No. 86-728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,
Petitioner,
v.
JOHN DOE and JACK SMITH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, THE COUNCIL FOR EXCEPTIONAL CHILDREN, THE EPILEPSY FOUNDATION OF AMERICA, THE NATIONAL ALLIANCE FOR THE MENTALLY ILL, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE NATIONAL MENTAL HEALTH ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

Statutes and Regulations

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are eight organizations of parents of handicapped children, disabled adults, mental disability and special education professionals and advocates who are

[1] Letters of Consent to the filing of this Brief have been lodged with the Clerk of the Court.

concerned that all children with handicapping conditions receive the educational services that are appropriate to meet their needs and to which they are entitled.[2] These

[2] *Amici* include:

(1) The American Association on Mental Deficiency (AAMD), the nation's oldest and largest interdisciplinary organization of professionals working exclusively in the field of mental retardation. AAMD, founded in 1876, has nearly 10,000 members today from a wide variety of disciplines who work with people with mental retardation in education, institutional and community settings;

(2) The American Orthopsychiatric Association, an interdisciplinary organization of more than 8,000 members, including psychiatrists, psychologists, social workers, psychiatric nurses, educators and allied professionals, concerned with the problems, causes and treatment of abnormal behavior;

(3) The Association for Retarded Citizens of the United States, a voluntary organization of 300,000 members devoted to promoting the welfare of mentally retarded children and adults;

(4) The Council for Exceptional Children, founded in 1922, the only international professional association dedicated to the improvement of the quality of education for all exceptional children and youth, both handicapped and gifted and talented. The Council's more than 50,000 members are primarily teachers, administrators, teacher educators and providers of education-related services. CEC has local units in each of the United States and the Canadian provinces. As the association representing special educators, CEC develops and promotes policies to assure appropriate services to children and youth in need of special education, publishes professional journals, conducts conferences and establishes professional standards;

(5) The Epilepsy Foundation of America, the only national, charitable, voluntary nonprofit health agency in the United States specifically dedicated to the welfare of more than two million children and adults with epilepsy. Since its inception, the Foundation has worked to ensure that children with epilepsy are permitted to fully participate in educational programs regardless of the severity of their condition or any possible behavioral manifestations;

(6) The National Alliance for the Mentally Ill (NAMI), representing 45,000 parents, spouses and children of mentally ill persons, as well as mentally ill clients themselves. It is organized into state alliances and more than 730 local affiliates. As a family movement, NAMI provides self-help and supportive services, conducts a vigorous educational campaign against the stigma of mental illness, and advocates for increased research on the causes and cures of mental illness and improved treatment and rehabilitative services for those afflicted with serious mental diseases;

(7) The National Association of Social Workers (NASW), a non-profit association with more than 100,000 members and the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice and to improving the quality of life through utilization of social work knowledge and skills; and

(8) The National Mental Health Association, a citizens' organization of one million lay and professional members and supporters whose primary purpose is encouragement of efforts to provide better educational and other services for mentally ill children and adults.

children's handicaps range from mild to severe. All of them are impaired in their ability to learn and many evince behavior problems that are a manifestation of their handicapping conditions.

Amici are directly familiar with the devastating effect on handicapped children and on their families of exclusion from school. Failure to serve these children will waste their valuable talent, impede their intellectual and social development and burden society with the unnecessary expense of supporting their continued dependency as adults.

Many of the *amici* organizations actively participated in the congressional hearings preceding enactment of the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401-1420 (hereafter "EHA" or "the Act"), and all have been involved in its implementation. They share a commitment to access for all handicapped children to appropriate educational services and to the preservation of Congress' flexible and individualized approach to assuring the education of handicapped children.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case requires the Court to decide two questions: (I) Whether a local school district can unilaterally change the placement of a child because of disruptive behavior caused by his or her handicapping condition in derogation of the stay-put provision of the EHA, which prohibits such changes, and (II) whether the state education agency must provide services to a handicapped child whom the local authority is unable or unwilling to serve.

I. The EHA requires that a handicapped child's educational program and placement be determined by parents, school officials and special education experts through a comprehensive process resulting in a written plan (the "individualized education plan" or IEP) tailored to the unique needs of the child. The Act includes procedures to change the IEP if the placement or program is not working. 20 U.S.C. § 1415(b)-(e). However, to safeguard against the historic pattern of excluding handicapped children who present difficulties for school authorities, the EHA prohibits schools from changing the placement specified in the IEP without parental agreement. 20 U.S.C. § 1415(e)(3). Petitioner seeks to rewrite the law by claiming that school districts have the right to unilaterally change a child's placement if the child is disruptive in school. To permit such a change would effectively nullify the protection provided by the EHA.

Amici recognize that school districts have a responsibility to maintain discipline in the school environment. Therefore, when a child is disruptive or endangers himself or other children, teachers and principals need the authority to suspend the child temporarily. But this limited authority must not be expanded into an instrument for excluding handicapped children from the public school system.

The decision of the Ninth Circuit struck a reasonable balance between the school district's need to preserve order and the handicapped child's right to the substantive and procedural safeguards of the EHA. It ruled that suspensions for fixed periods up to 30 days[3] do not amount "to either a change in placement or the deprivation of an appropriate public education." *Doe v. Maher*, 793 F.2d 1470, 1484 (9th Cir. 1986). Indefinite suspension, however, constitutes a significant change in placement. *Id.* at 1483. The court emphasized that school officials cannot "avoid the EAHCA's 'stay-put' provision simply by making a unilateral determination that a child should be suspended indefinitely because he or she threatens to disrupt the educational process." *Id.* at 1486.

Petitioner states that the Ninth Circuit's decision could have appalling consequences. His brief to this Court portrays an explosive, gun-wielding teenager menacing fellow pupils, teachers and school property. Brief for Petitioner at 5, 6. Petitioner implies that the Circuit Court has insulated this child from the rule of law. This is simply not true. School districts retain a range of options for dealing with disruptive pupils—among them adding a teacher's aide (as petitioner did), immediate suspension, an expedited due process hearing or petition to a court for a change of placement, or referral to the juvenile justice or mental health system.

More important, however, the children affected by petitioner's proposed rule are not violent criminals, as he implies. They are children whose behavioral problems are a manifestation of handicapping conditions such as autism, mental retardation, learning disabilities or cerebral palsy. Disruptive behavior may also be a symptom of medical problems or may result from the school's failure to provide adequate therapies or other appropriate services

[3] The 30-day figure was chosen by the court because that is the maximum time authorized under California law for suspensions of fixed duration.

specified in the IEP. Congress mandated that all of these children are entitled to the substantive and procedural safeguards of the EHA. To afford them anything less would render illusory the promises of the Act.

II. The court below also held that a state education agency must provide the services to which a child is entitled when the local educational authority is unable or unwilling to provide those services. This result is required by the statute itself. 20 U.S.C. § 1414(d). A holding to the contrary would leave a child without educational services while state and local agencies wrangle over their respective duties. The statute places the final responsibility for assuring educational services with the state agencies that receive the federal funds. The court below properly interpreted the statute.

ARGUMENT

I. THE EHA BARS SCHOOL DISTRICTS FROM UNILATERALLY CHANGING A HANDICAPPED CHILD'S PLACEMENT IN RESPONSE TO BEHAVIOR THAT IS CAUSED BY THE HANDICAPPING CONDITION.

A. Changing a Handicapped Child's Placement Over Parental Objection Violates 20 U.S.C. § 1415(e)(3).

The Education for All Handicapped Children Act requires that state and local education agencies provide all handicapped children with a "free appropriate public education," 20 U.S.C. §§ 1412(1), 1414(a)(1)(C)(ii), "regardless of the severity of their handicap." 20 U.S.C. §§ 1412(2)(c), 1414(a)(1)(A); *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 181 n.5. (1982). The Act "arose from the efforts of parents of handicapped children to prevent the exclusion or expulsion of their children from public schools." *Burlington School Comm. v. Mass. Dept. of Education*, 471 U.S. 359, 373 (1985). Before its enactment, more than one million

children were deprived of education by such discriminatory practices.[4]

In order to protect children and their parents, Congress enacted Section 1415(e)(3), commonly referred to as the "status quo" or "stay-put" requirement, which mandates that "[d]uring the pendency of any proceedings conducted pursuant to 20 U.S.C. § 1415,[5] unless the State or local educational agency and parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . ." This requirement is an important provision of the EHA's interconnected set of procedural protections. *Rowley*, 458 U.S. at 205-06 (procedural requirements of EHA as important as its substantive requirements).

Amici recognize that school officials may be under considerable pressure when dealing with a behaviorally disordered handicapped child. Although many innovative forms of intervention have been successful in dealing with a handicapped child who presents behavior problems in a regular classroom setting,[6] researchers have noted that "school personnel have not, as a rule, been aggressive in adapting, implementing, and delivering these in-

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[4] Pub. L. No. 94-142, § 3(a), 89 Stat. 773 (1976) (reprinted in notes to 20 U.S.C.A. § 1401).

[5] 20 U.S.C. § 1415 provides a mechanism whereby parents who disagree with a school's proposed decision concerning the education of their handicapped child, including decisions as to placement, are entitled to an administrative hearing. Any party aggrieved by the decision resulting from the hearing may appeal to either state or federal court.

[6] Examples of recognized techniques include cognitive behavior modification, Harris, "Cognitive behavior modification: Application with Exceptional Students," 15 *Focus on Exceptional Children* 1-16 (1982); timeout procedures, Zabel, "Timeout Use with Behaviorally Disordered Students," 12 *Behavior Disorders* 15-21 (1986); and contingency contracting, L. Polsgrove, "Self-Control: Methods for Child Training," 4 *Behavioral Disorders* 116-30 (1979).

novative practices to the school setting."[7] That is precisely why the Act prohibits school officials from changing the child's placement without parental consent. As one court observed, "We do not impugn the conduct or dedication of these officials by recognizing that the expense of special education programs may perhaps, even unconsciously, lead them to be less than zealous in ensuring the child's right to a free and appropriate education." *Doe v. Brookline School Committee*, 722 F.2d 910, 921 (1st Cir. 1983).

For this reason courts have differentiated between the application of § 1415(e)(3) to parents and to schools:

> We have no quarrel with the proposition that a parent who believes his child is receiving inappropriate service from a local education agency may take unilateral action to change the child's placement prior to the outcome of the administrative processes. This does not, however, mean that the local education agency has the same right; we think that different policy considerations come into play, and that the proper interpretation of (e)(3) as it pertains to the actions of local educational agencies is that in such situations, the provision operates much like a rebuttable presumption that maintaining the original placement is required. This approach both acknowledges the strong wording of the statute—'the child *shall* remain (emphasis supplied)'—while preserving to courts enforcing the EAHCA their 'traditional powers of equity' in fashioning appropriate remedies for apparent violations.

Lamont X. v. Quisenberry, 606 F. Supp. 809, 815 (S.D. Ohio 1984).

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[7] Walker, H.M., Reavis, H.K., Rhode, G. and Jenson, W.R., A Conceptual Model for Delivery of Behavior Services to Behavior Disordered Children in a Continuum of Educational Settings, in P. Bornstein and A. Kazden (eds.) *Handbook of Clinical Behavior Therapy with Children* (Homewood, Ill.: Dorsey 1985), p. 704.

Burlington, 471 U.S. 359, is the only case this Court has decided dealing directly with the stay-put provision. Although Petitioner claims that *Burlington* merely reflects this Court's willingness to interpret § 1415(e)(3) flexibly, Petitioner's Brief at 13, it is clear that the flexibility was strictly reserved for parents. This Court specifically declared that "at least one purpose of § 1415(e)(3) was to prevent school officials from removing a child from the regular public school classroom over the parents' objections pending completion of the review proceedings." 471 U.S. at 373. The Court emphasized that "section 1415(e)(3) is located in a section detailing procedural safeguards *which are largely for the benefit of parents and the child.*" *Id.* (emphasis added).

Subsequent lower court decisions have cited *Burlington* for the proposition that "correctly construed, § 1415(e)(3) is a bar to removal of a child from the mainstream classroom over parental objection pending review of an IEP that would place a child elsewhere." *Eugene B. Jr. v. Great Neck Union Free School District*, 635 F. Supp. 753, 758 (E.D.N.Y. 1986); *Linkous v. Davis*, 633 F. Supp. 1109, 1116-17 (W.D. Va. 1986).

B. Unilaterally Changing a Handicapped Child's Placement Vitiates the Intent of the Individual Education Plan and Thus Denies the Child's Right to a Free Appropriate Public Education.

The free appropriate public education mandated by the EHA is defined as, *inter alia*, a program of special education and related services designed to meet each handicapped child's "unique needs," provided in accordance with an individually designed education program or "IEP." 20 U.S.C. § 1401(16) and (18). The IEP is the centerpiece of the Act. It is the blueprint for the child's education, developed collaboratively by qualified special education personnel, the child's teacher, the child's par-

ents or guardian and, whenever appropriate, the child. 20 U.S.C. § 1401(19).

The IEP planning process and the document resulting therefrom together represent a "communication vehicle between parents and school personnel [which] enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be." 34 C.F.R. Pt. 300, App. C (I)(a) (1985). It provides "an opportunity for resolving any differences between parents and the agency concerning a handicapped child's special education needs; first, through the IEP meeting, and second, if necessary, through the procedural protections that are available to the parents." *Id.* at (b). It is "a commitment of resources" by the school to the child. *Id.* at (c). It is "a management tool . . . used to ensure that each handicapped child is provided special education and related services appropriate to the child's special learning needs." *Id.* at (d). The IEP is also an "evaluation device for use in determining the extent of the child's progress towards meeting the projected outcomes." *Id.* at (f). Finally, it is a "compliance/monitoring document" to gauge whether the school is living up to its promises. *Id.* at (e). Each of these functions of the IEP would be nullified if school districts had the power to unilaterally change a child's placement without regard to the agreements embodied in the IEP.

The IEP, both in itself and in the process of its development, is thus the fulfillment of the promise to provide an individualized education based on each handicapped child's unique needs. Yet Petitioner insists that, regardless of the terms of the IEP, school districts have complete discretion—without further planning, process or parental agreement—to change the placement of a child who manifests behavioral difficulties. Petitioner further asserts that such discretion may be exercised repeatedly

during the course of a school year. Ironically, Petitioner would allow school officials to change the child's placement in response to the same behaviors that led them to identify the child as handicapped in the first place—the very behaviors targeted in the IEP for attention and modification.[8]

The IEP of a child who evinces disruptive behavior that is a manifestation of his handicapping condition should include programs to modify that behavior and goals against which to measure the child's and the school's success. The course contemplated by the EHA to deal with a child whose behaviors continue to be inappropriate or disruptive is to reconvene the IEP team and consider whether revisions of the child's program or placement are needed, including the appropriateness of a more restrictive setting.[9] Permitting school officials to unilaterally change a child's program or placement com-

[8] In fact, three of the handicaps identified by the regulations to the Act are defined in terms which suggest disruptive behavior. A child who is "seriously emotionally disturbed," for example, may exhibit "[i]nappropriate types of behavior or feelings under normal circumstances," or "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers." 34 C.F.R. § 300.5(b)(8)(B) and (C). A mentally retarded child has "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior . . ." *Id.* at § 300.5(b)(4). An autistic condition is "manifested by severe communication and other developmental and educational problems." *Id.* at § 300.5(b)(7)(i).

[9] The Comments to 34 C.F.R. § 300.552, one of the regulations implementing the EHA, acknowledge that disruptive behavior may be a basis for modifying a student's program—that is, revising the IEP to make it appropriate—rather than for excluding the child from services. Quoting from an analysis of the regulations implementing 29 U.S.C. § 794, it states:

> [I]t should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs.

pletely vitiates the purpose and intent of the IEP process.

C. Indefinite Suspension or Expulsion Constitutes a Change in Placement.

The court below held that an indefinite suspension or expulsion constitutes a " 'change in placement' that triggers the EAHCA's procedural requirements and safeguards [citation omitted]—including the vehicle of the IEP team." *Doe v. Maher*, 793 F.2d at 1483. In doing so it followed uniform case law: *School Board of Prince William County v. Malone*, 762 F.2d 1210, 1214 (4th Cir. 1985); *Kaelin v. Grubbs*, 682 F.2d 595, 599-602 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); *Sherry v. New York State Education Dept.*, 479 F. Supp. 1328 (W.D.N.Y. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978), *Doe v. Koger*, 480 F. Supp. 225, 228-29 (N.D. Ind. 1979); *Lamont X. v. Quisenberry*, 606 F. Supp. 809 (S.D. Ohio 1984); *Adams Central School District No. 090, Adams County v. Deist*, 214 Neb. 307, *cert. denied*, 464 U.S. 893 (1983).[10] The weight of authority permits school districts to impose time-limited, short-term suspensions. However, indefinite suspension, exclusion or expulsion constitutes an impermissible change of placement under the Act.

When school officials extrude a child from his classroom and send him home, or to another school, or to an institution, it is certainly a significant change in placement. Such unilateral action by school officials is pre-

[10] *See also Board of Education of Peoria v. State Board of Education*, 531 F. Supp. 148, 150-51 (C.D. Ill. 1982) (5 day suspension held not a change in placement, as distinguished from expulsion), and *Mrs. A.J. v. Special School District No. 1*, 478 F. Supp. 418, 432, n.13 (D. Minn. 1979) (finding that expulsion and exclusion are changes in placement, but not suspension). The court in *Mrs. A. J.* specifically interpreted the comment that a school may use its normal procedures for dealing with children who are endangering themselves or others to permit school officials to suspend, but not indefinitely exclude or expel students.

cisely what the parental involvement in decisionmaking required by the EHA was designed to eliminate.

D. Petitioner's Reliance on Existing Case Law to Support His Proposed Exception to the Stay-Put Requirement Is Misplaced.

Petitioner proposes to rewrite the Act to include a "disruptive child" exception to the stay-put requirement, which would permit schools to unilaterally change students' placements. Petitioner's Brief, p. 8, n.12. To support this proposal, he cites *Victoria L. v. District School Board*, 741 F.2d 369 (11th Cir. 1984), and *Jackson v. Franklin County School Board*, 765 F.2d 535 (5th Cir. 1985), two cases whose analysis rests on the decision in *S-1 v. Turlington*. These cases misinterpret *Turlington*, for it does not in any sense support unilateral change of placement by school districts. Indeed, while the *Turlington* court recognized, as did the court below (793 F.2d at 1484), a school district's right to impose a short-term suspension, it required that expulsion or any other change in placement be accomplished according to procedures set out in the Act. The court quoted the federal regulatory agency's comment to § 1415(e)(3),[11] providing that "*[w]hile placement may not be changed*, this does not preclude dealing with children who are endangering themselves or others" (emphasis added). The school district thus had "very limited authority" to "remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others." The court stressed that a child who was removed "*would of course be remanded to the special change of placement procedures for reassignment to an appropriate placement.*" 635 F.2d at 348, n.9 (emphasis added). *Turlington* thus reaffirms rather than limits the protection of the Act.

[11] At the time of the *Turlington* decision, this comment was found at 45 C.F.R. 121a.513 (1975). The comment is now located at 34 C.F.R. 300.513 (1985) in substantially the same form.

E. The Proposed Exception Is Designed to Serve the Convenience of School Officials Rather than the Needs of Handicapped Children.

The "disruptive child" exception to the mandate of a free, appropriate public education that Petitioner proposes is an exception that would swallow the rule. Depending on Petitioner's definition of "disruptive"—and he proposes to allow school districts to make that finding unilaterally—a substantial number of handicapped children served under the Act could be arbitrarily excluded from its protections.

It must be recognized that the children who would be affected by Petitioner's proposed exception are not the weapon-carrying criminals his brief portrays. They are children whose behavioral problems are a manifestation of their handicapping condition. They include the autistic child who lacks impulse control, the mentally retarded child with poor social adjustment skills, the learning disabled child with motor-control problems, the cerebral palsied child whose frustration may produce self-abusive or aggressive behavior. Sometimes disruptive behavior is a symptom of a medical problem, such as lack of medication or the wrong dosage of seizure-control medication for a child with epilepsy.

For that matter, any handicapped child may have behavior problems as a result of cumulative frustration and confusion when his or her needs are unmet or inadequately addressed. Researchers have acknowledged that the source of handicapped children's behavior problems in school may be inappropriate expectations, curriculum or teaching methods.[12] Courts, too, have recognized the causal relationship between the failure to provide appropriate services and antisocial behavior, e.g.: *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (the school's "handling of [plaintiff] may have contributed

[12] Kerr, M.M., and Nelson, C.M., *Strategies for Managing Behavior Problems in the Classroom* (Merrill, 1983).

to her disruptive behavior"); *Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634, 636, 640 (S.D. Tex. 1978) (lack of free, appropriate education was contributing and proximate cause of child's emotional difficulties).

If school officials were permitted to unilaterally transfer children out of the classroom because of disruptive behavior, schools would have no incentive to discover the source of the behavior problem and attempt to remedy it. While the behavior problem would no longer be a difficulty to the school, the child would still need help. In effect, Petitioner asks this Court to strike down the stay-put provision of the EHA not because it is illegal but because it is inconvenient. As this Court has repeatedly emphasized, such a request is more appropriately considered in a legislative forum.[13]

F. Schools Have Alternative Ways to Deal With Disruptive Students.

Petitioner portrays school districts as backed into a corner by the stay-put requirement, with no alternative but to permit a disruptive child to destroy the decorum of the classroom. That is hardly the case. In fact, § 1415(e)(3) specifically permits school districts to change a child's placement immediately if the parents agree to the new placement. The student must remain in the placement only if parents object to the proposed change.

Amici believe that most parents will agree to change a placement that is truly inappropriate. As this Court has noted, the "pages of human experience teach that parents

[13] In *Kleppe v. New Mexico*, this Court responded to a similar request by stating: "What appellees ask is that we reweigh the evidence and substitute our judgment for that of Congress. This we must decline to do." 426 U.S. 529, 541, n.10 (1976). *See also Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 283 (1981), and *New Orleans v. Dukes*, 472 U.S. 297, 303 (1976).

generally *do* act in the child's best interests." *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (emphasis added). Since both the Act and this Court have repeatedly emphasized the importance of the parents' role in assuring an appropriate education for their children, it makes no sense to now give school officials carte blanche to effect a change in placement over the parents' objection.

When parents do not agree to a change in placement, the school district may seek expedited administrative hearings or judicial relief, such as a preliminary injunction ordering a change in placement. *Doe v. Maher*, 793 F.2d at 1486; *Doe v. Brookline School Committee*, 722 F.2d at 917 (courts retain equitable powers and can issue injunctions despite the requirements of § 1415(e)(3)); *Stacey G. v. Pasadena Independent School District*, 695 F.2d 949, 955 (5th Cir. 1983) (same); *Jackson v. Franklin County School Board*, 765 F.2d 535, 538-39 (5th Cir. 1985) (court upheld district court's issuance of a preliminary injunction preventing handicapped student's readmission to school).

Emergency situations may arise, of course, when school officials must act before all parties to the IEP are able to meet. This is why courts have upheld the discretion of school officials to use temporary, fixed-period suspensions. During this time they can meet with parents to work out more appropriate longer-term arrangements. They may also add an extra teacher's aide or monitor,[14] or make changes *within* the child's placement—a change in classes, for example, if the problem is with the teacher or another student in the class.

The decision of the court below strikes a reasonable balance between the rights of handicapped students to

[14] Teachers' aides and monitors are commonly used in classrooms to increase individualized attention given to students. The attitude of the school and the aide determine whether these monitors are perceived as teacher's helpers or "guards", as Petitioner characterizes them. Petitioner's Brief at 11.

special services and district officials' ability to deal with disruptive students and ensure a safe learning environment. It is a balance that gives full weight to the language and the spirit of the "status quo" requirement of the ERA. It should be affirmed by this Court.

II. 20 U.S.C. § 1414(d) REQUIRES STATE EDUCATION AGENCIES TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION TO HANDICAPPED STUDENTS IF LOCAL EDUCATION AGENCIES DEFAULT IN THEIR DUTY TO PROVIDE SUCH SERVICES.

The court below held that the California educational agency must provide education services directly whenever it determines that a responsible local agency is unable or unwilling to provide free appropriate public education to its handicapped residents. In so doing, the court relied on 20 U.S.C. § 1414(d).[15] *Doe v. Maher*, 793 F.2d

[15] 20 U.S.C. 1414(d) provides:

> Whenever a State educational agency determines that a local educational agency—
>
> (1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;
>
> (2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or
>
> (3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;
>
> the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

at 1491-92. Petitioner argues that the decision is in error and imposes an insurmountable hardship on the state agency. *Amici* disagree.

The state agency (SEA) is in the best position to compel local school districts to provide necessary services. But if its persuasive efforts do not succeed, the child must not be the one to suffer. The EHA makes clear that the buck stops with the SEA. 20 U.S.C. § 1412(6) states that:

> The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet educational standards of the State educational agency.

See also 34 C.F.R. § 300.600 (1985).

In *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981), the court considered the role of the state agency in ensuring compliance with the EHA. In that case, the district court had found that the plaintiff was entitled to residential services and, having found the youngster's IEP inadequate, assigned the responsibility of ensuring compliance to the state agency. The court affirmed that decision, finding that it was entirely consistent with the language and spirit of the EHA.

> Both a general congressional perception of the state's primary responsibility to provide a publicly-supported education for all children and a specific intent to centralize this responsibility underlie this explicit statutory mandate.
>
> The legislative history indicates that the full committee considered the establishment of a single agency on which to focus responsibility for assuring the right to education of all handicapped children to be of permanent importance:

> Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending on the age of the handicapped child, sources of funding, and type of services delivered. While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.
>
> See S. Rep. No. 168, 94th Cong., 1st Sess. 24 reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1448.

Id. at 696.

In reaching its decision, the court below focused on 20 U.S.C. § 1414(d). The court rejected the argument that this provision applies only when groups of children are denied services, since § 1414(d)(3) mandates state intervention when "one or more handicapped children" are unserved. *Doe v. Maher*, 793 F.2d at 1492.[16]

Contrary to Petitioner's assertions, the decision below does not impair the effectiveness of the administrative procedures established by 20 U.S.C. § 1415. The families of handicapped children will still have to utilize these processes to resolve disputes regarding an individual child's "identification, evaluation or placement and the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(A). However, in a case that involves no factual dispute but rather a clear

[16] *Accord, Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1574 n.6 (11th Cir. 1983) (*en banc*) (under § 1414(d) "[T]he state agency must administer funds and services *directly* if it determines that the local educational agency is failing to provide appropriate programs."); *Anderson v. Thompson*, 658 F.2d 1205, 1207 n.1 (7th Cir. 1981). *See also Kerr Center Parents Association v. Charles*, 572 F. Supp. 448, 458-59 (D. Ore. 1983).

default by a local education agency in its responsibility to provide a free appropriate public education, § 1415 gives the state both the authority and the obligation to remedy the default.

Finally, even if Petitioner were correct in his position that § 1415 applies only when there is a district-wide breakdown in the provision of services, this is such a case. Respondents in this case have alleged a statewide failure to establish a lawful policy for discipline of disabled students. As a consequence of this failure, the two named plaintiffs and all other behaviorally handicapped students have been denied their right to a free appropriate public education. (*See* Section I, *supra.*) Therefore, even if the scope of § 1414(d) is less broad than respondents herein assert, the court properly applied it to this case.

CONCLUSION

In conclusion, *amici* urge this Court to reject Petitioner's position and to affirm the decision of the Ninth Circuit. The unilateral transfer of behaviorally disabled students by school officials violates the children's rights under the EHA to free appropriate public education and to the maintenance of their "current educational placements" during the administrative and judicial proceedings required by the Act.

Respectfully submitted,

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