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Educational Law - Wyoming Refuses to Recognize Compensatory Education as a Remedy under the Education for All Handicapped Children Act of 1975 - Natrona County School Dist. No. 1 v. McKnight

Fred Hartmeister

EDUCATIONAL LAW—Wyoming Refuses to Recognize Compensatory Education as a Remedy Under the Education for All Handicapped Children Act of 1975. *Natrona County School Dist. No. 1 v. McKnight,* 764 P.2d 1039 (Wyo. 1988).

David McKnight, a severely handicapped autistic[1] young man of twenty-one, had the mental abilities of a two-year-old.[2] For several years David had shown little improvement and, in some ways, had even regressed in his ability to function without constant supervision.[3]

In the fourteen years that David's parents lived in Casper, Wyoming,[4] the Natrona County School District spent approximately one million dollars on David's education and institutional care.[5] During most of that time, David was placed at the Behavioral Research Institute (BRI) in Providence, Rhode Island.[6] From 1979 to 1982, however, the school district moved David between several other institutions in order to save money[7] and find suitable living arrangements closer to Casper.[8]

In 1987 the school district informed David's parents that it would stop funding David's education on his twenty-first birthday.[9] Shortly before David turned twenty-one,[10] David's parents asked the school district for thirty-seven months of "compensatory education"[11] for the time that

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1. Brief of Respondent at 5, Natrona County School Dist. No. 1 v. McKnight, 764 P.2d 1039 (Wyo. 1988) (No. 88-75 and 88-76). "Autism" is defined as:

> a severe disorder of communication and behavior which can be present at birth or have its onset usually within the first thirty months of life. Autism is a severely incapacitating bio-neurologically caused lifelong developmental disability which has been found throughout the world in families of all racial and social backgrounds. Autism severely impairs the way sensory input is assimilated causing problems in communications, social behavior and learning.

Wyoming State Board of Education, Rules and Regulations Governing Services For Handicapped Children in Wyoming School Districts—Programs and Services, ch. VII, § 5(d), *filed* June 19, 1986 [hereinafter cited as State Board Rules].

2. Natrona County School Dist. No. 1 v. McKnight, 764 P.2d 1039, 1042 (Wyo. 1988).

3. *Id.* at 1056.

4. David McKnight was seven years old when his family moved to Casper in 1973. *Id.* at 1042.

5. *Id.* at 1055 n.15. In addition to tuition costs, the school district provided related services including transportation, staff time, litigation costs, expert fees, and evaluation. *Id.* at 1042-43 n.3.

6. *Id.* at 1042-43 n.3. The court described BRI as:

> a well-publicized non-profit corporation devoted to the development of behavioral technology. The facility combines residential units in Massachusetts and adjacent educational facilities in Rhode Island. The usual type of person accepted for placement involves severe behavioral problems. The regimen for control and instruction involves extensive use of negative aversives as well as affirmative food rewards as a very structured process.

Id. at 1044.

7. *Id.* at 1042.

8. *Id.* From April, 1979 until May, 1982, David was placed in other institutions and programs including the Devereux Foundation in Scottsdale, Arizona, the A.J. Woods School in Casper, Wyoming, and the Wyoming State Training School in Lander, Wyoming. *Id.*

9. *Id.* at 1046.

10. David turned twenty-one on November 8, 1987. *Id.* at 1040.

11. Compensatory education has been defined as "remedial educational services designed to make up for the education a child lost between the time the child entered into an alterna-

David spent at the other institutions.[12] David's parents argued that he had been deprived of his right to an appropriate education during the contested three-year period. They wanted the school district to continue to pay tuition at BRI for approximately three more years as compensation for the deprivation. The school district refused the parent's request.[13]

The McKnights sought a hearing[14] under the Education for All Handicapped Children Act (EAHCA).[15] A hearing officer decided in David's favor and awarded the necessary funding for thirty-seven months of compensatory education.[16] The hearing officer concluded that the school district acted in bad faith when it moved David from BRI to other less-costly programs.[17] The projected cost to the school district for the additional thirty-seven months of compensatory education was $349,058.[18]

The school district appealed,[19] and the Wyoming Supreme Court reviewed the decision on direct certification from the district court.[20] The court determined that the school district did not act in bad faith[21] and

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tive placement and when a more appropriate placement was resumed." Comment, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 WIS. L. REV. 1469, 1473 (1984) (advocating compensatory educational services whenever a child has been deprived of a free appropriate public education due to inappropriate placement).

12. *McKnight*, 764 P.2d at 1046.

13. *Id.* at 1042-43 n.3.

14. 20 U.S.C. § 1415(b)(2) (1986).

15. *McKnight*, 764 P.2d at 1046. 20 U.S.C. §§ 1401-1415 (1986). The Education for All Handicapped Children Act of 1975, PUB. L. 94-142, 89 STAT. 774 amended the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1970), PUB. L. 91-230, 84 STAT. 175 (1970). In *McKnight*, the "stay put" provision [20 U.S.C. § 1415(e)(3)] in EAHCA and State Board Rules, *supra* note 1, ch. VII, § 84 [Status of Child During Hearings], allowed McKnight to continue to receive educational services from the state and local school district after he turned twenty-one on Nov. 8, 1987 until Nov. 15, 1988—the date the court issued its mandate. *McKnight*, 764 P.2d at 1058. *See Honig v. Doe*, 108 S. Ct. 592, 595 (1988) for discussion of "stay put" provisions.

16. *McKnight*, 764 P.2d at 1046. The hearing officer decided the school district must pay tuition for David to attend BRI for three more years. *Id.* at 1040.

17. *Id.* at 1046. The hearing officer made three findings—two of law and one of fact. He found as a matter of law: (1) that public educational eligibility in Wyoming ends at the twenty-first birthday, and (2) that he could require compensatory education beyond age twenty-one if, in his analysis, any period of adequate free appropriate public education had been denied during the time of the school district's responsibility for David McKnight's education (1973 until his twenty-first birthday in 1987). The factual determination was that the school district acted in bad faith both substantively and procedurally in interrupting David's placement at BRI in 1979. *Id.*

18. *Id.* at 1040.

19. *Id.* at 1042-43 n.3. The Wyoming State Department of Education was also a captioned party after filing a separate petition for review of the hearing officer's decision. Both appeals were combined in *McKnight*. For purposes of this casenote, Natrona County School District No. 1 and the Wyoming State Department of Education are not distinguishable parties.

20. *Id.* at 1047 n.7. Review was from the Natrona County District Court, pursuant to Rule 12.09 of the WYOMING RULES OF APPELLATE PROCEDURE. The court recognized that this review procedure was unique to this case due to the high cost involved and the urgency of the situation. The court emphatically stated that "no further direct certification of these cases will be accepted" because of difficulty in dealing with the record. *Id.*

21. The court concluded that the hearing officer's decision that the educational efforts of the school district demonstrated "willful bad faith" was factually unsupported by the entire record. *Id.* at 1053.

reversed the decision of the hearing officer. The court held that the Natrona County School District and the State of Wyoming had no obligation to provide compensatory education to David past his twenty-first birthday.[22]

Natrona County School Dist. No. 1 v. McKnight is a case of first impression in Wyoming. This casenote examines the standards applied by the Wyoming Supreme Court to decide this case. Specifically, the casenote discusses whether the court arrived at a just result based on sound legal reasoning. A careful examination of *McKnight* reveals that the court went beyond simply deciding that the school district did not act in bad faith. The court unnecessarily complicated the case by confusing legal theories and, in the process, failed to articulate precise guidelines for behavior. Finally, this casenote will consider the uncertain consequences of *McKnight* for public school special education in Wyoming.[23]

BACKGROUND

The recognition of special education needs of handicapped children began to gather momentum in the early seventies based upon the "equal opportunity" premise announced in *Brown v. Board of Education*.[24] In *Brown*, the Supreme Court concluded that, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[25] Adopting the "equal opportunity" logic in *Brown*, Congress passed The Education of the Handicapped Act[26] in 1970. This Act, subject to frequent amendment, was most significantly modified in 1975 with adoption of EAHCA.[27] The EAHCA enactment provided federal funding for the excess costs associated with educating handicapped students.[28]

22. *Id.* at 1050-52. The court relied on Natrona County School Dist. No. 1 v. Ryan, 764 P.2d 1019 (Wyo. 1988) (a companion case involving special education eligibility and funding decided by the court the same day as *McKnight*), Adams Central School Dist. No. 090 v. Deist, 214 Neb. 307, 334 N.W.2d 775 (1983) (a Nebraska case dealing with compensatory education), and Monahan v. School Dist. No. 1 of Douglas County, 229 Neb. 139, 425 N.W.2d 624 (1988) (a Nebraska case remarkably similar to the facts in *Ryan*).

23. This note is limited to an analysis of compensatory education. Other tangential issues, most notably hearing officer bias, statute of limitations criteria, the extent of judicial review of administrative decisions under EAHCA, and collateral estoppel are beyond the scope of this note.

24. 347 U.S. 483 (1954). *Brown* struck down the segregation of racial minority students. *Id.* at 495.

25. *Id.* at 493.

26. 20 U.S.C. §§ 1401-1461 (1970, Rev. 1986).

27. 20 U.S.C. §§ 1401-1415 (1975, Rev. 1986).

28. 20 U.S.C. §§ 1401(20). EAHCA defines "excess costs" as:

> those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I [20 U.S.C. 2701 et seq.] or title VII [20 U.S.C. 3221 et seq.] of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

Id.

Due to Wyoming's voluntary participation in this federal entitlement program, handicapped children[29] in Wyoming have educational rights under its provisions. The Wyoming Constitution[30] and statutes[31] also guarantee a free appropriate education to children under the age of twenty-one.[32] To qualify for EAHCA funds, the state must demonstrate that it has "a policy that assures all handicapped children the right to a free appropriate public education."[33] Wyoming's State Board of Education Rules and Regulations Governing Services for Handicapped Children in Wyoming School Districts incorporate EAHCA in substance and effect.[34] Generally, state acceptance of federal funds under EAHCA results in federal standards preempting inconsistent state laws.[35] Thus, Wyoming educational agencies, by participating in the program, become subject to federal guidelines because of supremacy clause[36] and federalism[37] principles.

Several United States Supreme Court decisions in this decade have had significant impact on the education of handicapped children. In *Board of Education v. Rowley*,[38] the parents of a deaf child requested that a full-

29. 20 U.S.C. § 1401(a)(1) (Supp. IV 1986) defines "handicapped children" as "mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services."

30. WYO. CONST. art. I, § 23 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."

WYO. CONST. art. VII, § 1 authorizes the legislature to "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."

WYO. CONST. art. XXI, § 28 commands the legislature 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."

31. WYO. STAT. § 21-4-310 (1977, Rev. 1985) states:

> Except as otherwise provided by law, the public schools 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. § 21-2-501 (1977, Rev. 1987) states, "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."

32. *See Ryan*, 764 P.2d at 1033.

33. 20 U.S.C. § 1401(a)(18). A "free appropriate public education" is defined as: special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(a)(5)].

34. State Board Rules, *supra* note 1, ch. VII, sec. 1(a), effective as provided by WYO. STAT. § 16-3-104 (1977, Rev. 1986). *See* Comment, *Education for Handicapped Children in Wyoming: What Constitutes a Free Appropriate Public Education and Other Administrative Hurdles*, 19 LAND & WATER L. REV. 225, 228 (1984), n.20 and accompanying text.

35. Comment, *supra* note 34, at 228. *See also Ryan*, 764 P.2d at 1028.

36. Comment, *supra* note 34, at 228.

37. *See Ryan*, P.2d at 1029.

38. 458 U.S. 176 (1982).

time sign language interpreter be assigned to their daughter. The school district refused on the basis of the student's satisfactory progress in a regular classroom with other less drastic and less costly assistance.[39] The Court held that, under EAHCA, Congress did not intend that states *maximize* a handicapped student's potential, but rather that the child receive a *beneficial* educational opportunity.[40] *Rowley* is the touchstone by which school districts measure whether or not they are providing "meaningful access" to education for their handicapped students.[41]

In *Burlington School Comm. v. Department of Education*,[42] the Court considered types of relief available under EAHCA. *Burlington* involved a parental decision to place their handicapped child in a private institution.[43] The Court held that the parent's placement was appropriate and the school district's recommended placement was inappropriate.[44] The Court ordered the school district to reimburse the parents for tuition expenses that the district should have paid all along.[45]

The United States Supreme Court has yet to discuss compensatory education under EAHCA. *Rowley* and *Burlington*, though not on point with *McKnight*, are relevant because the Court has begun to identify the scope of "appropriate education" and "appropriate relief." These cases reaffirmed the basic right of all handicapped students to a free appropriate public education and recognized remedies for eligible students whose rights were denied.

Numerous federal and some state courts have held that compensatory education relief is available for handicapped students who are deprived of their educational entitlement.[46] Compensatory education has been recognized by these courts in the procedural safeguard language of EAHCA. Courts may grant "such relief as the court determines is appropriate."[47] Compensatory education, in this sense, is a non-damage form of relief. The student seeks to recover educational services rather than reimbursement for out-of-pocket tuition expenses paid by parents. A school district held accountable for compensatory education pays for substitute educational services. The handicapped child does not actually receive monetary compensation.

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39. *Id.* at 185.

40. *Id.* at 200. The Court found that Congress sought to provide a "basic floor of opportunity" to handicapped students. The Court concluded that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.*

41. *See* Hill, *Legal Conflicts in Special Education: How Competing Paradigms in the Education for All Handicapped Children Act Create Litigation*, 64 U. DET. L. REV. 129, 165 (1986).

42. 471 U.S. 359 (1985).

43. *Id.* at 362.

44. *Id.* at 370.

45. *Id.* at 370-71.

46. *McKnight*, 764 P.2d at 1052 n.11. *See also* Zirkel and Osborne, *Are Damages Available in Special Education Suits?* 42 EDUC. L. REP. 497, 502-03 (Dec. 23, 1987).

47. 20 U.S.C. § 1415(e)(2). Courts are split as to the extent of relief intended by Congress as expressed in this nonspecific "appropriate relief" language. *See* Comment, *supra* note 11, at nn.8-10 and accompanying text.

The Eleventh Circuit, in *Jefferson County Board of Education v. Breen*,[48] awarded a handicapped twenty-two-year-old two years of compensatory education. The court found that the Jefferson County school board deprived Alice Breen of an appropriate education by failing to place her in a residential facility capable of providing an integrated program of educational services.[49] The *Breen* court followed the reasoning in *Rowley*[50] in determining that "compensatory education, like retroactive reimbursement [for tuition], is necessary to preserve a handicapped child's right to a free education."[51] The court held that compensatory education should serve as a deterrent against school districts unnecessarily prolonging litigation in order to decrease their potential liability.[52] It would appear the *Breen* court reasoned that school districts may be disinclined to provide appropriate educational services to handicapped students if they will not be held accountable for compensatory education beyond age twenty-one. Rather than acting in the best interests of the handicapped child they could act with impunity, doing little or nothing—simply waiting until the child turns twenty-one and is no longer the responsibility of the school district.[53]

Other courts have held that compensatory education is not available to students beyond their twenty-first birthday. In *Adams Central School Dist. v. Deist*,[54] the Nebraska Supreme Court reversed a compensatory education award to a handicapped student who had turned twenty-one. The *Deist* court recognized that compensatory relief may be appropriately granted under EAHCA if the school district caused the student to "lose any education."[55] However, the court interpreted EAHCA to restrict eligibility to handicapped students between the ages of three and twenty-one. Consequently, all publicly funded educational services, including compensatory relief, are terminated once the student turns twenty-one.[56] In *Monahan v. School Dist. No. 1 of Douglas County*,[57] the Nebraska Supreme Court reiterated its twenty-one year age limit for funding handicapped education.[58]

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48. 853 F.2d 853 (11th Cir. 1988), *reh'g denied*, 864 F.2d 795 (1988).

49. *Breen*, 853 F.2d at 857.

50. 458 U.S. 176 (1982).

51. *Breen*, 853 F.2d at 857.

52. *Id.* at 858.

53. *See* Menier v. State of Missouri, 800 F.2d 749 (8th Cir. 1986) (a handicapped child was entitled to recover compensatory educational services if she prevailed on her claim that state and local government entities denied her free appropriate education); White v. State, 195 Cal. App. 3d 452, 240 Cal. Rptr. 732 (1987), (a California Court of Appeals held that a handicapped plaintiff beyond the age of twenty-one is entitled to compensatory education to remedy past denial of services).

54. 214 Neb. 307, 334 N.W.2d 775 (1983) (a case involving the public school expulsion and subsequent private placement of a handicapped student).

55. *Id.* The *Deist* court did not define "compensatory education."

56. *Id.* at 786.

57. 229 Neb. 139, 425 N.W.2d 624 (1988) (a case factually similar to *Ryan*; the Nebraska Supreme Court held that the school district's obligation to provide free public education ends at the twenty-first birthday and does not continue through the twenty-first year).

58. The only reference to compensatory education in *Monahan* is a quote taken from *Deist*. *Monahan* 425 N.W.2d at 628 (quoting *Deist*, 334 N.W.2d at 786):

> Turning to the issue of compensatory education, we find no support for the findings of the hearing officer in the relevant law. The [Education for All

THE PRINCIPAL CASE

In *McKnight*, the Wyoming Supreme Court held that the Natrona County School District satisfied its educational obligations to David McKnight under EAHCA.[59] The court determined that: (1) the school district did not act in bad faith; and (2) David McKnight was not entitled to thirty-seven months of compensatory education. The court discussed the availability of compensatory education beyond the age of twenty-one as a remedy under Wyoming's participation in EAHCA.[60] The court also analogized compensatory educational relief to recovery under an educational malpractice claim.

First, the Wyoming Supreme Court held that the school district did not act in bad faith when it moved David from BRI to other less costly institutions closer to Casper.[61] The court decided that David had not been deprived of a free appropriate public education while living in places other than BRI.[62] During that time the school district had continued to provide support for his education.[63] Moreover, the court held the district's million dollar expenditure over a fifteen-year period satisfied both EAHCA and the Wyoming constitutional obligations for David's education.[64] The court balanced David's right to a free appropriate public education against the state's interest in allocating scarce funds among students.[65] The court emphasized that David's educational and functional progress had leveled off over the last several years. David was simply being "maintained" at BRI, and was not showing any reciprocal growth in return for the high cost of institutionalization.[66]

Second, the *McKnight* court held that David was not entitled to thirty-seven months of compensatory education.[67] Justice Urbigkit, writing for a unanimous court, adopted the "well-reasoned and persuasive"[68] considerations in *Deist*[69] and *Monahan*.[70] Justice Urbigkit distinguished recent United States Supreme Court decisions in *Rowley*[71] and *Burlington*.[72] He stated that educational agencies did not intend to assume an indefinite

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> Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976)], by its clear and unambiguous language, limits eligibility to children ages 3 to 21. § 1412(2)(B). There is no authority under this statutory scheme by which the hearing officer could grant free appropriate public educational benefits to David [Deist] beyond his 21st birthday.

The *McKnight* court quoted the same passage from *Deist*. *McKnight*, 764 P.2d at 1052.

59. *McKnight*, 764 P.2d at 1057.
60. *Id.* at 1052.
61. *Id.* at 1040.
62. This conclusion is implied in the *McKnight* opinion. Justice Urbigkit does not specifically address the issue of the alleged deprivation of a free appropriate public education.
63. *Id.* at 1040-42.
64. *Id.* at 1040-41.
65. *Id.*
66. *Id.* at 1054-57.
67. *Id.* at 1040.
68. *Id.* at 1052.
69. 214 Neb. 307, 334 N.W.2d 775 (1983).
70. 229 Neb. 139, 425 N.W.2d 624 (1988).
71. 458 U.S. 176 (1982).
72. 471 U.S. 359 (1985).

educational responsibility for students beyond the age of twenty-one simply by participating in federal entitlement programs.[73]

In analyzing the general availability of compensatory education, the *McKnight* court held that whatever rights for "corrective opportunity"[74] which may exist under the Wyoming Constitution and various statutes end at age twenty-one. "[C]ompensatory education past age twenty-one is not included in substance, text or by construction of what the legislative branch of state government has authorized or what the judicial branch of this state may provide."[75] The court noted that other state programs should take over responsibility for care of the severely handicapped after age twenty-one.[76] The court stated that the two or three years of education that handicapped students receive after the time most students traditionally graduate from high school is adequate compensation for any alleged deprivation of a free appropriate education.[77]

Elsewhere in the opinion, however, the court used language indicating recognition of compensatory education as a potential remedy in certain situations. Assuming facts other than those present in *McKnight*, "peculiar circumstances" may exist which *would* give rise to a compensatory education obligation.[78] *McKnight* goes so far as to establish a "bad faith test" when the court will not defer to the discretion of elected school district officials.[79] The test requires that "clear, specific and persuasive" evidence of school district misconduct must be shown before compensatory education is awarded for an alleged deprivation of appropriate educational services.[80]

Finally, the Wyoming Supreme Court compared compensatory education to educational malpractice.[81] Educational malpractice is generally

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73. *McKnight*, 764 P.2d at 1052.

74. *Id.* at 1053. The court introduced the term "corrective opportunity" to signify possible types of relief. *Id.*

75. *Id.*

76. *Id.* at 1051.

77. *Id.* The court stated, "Normalized public education in Wyoming ends about age eighteen or nineteen and the additional two years generally available as compensatory to the underachiever or the handicapped should be sufficient." *Id.*

78. *Id.* at 1050. The court stated, "[W]e will not extend educational responsibility by whatever theory beyond age twenty-one at least in the absence of peculiar circumstances that are not considered [in *McKnight*] as factually established whether characterized as egregious and unremitted bad faith or otherwise." *Id.*

79. *Id.* at 1057.

80. *Id.*

81. *Id.* at 1050. The court said that it "is not presently willing to embrace a general theory of educational malpractice which would serve as a foundational premise from which compensatory education for those who have not reached desired limits of achievement by age twenty-one might opportunistically continue in the public educational system . . . ." *Id.* The court further stated:

> We are also concerned since if Wyoming, by policy, embarks upon theories of educational malpractice, which buttress claims for compensatory educational services, that it, under equal protection and due process, can properly confine relief to a sub-category of the handicapped. The system, consequently, would be faced with failed expectation complaints applicable to all "graduating" students or at least for those students who do not become Rhodes Scholars.

Id.

considered to be professional misconduct by educators,[82] premised on a tort theory of negligence.[83] Justice Urbigkit stated that to recognize compensatory education would require a step in the direction of allowing recovery under an educational malpractice theory.[84] This is a step the Wyoming Supreme Court is presently unwilling to take.

ANALYSIS

In reversing the bad faith determination of the hearing officer, the court reached the correct result. From the limited facts in the case, it would appear that the school district generally fulfilled its educational obligations to David McKnight and attempted to conserve economic resources during the time David was removed from BRI. The school district had limited funds to spread among many deserving students—both handicapped and nonhandicapped. The court found that the school district's conduct did not warrant a thirty-seven month compensatory education award. The court could have stopped at this point. In going further, the court confused the issue.

While the court's result is correct, its reasoning is flawed in three areas. First, it is unclear whether the court intended to refuse EAHCA compensatory education relief under all circumstances, or whether the court would be receptive to such a claim under different and more egregious circumstances than in *McKnight.* The court stated that Wyoming educational institutions lack constitutional and statutory authority to provide compensatory education.[85] Elsewhere in the opinion, however, the court qualified its holding and contradicted the *no compensatory education under any circumstances* language. The court identified a "clear, specific and persuasive" standard for the demonstration of "egregious bad faith" as the test for compensatory educational relief.[86]

The court equivocated in its resolve that compensatory education is not available to handicapped students contesting deprivation of educational services under EAHCA. The conflicting language in *McKnight* fails to clarify the court's position. It is impossible to tell whether the court's presumption of school district good faith is absolute or limited. Handicapped students seeking compensatory education as a remedy for an

82. *See, e.g.,* Comment, *Educational Malpractice: A Cause of Action in Need of a Call for Action,* 22 VAL. U.L. REV. 427 (1988) (proposing a model statute to provide a workable standard of care for courts to use in assessing educational malpractice complaints); Comment, *Educational Malpractice and Special Education Law,* 55 CHI.[-]KENT L. REV. 685 (1979) (predicting dramatic growth in the number of special education malpractice claims under federal guidelines); *but see* Comment, *Educational Malpractice—Does the Cause of Action Exist?,* 49 MONT. L. REV. 140 (1988) (suggesting that policy considerations require that courts not recognize educational malpractice under a negligence theory approach despite a Montana decision seemingly to the contrary); Note, *Education Malpractice: A Cause of Action that Failed to Pass the Test,* 90 W. VA. L. REV. 499 (1987) (stating that courts should not recognize a duty of an educator to a student and should not recognize a cause of action for educational malpractice).

83. *See* Comment, 55 CHI.[-]KENT L. REV. 685, 690 & 693 (1979).

84. *McKnight,* 764 P.2d at 1050.

85. *Id.* at 1040.

86. *Id.* at 1057.

alleged prior deprivation cannot determine what, if any, school district behavior is egregious enough to warrant relief. Similarly, school district personnel cannot be certain how much authority they have to restrict or alter educational services provided to eligible handicapped students under the age of twenty-one.

The court erred in stating that compensatory education is totally unavailable as a form of relief under all circumstances. A better course of action, premised on the reasoning in other jurisdictions,[87] is that compensatory education *should* be available in the event of school district bad faith or misconduct. The Wyoming Supreme Court's reluctance to recognize compensatory education as an appropriate form of relief emasculates protected rights of handicapped students under EAHCA.

Second, the Wyoming court equated compensatory educational relief with recovery under an educational malpractice theory. In equating the two, the court took an unjustified leap in logic. Cases which have held that educational malpractice claims are not actionable have all been decided by state courts based on state tort negligence law.[88] In contrast, compensatory education is based on statutory relief provisions in EAHCA. The court compared apples with oranges by identifying educational malpractice as the foundation of a compensatory education claim. It appears that the court felt that to recognize compensatory education under EAHCA would encourage others to bring claims for educational malpractice. The court's aversion to the concept of educational malpractice caused it to foreclose the availability of compensatory educational relief.

Third, the court balked at following the special education trend recognizing various forms of "appropriate relief" under EAHCA in *Burlington*[89] and *Breen*.[90] Instead, the court relied on the Nebraska Supreme Court's reasoning in *Deist*.[91] The court's reliance on *Deist* is suspect, however, since *Deist* held that compensatory education was appropriate if the school district acted egregiously.[92] Under Nebraska law, a student is eligible to receive compensatory education until he reaches age twenty-one.[93] However, since the student is already entitled to a free appropriate public education under state law until age twenty-one, an award of compensatory education is a hollow victory. The student essentially receives nothing to replace the education lost during the period of deprivation. Thus, Wyoming's adoption of *Deist* leaves handicapped students with nothing beyond that to which they were already entitled.

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87. *E.g., Breen*, 853 F.2d at 857-58.

88. Comment, 55 CHI.[-]KENT L. REV. 685, 706 (1979). Though most courts do not allow plaintiffs to recover under the theory, recent case law and commentary suggest the pendulum may swing in the other direction. *See, e.g.*, B.M. v. State, 649 P.2d 425 (Mont. 1982) (dismissed on other grounds, 698 P.2d 399 (Mont. 1985)); Comment, 22 VAL. U.L. REV. 427, 440 (1987).

89. 471 U.S. 359.

90. 853 F.2d 853.

91. 214 Neb. 307, 334 N.W.2d 775.

92. *Id.* at 783.

93. *Id.* at 783-84.

Following *McKnight*, those interested in the rights of handicapped students in Wyoming should monitor public education closely. Parents of handicapped students should insist on strict compliance by school district personnel with all federal, state, and local procedures affecting the handicapped. They should document any perceived irregularities and contest all disputed actions in a timely fashion. Aggrieved parties may find the federal courts to be a more friendly forum than the Wyoming state courts.[94]

Similarly, boards of education and school district personnel are well advised to strictly comply with EAHCA. Every procedural step involving individual handicapped students must be fully documented. Schools should involve legal counsel in an active and prophylactic role. School personnel should be comprehensively trained to ensure knowledgeable and informed decision-making. While *McKnight* may hold some relief from the ominous threat of strict accountability for all school district actions, the relief may be illusory. The growing national trend and inherent costs associated with special education litigation compel strict school district compliance with all federal, state, and local statutes and regulations. Barring legislative action to either limit total per-student expenditures or discontinue Wyoming's participation in EAHCA, schools cannot afford to run the risk of finding that the *McKnight* "peculiar circumstances" are a reality in their district.

The fact that the Natrona County School District spent approximately one million dollars on David McKnight was outcome determinative. The court was emphatic that the school district did not act in bad faith to deprive David of his educational entitlement. By qualifying the holding, however, the court failed to establish any dependable guidelines for handicapped students or public educators. The court contradicted itself and, as a result, left the special education picture out of focus.

CONCLUSION

Natrona County School Dist. No. 1 v. McKnight reversed a hearing officer's decision awarding thirty-seven months of compensatory education to a handicapped student claiming deprivation of his right to a free appropriate public education. The court held that the school district did not act in bad faith when it moved the student from a very expensive institutional placement to other, less costly institutions. The court equivocated as to whether compensatory education will ever be available in Wyoming under EAHCA.

While the *no bad faith* result in *McKnight* was fiscally appropriate under particular circumstances, the remainder of the opinion sent conflicting messages to those involved with special education. The court used contradictory language, mixed legal theories, and failed to identify when compensatory education may, in fact, be available in Wyoming.

FRED HARTMEISTER

94. *McKnight*, 764 P.2d at 1052. The court stated, "[T]he variant results achieved with diversified factual situations when the federal court forum was chosen does not alter our application of controlling principles for Wyoming law." *Id.*