b) (1990 & Supp. 1991).

90. 491 U.S. 223 (1989) (5-4) (denying relief against State of Pennsylvania under the EHA for due process violations).

91. The Court's majority opinion explained:

We recognize that the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA. This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation.

Id. at 232.

their subdivisions can be sued under the EHA.⁹²

Unfortunately, the legislative history behind Section 1403 fails to explain the effect this abrogation of immunity will have upon each states' own statutory scheme of governmental immunity.⁹³ In fact, the language of Section 1403 itself may make each states' particular statute dealing with immunity determinative of a state agencies' liability under the IDEA.⁹⁴

To illustrate, assume the following hypothetical:

Johnny Doe is twelve years old. He attends A, a public secondary school, within B, a local school district, regulated by C, the state board of education, located in state X. Currently, A's administration has developed an IEP for Johnny which includes treatment for attention disorders. After Johnny's parents try to convince A to modify his IEP, they request a formal hearing before B challenging A's failure to provide adequate treatment. B concurs in A's findings. Disappointed by B's findings that Johnny's IEP is adequate, Johnny's parents place him in a private facility and request a review of B's decision by C. More than one year after the original hearing, and without giving Johnny's parents notice of its action, C determines B's findings were not erroneous and decides against Johnny's parents. Johnny's parents file a lawsuit in federal court against B and C for violations under the IDEA, seeking injunctive relief, reimbursement of the tuition paid for private education, and attorneys' fees and costs. The court reviews the administrative proceedings below and finds B failed to abide by the proper procedures required by law.

92. H.R. REP. NO. 544, 101st Cong., 2d Sess. 12 (1990), *reprinted in* 1990 U.S.C.A.N. 1723, 1734 wherein the House Committee on Labor and Education declared the following:

On June 15, 1989, the Supreme Court, in a 5-4 decision (*Delmuth v. Muth*) held that children with disabilities who are denied a free appropriate education by any State are not entitled to be reimbursed for tuition paid by their parents for placement in an appropriate program. The Committee has determined that the Supreme Court misinterpreted Congressional intent. Such a gap in coverage was never intended. It would be inequitable for the EHA to mandate State compliance with its provisions and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue.

Id.

93. *Id.*

94. For a comprehensive list of governmental immunity statutes in the 50 states and the District of Columbia see Table 4.1 VAN DER SMISSEN, *supra* note 86, § 4.2, at 178-96; See also 2 VALENTE *supra* note 11, at § 19.28, at 224 n.100.

Furthermore, it finds that C's one year delay aggravated the due process violation. Judgment is entered against B and C jointly and severally for the amount of Johnny's tuition at the private facility and for his attorneys' fees and costs in connection with the action.

Prior to the IDEA, C would not be liable for any amount of the judgment since it could invoke the Eleventh Amendment in its defense. B would be responsible for the harm caused by the due process violation. However, C will be exposed to suit to the same extent as any other "public entity" in state X since C is arguably an "arm of the state" subject to Title 20, Section 1403. Thus, C is responsible for its share of the judgment if state X has waived sovereign immunity for governmental functions such as administrative review by state agencies.⁹⁵ Generally, this inquiry comes down to whether C's conduct is discretionary or ministerial.⁹⁶ If the former, C is immune; if the latter, C is liable.

Assuming that state X considers failure to give adequate notice of proceedings to be a ministerial function, C will be liable for a due process violation. Johnny's parents will be able to enforce all of the judgment against C, and most likely C will sue B for contribution. Thus, B will pay less than it would have paid prior to Section 1403's enactment. In essence, one effect of the IDEA is to open up state X's coffers to compensatory damage awards, such as tuition reimbursements and attorneys' fees, for due process violations by its agencies.

B. The Effect of Court Awards on Poorer Schools

Adverse damage awards will help protect handicapped children against due process violations in administrative proceedings by deterring improper state action. A court that grants a substantial damage award along with attorneys' fees and costs against the state sends a strong signal to the state comptroller to correct the administrative review process. While on the surface this seems a step towards improving the quality and availability of an equal education to the disabled, the cost to the public education system may have as yet unrecognized adverse effects.

95. VAN DER SMISSEN, *supra* note 86, §§ 4.13-133, at 162-78.

96. *Id.*

Permitting a private right of action for damages against states and state agencies necessarily imposes an economic cost to local public education which hurts the schools least able to afford it. Since Congress has permitted greater access to the courts and greater liability for defendants, it is not unlikely that more parents whose disabled children have been shorted in administrative proceedings will bring suit. As suits increase, the number of awards will increase. Payment of these awards will take a bite out of the slice of the governor's pie earmarked for education. Less state monies will reach the local school districts unless higher taxes make the pie grow, or lobbyists for state education get the governor to cut the local districts a bigger slice of the same pie. Thus, poorer local districts will suffer from the inability to raise more taxes to make up for reduced state assistance. Wealthier districts can compensate for lower state appropriations by increased local taxation or private contributions.⁹⁷ Unfortunately, poorer districts lack these resources.⁹⁸

VII. CONCLUSION

The responsibility for public education in this nation primarily rests on state governments and their subdivisions. Funding for the many aspects of public education relies upon government subsidies and contributions from the private sector. Government assistance keeps public education running in states by distributing public funds from federal, state, and local sources. In order to receive funds for special education, states must abide by administrative guidelines protecting the due process rights of school-aged handicapped children. These guidelines, along with administrative regulations, permit a handicapped child to challenge his individualized educational plan in a hearing and require each state to abide by procedural safeguards in any and all such proceedings. Additionally, proceedings are subject to judicial review in federal or state courts. Beyond injunctive relief, courts can grant monetary awards such as tuition reim-

97. Thro, *supra* note 29, at 1647 ("Because a local school district that includes areas with predominately high property values can typically raise more revenue from property taxes than a district with predominately low property values, wealth effectively determines the level of funding for the local schools.").

98. *Id.* at 1648.

bursements and attorneys' fees and costs. Congress' latest action now permits these awards against state agencies themselves by abrogating sovereign immunity under the IDEA. Each state's governmental immunity legislation will determine to what extent compensatory awards will reduce state funds due to the immunity or liability of state agencies reviewing claims brought under the IDEA and its predecessors.

Words expressed by the nation's highest court nearly forty years ago still ring true in our day—"Today, education is perhaps the most important function of state and local governments."⁹⁹ Private suits by disabled children economically threaten this vital function. These institutions live or die not so much by those funds sent from Washington, D.C, but rather according to the yearly appropriations decided by governors and state legislators. Awarding damages and attorneys' fees against state agencies reduces state funding of local schools by taking state revenues earmarked toward education and applying them towards the budgets of state administrative agencies to cover increased costs in paying off adverse judgments. Moreover, poorer school districts have less resources available to compensate for reduced state assistance. Notwithstanding IDEA's worthy purpose of meeting the educational needs of millions of handicapped children, the public needs to ask itself a gnawing question. Is it better for the needs of the few to be met at the expense of the many?

Christopher Dean Greenwood

99. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).