

1984

Education for Handicapped Children in Wyoming: What Constitutes a Free Appropriate Public Education and Other Administrative Hurdles

Robert J. Walters

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Walters, Robert J. (1984) "Education for Handicapped Children in Wyoming: What Constitutes a Free Appropriate Public Education and Other Administrative Hurdles," *Land & Water Law Review*. Vol. 19 : Iss. 1 , pp. 225 - 251.

Available at: https://scholarship.law.uwyo.edu/land_water/vol19/iss1/13

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

EDUCATION FOR HANDICAPPED CHILDREN IN WYOMING: WHAT CONSTITUTES A FREE APPROPRIATE PUBLIC EDUCATION AND OTHER ADMINISTRATIVE HURDLES

In 1975, Congress amended legislation regarding the education of handicapped children and enacted the Education For All Handicapped Children Act (EAHCA or Act), or what has been commonly referred to as "Public Law No. 94-142."¹ The EAHCA is a broad, and somewhat comprehensive legislative statement intended to encourage states to provide educational services to handicapped children² in exchange for limited federal funding.³ In addition to its substantive provisions,⁴ as well as the regulations promulgated thereunder,⁵ the Act creates a system of procedural guarantees which participating states must provide.⁶

Since the enactment of the EAHCA, many courts have found themselves bombarded with litigation concerning the Act's application.⁷ Any generalization concerning the subject matter of the litigation arising from the Act would be misleading; however, the major issues may be summarized by two related questions: what procedures do the Act require of

1. 20 U.S.C. §§ 1401-1461 (1976).

2. "Handicapped children" are defined as,

[M]entally 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.

20 U.S.C. § 1401(1) (1976).

The age range of handicapped children in a state participating under the Act is from three to twenty-one. 20 U.S.C. § 1412(2)(B) (1976); 34 C.F.R. § 300.300(a) (1982). However, a state is not required to provide services to handicapped children ages three through five and eighteen through twenty-one if either state law prohibits or does not authorize the expenditure of public funds in those age groups, or if the requirement is inconsistent with a court order governing educational services to handicapped children in that state. 20 U.S.C. § 1412(2) (B) (1976); 34 C.F.R. § 300.300(b) (5) (1982).

3. One reason suggested for states participating in the EAHCA regulatory scheme is that it otherwise places states in compliance with section 504 of the Rehabilitation Act of 1974 (29 U.S.C. § 794 (1976)) at least with respect to education of handicapped children. See Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477, 486 (1982).

Although additional remedies may be available under section 504, and possibly 28 U.S.C. § 1983 (1976), discussion of these is beyond the scope of this article. For a discussion of these statutes, see, e.g., Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1 (1981).

4. States that participate under the Act must have a policy in effect that "assures all handicapped children the right to a free appropriate public education" and have developed a state plan which demonstrates compliance with specific goals, services, priorities, policies and procedures. 20 U.S.C. § 1412 (1976). It is noteworthy that section 1412 contains no language which permits deviation from compliance, such as "if feasible." Section 1412 does provide, however, that certain age ranges may be excluded from coverage, 20 U.S.C. § 1412(2)(B) (1976), and that handicapped children are not required to be educated with nonhandicapped children if the handicapping condition makes regular classroom placement inappropriate, 20 U.S.C. § 1412(5) (1976).

5. The regulations are found at 34 C.F.R. §§ 300.1 - 300.754 (1982).

6. See 20 U.S.C. § 1415 (1976); 34 C.F.R. §§ 300.500 - 300.514 (1982). For further discussion of the procedural safeguards guaranteed by the Act, see *infra* notes 73-103 and accompanying text.

7. Obviously, the impact of the Act is felt most by the local and state educational agencies. However, discussion of specific impacts and the educational agencies' response thereto are beyond the scope of this article.

educational agencies, particularly at the local level; and what entitlements do the Act create for handicapped children?

Since an array of law review articles have given significant attention to these issues,⁸ this comment will concentrate on Wyoming's role in providing education to handicapped students.⁹ Specifically, Part I will provide a general overview of the EAHCA and the corresponding Wyoming statutes, including a discussion of the scope of the statutory provisions. Additionally, this comment will consider how the phrase "free appropriate public education" has been construed and the implications this construction has on the development of Wyoming's educational policies. It should be noted that the constitutional right to education suggests that state law may require a greater duty to provide an appropriate education to handicapped children than is required under the Act.

Part II will consider the procedural guarantees provided in the Act and compare them to the regulatory scheme existing in Wyoming. This part will also consider the ramifications of recent Wyoming administrative law developments on the procedural protections in contrast to features the Act contemplates. As such, this will serve to provide practice pointers to the attorney embarking on this nebulous area of the law.

Part III will discuss issues which have prompted substantial litigation in state and federal courts. An analysis of the possible impact of these issues on Wyoming will be provided, as well as discussion of the implications of the future of education of handicapped children in Wyoming.

I. HANDICAPPED CHILDREN HAVE A RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION

The early to mid-seventies found an increasing federal interest in education for handicapped children.¹⁰ Although education has not been con-

8. See, e.g., Comment, *A Modern Wilderness—The Law of Education for the Handicapped*, 34 MERCER L. REV. 1045 (1983); Stark, *supra* note 3; Rebell, *Implementation of Court Mandates Concerning Special Education: The Problems and the Potential*, 10 J. L. & ED. 335 (1981); Comment, *Self-Sufficiency Under the Education For All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516 (1981); Miller & Miller, *The Education For All Handicapped Act: How Well Does It Accomplish Its Goal of Promoting the Least Restrictive Environment For Education?* 28 DE PAUL L. REV. 321 (1979); Comment, *Enforcing the Right to an "Appropriate" Education: The Education For All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979); Comment, *Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children*, 14 COLUM. J.L. & SOC. PROBS. 389 (1979); Haggerty & Sacks, *Education of the Handicapped: Towards A Definition of An Appropriate Education*, 50 TEMP. L.Q. 961 (1977).

9. This comment does not consider the entitlements of handicapped students in higher education.

10. The EAHCA was a culmination of the increasing federal interest of education for handicapped children. S. REP. NO. 168, 94 CONG., 1st Sess. 5-7, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1429-31. The policies of the Act were in part derived from cases recognizing a constitutional right of handicapped children to an equal education mandated by *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (right to education must be available to all on equal terms). See Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). For a historical development of the EAHCA, see, e.g., Stark, *supra* note 3, at 479-80; Colley, *The Education for All Handicapped Children Act (EHA) A Statutory and Legal Analysis*, 10 J. L. & ED. 137, 137-39 (1981); Haggerty & Sacks, *supra* note 8.

sidered a fundamental constitutional right,¹¹ Congress was impressed with the substantial number of handicapped students either receiving no education or an inadequate education.¹² Federal legislation ultimately took form in the Education For All Handicapped Children Act of 1975.

A. General Features of the EAHCA

The scope of the Act appears to be quite broad. To be eligible to receive federal funds¹³ under the EAHCA, states must have a policy in effect which "assures all handicapped children [residing in the state] the right of a free appropriate public education."¹⁴ A "free appropriate public education" is defined earlier in the Act as:

[S]pecial 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 [IEP]¹⁵

The IEP plays a central role in determining whether the local educational agency is providing the handicapped child a free appropriate public education.¹⁶ The Act's definition of the IEP describes who should participate in the formulation of the IEP as well as the content of the IEP.¹⁷ It

11. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

12. S. REP. NO. 168, 94 Cong., 1st Sess. 8, 20-21, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432, 1444-45.

13. See 20 U.S.C. § 1412 (1976).

14. 20 U.S.C. § 1412(1) (1976).

15. 20 U.S.C. § 1401(18) (1976). Special education is defined as "specially designed instruction . . . 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) (1976). Further, related services are a component of an educational agency's obligation to provide a free appropriate public education in addition to special education. Consequently, the statute lists a substantial number of services that may be necessary to assist the handicapped child benefit from special education. See 20 U.S.C. § 1401(17) (1976).

16. Special education and related services must be provided in conformity with the IEP. 20 U.S.C. § 1401(18)(D) (1976). See also, *Board of Educ. v. Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 3049 (1982).

17. 20 U.S.C. § 1401(19) (1976). This subsection provides:

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

Compare, Wyoming State Board of Education, Rules and Regulations Governing Programs and Services For Handicapped Children in Wyoming School Districts, ch. XI, § 8, filed February 13, 1981.

is also apparent that the procedural requirements of the Act directly relate to the IEP.¹⁸

The provision of a free appropriate public education must be consistent with standards of the state educational agency.¹⁹ However, the policies and procedures the state educational agency must develop are prescribed by the Act.²⁰ Among those policies and procedures are: (1) a goal of providing full educational opportunity to all handicapped children;²¹ (2) within a prescribed age range;²² and (3) a method which is designed to identify handicapped children and the extent to which each child may or may not be receiving appropriate special education and related services.²³

Further, the Act requires a participating state to establish certain due process guarantees,²⁴ as well as procedures designed to prevent unnecessary placement outside the regular classroom.²⁵ Additional procedures must be established to assure that "testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory."²⁶

Thus, while the substantive requirements of the EAHCA were drafted very broadly,²⁷ the significance of the Act's breadth is more apparent when one considers the application of the supremacy clause in which federal standards preempt inconsistent state laws when that state has accepted federal

18. See 20 U.S.C. § 1415 (1976). The United States Supreme Court stated that courts must decide whether the IEP, developed through the procedures required by the EAHCA, is "reasonably calculated to enable the [handicapped] child receive educational benefits." *Board of Educ. v. Rowley*, 102 S.Ct. at 3051.

19. 20 U.S.C. § 1401(18) (B) (1976).

20. 20 U.S.C. § 1412(2) (1976).

21. 20 U.S.C. § 1412(2) (A) (1976).

22. 20 U.S.C. § 1412(2) (B) (1976). See also *supra* note 2.

23. 20 U.S.C. § 1412(2) (C) (1976).

24. 20 U.S.C. § 1412(5) (A) (1976). The procedural safeguards are set forth at section 1415. In general, the procedural requirements include notice and opportunity for the handicapped child's parents to participate in the beginning stages of the identification and evaluation through the placement stage. Participation includes permitting the parents to challenge either the identification, evaluation or placement of their child. Provision is made for administrative and judicial review. For further discussion of the procedural safeguards, see *infra* notes 73-103 and accompanying text.

25. 20 U.S.C. § 1412(5) (B) (1976) This has been commonly understood as "mainstreaming." See *infra* note 64.

26. 20 U.S.C. § 1412(5)(C) (1976).

27. See, e.g., Comment, *Self-Sufficiency Under the Education For All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516, 519-20 (1981). One rationale may be that Congress did not intend to interfere with educational policies which have been the province of the states and, therefore, the broad language of the statutes provides flexibility for state educational policies. See also Comment, *Enforcing the Right to an "Appropriate" Education: The Education For All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1109 (1979).

Another rationale is based on the complexity and unsettled nature of the science of learning disabilities. See, e.g., 41 Fed. Reg. 52,404-05 (1976). Beyond the above noted rationales, the Act contemplates that special education and related services be provided to a handicapped child based on his or her individual needs. This requirement by itself does not permit anything but a general statutory directive.

funds.²⁸ In this regard, the EAHCA establishes a minimum level of substantive and procedural guarantees which participating states must provide to handicapped children.

B. Wyoming Law Governing Education to Handicapped Children

Before the enactment of the EAHCA, the Wyoming legislature amended the state education code and included a chapter entitled "Program for Handicapped Children."²⁹ The Wyoming Constitution, unlike the federal constitution, expressly recognizes a right to education.³⁰ It has been suggested that the 1969 code "include[d] three specific areas which, combined spell out specifically the right to an education which the State Constitution guarantees."³¹ One of the specific areas was a program for handicapped children.³²

Section 21-14-101 of the Wyoming Statutes provides that "[e]ach and every child of school age in the State of Wyoming having a mental, physical or psychological handicap or social maladjustment which impairs learning, shall be entitled to and shall receive a free and appropriate education in accordance with his capabilities."³³ Although the term "handicapped

28. *See, e.g.*, *Parks v. Pavkovic*, 557 F. Supp. 1280, 1287 (N.D. Ill. 1983) (Illinois statutory scheme invalid under Supremacy Clause); *Monahan v. State of Nebraska*, 491 F. Supp. 1074, 1091 (D. Neb. 1980), *mod. on other grounds*, 647 F.2d 591 (5th Cir. 1981); *Vogel v. School Bd. of Montrose R-14 School Dist.*, 491 F. Supp. 989, 991-93 (W.D. Miss. 1980); *San Francisco Unified School Dist. v. State*, 131 Cal. App. 3d 54, 65-66, 182 Cal. Rptr. 525, 532 (1982); *Matter of "A" Family*, 602 P.2d 157, 166 (Mont. 1979). *See also* *Board of Educ. v. Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 3049-50 n.26 (1982), *Crawford v. Pittman*, 708 F.2d 1028, 1036 (5th Cir. 1983) (EAHCA involves both Congress' power to legislate under spending clause and to assure equal protection of the laws under section five of the fourteenth amendment).

Also, the EAHCA has been found not to violate the tenth amendment. *See Crawford v. Pittman*, 708 F.2d at 1036-39. *Cf.*, Comment, *Self-Sufficiency Under the Education For All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516, 524 n. 59 (1981).

29. WYO. STAT. § 21-14-101 to -106 (1977). *See Painter & Johnson, The Wyoming Education Code of 1969*, 5 LAND & WATER L. REV. 531 (1970).

30. WYO. CONST. art. 1, § 23. This section provides: "The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts."

The Wyoming Constitution also mandates that the legislature "provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, . . . and such other institutions as may be necessary." WYO. CONST. art. 7, § 1. Additionally, the legislature is required to "make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the state and free from sectarian control." WYO. CONST. art. 21, § 28.

31. *Painter & Johnson, The Wyoming Education Code of 1969*, 5 LAND & WATER L. REV. 531, 559 (1970).

32. *Id.*

33. WYO. STAT. § 21-14-101 (1977). Another provision in the education code provides: "Except as otherwise provided by law, the public school of each school district in the state shall at all times be equally free and accessible to all children resident therein over six (6) years of age and under the age of twenty-one (21), subject to such regulations as the board of trustees may prescribe." WYO. STAT. § 21-4-301 (1977). Read together, the state is only obligated to provide education to handicapped children between the ages of 6 and 21. *Cf. supra* note 2 (states may exclude children between the ages of 3-5 and 18-21 if state law does not authorize education for those age groups). However, the regulations promulgated by the Wyoming State Department of Education, provide for the identification of handicapped children, ages birth through twenty-one. Wyoming State Board of Education, *Rules and Regulations Governing Programs and Services For Handicapped Children in Wyoming School Districts*, 117, *filed* February 13, 1981 [hereinafter cited as *State Board Rules*] (on file at *Land & Water Law Review* office).

children" is not defined in the Wyoming Statutes,³⁴ section 21-14-101 indicates that the legislature intended to cover a broad category of handicapping conditions. It should be noted that the language of the statute suggests that a handicapping condition which does not impair learning is outside of the statute's coverage. Under its rulemaking authority,³⁵ the State Board of Education [State Board] has defined certain handicapping conditions such as hearing impairment, mental retardation, multihandicap, orthopedic impairment, other health impairment, social emotional handicaps, specific learning disability, speech and language handicaps, and visual handicaps.³⁶

Children who possess any of the handicaps noted above must be provided "appropriate diagnosis, evaluation, education or training, and necessary related services."³⁷ Further, if a particular school district cannot provide the necessary and appropriate programs and services, it must contract with another school district or agency to obtain them.³⁸ Likewise, if the program and services cannot be provided anywhere within the state, the State Board is required to assist the local board of trustees secure those programs and services outside the state.³⁹

The Wyoming Administrative Procedure Act⁴⁰ applies specifically to the provisions related to education for handicapped children.⁴¹ The Wyoming Education Code itself does not specifically authorize or require a hearing under the education for handicapped children provisions. However, the regulations promulgated by the State Board permit parents to "initiate an impartial due process hearing on any matter pertaining to the identification, assessment, educational placement, or provision of a free, appropriate public education . . . for the handicapped child."⁴²

34. Presumably, the legislature wished that the state board of education, because of its expertise in the area, define "handicapped children." Regardless, the state board defines a "handicapped child" as "a child or youth who, as a consequence of an individual assessment conducted by a multidisciplinary team comprised of properly certified and endorsed and/or licensed personnel, is identified as having a mental, physical, or psychological handicap or social maladjustment which impairs learning." State Board Rules, *supra* note 33, Appendix E, at 143.

35. WYO. STAT. § 21-14-102 (1977). The state board also has required local school districts to promulgate rules and regulations to assure that each child receives a free and appropriate education. State Board Rules, *supra* note 33, Ch. XI, § 1.

36. State Board Rules, *supra* note 33, Appendix E, at 143-44. Arguably, the handicapping conditions indicated in the state board's regulations are not exhaustive, provided that the handicap fits under the general categories in section 21-14-101 of the Wyoming Statutes.

37. WYO. STAT. § 21-14-103 (1977).

38. *Id.*

39. *Id.* The language of this section suggests that the state board may exercise a mediation function between school districts if one of the districts will not permit the other access to its programs or services.

A substantial amount of litigation has occurred because the parents wished an out of state placement that the parents perceived was better, even though the state could provide appropriate services in-state. See *infra* note 173.

40. WYO. STAT. §§ 16-3-101 to -115 (1977).

41. WYO. STAT. § 21-2-101 (1977). It is unclear whether this is an exclusive remedy or is intended to govern the procedures to be followed by the state board.

42. State Board Rules, *supra* note 33, ch. XI, § 5(h). Evidently, these rules were adopted to assure compliance with Sections 1412 and 1415 of the EAHCA.

It is unlikely that, despite the fact no express authority exists for the state board to promulgate rules and regulations governing procedural guarantees to enforce the provisions of the education code relating to education of handicapped children, the above noted regulations run afoul of the Wyoming Administrative Procedure Act. First, the state board has general rulemaking authority under section 21-14-102 of the Wyoming

The state board regulations also require that a school district provide notice to parents when it initiates or changes, or refuses to initiate or change, the identification, evaluation, educational placement of or the provision of free and appropriate education to a handicapped child.⁴³ Finally, either the school districts or parents may obtain judicial review of the state board's decision pursuant to Rule 12 of the Wyoming Rules of Appellate Procedure.⁴⁴

C. Comparison of the Scope of the EAHCA and the Wyoming Statutes Governing Education of Handicapped Children

Congress' authority to enact the EAHCA is premised in part on its conditional spending power or under a program of cooperative federalism.⁴⁵ The United States Supreme Court has taken cognizance that all states except New Mexico receive federal funds under portions of the Act.⁴⁶

On the other hand, the Wyoming legislature's authority to enact the provisions related to education of handicapped children is derived from the right to education guaranteed by the Wyoming constitution.⁴⁷ Indeed, the Wyoming Supreme Court recently characterized the constitutional right to education for the children of Wyoming as a "matter of fundamental interest."⁴⁸ The Wyoming School Foundation was devised to guarantee a minimal education for every child by providing state financial assistance to

Statutes. Thus, it is not unreasonable that the state board finds that due process assurances are necessary to assure that handicapped children receive a free and appropriate education. Second, "agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their duties." *Tri-State Generation v. Environmental Quality Council*, 590 P.2d 1324, 1332 (Wyo. 1979).

Further, since Wyoming law has given handicapped children a property interest in receiving a free and appropriate education, and because liberty interest may arise because of possible stigma (particularly if a child is labeled "handicapped" and the parents disagree with the determination by educational agencies), procedural due process is triggered. *Goss v. Lopez*, 419 U.S. 565, 572-74 (1975).

43. State Board Rules, *supra* note 33, ch. XI, § 5(a).

44. *Id.* at ch. XI, § 5(h)(12).

45. *See, e.g.,* *Battle v. Com. of Pa.*, 629 F.2d 269, 272 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981). *Stacy G. v. Pasadena Independent Sch. Dist.*, 547 F. Supp. 61, 73 (S.D. Tex. 1982). One commentator noted that "[t]hrough the use of conditional appropriations, [Congress'] power to spend becomes a power to regulate." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-10, at 247-48 (1978). Professor Tribe notes that courts have become generally deferential toward Congress' exercise of its conditional spending power. *Id.* at 249-50. *See also supra* note 28.

46. *Board of Educ. v. Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 3039 (1982).

47. *Painter & Johnson, supra* note 31, at 559.

48. *Washakie Co. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo.), *cert. denied* 449 U.S. 824 (1980). Here, the Wyoming Supreme Court viewed a classification based on wealth to be suspect when applied to a fundamental interest. *Id.* at 334. Arguably, the same reasoning should apply to classifications involving handicapped children. Thus, if children are discriminated against, the relevant statute, or action by the legislature or educational agencies, must survive strict scrutiny analysis. That is, the action must be necessary to achieve a compelling state interest. *Id.* at 333.

For discussion of jurisdictions that have held right to education under state constitution as either fundamental or not fundamental, see *Lujan v. Colorado Bd. of Educ.*, 649 P.2d 1005, 1016-17 n.11 (Colo. 1982). Although some states view right to education under state constitution as a fundamental right, handicapped children were not considered a suspect classification. *See, e.g.,* *Levine v. State Dep't of Institutions and Agencies*, 84 N.J. 234, 418 A.2d 229, 242-43 (1980). *But see* Rothstein, *Right to Education for the Handicapped in West Virginia*, 85 W. VA. L. REV. 187, 189 (1983) (strict scrutiny should apply).

the local school districts.⁴⁹ The foundation program must consider not only basic educational services but also the needs of exceptional and handicapped children.⁵⁰

The constitutional right to education suggests another difference between the state's obligation to provide education for handicapped children and requirements the EAHCA imposes on participating states in general. Both require that handicapped children receive a free appropriate public education.⁵¹ However, the provision of a free appropriate public education under the respective statutes and the goals they envision are not the same.

The United States Supreme Court, in *Board of Education of the Hendrick Central School District v. Rowley*,⁵² recently construed the phrase "free appropriate public education." The Court concluded that a handicapped child is receiving a free appropriate public education if personalized instruction is provided with sufficient supportive services to permit the child to benefit from that instruction.⁵³ The Court rejected the argument that the Act prescribed a substantive standard related to the level of education a handicapped child was entitled to receive, such as a requirement that states maximize the potential of handicapped children commensurate with the opportunity provided non-handicapped children.⁵⁴ In fact, a requirement that states provide equal educational opportunities was considered "an entirely unworkable standard requiring impossible measurements and comparisons."⁵⁵

To the extent that the Supreme Court indicated that the Act did not create a substantive right to a particular quality of education, the Court's understanding of the Act seems reasonable. As previously indicated, the EAHCA establishes a minima⁵⁶ of requirements states must be able to meet to be eligible to receive federal funds. With respect to the provision of a free appropriate public education, a state complies with the Act if it provides a handicapped child "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."⁵⁷ However, if this means that the Act only guarantees handicapped children meaningful access to education, measured by the incremental benefits those children may obtain from a program of special education and related services, the relative worth of that education is substantially diminished.

Wyoming has not yet been presented with a question related to the substantive entitlement of handicapped children to a particular kind of education. The relevant statutory provisions⁵⁸ are less helpful than the

49. Washakie Co. Sch. Dist. No. One v. Herschler, 606 P.2d at 322.

50. *Id.*

51. 20 U.S.C. § 1412(1) (1976); WYO. STAT. § 21-14-101 (1977).

52. ___ U.S. ___, 102 S.Ct. 3034 (1982).

53. *Id.* at 3042.

54. *Id.*

55. *Id.* at 3047. This particular aspect of the opinion is interesting since as the dissent points out, "[t]he Act itself announces it will provide a 'full' educational opportunity to all handicapped children.'" *Id.* at 3054 (White, J., dissenting).

56. Or in the Supreme Court's words, "a 'basic floor of opportunity.'" *Id.* at 3048.

57. *Id.*

58. WYO. STAT. §§ 21-14-101 to -106 (1977).

federal statutes may have been to the United States Supreme Court. In the state plan prepared for application of federal funds under the EAHCA, the Wyoming Department of Education stated its educational goals for handicapped children as follows: "all handicapped children as defined in the [EAHCA] will be provided full educational opportunities in programs meeting standards established and approved by the State Education Agency."⁵⁹ Additionally, the state plan expresses the Wyoming Department of Education's policy on priorities for educational services for handicapped children.⁶⁰

The regulations promulgated to implement the statutes which govern education to handicapped children indicate that "each Wyoming school district is responsible for identifying all handicapped school-age children who reside in the district and for providing them with a free, appropriate education."⁶¹ Under the regulations, each school district must provide for the normalization of educational experiences for handicapped children who are residents of that district, assurance of due process rights of children and their parents, referral of children for special services, assessment of those children, individual educational programs, appointment and functioning of a Child Study Committee, graduation of handicapped youths from high school, in-service preparation for all staff members in the education of handicapped children, and placements in private schools and facilities.⁶²

The most notable substantive entitlement of handicapped children contained in the regulations is the requirement that the school district provide for the normalization of educational experiences.⁶³ This requirement more than any other expresses how the provision of a free and appropriate public education in Wyoming is to take form. Its ultimate goal is to achieve full-

59. Wyoming Department of Education, Fiscal Year 1981-1983 State Plan Under Part B of the Education of the Handicapped Act As Amended by Public Law 94-142 (October 1, 1980) at 9 (on file at *Land & Water Law Review* office). It is not suggested that the state plan imposes a substantive obligation of educational agencies in the state beyond those which are in accordance with state law.

60. *Id.* at 11. The state plan states:

The Department [of Education]'s policy places highest priority on the provision of a free appropriate public education to handicapped school age children (ages 5 to 21) who are not receiving special education services. The identification, location and evaluation activities related to suspected handicapped children (ages 0 to 21) are also considered first priority. Second in priority are those handicapped children, within each disability group, who have the most severe handicaps and who are receiving an inadequate education. Second priority may include handicapped children outside of the state mandated school age (5-21).*Id.*

This is consistent with the EAHCA's requirement of priorities of educational services to handicapped children. *See* 20 U.S.C. § 1412(3) (1976); 34 C.F.R. §§ 300.320 - 300.324 (1982).

61. State Board Rules, *supra* note 33, ch. X, § 2.

62. *Id.* at ch. XI, § 1. The state agency implements the identification of handicapped children within each school district. *Id.* at § 2.

63. "Normalization of educational experiences" is not defined in the regulations. The term basically refers to the process of "assur[ing] that to the maximum extent appropriate handicapped children are educated in regular classes along with children who are not handicapped," *id.* at § 3(a); however, if regular classroom placement is inappropriate, referral, evaluation and placement of the handicapped child must occur within a continuum of alternatives ranging from a least restrictive environment to the most restrictive environment. *Id.* at § 3(a), (b). The continuum of educational alternatives are contained in Appendix A of the State Board Rules. *See also*, 20 U.S.C. § 1412(5) (B) (1976); 34 C.F.R. §§ 300.550 - 300.556 (1982).

time functioning in the regular classroom.⁶⁴ The school district, after evaluation of a given handicapped child, may resort to removal of that child from the regular classroom environment "only when there is clear evidence that the learning problems are of such a nature and severity that education in regular classes, even with the use of supplementary resources, cannot be achieved satisfactorily."⁶⁵ Any deviation from full-time regular classroom placement also must be provided in the least restrictive environment.⁶⁶ Once in a placement other than a regular classroom, the school district must facilitate movement of the handicapped child toward returning to a full-time regular classroom placement.⁶⁷ Of course, a major consideration in the normalization process is the potential adverse effect of movement from a less to more restrictive environment and from a more to a less restrictive environment.⁶⁸ From a procedural standpoint, a school district must justify any classroom placement and subsequent modification by an individualized educational program.⁶⁹

In contrast to the EAHCA, as the United States Supreme Court has interpreted it, Wyoming law and the regulations promulgated by the State Board of Education envision education of handicapped children as more than just a meaningful access to public education. Rather, it is viewed to include a meaningful education as well. Put differently, the view expressed by the dissent in *Rowley* that "the basic floor of opportunity is . . . intended to eliminate the effects of the handicap, at least to the extent that the [handicapped] child will be given an equal opportunity to learn if that is reasonably possible",⁷⁰ more closely fits the nature of the handicapped child's right to education in Wyoming. Arguably, the fact that the constitutional right to education in Wyoming is "a matter of fundamental interest"⁷¹ also adds support to the proposition that handicapped children must be provided a meaningful education. Thus, to the extent the State of Wyoming meets only the threshold requirements of the EAHCA, the state may fall short of its substantive obligation to provide education for handicapped children under the Wyoming Constitution.

It should be noted that under the EAHCA, a free appropriate public education does not mean that a handicapped child must receive the "best" education.⁷² Likewise, in Wyoming the provision of a free and appropriate

64. See *supra* note 63. For a general discussion of promoting placement of children in the least restrictive environment, or what has been referred to as "mainstreaming," see Miller & Miller, *The Education For All Handicapped Act: How Well Does It Accomplish Its Goal of Promoting the Least Restrictive Environment for Education?* 28 DE PAUL L. REV. 321, 324-40 (1979).

65. State Board Rules, *supra* note 33, ch. XI, § 3(c).

66. *Id.*

67. *Id.*

68. *Id.* at § 3(f).

69. *Id.* at § 8. If a conflict arises as to the appropriateness of a proposed educational placement, either the parents or the school district may resort to an impartial due process hearing. *Id.* at § 5(h).

70. 102 S.Ct. at 3055 (White, J., dissenting).

71. Washakie Co. Sch. Dist. No. One v. Herschler, 606 P.2d at 333.

72. See, e.g., Harrell v. Wilson County Schools, ___ N.C. App. ___, 293 S.E.2d 687, 689-90 (1982); Buchholtz v. Iowa Dept. of Public Instr., 315 N.W.2d 789, 793 (Iowa 1982) (state standard does not require best or maximum program in the sense of an unlimited commitment of resources and effort to meet the needs of each handicapped child); Rettig v. Kent City School Dist., 539 F. Supp. 768, 777 (N.D. Ohio 1981) (handicapped child not entitled to a perfect education, nor is school system required to provide any and all services that might be beneficial or experiment with novel teaching techniques).

education does not require that the state provide handicapped children the best available education. It only requires that the state provide handicapped children educational programs and services designed to eliminate the effects of the handicap and permit him or her to learn. In other words, Wyoming law only requires that the state provide handicapped children a meaningful education.

II. PROCEDURAL DUE PROCESS RIGHTS RELATED TO EDUCATION OF HANDICAPPED CHILDREN

A. *The Procedural Safeguards Under the EAHCA*

Section 1415 of the EAHCA sets forth the procedural safeguards participating states must provide to receive federal funds under the Act.⁷³ As with the state's obligation to provide handicapped children a free and appropriate public education, section 1415 establishes a minima of due process guarantees which handicapped children and their parents are entitled to receive. The language of the statute also indicates that states may provide additional procedural safeguards beyond those required under the EAHCA.⁷⁴ Alternatively, the supremacy clause applies to preempt conflicting or nonexistent state laws if the state receives federal funds under the Act.⁷⁵

Among the requirements in the EAHCA are: (1) the parents' rights to inspect all relevant records of their child;⁷⁶ (2) written notice to the parents under certain circumstances,⁷⁷ as well as the form of the written notice;⁷⁸ (3) an impartial due process hearing for complaints concerning the identification, evaluation, educational placement, or provision of a free appropriate public education;⁷⁹ (4) opportunity for administrative review if

73. S. CONF. REP. No. 455, 94 Cong., 1st Sess. 47-50, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1500-1503.

74. 20 U.S.C. § 1415(b) (1) (1976).

75. *See supra* note 28 and accompanying text.

76. 20 U.S.C. § 1415(b) (1) (A) (1976). In addition to challenging the evaluation of a particular handicapped child, the parents may obtain an independent evaluation at public expense. *Id.*; 34 C.F.R. § 300.503 (1982). However, if the evaluation is found to be appropriate in an impartial due process hearing initiated by the local education agency, the parents are still entitled to an independent evaluation at their own expense. 34 C.F.R. § 300.503(b) (1982).

77. 20 U.S.C. § 1415(b) (1) (C) (1976). Written notice must precede any proposal or refusal to initiate or change the identification, evaluation, or educational placement of or the provision of a free appropriate public education to a handicapped child. *Id.* Consent of the parent is only required before (1) the local educational agency conducts a preplacement evaluation and (2) the initial placement of a handicapped child in a program other than full-time regular classroom placement. 34 C.F.R. § 300.504(b) (1) (1982). Also, any changes in a child's special education program after initial placement only requires prior notice of such change. *Id.* at Comment 1.

78. 20 U.S.C. § 1415(b) (1) (D) (1976); 34 C.F.R. § 300.505 (1982). The notice is intended to inform the parents of the actions of the educational agency. If translation into a language other than English is necessary, the agency has a limited duty to do so. 20 U.S.C. § 1415(b) (1) (D) (1976); 34 C.F.R. § 300.505(b) (2), (C) (1982).

79. 20 U.S.C. § 1415(b) (2) (1976). This paragraph provides in pertinent part:

[T]he parents or guardians shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child. *Id.*

the state educational agency does not conduct the impartial due process hearing;⁸⁰ and (5) judicial review.⁸¹

The most notable areas are the requirements of an impartial due process hearing and the scope of judicial review. The Act and the federal regulations promulgated thereunder concerning impartial due process hearings⁸² require that state administrative procedures, as determined by state law or the state educational agency, be followed.⁸³ Although state administrative procedure may conflict, the hearing officer may not be an employee of the agency conducting the hearing or be involved in the education or care of the subject child,⁸⁴ or have a personal or professional bias.⁸⁵ In addition, the hearing rights under the regulations contemplate an adversary proceeding.⁸⁶

Whether the due process hearing is provided by the state or the local educational agency is left to the discretion of the states.⁸⁷ If the state educational agency conducts the hearing, the decision is deemed final unless appealed.⁸⁸ However, if the local educational agency or any intermediate educational unit conducts the hearing and either party appeals, the state educational agency must provide an impartial review of the hearing.⁸⁹ The decision which results from the administrative review stage becomes final unless the aggrieved party seeks judicial review.⁹⁰

The procedures under the EAHCA contemplate an active participation by the parents. On the other hand, the fact that a complaining party must look generally to state administrative procedure as the mechanism for enforcement of the Act presents a potential source for conflict between

80. 20 U.S.C. § 1415(c) (1976).

81. 20 U.S.C. § 1415(e) (2) (1976). *See also infra* notes 91-101 and accompanying text.

82. 20 U.S.C. § 1415(b) (2) (1976); 34 C.F.R. §§ 300.506-509 (1982).

83. 34 C.F.R. § 300.506(b) (1982). However, the Comment to this section permits the use of mediation prior to a due process hearing. *See infra* notes 114-18 and accompanying text.

84. 34 C.F.R. § 300.507(a) (1) (1982). *See also, e.g.,* Helms v. McDaniel, 657 F.2d 800, 805 (5th Cir. 1981) (members of local board may not conduct hearings); Robert M. v. Benton, 634 F.2d 1139, 1141-42 (8th Cir. 1980) (Superintendent of Public Instruction may not serve as a hearing officer because he was an "employee" within contemplation of the Act); Vogel v. School Bd. of Montrose R-14 School Dist., 491 F. Supp. 989, 995 (W.D. Mo. 1980) (State Board of Education cannot conduct hearing).

Additionally, the United States Department of Education recently sent out a policy memorandum indicating that state education employees, chief state school officers and members of state boards of education were prohibited from serving as either hearing or reviewing officers under section 1415. United States Department of Education, DAS Bulletin No. 107 (January 26, 1983).

85. 34 C.F.R. § 300.507(a) (2) (1982). However, bias due to pecuniary interest is not a ground for disqualification. *See id.* at § 300.507(b). *Cf.,* Harrell v. Wilson County Schools, ___ N.C. App. ___, 293 S.E.2d 687, 691 (1982) (expression of professional opinion between, e.g., mainstreaming versus residential placement does not violate due process).

86. 20 U.S.C. § 1415(b) (d) (1976); 34 C.F.R. § 300.508 (1982). *But see* Rothstein, *Right to An Education in West Virginia*, 85 W. VA. L. REV. 187, 206 (1983) (due process hearing should be approached as a non-adversarial hearing for the purpose of achieving a common goal).

87. 20 U.S.C. § 1415(b) (2) (1976).

88. 34 C.F.R. § 300.509 (1982).

89. 20 U.S.C. § 1415(c) (1976); 34 C.F.R. § 300.510 (1982). The regulations permit the reviewing agency to consider additional evidence at the administrative review stage. 34 C.F.R. § 300.510(b) (1982).

90. 20 U.S.C. § 1415(e) (2) (1976). *Cf.,* 34 C.F.R. § 300.510(c) (1983). Note that section 300.510(c) of the federal regulations refers to section 300.512. This seems to be a typographical error and should read: "unless a party brings a civil action under § 300.511."

federal and state law, at least to the extent of resolving questions which determine the nature of the due process hearing and the scope of judicial review.⁹¹ The judicial review provisions under the EAHCA permit an aggrieved party a forum for a civil action in either an appropriate state court or in federal district court.⁹²

There are two deviations from standard federal administrative law which appear in the Act: (1) reviewing courts must consider additional evidence at the request of either party, and (2) the reviewing court must base its decision on the preponderance of the evidence.⁹³ It has been suggested that these deviations do not require a reviewing court to accept the findings of a hearing officer even if supported by substantial evidence.⁹⁴ Indeed, some courts have held that judicial review under the EAHCA is not limited to the kind of review required by the Administrative Procedure Act.⁹⁵ Additionally, the requirement that the reviewing court receive additional evidence at the request of either party and base its decision on the preponderance of the evidence, including the authorization to "grant such relief as the court determines is appropriate,"⁹⁶ has been interpreted as authorizing a *de novo* review.⁹⁷

On the other hand, the United States Supreme Court stated that "the provision that the reviewing court must base its decision on the 'preponderance of the evidence' is by no means an invitation for courts to substitute their own notions of sound educational policy for those of the school authorities which they review."⁹⁸ Thus, due weight is to be given to the administrative proceedings of the educational agencies.⁹⁹

In the normal case, a party may not obtain judicial review under section 1415 of the Act without having first exhausted their administrative

91. See *infra* notes 148-61 and accompanying text.

92. 20 U.S.C. § 1415(e) (2) (1976).

93. *Id.* Ordinarily, a reviewing court may not consider additional evidence, but its review of an administrative agency's action is limited to the record before the agency at the time the agency made its decision. See, e.g., *Wyoming Hospital Ass'n v. Harris*, 527 F. Supp. 551, 559 (D. Wyo. 1981). Also, the standard for review of agency action is whether the agency's decision is supported by "substantial evidence." See, e.g., 5 U.S.C. § 706(a) (E) (1976); *Citizens Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971).

94. Comment, *Enforcing the Right to an "Appropriate" Education: The Education For All Handicapped Children Act of 1976*, 92 HARV. L. REV. 1103, 1108 (1979). See also, Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 9 (1981); *Colin K. v. John K. Schmidt*, 715 F.2d 1, 5 (1st Cir. 1983).

Contra, *Harrell v. Wilson County Schools*, ___ N.C. App. ___, 293 S.E.2d 687 (1982) (court applied substantial evidence test); *Doe v. Anrig*, 561 F. Supp. 121, 124 (D. Mass. 1983) (standard of review is substantial evidence test).

95. See, e.g., *Doe v. Anrig*, 692 F.2d 800, 805-06 (1st Cir. 1982).

96. 20 U.S.C. § 1415(e) (2) (1976).

97. See, e.g., *Colin K. v. John K. v. Schmidt*, 715 F.2d 1, 5 (1st Cir. 1983) (EAHCA requires something short of *de novo* review); *Ronker v. Walter*, 700 F.2d 1058, 1061-62 (6th Cir. 1983) (EAHCA requires *de novo* review); *Kruelle v. New Castle County School District*, 642 F.2d 687, 692 (3d Cir. 1981) (same); *Doe v. Anrig*, 561 F. Supp. 121, 124 (D. Mass. 1983) (same); *Colin V. Schmidt*, 536 F. Supp. 1375, 1385 (D. R.I. 1982) (same); *Workman v. Scanlon*, 528 F. Supp. 1032, 1033 (W.D. Penn. 1981) (same). *Contra*, *Quackenbush v. Johnson City School District*, ___ F.2d ___, Ct. App. No. 82-7695 (2d Cir. August 24, 1983); *Lang v. Braintree School Committee*, 545 F. Supp. 1221, 1226 (D. Mass. 1982).

98. *Board of Educ. v. Rowley*, 102 S.Ct. at 3051.

99. *Id.* There may be competing considerations of which courts should be aware. See, e.g., Comment, *Self-Sufficiency Under the Education For All Handicapped Children Act*, 1981 DUKE L. J. 516, 528-33 (1981).

remedies.¹⁰⁰ However, some courts have not required exhaustion when the procedures are inadequate or exhaustion would otherwise be futile.¹⁰¹

Finally, the EAHCA requires that the subject child remain in his or her present educational placement during the pendency of any administrative or judicial proceeding.¹⁰² This has been construed to mean that the handicapped child may not be placed in a less or more restrictive environment than he or she was placed before an impartial due process hearing was requested by either party;¹⁰³ that is, educational agencies must maintain the status quo while any review is pending.

B. Due Process Rights of Handicapped Children in Wyoming

As noted above, the EAHCA requires that participating states provide certain procedural protections.¹⁰⁴ Although the Wyoming statutes indicate that hearings under the education code are governed by the Wyoming Administrative Procedure Act,¹⁰⁵ there is no express requirement for a hearing under the provisions which govern education of handicapped children. To comply with the EAHCA, therefore, the Wyoming State Board of Education promulgated the necessary regulations pursuant to its general rule-making authority under the provisions concerning education of handicapped children.¹⁰⁶ The State Board regulations generally track the language of the EAHCA and the regulations promulgated thereunder.

Almost as a preamble, the regulations state that: "Due process assurances are legal expressions of the dignity and worth of children and of the district's commitment to their healthy development and progress."¹⁰⁷ At first glance, this statement suggests that the State Board views the due process assurances as more than a mechanism to ensure that handicapped children receive all of the benefits to which the EAHCA entitles them.¹⁰⁸ Rather, the procedural protections under the State Board regulations reflect an educational policy of advancing the development and progress of handicapped children.

However, as noted above, there is little variance between the federal regulations and the state board regulations. For instance, both require notice to the parents of any actions by the educational agencies with respect to the identification, evaluation, educational placement of and the provision of a free appropriate public education,¹⁰⁹ as well as the content of

100. See Hyatt, *Litigating the Rights of Handicapped Children to An Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 29-34 (1981). See also, Annot., 62 A.L.R. FED. 376 (1983).

101. *Id.*

102. 20 U.S.C. § 1415(e) (3) (1976). This requirement may be waived by consent of all parties.

Id.

103. See, e.g., Stacy G. v. Pasadena Indep. School Dist. 695 F.2d 949, 953 (5th Cir. 1983).

104. See *supra* note 24.

105. WYO. STAT. § 21-2-101 (1977).

106. See State Board Rules, *supra* note 33, ch. XI, § 5. The State Board's rulemaking authority is derived from section 21-14-103 of the Wyoming Statutes. See also *supra* note 42.

107. State Board Rules, *supra* note 33, ch. XI, § 5.

108. In *Rowley*, the United States Supreme Court emphasized the significant degree of participation by parents at every stage of the administrative process. 102 S.Ct. at 3050-52. Moreover, the Court viewed the procedural safeguards as an enforcement mechanism by the parents. *Id.*

109. State Board Rules, *supra* note 33, ch. XI, § 5(a); 34 C.F.R. § 300.504(a) (1982).

the notice.¹¹⁰ Both require the parents be permitted examination of their child's records.¹¹¹ Both require the opportunity for independent educational evaluation.¹¹² Both create an entitlement to an impartial due process hearing subject to judicial review.¹¹³

The most notable difference between the federal regulations and the state board regulations is the latter's provision for a pre-hearing conference. When the parents or a local school district exercise their right to initiate an impartial due process hearing, the superintendent of the local school district and the state superintendent must schedule a pre-hearing conference.¹¹⁴ The pre-hearing conference is an attempt at mediation between the parties, which in part seeks to avoid a due process hearing.¹¹⁵ However, the regulations indicate that mediation cannot be used to deny or delay an aggrieved party's rights to an impartial due process hearing.¹¹⁶ If mediation efforts fail, a due process hearing is held.¹¹⁷

The pre-hearing conference (mediation effort) provision seems to suggest that, to the extent that exhaustion of administrative remedies is required, this stage is a prerequisite to an impartial due process hearing. In this regard, it is possible that a party may successfully challenge a mediation process which is a prerequisite to a due process hearing. Arguably, the phrase, "if mediation efforts fail,"¹¹⁸ in the State Board regulations should include a refusal to participate in the pre-hearing conference. Additionally, over-riding considerations may dictate the need to forego a pre-hearing conference, such as when protection of the handicapped child or other children is exigent. This consideration applies in the context of maintenance of the handicapped child's present placement during the pendency of administrative or judicial proceedings.¹¹⁹ Likewise, similar considerations should apply in the context of the pre-hearing stage.

Regarding the specific requirements for impartial due process hearings, the EAHCA requires participating states to provide for an opportunity for such hearings, "as determined by State law or by the State educational agency."¹²⁰ Wyoming complies with this requirement through the

110. State Board Rules, *supra* note 33, ch. XI, § 5(b); 34 C.F.R. § 300.505 (1982).

111. State Board Rules, *supra* note 33, ch. XI, § 5(g); 34 C.F.R. § 300.502 (1982).

112. State Board Rules, *supra* note 33, ch. XI, § 5(i); 34 C.F.R. § 300.503 (1982).

113. State Board Rules, *supra* note 33, ch. XI, § 5(h); 34 C.F.R. §§ 300.506, 300.509 (1982).

114. State Board Rules, *supra* note 33, ch. XI, § 5(h) (2).

115. *Id.* The federal regulations acknowledge that the use of mediation can lead to a resolution of the difference between parents and educational agencies without developing an adversarial relationship. *See* comment to 34 C.F.R. § 300.506 (1982). The federal regulations, however, take a position against the use of mediation to deny or delay a due process hearing. *Id.*

116. State Board Rules, *supra* note 33, ch. XI, § 5(h) (2).

117. *Id.* at ch. XI, § 5(h) (3). It should be noted that within 45 days after receipt of the request for hearing, the State Board or its designee must render a written decision. *Id.* at ch. XI, § 5(h) (11). This may suggest that the pre-hearing conference does not extend the 45-day time period unless all parties consent.

118. *Id.*

119. *See, e.g., id.* at ch. XI, § 5(h) (3): Despite requirement that the school district must maintain a particular child during pendency of administrative or judicial proceedings, school district can use its normal procedures for dealing with children who are endangering themselves or others.

120. 20 U.S.C. § 1415(b) (2) (1976).

State Board regulations which entitle handicapped children to a hearing either to challenge a school district's provision of or to enforce the handicapped child's entitlement to a free and appropriate education. However, the nature of the hearing is unclear. The handicapped child's procedural due process rights under the fourteenth amendment suggest some considerations.

A handicapped child in Wyoming derives a right to education both from a property interest and a liberty interest. Under *Goss v. Lopez*,¹²¹ a property interest is created by statutory or regulatory entitlements.¹²² Liberty interests arise from stigma to a person's reputation which may result from governmental activity.¹²³ In *Goss*, the United States Supreme Court held that a student's property and liberty interest in receiving an education was sufficient to prohibit a school from imposing suspension on the student without applying a minimum of procedures required under the due process clause.¹²⁴ In this context the competing interests of the student and the school are resolved by application of an informal procedure.¹²⁵

However, in the context of determining whether a handicapped child is receiving a free appropriate public education, applying an informal procedure will not suffice under the due process clause. A handicapped child, like other students, has an interest in not being unfairly or mistakenly excluded from the educational process. Unlike nonhandicapped students, the handicapped child has a specific right to an appropriate education, the nature of which is described by federal law. Further, the EAHCA's requirements for an impartial due process hearing include the right to present evidence, cross-examine witnesses, and receive a verbatim transcript of the proceedings.¹²⁶ This indicates that a formal procedure is contemplated. Thus, the fourteenth amendment requires a formal hearing despite the Wyoming education code's failure to expressly provide for one.

The same result occurs under the Wyoming Administrative Procedure Act. The Wyoming Administrative Procedure Act contemplates administrative proceedings which require a hearing and administrative proceedings which do not require a hearing.¹²⁷ The former is met by a full blown trial-type hearing,¹²⁸ or "contested case" procedures.¹²⁹ A contested case is defined as "a proceeding . . . in which legal rights, duties or privileges of a party are required by law to be determined after an opportunity for a hearing."¹³⁰ Under this definition, the entitlement to a hearing is not dependent on a statute creating the entitlement if state or federal law otherwise provides for one. In this regard, the due process clause of the fourteenth amendment creates an entitlement for a hearing since a handicapped child has a specific property interest in receiving a free appropriate public education under Wyoming's Constitution.

121. 419 U.S. 565 (1974).

122. *Id.* at 572-73.

123. *Id.* at 574-75.

124. *Id.* at 581.

125. *Id.* at 579-83.

126. 20 U.S.C. § 1415(d) (1976). *See also* 34 C.F.R. § 300.508 (1982).

127. *Thornley v. Wyoming Hwy. Dep't.*, 478 P.2d 600, 603 (Wyo. 1971).

128. *Diefenderfer v. Budd*, 563 P.2d 1355, 1359 (Wyo. 1977).

129. *See* WYO. STAT. § 16-3-107 (1977).

130. WYO. STAT. § 16-3-101(b) (ii) (1977).

The EAHCA also creates a specific right to an "impartial due process hearing" which must be adopted by states receiving funds under the EAHCA.¹³¹ It should be recalled that federal preemption applies when a conflict exists between the procedural requirements of the Act and state law.¹³² If a state's procedures provide less protection than the EAHCA contemplates, the provisions of the Act must be employed.¹³³ Congress' power to impose the procedural requirements also should survive a tenth amendment challenge.¹³⁴

Additional considerations indicate that contested case procedures apply to enforce a handicapped child's right to an appropriate education. First, a free appropriate public education must be provided in accordance with the IEP.¹³⁵ The IEP in turn must describe the handicapped child's current educational performance, establish short-term objectives and long-term goals, and the services necessary to achieve those goals.¹³⁶ Contested case procedures are particularly suited for determining whether the educational services, program or placement proposed in an IEP are appropriate.

Second, in this context, contested case procedures also assist in the development of an adequate record for judicial review. In *Board of County Commissioners of Teton County v. Teton County Youth Services*,¹³⁷ the Wyoming Supreme Court stated that "meaningful review of administrative actions requires that an adequate record of the proceedings be made before the administrative agency."¹³⁸ Thus, to the extent that contested case procedures are not utilized in an impartial due process hearing, a handicapped child may be deprived of due process of law.¹³⁹

In Wyoming, appeal of the impartial due process hearing is direct to the district court having venue.¹⁴⁰ There is no administrative review of the hearing by an intermediate educational agency. The State Board regulations provide that: "Appeals from . . . [an impartial due process hearing] are taken in pursuant to Rule 12 of the Wyoming Rules of Appellate Procedure," which applies to judicial review of administrative action.¹⁴¹ What kind of judicial review an aggrieved party is entitled to is the subject of the section which follows.

C. Judicial Review in Wyoming Concerning A Handicapped Child's Right to An Appropriate Education

The Wyoming Administrative Procedure Act governs the availability of judicial review of administrative decisions.¹⁴² The Wyoming Supreme

131. 20 U.S.C. § 1415(b)(2). The phrase "impartial due process hearing" is probably a generic term for trial-type hearings under state administrative codes.

132. See *supra* note 28.

133. See, e.g., *San Francisco Unified School Dist. v. State*, 131 Cal. App. 3d 54, 182 Cal. Rptr. 525, 532 (1982).

134. See *infra* notes 167-71 and accompanying text.

135. 20 U.S.C. § 1401(18) (1976). Compare *Board of Educ. v. Rowley*, 102 S.Ct. at 3038.

136. 20 U.S.C. § 1401(19) (1976). See also 34 C.F.R. §§ 300.340 - 300.349 (1982).

137. 652 P.2d 400 (Wyo. 1982).

138. *Id.* at 413.

139. See also Comment, *Legal Remedies for the Misclassification or Wrongful Placement of the Handicapped Child*, 14 COLUM. J.L. & SOC. PROBS. 389, 414-18 (1979).

140. *Supra* note 113.

141. State Board Rules, *supra* note 33, ch. XI, § 5(h) (12); W.R.A.P. 12.

142. WYO. STAT. § 16-3-114 (1976). This section provides in pertinent part:

Subject to the requirement that administrative remedies be exhausted and in

Court has construed the availability of judicial review of administrative decisions or agency action as a right derived entirely from statutes entitling a person to judicial review.¹⁴³ However, restrictions on the availability of judicial review are not favored and those statutes restricting or precluding review must be supported by clear and convincing expressions of a legislative intent to prohibit review.¹⁴⁴ Thus, judicial review should be available when an administrative proceeding, whether or not characterized as a contested case, is used to determine a handicapped child's entitlement to an appropriate education under Wyoming law.¹⁴⁵

On the other hand, the procedure to be followed in obtaining judicial review is determined by rules adopted by the Wyoming Supreme Court.¹⁴⁶ The rules adopted by the Wyoming Supreme Court require the aggrieved party to file a petition for review in the district court having venue.¹⁴⁷ A petition for review must be filed within thirty (30) days after written, certified notice is delivered to all parties of the final decision of the agency.¹⁴⁸ Additional evidence may only be considered by the reviewing court in contested cases if fraud or misconduct is present at the earlier administrative proceeding, and, in cases other than a contested case, if the additional evidence is material.¹⁴⁹ Also, an independent action is available "notwithstanding any petition for review filed."¹⁵⁰ Finally, any party aggrieved by the final decision of the district court may appeal to the Wyoming Supreme Court.¹⁵¹

Administrative law in Wyoming presents additional considerations for the practicing attorney seeking judicial review of the final decision resulting from the impartial due process hearing. Most noteworthy are the decisions interpreting the scope of judicial review. First, the reviewing court is generally limited to consideration of the record before the agency at the time when the decision was made.¹⁵² Second, de novo review is generally unavailable for review of administrative decisionmaking or

the absence of any statutory or commonlaw provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, . . . is entitled to judicial review. . . . *Id.*

143. U.S. Steel Corp. v. Wyoming Environmental Quality Council, 575 P.2d 749, 750 (Wyo. 1978).

144. *Id.*

145. *See, e.g.,* Diefenderfer v. Budd, 563 P.2d 1355, 1359-60 (Wyo. 1977) (judicial review authorized for noncontested case because Wyoming Administrative Procedure Act does not limit review only to contested cases but also to "any other agency action").

146. WYO. STAT. § 16-3-114(a) (1982).

147. W.R.A.P. 12.03. Note that all appeals from administrative agencies and all proceedings for trials de novo reviewing administrative action are governed by this rule.

148. W.R.A.P. 12.04.

149. W.R.A.P. 12.08. In contested cases additional evidence which is material must first be considered by the agency.

150. W.R.A.P. 12.12. However, the Wyoming Supreme Court in Rocky Mountain Oil & Gas Association v. State, 645 P.2d 1163 (Wyo. 1982), limited the use of Rule 12.12 to challenges concerning the validity and constitutionality of agency regulations or the constitutionality or interpretation of a statute upon which the administrative action is, or is to be, based. *Id.* at 1168. For a discussion of the implications of this decision, see Battle, *Administrative Law, Wyoming Style*, 18 LAND & WATER L. REV. 223, 224-240 (1983).

151. W.R.A.P. 12.11.

152. *See, e.g.,* W.R.A.P. 12.09 (review confined to the record); Wyoming Hospital Ass'n v. Harris, 527 F. Supp. 551, 559 (D. Wyo. 1981). *See also supra* note 149 and accompanying text.

agency action.¹⁵³ And third, the standard for review is whether the decision by the agency is supported by substantial evidence.¹⁵⁴

As previously indicated, the EAHCA deviates from general federal administrative law by requiring that the reviewing court consider additional evidence at the request of either party and by requiring that the reviewing court base its decision on the preponderance of the evidence.¹⁵⁵ Although this appears to depart from the deference reviewing courts generally afford the decisionmaking of administrative agencies,¹⁵⁶ the United States Supreme Court indicated that the Act carried an implied requirement that due weight was to be given to the administration proceedings.¹⁵⁷ On the other hand, some courts view the expansive provisions under the Act concerning the scope of judicial review as contemplating *de novo* review.¹⁵⁸

Almost immediately, the variances between the kind of judicial review available in Wyoming and the kind of review the EAHCA contemplates becomes apparent. Under the EAHCA, the requirement that the reviewing court receive additional evidence appears to be a matter of right. In contrast, a Wyoming court which reviews an administrative decision may consider additional evidence only if a showing is made that the evidence is material or if fraud or misconduct was present in the earlier proceeding. Due process or the need for an adequate record may dictate that the reviewing court consider additional evidence.¹⁵⁹ In practice, however, a court probably will remand to the agency to more fully develop the record by considering additional evidence.¹⁶⁰

Changing the standard of judicial review of the administrative determination regarding a handicapped child's right to an appropriate education from the substantial evidence test to a decision based on the preponderance of the evidence presents more difficulty. In Wyoming, unlike the federal system,¹⁶¹ the rules for judicial review adopted by the Wyoming Supreme Court supercede existing statutory provisions.¹⁶² Also, Rule 12.09 limits

153. See, e.g., *City of Evanston v. Whirl Inn*, 647 P.2d 1378, 1382-83 (Wyo. 1982). See also *Battle, Administrative Law, Wyoming Style*, 18 LAND & WATER L. REV. 223, 249-263 (1983).

In *City of Evanston*, the Wyoming Supreme Court noted that the Wyoming Administrative Procedure Act replaced the trial *de novo* provisions. 647 P.2d at 1384. Compare, *City of Casper v. Regan*, 433 P.2d 834 (Wyo. 1967) (same).

154. See WYO. STAT. § 16-3-114(c) (ii) (E) (1977). Note that this provision applies to hearings provided by statute. *Id.* Presumably, this refers to contested case proceedings.

155. See *supra* notes 93-99 and accompanying text.

156. See, e.g., *Doe v. Anrig*, 692 F.2d 800, 805 (1st Cir. 1982) (review mechanism under EAHCA stands in sharp contrast to the usual situation where a court is confined to examining the record made before the agency and to determining whether the administrative decision is supported by substantial evidence).

157. *Board of Educ. v. Rowley*, 102 S.Ct. at 3051.

158. See *supra* note 97.

159. See W.R.A.P. 12.07. Cf., W.R.A.P. 12.08. See also, *Bd. of County Comm'rs v. Teton County Youth Services, Inc.*, 652 P.2d 400, 413-16 (Wyo. 1982) (although record was deficient and court could have taken additional evidence, Board required to develop record under a contested case procedure).

160. *Id.*

161. The judicial review provisions under the Federal Administrative Procedure Act are subject to additional requirements imposed by statute or otherwise recognized by law. 5 U.S.C. § 559 (1976).

162. WYO. STAT. § 16-3-114(b) (1977).

review to those matters specified in the Wyoming Administrative Procedure Act.¹⁶³ Additionally, because of case law on the subject, review de novo is unavailable in Wyoming for review of administrative decisions regarding the handicapped child's right to an appropriate education.¹⁶⁴

Again, when state law conflicts with the procedural requirements of the EAHCA, as it does in Wyoming with respect to the scope of judicial review, the Act controls.¹⁶⁵ In *San Francisco Unified School District v. State*, the court held that the provisions of the EAHCA should be employed where state review procedures provide less protection or a more limited scope of review.¹⁶⁶ This may present some tenth amendment difficulties; however, the nature of Congress' power to enact the EAHCA should shield it from attack under the tenth amendment. The court in *Crawford v. Pittman*,¹⁶⁷ recently concluded that the EAHCA is not subject to tenth amendment limitations under a *National League of Cities v. Usury (NLC)* analysis.¹⁶⁸

The *Crawford* court viewed Congress' power to enact the EAHCA as an exercise of its spending power and to assure equal protection of the laws under section five of the fourteenth amendment.¹⁶⁹ Regarding the Act as spending power legislation, it held that the voluntary nature of the Act precluded application of *NLC*.¹⁷⁰ The *Crawford* court also noted that statutes enacted pursuant to section five of the fourteenth amendment are not subject to the limitations of *NLC*.¹⁷¹ Although the reasoning of the court is not very expansive, the opinion in *Crawford* should provide reviewing courts some guidance in resolving questions of the tenth amendment's applicability to the EAHCA.

163. W.R.A.P. 12.09. The rule limits review to those matters in section 16-3-114(c) of the Wyoming Statutes, which provides in pertinent part:

[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:

- (ii) Hold unlawful and set aside agency action, findings and conclusions found to be:
 - (A) Arbitrary, capricious, an abuse or discretion or otherwise not in accordance with law;
 - (B) Contrary to constitutional right, power, privilege or immunity;
 - (D) Without observance or procedure required by law; or
 - (E) Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.

WYO. STAT. § 16-3-113(c) (1982).

It is unclear to what extent the supremacy clause may apply to preempt the rules for judicial review of agency action adopted by the Wyoming Supreme Court.

164. See *supra* note 153.

165. See *supra* note 28.

166. 131 Cal. App. 3d 54, 182 Cal. Rptr. 525, 532 (1982).

167. 708 F.2d 1028 (5th Cir. 1983).

168. *Id.* at 1037-38.

169. *Id.* at 1036.

170. *Id.* at 1037. Compare Comment, *Self-Sufficiency Under the Education For All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L. J. 516, 524 n.59 (1981).

171. *Id.*

Thus, the practicing attorney is encouraged to familiarize him or herself with the due process assurances provided under the EAHCA, the State Board's regulations, and Wyoming administrative law.¹⁷²

III. THE PRESENT AND THE FUTURE OF A HANDICAPPED CHILD'S RIGHT TO AN APPROPRIATE EDUCATION IN WYOMING

In the 1976-77 academic year a total of 7,598 Wyoming students between the ages of three and twenty-one¹⁷³ were identified to receive services under P.L. 94-142.¹⁷⁴ This represented 7.45% of the total statewide student population.¹⁷⁵ Six years later, in the 1982-83 academic year, the total number of children in the same age category who received services under the Act rose to 9,837.¹⁷⁶ Correspondingly, this represented 9.36% of the total school population.¹⁷⁷ The above figures reflect a growing handicapped student population whose impact on Wyoming education law has largely gone unnoticed.

This may be due in part to the relatively low number of challenges to local school district's implementation of the EAHCA since its inception.¹⁷⁸ It would not be unreasonable to project, however, that as case law develops nationally in the area of education to handicapped children, including the possibility of a lesser degree of federal regulation,¹⁷⁹ Wyoming will experience its share of having to determine the scope of a handicapped child's entitlement to an appropriate education and the educational agencies' obligations thereunder.

A. Potential Areas of Controversy

Should an issue arise before a Wyoming court as to the appropriateness of a handicapped child's education, a preliminary question which should be

172. The attorney should also be familiar with any rules and regulations a local school district has promulgated since the State Board regulations require local school districts to promulgate rules and regulations for education of handicapped children. State Board Rules, *supra* note 33, ch. XI, §§ 1-2.

173. The area of greatest concentration was students between the ages of six to twenty-one (7268).

174. These statistics were compiled by the Department of Health, Education and Welfare (the Department of Education became a separate department under President Carter's reorganization) in Washington, D.C. Department of Health, Education and Welfare, State Child Count Profile - Wyoming (1977).

175. *Id.*

176. *From* Department of Education, Report of Handicapped Children Receiving Special Education and Related Services Under P.L. 94-142 and P.L. 89-313, School Year 1982-1983, Wyoming (June 27, 1983). These statistics were compiled by the Department of Education, Washington, D.C. The area of greatest concentration was ages 6-17.

177. *Id.* It was suggested a few years ago that approximately ten percent of America's school age population are handicapped children. Haggerty & Sacks, *Education of the Handicapped: Towards A Definition of An Appropriate Education*, 50 TEMP. L. Q. 961 (1977).

178. Interview with Gayle R. Lain, Ed.D., Director of the Special Programs Unit, Department of Education, State of Wyoming, in Cheyenne, Wyoming (October 4, 1983). According to Dr. Lain, only three complaints reached the impartial due process hearing stage since the EAHCA took effect. In addition, no civil actions have been brought thus far against a local school district or the Department of Education concerning the education provided or not provided a handicapped child.

The Department, on the other hand, in the time period from July 1982 through September 1983, received seven (7) formal hearing requests. Seven (7) mediations followed with one resulting in an impartial due process hearing. The issues presented involved challenges to placement or programs, evaluations, and funding of placements.

179. See *infra* notes 208-12 and accompanying text.

considered is the parameters of a handicapped child's right to an education guaranteed by the Wyoming Constitution. Only after resolution of this question may the appropriateness of a particular education program, as well as the scope of a school district's obligations therein, be determined. Although a myriad of individual circumstances may give rise to disputes, three areas of controversy have frequently reached the courts: (1) the appropriateness of residential placement; (2) school discipline of handicapped children; and (3) the provision of an educational program that extends beyond the regular school year.

(1) Residential Placement

Residential placement disputes may occur in at least two contexts. The first involves a determination by a local school district that it does not have the resources to provide the types of services a particular handicapped child requires. Obviously, residential placement should not occur if the child can be educated in a less restrictive environment.¹⁸⁰ However, the Wyoming Department of Education has noted that Wyoming has several unique factors which present obstacles to alternative educational placements according to the needs of handicapped children,¹⁸¹ resulting in potentially greater use of residential placements. Specifically, some of the factors are: (1) low numbers of handicapped children; (2) low incidence of handicapping conditions; (3) size of districts in rural or remote areas; (4) difficulty recruiting special education personnel because of isolation; and (5) lack of facilities because of impact in energy producing areas.¹⁸²

Residential placement disputes may also arise when the parents believe that a particular facility is best adapted for their child's needs.¹⁸³ This dispute is most frequent when the local or state agency believes that an appropriate placement exists somewhere else within the district or the state.¹⁸⁴ In either context, the inquiry ultimately rests on a determination whether a residential placement is appropriate and necessary for educational reasons.¹⁸⁵ A more difficult question occurs when a child's problems, which may not be related to educational disabilities (such as emotional,

180. See, e.g., State Board Rules, *supra* note 33, ch. XI, § 3(a) (to the maximum extent appropriate, handicapped children must be educated in regular classes along with children who are not handicapped, however, placement of handicapped children in regular classes must be appropriate to their needs); *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983) (residential placement is appropriate if handicapped child's needs are such that any educational progress would not occur in its absence). See generally, Annot., 23 A.L.R. 4th 740 (1983). See also Mooney & Aronson, *Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements*, 14 CONN. L. REV. 531, 537-45 (1982).

181. Wyoming Department of Education, Fiscal Year 1981-1983 State Plan Under Part B of the Education of the Handicapped Act As Amended by Public Law 94-142 (October, 1980).

182. *Id.* at 35. See also, Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477, 491-95 (1982).

183. It should be noted that a handicapped child is not entitled to a particular program considered by the parents to be superior to the one recommended by the local educational agency through an individualized education program. See, e.g., *Springdale Sch. Dist. #50 of Wash. v. Grace*, 693 F.2d 41, 43 (8th Cir. 1982) (although a particular facility may offer handicapped child the best educational opportunities, EAHCA does not require states to make available best possible option); *Buchholtz v. Iowa Dept. of Public Instruction*, 315 N.W.2d 789, 794 (Iowa 1982) (one district's program is not inappropriate merely because another district has a better program).

184. *Id.*

185. See *supra* note 170.

social or medical problems), adversely affect his or her ability to learn and thus interfere with his or her educational progress. The rule that emerges from these situations is that if a child's noneducational problems are so linked or interwoven with his or her learning disability that residential placement is appropriate and necessary, the educational agency is responsible for providing the placement.¹⁸⁶

To the extent that educational problems can be separated from noneducational ones, the Wyoming statutes attempt to prescribe how the costs of court ordered placement of children in private residential treatment facilities and group homes are to be allocated.¹⁸⁷ The statute contemplates reimbursement by the Department of Education to the Department of Public Assistance and Social Services.¹⁸⁸ Additionally, periodic review of the placement is required, among other things, to determine if the placement is educationally inappropriate or not the least restrictive alternative available.¹⁸⁹ If the placement is inappropriate, the placement is referred back to the district court with a recommendation by the local team of an appropriate placement.¹⁹⁰

(2) School Discipline

Another area of interest concerns the extent to which handicapped children may have unique rights under a school's system of discipline. The EAHCA is silent on the issue of school discipline of handicapped children and thus far the Department of Education has not addressed the issue in regulations.¹⁹¹ However, some courts have been presented with questions regarding the scope of an educational agency's disciplinary procedures on handicapped children.¹⁹² The conclusion drawn by these courts has been that expulsions and indefinite suspensions are changes of placement within

186. See, e.g., *San Francisco Unified Sch. Dist. v. State*, 131 Cal. App. 3d 54, 182 Cal. Rptr. 525, 534-36 (1982); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 692-97 (3d Cir. 1981); *North v. District of Columbia Bd. of Ed.*, 471 F. Supp. 136, 139-41 (D.D.C. 1979). See also *Papaocoda v. State*, 528 F. Supp. 68, 71-72 (D. Conn. 1981) (placement necessary for child to learn).

187. WYO. STAT. § 21-13-315 (Supp. 1983).

188. WYO. STAT. § 21-13-315(b) (Supp. 1983).

189. WYO. STAT. § 21-13-315(b) (v) (Supp. 1983). This determination is made by a local team consisting of representatives of the child's school district of residence, the child's caseworker, the county division of public assistance and social services and other appropriate personnel. WYO. STAT. § 21-13-315(b) (ii) (Supp. 1983).

190. WYO. STAT. § 21-13-315(b)(v) (Supp. 1983). Section 21-13-315 became effective on July 1, 1983. The Department of Education and the Division of Public Assistance and Social Services are required to jointly adopt rules to implement this section. Until these rules are promulgated it would be premature to comment on its potential impact. Note that this section only applies to court ordered placements of children in residential treatment facilities or group homes.

191. It should be noted that the Department of Education has proposed regulations regarding disciplinary rules and procedures. See 47 Fed. Reg. 33,836 (August 4, 1982). The proposed regulations indicate that a handicapped child cannot be subjected to a disciplinary sanction which, "requires a hearing by law or agency policy before determining that the child's behavior was not caused by the child's handicapping condition." *Id.* at 33,839. However, the proposed regulations are not "intended to affect any additional due process requirements imposed by Federal or State law regarding disciplinary procedures." *Id.* at 33,840.

192. *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981); *H. R. v. Hornbeck*, 524 F. Supp. 215 (D. Md. 1981); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979); *Sherry v. New York State Ed. Dept.*, 479 F. Supp. 1328 (N.D.N.Y. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978). See also Comment, *School Discipline and the Handicapped Child*, 39 WASH. & LEE L. REV. 1453 (1982).

the contemplation of the EAHCA¹⁹³ and, before such disciplinary actions may be implemented, the educational agency must determine whether the child's handicapping condition caused the behavior which was the subject of the disciplinary action.¹⁹⁴

None of the courts have suggested that a handicapped child is never subject to a school's disciplinary procedures.¹⁹⁵ Indeed, a handicapped child may be temporarily suspended without resort to the procedures under the Act,¹⁹⁶ and may be expelled in appropriate circumstances when the Act's procedural protections are followed.¹⁹⁷ Additionally, courts have rejected the claim that the additional protections for handicapped children from expulsion creates a double standard for student conduct.¹⁹⁸

In Wyoming, no distinction is made between the nonhandicapped child and the handicapped child concerning school disciplinary procedures, either in the education code or in the State Board regulations. Presumably, the existing statutes are to apply to both.¹⁹⁹ Suspension periods cannot exceed a maximum of ten (10) days,²⁰⁰ and suspension cannot physically occur until the student is given "an opportunity to be heard and to present his version of the charges against him."²⁰¹

On the other hand, if a student is to be expelled, the student has a right to hearing pursuant to the Wyoming Administrative Procedure Act²⁰² in which contested case procedures apply.²⁰³ However, when a handicapped child is the subject of expulsion, there are no statutes or regulations to guide the administrative tribunal or the district court under judicial review. Under these circumstances, an impartial due process hearing should be held to determine if the child's behavior is caused by his or her handicapping condition, and if so, the Child Study Committee should convene to reconsider whether the child's behavior justifies a more restrictive educational placement.²⁰⁴ Alternatively, if the behavior is not because of his or

193. See, e.g., *Kaelin v. Grubbs*, 682 F.2d at 601; *S-1 v. Turlington*, 635 F.2d at 348; *Sherry v. New York State Ed. Dept.*, 479 F. Supp. at 1337; *Stuart v. Nappi*, 443 F. Supp. at 1241.

194. See, e.g., *S-1 v. Turlington*, 635 F.2d at 346; *Doe v. Koger*, 480 F. Supp. at 229.

195. See, e.g., *Stuart v. Nappi*, 443 F. Supp. at 1243.

196. See, e.g., *Kaelin v. Grubbs*, 682 F.2d at 602; *Doe v. Koger*, 480 F. Supp. at 229; *Sherry v. New York State Ed. Dept.*, 479 F. Supp. at 1337; *Stuart v. Nappi*, 443 F. Supp. at 1242. However, the procedural protections which also apply to nonhandicapped students must be followed. *Kaelin v. Grubbs*, 682 F.2d at 602.

197. See, e.g., *S-1 v. Turlington*, 635 F.2d at 348; *H.R. v. Hornbeck*, 524 F. Supp. at 219. However, the behavior must not be a manifestation of the child's handicap. *S-1 v. Turlington*, 635 F.2d at 348; *Doe v. Koger*, 480 F. Supp. at 229.

198. See, e.g., *Kaelin v. Grubbs*, 682 F.2d at 601.

199. See WYO. STAT. §§ 21-4-305 to -306 (1977).

200. WYO. STAT. § 21-4-305(a) (1977).

201. WYO. STAT. § 21-4-305(b) (1977). This language comes right out of a United States Supreme Court case. *Goss v. Lopez*, 419 U.S. 565, 581 (1975). Section 21-4-305(b), however, provides a student an unqualified right to present his side of the story, in contrast with *Goss* which only requires an opportunity for response if the student denies the charges made against him. See 419 U.S. at 581. Of course, the statute provides for emergency suspensions, in which case an opportunity to be heard and to respond must occur no later than seventy-two (72) hours. WYO. STAT. § 21-4-305(c) (1977).

202. WYO. STAT. § 21-4-305(d) (1977).

203. See *supra* notes 127-29 and accompanying text.

204. Some courts have determined that the EAHCA requires this approach. See, e.g., *Kaelin v. Grubbs*, 682 F.2d at 600-01; *Doe v. Koger*, 480 F. Supp. at 228-29; *Stuart v. Nappi*, 443 F. Supp. at 1242.

her handicap, the handicapped student may be expelled on the same basis as nonhandicapped children.²⁰⁵

(3) *Extended School Year*

Finally, another significant issue involves a school district's obligation to provide educational services to handicapped children beyond the regular school year. In Wyoming, the relevant statute provides that: "Each school district shall operate its schools and its classes for a *minimum* of one hundred seventy-five (175) days each school year."²⁰⁶ Read in *pari materia* with section 21-14-101,²⁰⁷ a school district seems to be required to furnish a full year program for a handicapped child if this is necessary to provide the handicapped child an appropriate education. Again, the difficulty in resolving this issue is that neither the EAHCA, the federal regulations, the Wyoming Statutes nor the State Board regulations offer any express guidance to the state or local educational agencies.

It has been held that a blanket policy which does not permit the provision of any educational services beyond the regular school year is violative of the Act.²⁰⁸ However, the complainant may be required to demonstrate that the handicapped child will substantially regress during the summer recess if the child is not provided a full year program.²⁰⁹ Additionally, funding limitations have not been found a sufficient justification for a policy which precludes the provision of educational services beyond the regular school year.²¹⁰

Inadequacy of funds is one reason the issue of providing handicapped students with educational services beyond the regular school year may become a significant issue under the EAHCA.²¹¹ A state educational agency with limited funding might conclude that a policy in which available funds are expended in an equitable manner such that no child, handicapped or nonhandicapped, is entirely excluded from a publicly supported education would survive a challenge.²¹² However, if scarcity of funds actually

205. See, e.g., *Doe v. Kroger*, 480 F. Supp. at 229. Admittedly, consideration whether a handicapped child's behavior is an outgrowth of the child's handicapping condition is a difficult question to resolve; particularly, for example, if the handicapped child also has been adjudicated a child in need of supervision or delinquent. Resolution of this question, however, should not be more difficult than a determination of educational placement at the IEP stage.

206. WYO. STAT. § 21-4-301 (1977) (emphasis added).

207. See *supra* note 33 and accompanying text.

208. See *Crawford v. Pittman*, 708 F.2d 1023, 1035 (5th Cir. 1983); *Battle v. Com. of Pa.*, 629 F.2d at 276; *Yaris v. Special School Dist. of St. Louis County*, 558 F. Supp. 545, 559 (E.D. Mo. 1983).

One court has held that in ascertaining a handicapped student's entitlement to extended school year services, the state educational agency should consider at least: (1) the nature and severity of the student's handicapping conditions; (2) the areas of learning crucial to attaining the goal of self-sufficiency and independence from caretakers; (3) the extent of regression caused by interruption in educational programming; and (4) the rate of recoupment following interruption in educational programming. See *Lee v. Thompson*, Current EHLR Dec. 554:429, 430 (D. Hawaii 1983).

209. See, e.g., *Battle v. Com. of Pa.*, 629 F.2d at 276 n.9; *Phipps v. New Hanover County Bd. of Educ.*, 551 F. Supp. 732, 734 (E.D.N.C. 1982).

210. See, e.g., *Crawford v. Pittman*, 708 F.2d at 1035; *Yaris v. Special School Dist. of St. Louis County*, 558 F. Supp. at 549.

211. See *Stark, Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477, 501-02 (1982).

212. Such a conclusion may be drawn from some of the language in *Rowley*. See 102 S.Ct. at 3044 n.15.

bears more heavily on the handicapped child, the policy may be viewed as conflicting with the Act.²¹³ Thus, some courts on judicial review have considered whether the educational agency's claim that a handicapped child is receiving a free appropriate public education within the confines of a regular school year is motivated in part by funding limitations.²¹⁴

B. Uncertainty in the Law Concerning Education of Handicapped Children

One commentator stated that: "The Reagan Administration's 'new federalism' calls for a drastic reduction of the federal role in education."²¹⁵ In response, the United States Department of Education planned to amend some of the regulations previously promulgated under the EAHCA.²¹⁶ The amendments were intended to "[1] reduce fiscal and administrative burdens on recipients . . . , and [2] to address various problems that have arisen . . . since the current regulations became effective . . ."²¹⁷ However, because of a strong negative response to the proposals, the Department of Education withdrew several of the proposals.²¹⁸ Nonetheless, there is a concern that "endless . . . attempts to diminish even further the rights of handicapped children to obtain a free appropriate public education"²¹⁹ will continue into the future.

The potential economic impact resulting from the award of damages under the EAHCA may give rise to a further backlash on the EAHCA.²²⁰ Generally, damages are not available under the Act because of an educational agency's failure to provide a handicapped child a free appropriate public education.²²¹ However, damages may be available under exceptional circumstances,²²² or at least to the extent of reimbursement for tuition and expenses related to providing an appropriate educational placement for a handicapped child.²²³ Should a trend develop in favor of awarding damages

213. *Id.* See also *Yaris v. Special School Dist. of St. Louis County*, 558 F. Supp. at 559.

214. See *supra* text accompanying note 210.

215. Levin, *Equal Opportunity For Special Pupil Populations and the Federal Role*, 85 W. VA. L. REV. 159, 159 (1982-83).

216. 47 Fed. Reg. 33,836 (Aug. 4, 1982).

217. *Id.*

218. See 47 Fed. Reg. 49,871-72 (Nov. 3, 1982). One of the proposals not withdrawn concerned the proposals on disciplinary rules and procedures. See also Beyer, *A Free Appropriate Public Education*, 5 W. NEW ENG. L. REV. 363, 387-89 (1983); Comment, *A Modern Wilderness—The Law of Education for the Handicapped*, 34 MERCER L. REV. 1045, 1067-70 (1983).

219. See Beyer, *supra* note 218, at 1070.

220. For a good discussion of damages under the EAHCA, see Hyatt, *Litigating the Rights of Handicapped Children to An Appropriate Education: Procedures and Remedies*, 29 UCLA L. REV. 1, 42-51 (1981).

A related issue is the liability of an educational agency for educational malpractice. See generally Comment, *Educational Malpractice and Special Education Law*, 55 CHI.-[KENT L. REV. 685 (1979). Discussion of this issue is beyond the scope of this article.

221. See, e.g., *Doe v. Anrig*, 692 F.2d 800, 811-12 (1st Cir. 1982); *Meiner v. State of Mo.*, 673 F.2d 969, 979-80 (8th Cir. 1982); *Anderson v. Thompson*, 658 F.2d 1205, 1206 (7th Cir. 1981); *Hurry v. Jones*, 560 F. Supp. 500, 505 (D.R.I. 1983).

222. See, e.g., *Anderson v. Thompson*, 658 F.2d at 1214 (school's failure to provide services necessary to protect physical health of the child when the school otherwise has an obligation to provide those services, and when school acts in bad faith by failing to comply with procedural provisions of the Act); *Hurry v. Jones*, 560 F. Supp. at 505-06.

Although not an action under the EAHCA, one court awarded damages for misclassification of a handicapped child. See *Hoffman v. Bd. of Ed. of City of New York*, 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978).

223. See, e.g., *Matthews v. Ambach*, 552 F. Supp. 1273, 1278-80 (W.D.N.Y. 1982).

under the Act, it can be anticipated that some states may re-evaluate the benefits derived from the EAHCA and conclude that the burdens outweigh the benefits.

If these concerns become a reality, a question arises as to what alternatives are available to enforce whatever rights handicapped children have to an appropriate education. Obviously, one's remedy may still be available under state law, although there may be less incentive to provide the educational services to handicapped children contemplated under the current federal law.

Notwithstanding, the EAHCA has created a greater awareness of the significant disparity which has existed regarding education of handicapped children. In this regard, the forecast for education of handicapped children in Wyoming appears to be very promising.

CONCLUSION

This comment was not intended to be an exhaustive discussion on the sources of the handicapped child's right to an education. However, three things should be recalled from the above discussion. First, the Education For All Handicapped Children Act established that handicapped children are entitled to a free appropriate public education. States, such as Wyoming, which receive federal funds under the Act must provide handicapped children residing within its borders the minimum education the Act provides.

Second, a child in Wyoming has a constitutional right to education which has been characterized a matter of fundamental interest. This also applies to handicapped children in Wyoming. Thus, Wyoming law imposes a greater substantive obligation on educational agencies to provide education to handicapped children than does the EAHCA. On the other hand, a handicapped child is not entitled to the best possible education. Third, the due process rights required by the EAHCA are very broad. The hearings themselves are determined by state law or the state educational agency. However, if this conflicts with the EAHCA, the Act controls. Therefore, particular attention should be paid to developments in Wyoming administrative law.

The attorney representing a handicapped child must view furthering the best interests of the child as the ultimate goal under the handicapped child's educational program.

ROBERT J. WALTERS