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# The Burlington Decision: A Vehicle to Enforce Free Appropriate Public Education for the Handicapped

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# THE *BURLINGTON* DECISION: A VEHICLE TO ENFORCE FREE APPROPRIATE PUBLIC EDUCATION FOR THE HANDICAPPED

## INTRODUCTION

Although education is not a fundamental right,<sup>1</sup> the people of the United States believe education to be an essential prerequisite for achieving success in modern society. This philosophy (as possessed by the American populace) was articulated by the Supreme Court in 1954 in the landmark decision of *Brown v. Board of Education*,<sup>2</sup> where the Court stated:

Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.<sup>3</sup>

Unfortunately, during the first two decades following *Brown*, such equality was not universally afforded to the handicapped.<sup>4</sup> Therefore, in 1975 Congress enacted the Education of the Handicapped Act (the EHA),<sup>5</sup> which prescribes that all handicapped<sup>6</sup> students be provided a “free appropriate public education.”<sup>7</sup>

Central to that legislation is the Individualized Education Program (IEP).<sup>8</sup>

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<sup>1</sup>San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1972).

<sup>2</sup>*Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>3</sup>*Id.* at 493.

<sup>4</sup>S. REP. NO. 168, 94th Cong., 1st Sess. 8, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432 [hereinafter cited as S. REP. NO. 168]. In 1975 the Bureau of Education for Handicapped Children reported that less than half of the country's handicapped children were receiving an appropriate education. *Id.*

<sup>5</sup>Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1401-61 (1982 & Supp. I 1983)).

<sup>6</sup>The EHA defines “handicapped children” as “mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.” *Id.* at § 1401(1).

<sup>7</sup>*Id.* at §1401(18). The EHA definition is as follows:

The term “free appropriate public education” means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) [20 U.S.C. § 1414(a)(5)] [of this title].

States may qualify for federal assistance to implement the EHA if they adhere to numerous comprehensive requirements. *Id.* at § 1411.

Sections following describe lengthy “eligibility requirements” and “requisite features” with which state plans must comply in order to be eligible for funding. *Id.* at §§ 1412 and 1413.

<sup>8</sup>*Id.* at § 1401(19).

The term “individualized education program” means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . qualified to provide, or supervise the . . . specially designed instruction to meet the unique needs of handicapped children,

The IEP is a written statement outlining the goals and objectives and specific educational services for each handicapped child.<sup>9</sup> Parents are a part of the educational process because the EHA requires their input at the IEP conference.<sup>10</sup> In addition, detailed procedural safeguards protect the rights of the parties.<sup>11</sup>

As parents continue to take an active role in the education of their children, especially in the development and evaluation of the IEP, it is obvious that educational services will sometimes be challenged. Although the school and the parents share a common interest in the growth and development of the child, each brings a different perspective to the IEP conference. When these differences cannot be resolved among the parties, judicial review may be required.<sup>12</sup>

That option for judicial intervention was exercised by parents of a handicapped child in *Burlington v. Department of Education*.<sup>13</sup> In *Burlington* the parents rejected the public school's proposed IEP and sought review by the Massachusetts Department of Education's Bureau of Special Education Appeals.<sup>14</sup> In the interim, the parents withdrew the child from the public school and enrolled him (at their own expense) in a state-approved private institution.<sup>15</sup> for special education.<sup>16</sup> That change of placement was made without the approval of the public school authorities<sup>17</sup> and is contrary to the EHA.<sup>18</sup>

the teacher, the parents or guardian of [the] child, and, wherever appropriate, [the] child, which statement shall include

- (A) a statement of the present levels of educational performance of [the] child,
- (B) a statement of annual goals, including short term instructional objectives,
- (C) a statement of the specific educational services to be provided to [the] child, and the extent to which [the] child will be able to participate in regular educational programs,
- (D) the projected date for initiation and anticipated duration of such services, and
- (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at § 1415. Procedural safeguards include the "opportunity . . . to examine all relevant records [regarding] the identification, evaluation, and educational placement of the child. . . ." *Id.* at § 1415(b)(1)(A). Also, parents must be provided with written prior notice whenever the school proposes to change the educational status of the child. *Id.* at § 1415(b)(1)(C). Other provisions include the right to a hearing by the state educational agency and a right to bring a civil action. *Id.* at §§ 1415(b)(2) and 1415(e)(2).

<sup>12</sup>Note, *Education of Handicapped Children: The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN'S L. REV. 81, 106 (1981).

<sup>13</sup>105 S. Ct. 1996 (1985).

<sup>14</sup>*Id.* at 1999.

<sup>15</sup>*Id.*

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

<sup>17</sup>*Burlington*, 105 S. Ct. at 1999.

<sup>18</sup>"During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child." 20 U.S.C. § 1415(e)(3).

The United States Supreme Court examined two issues in *Burlington*: (1) "whether . . . potential relief under [the EHA] includes reimbursement to parents for private school tuition and related expenses, and [(2)] whether [the EHA] bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school authorities."<sup>19</sup>

This note will present an overview of early case law relevant to the EHA, discuss the facts and rationale of the *Burlington* decision, and analyze the implications of *Burlington* as they relate to implementing the EHA in the future.

#### AN OVERVIEW OF EARLY CASE LAW

Passage of the EHA was preceded by a series of landmark cases which established the right to education for all handicapped children.<sup>20</sup> In the first case, *Pennsylvania Association for Retarded Children v. Commonwealth*,<sup>21</sup> (PARC), plaintiffs claimed that the challenged statutes were unconstitutional because they excluded mentally retarded children from public education and training.<sup>22</sup> The district court ruled that due process requires a hearing before a retarded child can be denied entrance to a public school.<sup>23</sup> In short, the *PARC* court held that mentally retarded children have a constitutional right to public education.<sup>24</sup>

The *PARC* holding was extended to all handicapped students in *Mills v. Board of Education*.<sup>25</sup> In *Mills*, seven handicapped children excluded from public education in the District of Columbia brought a class action suit in the federal district court.<sup>26</sup> The court held that (1) no child may be denied entrance to public school unless provided with appropriate alternative services;<sup>27</sup> and (2) prior to exclusion, there must be a hearing to review the child's progress and to evaluate the adequacy of alternative placements.<sup>28</sup> While neither the *PARC* nor *Mills* courts delineated a basic standard regarding the quality of education, both courts emphasized that mere attendance in a public school is not suffi-

<sup>19</sup>*Burlington*, 105 S. Ct. at 2001-02. 20 U.S.C. § 1415(e)(2) authorizes the reviewing court to "grant such relief as the court determines is appropriate." See also § 1415(e)(3); *supra* note 18 for partial text of this provision.

<sup>20</sup>See S. REP. NO. 168, *supra* note 4, at 1430.

<sup>21</sup>334 F.Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F.Supp. 279 (E.D. Pa. 1972). This was a class action suit against the State of Pennsylvania and thirteen local school districts.

<sup>22</sup>*Id.* at 283.

<sup>23</sup>*Id.* at 303. Other procedural safeguards were also required.

<sup>24</sup>Note, *The Education For All Handicapped Children Act: What Is A "Free Appropriate Public Education?"*, 29 WAYNE L. REV. 1285, 1287 n.20 (1983).

<sup>25</sup>348 F.Supp. 866 (D.D.C. 1972).

<sup>26</sup>*Id.* at 868.

<sup>27</sup>*Id.* at 878.

cient.<sup>29</sup> To meet the intent of these rulings, at least a "minimal level of quality" is required.<sup>30</sup>

Although these early cases provided the impetus to encourage states to address the problems of the handicapped, the "lack of [adequate] financial resources prevented the implementation" of equal educational opportunities first heralded by *Brown*.<sup>31</sup> Therefore, in an effort to extend the principles of *PARC* and *Mills*, and to provide financial support through increased federal funding, Congress enacted the 1975 landmark EHA.<sup>32</sup> The stated purpose of the EHA was "to assure that all handicapped children have . . . [access to] a free appropriate public education which emphasizes special education . . . services designed to meet [the] unique needs" of each handicapped child.<sup>33</sup>

The intent of the legislature was to develop a vehicle through which schools could provide an appropriate education for each handicapped child. However, despite the obvious strengths of the EHA, the definition of appropriate education has been criticized as being "vague and circular."<sup>34</sup> The guidelines within the statute have been referred to as "general"<sup>35</sup> and "cryptic."<sup>36</sup> Also, the standards for developing an appropriate education have been deemed imprecise and "inexact."<sup>37</sup> Although this alleged ambiguity may present difficulties in interpretation, it was necessary that the language be sufficiently broad to allow for individual differences among children.<sup>38</sup> What might be appropriate education for one student could be inadequate education for another.<sup>39</sup> Furthermore, by using an imprecise standard, Congress insured that educational decisions would remain the responsibility of the state and local authorities.<sup>40</sup>

When judicial review is necessary, the courts must grapple with the gen-

<sup>29</sup>Note, *supra* note 24 at 1288. The *PARC* court suggested that this minimal level would be met if retarded students could demonstrate "self-sufficiency" skills. *PARC*, 343 F.Supp. at 302. The *Mills* court stated that alternative educational services must be "adequate" to meet the child's needs. 348 F.Supp. at 878.

<sup>30</sup>Note, *supra* note 26 at 1288.

<sup>31</sup>S. REP. NO. 168, *supra* note 4, at 1431; *Brown*, 347 U.S. 483.

<sup>32</sup>"The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act." *Board of Educ. v. Rowley*, 458 U.S. 176, 194 (1982) (Footnote omitted).

<sup>33</sup>20 U.S.C. § 1400(c).

<sup>34</sup>Note, *supra* note 24, at 1289.

<sup>35</sup>Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1103 (1979).

<sup>36</sup>*Rowley*, 458 U.S. at 188.

<sup>37</sup>Comment, *The Meaning of Appropriate Education to Handicapped Children Under the EHCA: The Impact of Rowley*, 14 SW. L. REV. 521, 530 (1984).

<sup>38</sup>Comment, *Defining an Appropriate Education for Handicapped Children: Board of Education v. Rowley*, 34 SYRACUSE L. REV. 1107, 1112 (1983).

<sup>39</sup>*Id.*

<sup>40</sup>*Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 7-8 (1981).

eralities of the EHA and develop standards to clarify the definition of a "free appropriate public education."<sup>41</sup> For example, in *Springdale School District v. Grace*,<sup>42</sup> the school authorities claimed that a profoundly deaf child could best be served educationally at a school for the deaf.<sup>43</sup> However, the Eighth Circuit Court of Appeals held that states are obligated to provide an *appropriate* education, not necessarily the *best* education.<sup>44</sup> The court ruled that the child should be placed in a regular public school classroom with sufficient auxiliary services and that such a program would be appropriate under the EHA.<sup>45</sup>

In *Campbell v. Talladega County Board of Education*,<sup>46</sup> the district court uses a self-sufficiency standard.<sup>47</sup> The case involved a severely retarded eighteen year old youth whose educational program failed to teach him functional and communicative skills which would help increase his independence.<sup>48</sup> The court held that an educational program which fails to assist a child in attaining self-sufficiency skills does not meet "even a minimally stringent standard of appropriateness."<sup>49</sup>

In *Kruelle v. New Castle County School District*,<sup>50</sup> the Third Circuit Court of Appeals affirmed<sup>51</sup> a district court ruling that an appropriate educational standard was one designed to help the child "realize his learning potential."<sup>52</sup> The appeals court held that residential placement was more appropriate for a profoundly retarded child because the condition necessitated more professional help than the public school could provide.<sup>53</sup>

For the first seven years after passage of the EHA, only the lower courts were challenged by the meaning of "appropriate education." Then in 1982, *Board of Education v. Rowley*<sup>54</sup> became the first case in which the Supreme

<sup>41</sup>Note, *Defining Appropriate Education for the Handicapped: The Rowley Decision*, 27 ST. LOUIS U.L.J. 685, 691-93 (1983).

<sup>42</sup>656 F.2d 300 (8th Cir. 1981).

<sup>43</sup>*Id.* at 303.

<sup>44</sup>*Id.* at 304 (Emphasis original).

<sup>45</sup>*Id.* at 305. The court relied largely on the "mainstreaming requirement" of the EHA which assure(s) that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . . *Id.*; 20 U.S.C. § 1412(5)(B).

<sup>46</sup>518 F.Supp. 47 (N.D. Ala. 1981).

<sup>47</sup>*Id.* at 54.

<sup>48</sup>*Id.* at 48, 54.

<sup>49</sup>*Id.* at 54.

<sup>50</sup>*Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d Cir. 1981).

<sup>51</sup>*Id.* at 699.

<sup>52</sup>*Kruelle v. Biggs*, 489 F.Supp. 169, 173-74 (D.Del. 1980), *aff'd. sub nom. Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 694-96 (3d Cir. 1981).

<sup>53</sup>642 F.2d at 694.

<sup>54</sup>458 U.S. 176 (1982).  
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Court was called upon to interpret the Act's statutory provisions.<sup>55</sup> *Rowley* involved a deaf child whose parents supported parts of the IEP recommended by the school, but they also requested a qualified sign language interpreter.<sup>56</sup> The Court rejected the parents' request, emphasizing the finding that "[the child was] receiving an 'adequate' education, since she performs better than the average [student] in her class and is advancing easily from grade to grade."<sup>57</sup> While the Court affirmed the state's responsibility to provide specialized educational services, it rejected any obligation to meet an "additional substantive standard."<sup>58</sup>

Although *Rowley* was the Supreme Court's *first* opportunity to interpret the EHA, disagreements between parents and school authorities necessitated further judicial interpretation. *Burlington v. Department of Education*<sup>59</sup> represents the Court's most recent analysis of the EHA.

#### THE BURLINGTON CASE

Shortly after Michael Panico began his public education in Burlington, Massachusetts, he began to experience serious learning difficulties.<sup>60</sup> He was identified as having "specific learning disabilities"<sup>61</sup> "and was thus 'handicapped'<sup>62</sup> within the [definition] of the Act. . . ."<sup>63</sup> By the end of the third grade, Michael had demonstrated little significant improvement and much discussion followed between the parents and the school regarding Michael's future placement.<sup>64</sup> Eventually, the parents rejected the school's proposed IEP for the fourth grade and requested an impartial due process hearing<sup>65</sup> by the Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA).<sup>66</sup>

<sup>55</sup>*Id.* at 187.

<sup>56</sup>*Id.* at 184.

<sup>57</sup>*Id.* at 209-10.

<sup>58</sup>*Id.* at 189-90, 191-204. The Court looked to the legislative history to determine the intent of the drafters *Id.*

<sup>59</sup>105 S. Ct. 1996 (1985).

<sup>60</sup>*Id.* at 1998-99.

<sup>61</sup>20 U.S.C. § 1401(15). The EHA defines "children with specific learning disabilities" as those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage. *Id.*

<sup>62</sup>*Id.* § 1401(i). See § 1401(1); *supra* note 6 for text of the provision.

<sup>63</sup>105 S. Ct. at 1999.

<sup>64</sup>*Id.*

<sup>65</sup>20 U.S.C. § 1415(b)(2).

<sup>66</sup>105 S. Ct. at 1999.

In the interim, the parents received the results of various tests which had been administered to Michael by specialists at a Massachusetts hospital.<sup>67</sup> These specialists concluded that Michael's "emotional difficulties are secondary to a rather severe learning disorder characterized by perceptual difficulties . . . ."<sup>68</sup> The specialists recommended "a highly specialized setting for children with learning handicaps . . . such as the Carroll School,"<sup>69</sup> a private facility having state approval. Based on the hospital's assessment, the Panicos enrolled their son at Carroll (at their own expense).<sup>70</sup> This was contrary to the EHA which stipulates that, during any judicial proceedings, "the child shall remain in [his] . . . current educational placement," unless the school and the parents otherwise agree.<sup>71</sup>

Disagreements continued between the Panicos and the public school officials, and several hearings were held in the fall of 1979.<sup>72</sup> In January 1980, the hearing officer ruled that the public school's proposed IEP and placement were "inappropriate" and that "the Carroll School was the 'least restrictive' environment<sup>73</sup> to meet Michael's needs."<sup>74</sup> The hearing officer ordered the school to pay Carroll for tuition and transportation costs for 1979-80 and to reimburse Michael's parents for educational expenses incurred at Carroll.<sup>75</sup>

The school then appealed to the district court pursuant to the EHA<sup>76</sup> and a parallel state statute,<sup>77</sup> naming Mr. Panico and the State Department of Education as defendants.<sup>78</sup> In November 1980, the district court held for Mr. Panico on the state law claim and set the federal claim for future trial.<sup>79</sup> Later,

<sup>67</sup> *Id.*<sup>68</sup> *Id.*<sup>69</sup> *Id.*<sup>70</sup> *Id.*<sup>71</sup> 20 U.S.C. § 1415(e)(3). See § 1415(e)(3), *supra* note 18 for text of the provision.<sup>72</sup> 105 S. Ct. at 1999.<sup>73</sup> *Id.* The terms "mainstreaming provision" and "least restrictive environment" frequently refer to the same concept.The "mainstreaming provision" of the eligibility requirements provides "that, to the maximum extent appropriate, handicapped children" are to be educated with their nonhandicapped peers. See 20 U.S.C. § 1412(5)(B). See *supra* note 47, for partial text of this provision.

In Ohio, the "least restrictive environment" is defined as follows:

[T]o the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

OHIO DEPARTMENT OF EDUCATION, RULES FOR THE EDUCATION OF HANDICAPPED CHILDREN, 7 (1982).

<sup>74</sup> 105 S. Ct. at 1999.<sup>75</sup> *Id.*<sup>76</sup> *Id.* § 1415(e)(2). See § 1415(e)(2), *supra* note 19 for partial text of the provision.<sup>77</sup> *Id.*<sup>78</sup> *Id.*<sup>79</sup> *Id.*

the court of appeals vacated this earlier judgment.<sup>80</sup>

In 1982, on remand relating to the federal claim, the district court reversed the BSEA decision and ruled that the appropriate IEP was the one previously proposed by the school.<sup>81</sup> Mr. Panico contested the judgment, and the case was transferred to another district judge, and consolidated with two other cases in order to resolve similar issues.<sup>82</sup> In a decision on the consolidated cases, the court ordered Mr. Panico to reimburse the school for payments to Carroll during 1980-81 and 1981-82.<sup>83</sup>

Following Mr. Panico's appeal, the court of appeals remanded the case a second time, affirming in part and reversing in part.<sup>84</sup> It ruled, among other matters, that the parents' unilateral change of Michael's placement would not bar reimbursement to the parents if their actions were found to be appropriate at final judgment.<sup>85</sup>

The school then appealed to the United States Supreme Court. The Court granted *certiorari* to consider only two issues:<sup>86</sup> (1) "whether the potential relief under [the EHA] includes reimbursement to parents for private school tuition and related expenses,<sup>87</sup> and [2] whether [the EHA] bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school authorities."<sup>88</sup>

The Court examined the first issue and concluded that the EHA authorizes reimbursement to parents for expenses incurred in private school placement if the courts determine that that placement is appropriate within the

<sup>80</sup>The court of appeals held that the Act pre-empted the state statute as to the appropriate standard of review of the administrative ruling. *Id.* at 1999-2000; *Burlington v. Depart. of Educ.*, 655 F.2d 428, 429 (1st Cir. 1981).

Meanwhile, in December 1980, the Massachusetts Commissioner of Education informed the school authorities that he would freeze its special education assistance unless the school complied with the BSEA order. In February 1981, the school agreed to pay Carroll for tuition and transportation costs for 1980-81, but it refused to reimburse Mr. Panico for similar expenses incurred in 1979-80. 105 S. Ct. at 2000; 655 F.2d at 430-431.

<sup>81</sup>105 S. Ct. at 2000.

<sup>82</sup>*Id.*

<sup>83</sup>*Doe v. Anrig*, 561 F.Supp. 121 (D. Mass. 1983).

First case: John Doe had Down's Syndrome of such severity that he was placed at a residential facility shortly after his birth. His parents sought an IEP and reimbursement from the public school district for part of the expenses incurred. *Doe v. Anrig*, 561 F.Supp. 121, 125 (D. Mass. 1983).

Second case: Junior was a handicapped second grader whose parents disagreed with the public school about several IEPs developed for their son. The school violated various procedural safeguards by excluding the parents from the first IEP conference and failing to give proper notice for others. Pending their appeal, the parents transferred Junior to a private school and sought reimbursement for their expenses. *Angier v. Anrig*, 561 F.Supp. 121, 125-26 (D. Mass. 1983).

<sup>84</sup>*Burlington v. Department of Educ.*, 736 F.2d 773, 802 (1st Cir. 1984).

<sup>85</sup>*Id.* at 799.

<sup>86</sup>105 S. Ct. at 2001-02.

<sup>87</sup>*Id.*; 20 U.S.C. § 1415(e)(2). See § 1415(e)(2), *supra* note 19 for partial text of the provision.

<sup>88</sup>*Id.*; § 1415(e)(3). See § 1415(e)(3), *supra* note 18 for partial text of the provision.

terms of the statute.<sup>89</sup> However, if the courts determine that the public school's proposed educational program is proper, the parents would be barred from reimbursement.<sup>90</sup>

The Court examined the statutory language which contemplates that education for the handicapped will be extended to children in public *or* private institutions, and that, where appropriate, handicapped children will be educated with their nonhandicapped peers.<sup>91</sup> Therefore, the Court reasoned, when judicial proceedings determine that appropriate educational services are unavailable in a public school setting, it is "clear beyond cavil" that relief should include private school placement at public expense.<sup>92</sup>

The Court also considered the length of time necessitated by administrative and judicial review.<sup>93</sup> Although the review process can often be lengthy, the Court noted that in this case the time delay was "ponderous."<sup>94</sup> The term covered by the challenged IEP could lapse before the case ever came to trial. The Court then balanced the decisions parents must make in relation to this timeframe: "go along with the IEP to the detriment of their child . . . or pay for what they consider to be the appropriate placement."<sup>95</sup> If financially able parents choose the private placement at their own expense, the Court reasoned that they would have an "empty victory" if eventually the Court affirmed their judgment but refused to permit reimbursement.<sup>96</sup> In conclusion, the Court looked to the Congressional intent<sup>97</sup> and determined that "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete" if retroactive reimbursement were not an available remedy when the parents' choice of placement is deemed proper.<sup>98</sup>

In regard to the second issue, the Court refused the school's contention that the Panicos waived their right to potential reimbursement when they violated the EHA by unilaterally changing Michael's placement during the

<sup>89</sup>105 S. Ct. at 2002-03.

<sup>90</sup>*Id.* at 2005.

<sup>91</sup>*Id.* at 2003; 20 U.S.C. § 1412(5)(B). Procedural safeguards will "assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped . . ." See §1412(5)(B), and *supra* note 73 for discussion of "mainstreaming provision" and "least restrictive environment."

<sup>92</sup>105 S. Ct. at 2003.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* By 1983, for the *Burlington* case alone, "there were 577 pages of administrative transcript, considerable documentary evidence, and new live expert testimony . . . The activities of counsel led to 198 docket entries prior to the first appeal, with over 100 more" (by the time *Burlington* was consolidated with two other cases). *Doe v. Anrig*, 561 F.Supp. 121, 124 n.2 (D. Mass. 1983). Yet it would be two more years before the case was finally decided by the Supreme Court!

<sup>95</sup>105 S. Ct. at 2003.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*

review process.<sup>99</sup> The Court did agree that the parents acted contrary to the statute.<sup>100</sup> However, the Court “note[d] that the [EHA] calls for an agreement by *either the State or the local educational agency*.”<sup>101</sup> Thus, when the BSEA ruled in January 1980 in favor of the Panicos, that “constituted agreement” between the State and the parents, regarding Michael’s change of placement.<sup>102</sup> Therefore, the Panicos were only in violation of the EHA from the fall of 1979 through January 1980.<sup>103</sup> This did not settle the question, however, because the Panicos were seeking reimbursement for the entire time that Michael was enrolled at Carroll.<sup>104</sup>

The Court’s rationale for rejecting the school’s claim that the Panicos waived their right to reimbursement was based on its interpretation of the statutory language.<sup>105</sup> The Court noted that there is no reference to financial responsibility, waiver, or parents’ right to reimbursement following judicial review.<sup>106</sup> It reasoned that “[t]he Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.”<sup>107</sup>

In its concluding remarks, the Court cautioned that “parents who unilaterally change their child’s placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.”<sup>108</sup> The statutory language stipulates that the public agency is not required to pay for educational services in a private school if free appropriate public education is available.<sup>109</sup> Therefore, if the Court had determined that the IEP proposed by the public school was appropriate, then the Panicos would have been barred from reimbursement during any period that they were in violation of the EHA.<sup>110</sup>

<sup>99</sup> *Id.* at 2003-04.

<sup>100</sup> *Id.* at 2004.

<sup>101</sup> *Id.* (Emphasis original). See also, 20 U.S.C. § 1415(e)(3) or *supra* note 18 for partial text of this provision.

<sup>102</sup> 105 S. Ct. at 2004.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 2005.

<sup>109</sup> Regulations of the Offices of the Department of Education, 34 C.F.R. § 300.403 (1985).

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child’s education at the private school or facility. . . .

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures. . . .

<sup>110</sup> 105 S. Ct. at 2005.

## AN ANALYSIS OF THE SUPREME COURT'S DECISION

Handicapped children have very different needs and are dependent on the schools to help them develop their capabilities. If their instruction does not emphasize special education designed to meet their individual differences, it may well be inappropriate.<sup>111</sup> When parents of a handicapped child perceive that the child's education is lacking, the parents may invoke the procedural safeguards of the EHA.<sup>112</sup> "Despite its [inherent] shortcomings, the parental complaint system [therein] is the primary mechanism for enforcing substantive rights under the Act."<sup>113</sup> Indeed, parents today are accepting an increasingly active role in the formal education of their children,<sup>114</sup> and they are challenging their local schools more frequently. Thus, for many parents, *Burlington* could have a significant impact on the future of their children because it may provide the impetus to remove the children from the current educational placement while the judicial process continues.

Demonstrating a stance of unity, the unanimous *Burlington* Court clearly resolved the issues consistently with the purpose of the EHA,<sup>115</sup> to hold otherwise would deny Michael Panico "a free appropriate public education"<sup>116</sup> which is within his rights. While the holding does not clarify the meaning of "appropriate education," it does offer greater specificity in interpreting the statutory language. Issues of "reimbursement" and "appropriate relief" have been addressed; *Burlington* now offers necessary guidance as the EHA continues to be applied.

In short, the Court has developed some guidelines for parents who seek reimbursement under the EHA: (1) potential relief under the statute includes reimbursement to parents for private school tuition and related expenses;<sup>117</sup> (2) the statute authorizes reimbursement for expenses incurred when parents change the child's educational placement during judicial proceedings without the consent of school authorities.<sup>118</sup> However, the EHA only authorizes reimbursement for expenses incurred in private school placement if the courts determine that that placement (rather than a public school setting) is appropriate under the statute.<sup>119</sup>

<sup>111</sup>Haggerty and Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 TEMP. L.Q. 961, 994 (1977).

<sup>112</sup>20 U.S.C. § 1415. See § 1415, *supra* note 11 for partial text of this provision.

<sup>113</sup>Note, *supra* note 35, at 1113.

<sup>114</sup>"... [t]he responsibility for education of the young lies, first and foremost, with parents and then with the state and local education agencies whose primary role is helping parents with that task." Bell, *Fall Survey of Education*, N.Y. Times, Nov. 15, 1981 § 6 at 65 (quoting President Reagan).

<sup>115</sup>20 U.S.C. § 1400(c).

<sup>116</sup>*Id.* at § 1401(18).

<sup>117</sup>105 S. Ct. at 2002-03.

<sup>118</sup>*Id.* at 2004.

Fortunately, the Court did not intrude on matters of curriculum and specific educational services which remain the responsibility of the state and local agencies. Handicapped children have very different needs, and schools must retain their flexibility and discretion to develop appropriate educational services based on the unique characteristics of each child.

Because *Burlington* involved specific rights of parents, it will be used by advocates of the handicapped to increase parental awareness of procedural safeguards under the EHA.<sup>120</sup> That, of course, would be a positive result because such efforts would help to insure that parents are cognizant of their statutory rights. However, if *Burlington* "encourages" parents (especially those who are more affluent) to feel somewhat "casual" about unilaterally changing their child's placement during judicial proceedings, the case could have a negative effect. A negative result may occur because handicapped children frequently learn better in an environment that is structured and predictable. Such an environment fosters security and confidence — psychological factors which enhance the learning process. However, if the educational setting is abruptly shifted, the handicapped child may have difficulty adjusting to the new situation, and the child's school work may suffer accordingly.

Overt disagreements between the parents and the school may leave a young child upset and confused if he feels "torn" between the "significant others" in his life. Removing the child from one educational setting and enrolling him in a new program (perhaps more than once) may have a positive influence on his education. However, at least initially, the handicapped child may have difficulty adjusting to the new environment and the change in structure and routine. Thus, the new setting may be to his detriment. Obviously, these are factors which must be balanced by the parents when they consider a change of placement.

In an effort to narrow the issues in *Burlington*, the Supreme Court did not address the question of funding. However, school authorities will be concerned about financial matters because they are the ones who must implement the EHA. On one hand, parents of handicapped children will understandably want the school to provide the best education possible for their child. Nevertheless, the cost of those special services can be burdensome to the local educational agency. As school districts across the nation face significant financial cutbacks and criticism that they are neglecting the basics, some scholars suggest that expensive programs for the handicapped (for many of whom remediation may not be possible) cannot be justified.<sup>121</sup> Budget conscious educators may suggest to parents that whatever the services proposed in the IEP, they be provided within a public school setting, where the costs are predictably less.

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<sup>120</sup>20 U.S.C. § 1415.

<sup>121</sup>Comment, *After Rowley: The Handicapped Child's Right to an Appropriate Education*, 38 U. MIAMI L.

It is true that the statutory language reflects a *free* appropriate education and that financial resources are available. However, federal funds do not cover the entire cost of educating the handicapped.<sup>122</sup> While *Burlington* did not intend to resolve budgetary matters, the decision may face negative reaction from schools which are facing financial crisis because the Court favored the more expensive placement. Although the child's needs may demand a more costly alternative, budget conscious educators may try to structure IEPs to fit within already constricted budgets.<sup>123</sup> Uninformed parents may rely on the judgment of school personnel rather than question their child's placement. Unfortunately, those who stand to lose are the handicapped children, many of whom can be helped to lead positive productive lives if given direction and opportunity through appropriate education.

### CONCLUSION

The *Burlington* Court resolved two issues relating to reimbursement and appropriate relief under the EHA: (1) potential relief includes reimbursement to parents for private school tuition and related expenses;<sup>124</sup> (2) parents do not waive their right to such reimbursement during judicial review if they violate the EHA and change the child's educational placement without the consent of school authorities.<sup>125</sup> However, reimbursement will only be authorized for expenses incurred in a private school setting if the courts determine the placement is appropriate under the statute.<sup>126</sup>

While the "needs of . . . [handicapped] children vary greatly, but the focus [of the EHA] is on one goal: to provide 'free appropriate public education.'" <sup>127</sup>*Burlington* does not clarify the meaning of "appropriate," but it does offer greater specificity in interpreting questions of reimbursement and appropriate relief. The ruling may heighten parents' awareness of their rights and of the procedural safeguards through which they may challenge the educational system. While budgetary matters were not addressed, *Burlington* may provide the impetus to influence legislators to design funding measures which will relieve some of the financial pressures from the State and local districts. In the interim, the intent and purpose of the EHA have become a reality for Michael Panico and his family.

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<sup>122</sup>Regarding costs, see 20 U.S.C. § 1411(a). This provision outlines a mathematical formula by which the number of handicapped children being served is multiplied by a specified percentage of the average per pupil expenditure in public schools in the nation. See generally Note, *supra* note 35, at 1109-11.

<sup>123</sup>See Note, *supra* note 35, at 1109-10.

<sup>124</sup>105 S. Ct. at 2002-03.

<sup>125</sup>*Id.* at 2004.

<sup>126</sup>*Id.* at 2005.

<sup>127</sup>Published by Idea Exchange@Usenet, on, 1986  
Comment, *supra* note 35, at 527.

