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Larry Bartlett

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Economic Cost Factors in Providing a Free Appropriate Public Education for Handicapped Children: The Legal Perspective

LARRY BARTLETT*

Introduction

Is the annual payment of $100,000 for the education of a child with disabilities financially excessive and against public policy? A federal district judge in Florida believed so and refused to approve a settlement agreement between parties in a lawsuit brought under federal special education law. Under the settlement, a school district and county health department were to pay $100,000 for educational placement and up to $60,000 for residential care support for a severely handicapped child.[1] While the judge agreed that the settlement was in the best interest of the child, he felt compelled to protect Florida's taxpayers and the general financial health of Florida's state treasury by refusing to approve the agreement.[2] The judge ruled from the bench:

> Gentlemen, the court is very concerned where the future is going to bring this type of case. We are going to be inundated within the next couple of years with drug abuse children who are going to be infused into the school system, and if each of those children are [sic] going to cost the school system and HRS two hundred thousand dollars per year, the state of Florida is going to go broke within no time. The court cannot approve this agreement. The court finds that it is against public policy, and a cost of two hundred thousand dollars per year per child is not within the intent of either the Handicapped Children Act, the Florida statutes on education or any statutes of HRS. You're going to have to work something out. But the court will not approve this agreement as being against public policy.[3]

On review, the Eleventh Circuit ordered the district court to vacate its order and approve the settlement.[4] It concluded that a court can refuse settlements between parties on public policy grounds only if they violate

* Associate Professor, Planning, Policy and Leadership Studies, The University of Iowa.

1. In re Smith, 926 F.2d 1027 (11th Cir. 1991).

2. *Id.* at 1029. Subsequent to the ruling of the federal district court, a state court approved the settlement under state law in parallel litigation. *Id.* at 1028.

3. *Id.*

4. *Id.* at 1030.

state or federal statute or policy. Even though the settlement in question involved a large sum of taxpayers' money, the Eleventh Circuit found that it did not violate any state or federal statute or policy and that as a result, the district court could not void it.[5] The circuit court apparently did not consider the economic cost of the proposed education program to be excessive or even relevant.

Not all courts have found the financial considerations of special education programming to be irrelevant. Many have been concerned with the negative impact that the high cost of special education may have on the amount of resources available for education services for other children. This author previously published a substantial review of the question and determined that the issue of cost in special education programming was unsettled and that the existing judicial responses covered the full spectrum of potential results.[6] This author concluded that cost was a legitimate factor to be considered and established a process to bring "parity" to the competing interests involved in disputes over cost issues in funding individual students' special education programs. He also concluded that the lack of consistency with which the courts addressed the issue of cost was "potentially critical" and had serious implications for the "institutional framework of public education."[7]

The purpose of this article is to review and synthesize court rulings that have expressly discussed the factor of economic cost in considerations of appropriateness of special education programming, and to demonstrate that court rulings issued since 1982 have not been as inconsistent and contradictory on the issue as rulings prior to 1982 had been. Bringing some clarity to the issue is important for members of education teams, including parents, responsible for planning and implementing special education programs for individual students, and for administrative law judges who review parent challenges to proposed individual education programs (IEP). The proper understanding of the role of cost as a factor for consideration by those persons will more likely result in a special education program that is appropriate as required by law. Consensus on this issue is also important for school district planners, providers of programs and services to handicapped children, state department of education staff members, and state legislators who play key roles in funding special education programs. National education policy developers should also be concerned as they consider potential amendments to existing special education statutes and regulations.

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5. *Id.* at 1029.

6. Larry Bartlett, *The Role of Cost in Educational Decision Making for the Handicapped Child,* 48 LAW & CONTEMP. PROBS. 7, 8 (1985).

7. *Id.* at 18.

Constitutional Considerations

The first substantial litigation of handicapped students' rights to an education under the Constitution arose two decades ago, and issues of insufficient and inadequate finding for handicapped programs were involved. In *Mills v. Board of Education,*[8] a class action was brought on behalf of seven students labeled as having behavior problems, mental retardation, emotional problems, or hyperactivity. The students had been denied admission to, or had been excluded from, the public schools in the District of Columbia. The court concluded that denying the handicapped students a publicly supported education was a violation of the Due Process Clause of the Fifth Amendment.[9]

The school district had argued that it was unable to provide education programs for handicapped students because it was not granted adequate funds by Congress to meet the needs of all its students. The district argued that, in order to provide handicapped students with an education, either Congress would be required to appropriate additional millions of dollars or the district would have to divert money from education services to non-handicapped students. The court rejected inadequate funding as a justification for depriving handicapped students of their constitutional right to a publicly supported education. In often quoted language, the court explained its position:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public Schools System *whether occasioned by insufficient funding or administrative inefficiency certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.*[10] (emphasis added)

The other major early court ruling on education of the handicapped was *Pennsylvania Association for Retarded Citizens v. Commonwealth.*[11] That ruling resulted in several consent decrees establishing the rights of handicapped students to attend school under both the due process[12] and equal protection[13] provisions of the Fourteenth Amendment. There was, however, no express issue of funding or finance discussed by the court.

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8. 348 F.Supp. 866 (D. D.C. 1972).
9. *Id.* at 875.
10. *Id.* at 876.
11. 334 F.Supp. 1257 (E.D. Pa. 1971); 343 F.Supp. 279 (E.D. Pa. 1972).
12. 343 F.Supp. at 295.
13. *Id.* at 297.

The legal principles enunciated in the *Mills* and *P.A.R.C.* rulings were very important factors in Congressional consideration of legislation to address issues of education of the handicapped. In considering the extensive amendments to the the federal education law that were contained in the Education for All Handicapped Children Act of 1975,[14] Congress gave considerable weight to the results of those two rulings.[15] The Act itself declared that the assurance of equal protection of the law to handicapped children was in the national interest.[16] When the Supreme Court later reviewed issues related to the EAHCA, it also relied heavily on the principles enunciated in *Mills* and *P.A.R.C.* and referenced the language on funding form *Mills* quoted above.[17] The Court expressly recognized the Congressional intent to incorporate equal protection into the EAHCA.[18]

In 1990, the EAHCA was amended, and its title was changed to the Individuals with Disabilities Education Act (IDEA).[19] However, because all of the court decisions discussed in this article were rendered before the effective date of the amendment under the IDEA and used the EAHCA as their reference point, the designation of EAHCA will continue to be used in this article to refer to federal special education statutes unless such designation is otherwise inappropriate.

In the time following the enactment and implementation of the EAHCA and the Supreme Court interpretation in *Board of Education v. Rowley,*[20] few court references have been made to the constitutional issues involved in the education of the handicapped. Most courts apparently take it for granted that the EAHCA has adequately incorporated the relevant constitutional principles.[21] Such can be inferred from the Fifth Circuit ruling in *Crawford v. Pettman,*[22] which involved a Mississippi Department of Education limitation on funding for special education programs. Due to alleged funding limitations, the state did not provide for the funding of special education programs for more than 180 school days, the maximum funding period allowed for non-handicapped student education.[23] The court ruled that lack of funds may not be used as an excuse to limit the

14. Pub. L. No. 94-142.

15. S. REP. No. 168, 94th Cong., 1st Sess. 23 (1975), *reprinted in* 1975 U.S.C.C.A.N 1425, 1429-30, 1433, 1447.

16. 20 U.S.C. § 1400(b)(9) (1988).

17. Board of Educ. v. Rowley, 458 U.S. 176, 193 n.15 (1982).

18. *Id.* at 200.

19. 20 U.S.C.A. § 1400(a) (West Supp. 1991).

20. 458 U.S. 176 (1982).

21. *See, e.g.,* Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 690-91 (3rd Cir. 1981) (tracing the equal protection aspect of *Mills* and *P.A.R.C.* back to Brown v. Board of Educ., 347 U.S. 483 (1954).

22. 708 F.2d 1028 (5th Cir. 1983).

23. *Id.* at 1030-31.

availability of "appropriate" special education programs and services to handicapped children to a greater degree than it does to non-handicapped children. In doing so, the court referenced the familiar language from *Mills* and expressly noted its place in the legislative history of the EAHCA.[24] In conclusion, the Fifth Circuit found that arbitrary limits of funding special education programs for a maximum of 180 days did not allow for individual considerations of appropriateness of programming that would provide a handicapped child with the substantive requirements of the EAHCA. The court stated that "[l]ack of funds . . . may not limit the availability of 'appropriate' educational services to handicapped children more severely than it does to normal non-handicapped children."[25]

Provision of a Free Appropriate Public Education

The EAHCA and its administrative regulations required school districts in states receiving federal special education funds to provide a "free appropriate public education" (FAPE) to children with disabilities.[26] No express reference to money or costs associated with the provision of an "appropriate" educational program appeared. On that specific point the statute and regulations are silent. The only references to money and expense in the EAHCA and its administrative regulations were generic statements and prohibitions, such as requiring the provision of an education program "at no cost to parents or guardians,"[27] and the provision of programs at "public expense."[28] The express language of the EAHCA provided no clear guideline or direction in resolving issues of parental advocacy for education programs and services when it conflicted with local school district budgetary concerns.[29] We know only that the statutes did not require the "best" education program or one that would "maximize" educational opportunities for the child with disabilities.[30]

In the years between the enactment of the EAHCA and the *Rowley* decision in 1982, the lower courts were divided in their views on the relevance of economic cost in determinations of appropriateness for individual

24. *Id.* at 1035; *see also* Battle v. Commonwealth, 629 F.2d 269, 278 (3rd Cir. 1980) (same quotation from *Mills*).

25. *Id.; see* Yaris v. Special Sch. Dist., 558 F.Supp. 545, 559 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984) (". . . inadequacy of funds does not relieve a state from its obligation to assure the handicapped child of equal access").

26. 20 U.S.C. § 1400(c) (1988).

27. 20 U.S.C. § 1401(a)(16) (1988).

28. 34 C.F.R. § 300.503(b) (1989).

29. Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1125 (1979).

30. Board of Educ. v. Rowley, 458 U.S. 176, 198-200 (1982).

handicapped children. The courts were obviously struggling with the meaning of "appropriate" in the context of the inherent tension arising from the mandate to provide an appropriate education for handicapped students and the availability of limited education funds. The situation is "unsettled" and exising court decisions can be divided into three groups; those in which cost was not considered relevant, those in which cost could be a factor to be taken into consideration, and those in which cost was relevant between considerations of appropriate and best programs.[31]

The majority of the pre-*Rowley* court rulings concluded that consideration of economic cost was an appropriate factor to be weighed in the decision making process involving determinations of the appropriateness of programming for individual children. Within that majority view, the rulings were fairly evenly divided in favoring the school's or student's view, depending on the specific facts involved.

One of the clearest pre-*Rowley* rulings that weighed cost considerations in determining appropriate special education placement involved a brain-injured child, and was found in favor of the school.[32] The parents claimed that the school district could not provide an appropriate program and requested the child's placement in a private school for severely handicapped children. The court found that the local school district's proposed program was appropriate for the child and that the real issue in the litigation was the parents' desire for an "ideal education" for their child.[33] The parents' witnesses took the position that determinations of appropriateness should be made without cost considerations and the court voiced strong disagreement.

> The argument that costs should not be considered in determining what is appropriate wholly overlooks the fact that cost is very much a factor in determining what is an appropriate education for non-handicapped children. *No language in State or Federal law can properly be read as mandating that costs may not be considered in determining what education is appropriate for a child — handicapped or non-handicapped.* Thus, such factors as the difference in travel costs between Accotink Academy and the Regional Center must be considered in determining the appropriateness of the shcools.[34]

In another pre-*Rowley* ruling, a federal district court in Ohio rejected parents' arguments for the best program available, regardless of cost.[35] The court concluded that an appropriate program for a child who

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31. Bartlett, *supra* note 6, at 13-19.

32. Bales v. Clark, 523 F.Supp. 1366 (E.D. Va. 1981).

33. *Id.* at 1370.

34. *Id.* at 1371.

35. Rettig v. Kent City Sch. Dist., 539 F.Supp. 768 (N.D. Ohio 1981), *aff'd in part, rev'd in part on other grounds and remanded,* 720 F.2d 463 (6th Cir. 1983).

displayed symptoms of mental disability and autism did not require provision of all programs and services that might be beneficial to the child. It noted that educational funding was not without its limits and that spending an exorbitant amount on one child was achieved only at the expense of other handicapped children.[36] The court did warn, however, that schools have a duty to continually keep abreast of and use new and innovative strategies in meeting the needs of handicapped children.[37] The warning infers that a school cannot use cost as an excuse for not maintaining up-to-date special education programs and services.

The Iowa Supreme Court was also presented with parental arguments that federal and state special education law required the provision of the "best" or "maximum" program attainable, regardless of cost.[38] Parental arguments were rebuffed when the court concluded that neither state nor federal law required the "best" or "maximum" program, in the sense of an unlimited commitment of financial resources, to meet the needs of individual handicapped children. The court expressly noted that one constraint on the provision of appropriate special education programs is the "limit of funds available."[39] It concluded that the law required a parity of educational opportunity between handicapped and non-handicapped students, but the realization of equality was dependent on the nature of the handicap, the resources available, and the reasonableness of the effort in the context of each student's situation.[40]

Several pre-Rowley rulings found or implied that the cost factors of individual student programming were relevant in making determinations of appropriateness, but ruled in favor of the student on the specific facts. The Third Circuit was presented with one of the earliest issues of providing clean intermittent catheterization (CIC) for a student to enable her to attend regular classes.[41] The court noted that the school district's objection to providing CIC was based, at least in part, on budgetary and fiscal constraints,[42] and in responding to the school's express argument that providing CIC would divert limited funds from other special education students, found that CIC was a cost-effective way of meeting the mainstreaming principle of the EAHCA. The court acknowledged that difficult issues were raised by choices "between placing the burden of

36. *Id.* at 777; *see also* Pinkerton v. Moye, 509 F.Supp. 107, 112-13 (W.D. Va. 1981) (upholding centralization of programs for low incidence handicaps).

37. *Id.*

38. Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982).

39. *Id.*

40. *Id.*

41. Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443 (3rd Cir. 1981), *cert. denied,* 458 U.S. 1125 (1982).

42. *Id.* at 455.

fiscal limitations on handicapped children as opposed to school districts," but determined that providing CIC would not pose an "undue drain" on the school's budget.[43]

One of the clearest statements of the conflict between limited funding and providing services to handicapped students was provided by a Texas federal district court which had been presented with issues surrounding a proposed 12-month special education and parent counseling program, the latter aspect to assist parents in relieving their emotional stress.[44] Although rendered two months after the *Rowley* decision, it made no express mention of that ruling. The court discussed the competing interests of the personal and unique needs of the child with realities of limited funding and concluded that the competing interests must be considered in determining an appropriate special education program for a specific handicapped child. The court noted that failure to take cost into account might reduce the resources available to meet the needs of other handicapped children.[45] The court ruled on the basis of the facts, however, that an appropriate program should include extended-year programming and that the girl's parents should be provided with counseling.[46]

Another Texas school district argued in a case involving a seven-year-old boy whose nervous system could not regulate his own body temperature, that it was less costly to air-condition a small improvised cubicle constructed within a regular classroom than to air-condition the entire classroom. The federal court concluded that the added cost of air-conditioning the entire room should be weighed against the boy's need to be mainstreamed in the least restrictive environment. It rules that the entire classroom should be air-conditioned.[47]

The pre-*Rowley* view that cost is not relevant in determinations of appropriateness is found in rulings from the Third Circuit and a North Carolina federal district court. The Third Circuit ruling involved the resistance of state and local school officials to fund a court-ordered residential placement for a student with disabilities. In its review of the challenged district court ruling, the circuit court noted that the cost of special education programs under the EAHCA was not relevant to the mandate to provide special education programs and services. It stated that "schools are required to provide a comprehensive range of services to accommodate a handicapped child's educational needs *regardless of finan-*

43. *Id.* at 458.
44. Stacy G. v. Pasadena Indep. Sch. Dist., 547 F.Supp. 61 (S.D. Tex. 1982).
45. *Id.* at 78.
46. *Id.* at 80.
47. Espino v. Besteiro, 520 F.Supp. 905 (S.D. Tex. 1981).

cial and administrative burdens, and, if necessary, to resort to residential placement."[48] (Emphasis added).

The North Carolina case involved a dispute over the appropriate placement of a 12-year-old boy diagnosed as having a schizoid personality.[49] The court found that the program offered by the resident school district was not appropriate for the boy and narrowed its consideration to two out-of-state alternative placements. The state and local school authorities argued that due to budgetary constraints, they could not afford to pay the costs of $450.00 or $1,850.00 per month for either of the out-of-state residential facilities. The court's curt response was that states that voluntarily participated in the EAHCA had to abide by its terms. It cited to the oft-quoted *Mills* language[50] for the proposition that financial support had to be consistent with a child's needs and ability to benefit from education and that inadequacies in funding could not be permitted to fall most heavily on the handicapped. The court refused to allow the school to provide less than an appropriate placement based on the school's argument that it could not afford the cost of the placement.[51]

The Rowley *and* Tatro *Decisions*

In the Supreme Court's first two decisions involving the EAHCA, cost factors were only indirectly involved. In *Board of Education v. Rowley,*[52] the Supreme Court was asked to review the situation of Amy Rowley, a successful elementary school student with a hearing disability. Amy's parents had requested that a sign language interpreter be provided as part of a "free appropriate public education." The school had refused, arguing that Amy did not need a sign language interpreter to succeed in school. The Court was asked to define "free appropriate public education." In doing so, it concluded that schools were not required to provide the best education possible or to maximize a child's educational potential through special education programming. Schools were required by the EAHCA to provide only "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[53] Since

48. Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 695-96 (3rd Cir. 1981). A California federal district court concluded that legal actions to secure special education for handicapped students could place a significant burden on the resources of public schools, "but, Congress has determined that it is worth the price to develop the potential of the handicapped. . . ." Boxall v. Sequoia Union High Sch. Dist., 464 F.Supp. 1104, 1114 (N.D. Cal. 1979).

49. Hines v. Pitt County Bd. of Educ., 497 F.Supp. 403, 405 (E.D. N.C. 1980).

50. *See supra* text accompanying notes 8-10.

51. *Hines,* 497 F.Supp. at 408.

52. 458 U.S. 176 (1982).

53. *Id.* at 203.

Amy Rowley was provided a personalized instruction program and was benefiting from that instruction, the Court concluded that the school did not have to comply with Amy's parents' request for a sign language interpreter.[54]

In establishing the substantive framework of appropriate programming, the Court indirectly removed any express or implicit consideration of cost as a factor in determining appropriateness. The substantive focus became the necessary instructional program and services required on an individualized basis to permit the child to benefit from the special instruction. *Rowley* appears to have set a "low level of duty on the part of the school system, but seems to make the duty absolute, unqualified by any defense based on cost."[55]

The Supreme Court's ruling in *Irving Independent School District v. Tatro*[56] had a less direct, but nonetheless important, impact on removing cost as a factor in determining the types and kinds of support services required to be provided to handicapped students. The issue before the Court was whether a school was required to provide CIC under the EAHCA. The school district argued that it should not be required to provide a student with CIC because it was a "medical service" that Congress excluded from the list of required services. The Court concluded that in developing and implementing rules under the EAHCA, the Secretary of Education properly defined the medical services exclusion to cover only those requiring a physician's services. It noted that it was reasonable for the Secretary to exclude medical treatment by a physician in order to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence."[57] Implicit in the ruling was the component that other services of a medical nature, such as those of nurses, may be required regardless of cost.

Lower Court Rulings Since Rowley *and* Tatro

Most lower courts were quick to follow the Supreme Court's guidance regarding determination of the appropriateness of special education programming, and thus the Supreme Court rulings in *Rowley,* and, to a lesser extent, in *Tatro,* served as a watershed regarding lower court rulings on the issue of cost relevance in determinations of special education programming. The lower courts adhered to the *Rowley* test of personalized instruc-

54. *Id.* at 210.

55. *Bartlett, supra* note 6, at 15. *See also* L.A. Collins & Perry A. Zirkel, *To What Extent, if Any, May Cost Be a Factor in Special Education Cases,* 71 EDUC. L. REP. 11, 24 (placement decisions should not be based solely on cost.)

56. 468 U.S. 883 (1984).

57. *Id.* at 892.

tion and support services provided to allow the child to benefit educationally. When parties to litigation argued that cost factors were a relevant consideration in determinations of appropriateness, they were generally rebuffed. The courts clearly focused determinations of appropriateness on the issue of the child's educational benefit, not on cost.

An Illinois federal district court reviewed a situation in which parents had unilaterally placed their multiple-handicapped child in an out-of-state residential school and sought reimbursement for their expenses. The resident school district argued that the out-of-state school could not possibly be an appropriate placement because of its inordinately high cost. The court rejected the argument in one sentence. Citing *Rowley*[58] as being clear on the point, the court stated "the appropriateness of an education is a function, not of cost but of the actual or potential educational benefits conferred."[59]

The reverse argument was heard by the Fourth Circuit when parents of a handicapped child argued that the appropriate special education placement for their daughter was in a private school setting with a special education program.[60] The parents contended that such a placement would be less restrictive and less expensive and was, therefore, the most appropriate. The court ruled that, after *Rowley,* the issue was one of appropriateness, not of "the best education, public or nonpublic, that money can buy."[61] In ruling against the parents, it reminded them that the focus of the appropriateness issue was the provision of an individualized program that would allow their daughter to benefit educationally.[62]

In a recent ruling by the Fourth Circuit, parents challenged a district court's refusal to grant their request for an in-home behavior managment and care-service program on the ground that the district court's decision was improperly influenced by cost considerations.[63] The circuit court rejected the parents' argument, stating that the district court's brief mention of cost factors in its decision was dicta that was consistent with its finding of educational appropriateness and was not dispositive of the case. It also noted with approval the district court's statement that "financial considerations are not a deciding factor" in determining appropriateness of special education programs.[64]

In another recent ruling, a school district in Massachusetts attempted to defend its failure to implement a special education hearing officer's order

58. 458 U.S. at 200-203.
59. William S. v. Gill, 572 F.Supp. 509, 516 (N.D. Ill. 1983).
60. Hessler v. State Bd. of Educ. of Md., 700 F.2d 134 (4th Cir. 1983).
61. *Id.* at 139.
62. *Id.*
63. Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).
64. *Id.* at 982.

of placement in a private boarding school.[65] As partial justification for its failure to obey the order, the school claimed that "difficult budget constraints" prevented it from doing so and should be a consideration.[66] The court rejected the school's argument and state that, "[s]uch constraints do not . . . provide sufficient grounds for refusing to comply with the Hearing Officer's Decision."[67] In so ruling, the Massachusetts federal district court cited to a 1983 state court ruling that had also concluded that budgetary restricitions do not relieve a school of its responsibility to provide special education.[68]

To date, the strongest and clearest court ruling involving cost of individual student special education programming was rendered in the Sixth Circuit, The facts in the *Clevenger v. Oak Ridge School Board*[69] case involved a dispute over the placement of a 19-year-old boy with a serious emotional disturbance resulting from a brain injury received at birth. He was very impulsive, aggressive, hostile to authority, and possibly schizophrenic. It was undisputed that the boy could not learn in a regular school setting and needed a "highly structured, well staffed, residential school with psychiatric treatment."[70]

The school district recommended placement at a residential school for short-term care. The boy's parents requested, instead, a residential facility which was locked and secure to impede his impulsively running away from treatment. The school's proposed residential program placement cost $55,000 annually and the parents' proposed program placement cost $88,000 annually. The school argued that the $33,000 difference in cost between the two proposed programs was significant and could be a legitimate factor in determining the appropriate placement for the boy.[71]

In its handling of the case, the district court determined that when two appropriate educations were at issue, courts should balance the needs of the handicapped child with the needs of the school to "allocate scarce funds among as many handicapped children as possible."[72] In doing so, the court ruled in favor of the less expensive program.

In its review of the district court decision, the Sixth Circuit acknowledged that its previous decisions in that circuit[73] had recognized cost as a

65. Grace B. v. Lexington Sch. Comm., 762 F.Supp. 416 (D. Mass. 1991).

66. *Id.* at 420.

67. *Id.*

68. *Id.*, citing School Comm. of Brookline v. Bureau of Special Educ. Appeals, 452 N.E.2d 476 (Mass. 1983).

69. 744 F.2d 514 (6th Cir. 1984).

70. *Id.* at 515.

71. *Id.* at 517.

72. Clevenger v. Oak Ridge Sch. Bd., 349, 350 (E.D. Tenn. 1983).

73. *See infra* text accompanying notes 85-90.

legitimate consideration when planning for an appropriate special education program for a handicapped student. However, the court stated that cost considerations were appropriate factors to be used only when making choices between two or more appropriate programs. It was not appropriate to consider the cost as a factor in situations where the less costly program was not appropriate to meet the special needs of the child. As the court stated: ". . . cost considerations are only relevant when choosing between several options all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice."[74] The Sixth Circuit found that a locked, secure facility was required for the student, and the more expensive program was the only appropriate program under consideration. In the eyes of the Sixth Circuit, the $33,000-per-year difference was not a relevant consideration between the two proposed programs.

Several subsequent federal district rulings in the jurisdiction of the Sixth Circuit have been faithful in following the *Clevenger* ruling on cost. In one case, the parents of a dyslexic secondary student had made a unilateral placement of their son in a more expensive private school after school officials refused to mainstream the boy into two regular education classes even though mainstreaming would have been appropriate.[75] In its discussion of the legal requirements in providing handicapped students with an appropriate program, the court cited *Clevenger* for the proposition that cost concerns are "legitimate" when devising an appropriate program; however, they may be considered only when choosing between several appropriate programs.[76]

In a later case before the same judge, parents of a child with a severe mental disability and autistic tendencies requested reimbursement in the amount of $91,413 for tuition and associated costs of a unilateral educational placement in a school in Japan.[77] The court noted that the funding of one student's program at a high cost could act as a detriment to many other students, both handicapped and nonhandicapped.[78] It also noted that the parents had refused to enroll their son in an appropriate program offered locally by the resident school district. In finding in favor of the school district, the court cited *Clevenger* for the proposition that the cost

74. Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 517 (6th Cir. 1984). The concept that cost may be a factor only when two or more appropriate programs are available has been accepted by a Michigan court without reference to *Clevenger.* Nelson v. Southfield Pub. Sch., 384 N.W.2d 423, 425 (Mich. App. 1989).

75. Gillette v. Fairland Bd. of Educ., 725 F.Supp. 343 (S.D. Ohio 1989), *rev'd on other grounds,* 932 F.2d 551 (6th Cir. 1991).

76. *Id.* at 346.

77. Matta v. Bd. of Educ., 731 F.Supp. 253 (S.D. Ohio 1990).

78. *Id.* at 259.

of programming is relevant between two appropriate programs. Since a lower-cost appropriate program was available locally, the court declined to approve the parents' request for reimbursement of the payment of the more expensive tuition rate.[79]

A federal district court in Tennessee was presented with the issue of whether a local school district had to pay for an expensive institutional placement for a student with a serious emotional disturbance and mental disability resulting from brain damage at birth.[80] The school district provided a program of homebound instruction for three hours per week and offered to increase homebound instruction to seven and one-half hours per week. Declining the offer, the parents placed their daughter in a residential facility and brought suit seeking reimbursement of tuition and related expenses. The court found in favor of the parents and, citing *Clevenger,* ordered the school district to reimburse the parents the full amount they had spent on their daughter's educational program without giving any consideration to the cost.[81]

In a Michigan state court decision, the court noted that, contrary to federal law, state law required special education programs to "maximize the potential" of handicapped students and recognized the need to balance a child's needs with the state's concern for allocating scarce resources "among as many handicapped children as possible."[82] The ruling, without reference to the *Clevenger* ruling, restricted cost as a consideration to situations when two or more appropriate programs were available. In such situations "it would appear reasonable to adopt the program requiring the less expenditure."[83] If only one appropriate program was available, cost could not be a consideration.

It can be determined from this line of case law, centering on the Sixth Circuit's handling of the issue in *Clevenger*, that schools can use limited considerations of economic expense in making decisions regarding the appropriateness of special education programs for individual children. If only one appropriate program is available, however, that program must be provided regardless of its cost. Two commentators have recently concluded that it is "inadvisable for any district to base a placement decision solely upon cost."[84]

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79. *Id.*.
80. Brown v. Wilson County, Sch. Bd., 747 F.Supp. 436 (M.D. Tenn. 1990).
81. *Id.* at 445.
82. Nelson v. South Field Pub. Sch., 384 N.W.2d 423 (Mich. App. 1989).
83. *Id.* at 425.
84. Collins & Zirkel, *supra* note 55, at 24.

Costs Involved in Mainstreaming

Two early Sixth Circuit decisions briefly mentioned the issue of cost and have been cited frequently in subsequent rulings in other jurisdictions, including the Eighth Circuit. In *Roncker v. Walter,*[85] a post-*Rowley* decision, the Sixth Circuit reviewed a disputed placement of a nine-year-old student with a severe mental disability in a handicapped segregated county school. The court noted the strong congressional preference for mainstreaming and stated that it would be inappropriate to place a handicapped student in a segregated facility if the same features of the segregated facility that made that placement superior could be provided to a student in a less restricted environment. The court recognized that for some students, such as those who only marginally benefited from mainstreaming, segregated facilities might provide educational benefits that outweighed the benefits gained from a nonsegregated setting.[86] The court, citing the pre-*Rowley* Sixth Circuit decision in *Age v. Bullitt County Schools,*[87] stated briefly that "cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children . . . . Cost is not defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children."[88] The court appeared to be saying that schools could not use economics as justification for not providing a full range of appropriate placements, but cost factors could be a consideration in mainstreaming issues when the benefits of mainstreaming did not greatly outweigh the educational benefits of a segregated placement.

The earlier decision in *Age*[89] involved a school's proposed placement of a 12-year-old boy experiencing severe to profound hearing loss in a "total communication" program involving sign language rather than transporting the boy to another school with an "oral/aural" method program. In finding for the school, the court noted in dicta that the school appeared to be reconciling the need for an appropriate educational program "with the need for the state to allocate scarce funds among as many handicapped children a possible."[90] The decisions in *Age* and *Roncker* provide a foundation for the later handling by other courts of the specific issue of relevancy of cost as a factor in considering appropriateness of mainstreaming in providing individual special education programs.

It is important to note here that the courts generally view cost relatedness of special education programming for individual children dif-

85. 700 F.2d 1058 (6th Cir. 1983), *cert. denied,* 464 U.S. 864 (1983).
86. *Id.* at 1063.
87. 673 F.2d 141, 145 (6th Cir. 1982).
88. Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).
89. Age v. Bullitt County Public Schools, 673 F.2d 141 (6th Cir. 1982).
90. *Id.* at 145.

ferently than they view the costs of mainstreaming. Rulings from the Sixth Circuit establish this point graphically. While the rulings in *Age* and *Roncker* stand for the proposition that the cost factor of mainstreaming may be taken into account in determinations of appropriate placement, the later Sixth Circuit ruling in *Clevenger v. Oak Ridge School Board*[91] provides the strongest statement yet that cost cannot be a factor when choosing an appropriate program for an individual child unless two or more appropriate programs are available.

The earliest discussion of cost of mainstreaming in special education programming by the Eighth Circuit occurred in *Springdale School District #50 v. Grace,*[92] a ruling involving a prelingual and profoundly hearing-impaired girl. The school district of residence had no local program for the hearing-impaired and developed an IEP that would provide the girl with an education program at a state school for the deaf. The parents formally challenged the local decision, and the hearing officer reversed the local school decision. On appeal, the state department of education affirmed the hearing officer's decision, and the school district initiated an action in federal court challenging the state-mandated amendments to the girl's IEP.

The school district argued that the original IEP should be reinstated because it was "unreasonable for the school district to bear the cost of establishing a program" for one student when the state already had an existing program available.[93] According to the schools' argument, it was more cost effective to send the girl to the state school where the program was of higher quality than could be provided locally. The Eighth Circuit concluded that local school officials had overlooked the requirement of least restrictive environment under federal law — that handicapped students must be educated with non-handicapped as much as possible — and found that providing a program locally would fulfill the federal intent more than one provided at a state run segregated facility. The court rejected the school's argument that placement at the state school was "best" for the girl. It noted that the Supreme Court had made it clear in *Rowley* that federal law required only an appropriate program, not the best possible.[94] In response to the school district's argument about the relative cost of the two programs, the court stated:

> The cost to the school or the judgment of local authorities do not justify the intervention of this Court to place Sherry elsewhere when the mainstreaming provisions of the Act and the judgment of the state's administrative decisionmakers

91. 744 F.2d 514, 517 (6th Cir. 1984), *cert. denied,* 461 U.S. 927 (1983).
92. 693 F.2d 41 (8th Cir. 1982).
93. *Id.* at 43.
94. *Id.*

support a finding that the Springdale School can provide a "free appropriate public education" consistent with the Act.[95]

The Eighth Circuit appeared to have agreed with the Sixth Circuit that cost is not a relevant factor to consider in judging appropriate special education programming, at least not when other issues such as mainstreaming and deference to the decision of state education officials are involved.

The clarity of the Eighth Circuit's position was muddied several years later in a decision based on similar facts. In *A. W. v. Northwest R-1 School District,*[96] the court reviewed a situation that also involved a local school district's effort to place a child in a state residential school rather than provide a special education program locally. A local due process hearing resulted in a finding that the Down's syndrome student should be educated locally with non-handicapped peers. However, the state education department reversed that portion of the ruling on the ground that such a determination was beyond the scope of the hearing officer's authority.

In its review, the district court found that the child functioned within the range of severe mental disability and would benefit only minimally from an education placement in the local school district. Taking limited school funds into account, the court concluded that the mainstreaming provisions of the EAHC were not appropriate to the child's situation.[97] The district court stated that limited available funds spent providing a local program for one student had the potential of reducing the educational benefits to other handicapped students. It concluded that the child's limited potential benefit from mainstreaming in the local school district did not justify a potential reduction in benefits to other handicapped students that would result from "an inequitable expenditure of the finite funds available."[98] In taking this position, the district court relied heavily on the Sixth Circuit decision in *Roncker v. Walter*[99] for the proposition that cost is a proper factor to consider in making determinations of appropriate programming.[100]

The child's parents strongly objected to the district court's consideration of cost as a factor in determining the appropriateness of programming. In its review, the Eighth Circuit expressly approved the district

95. *Id.*; cited with approval in Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52 (8th Cir. 1986).

96. 813 F.2d 158 (8th Cir. 1987).

97. *Id.* at 161-62.

98. *Id.*

99. 700 F.2d 1058 (6th Cir. 1983).

100. A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).

court's interpretation and use of *Roncker* and also cited the Sixth Circuit ruling in *Age v. Bullitt County Public Schools*[101] which held that a handicapped child's need for an appropriate education must be reconciled with the state's allocation of scarce funds.[102] It also expressly upheld the district court's consideration of the cost of a special education placement as a factor in determining mainstreaming appropriateness.[103]

The Eighth Circuit explained the apparent inconsistency in the results of *A. W.* and *Springfield School District #50* in a footnote[104] explaining that the rulings were not inconsistent because they both upheld the final decision of state education authorities on the issue of appropriateness. While that was true, no express explanation was provided regarding the apparent inconsistent positions the two rulings took on the specific issue of cost as a factor for consideration in determining appropriateness. In *Springfield School District #50,* the court upheld a state education official's administrative decision rejecting the local school's argument that placement in a state residential facility was justified on the basis of reduced cost. However, in *A. W.* the court upheld the decision of state education officials, agreeing with the local school's argument that cost was a relevant factor in determining a child's placement in a state residential facility. The Eighth Circuit seemed oblivious to the fact that inconsistent results occurred regarding cost considerations.

The Eighth Circuit also seemed oblivious to the lack of validity of its citation to the Sixth Circuit rulings in *Age* and *Roncker.* Those rulings were issued in 1982 and 1983, respectively, and were both clarified and superseded in 1984 by *Clevenger v. Oak Ridge School Board. Clevenger* was issued three years before *A. W.,* and expressly held that cost considerations in determining the appropriateness of special education programming were not relevant unless more than one appropriate program was available. Had the Eighth Circuit relied on the Sixth Circuit's then current authority, rather than on outdated authority, the result in *A. W.* may have been different and would have been more consistent with its own previous ruling in *Springdale School District #50.* It may have ruled in *A. W.* that cost is not a relevant factor in making appropriateness determinations.

The Eighth Circuit rulings, although facially inconsistent, are consistent in result. Because the Eighth Circuit found that no significant difference in benefit would be required from the proposed mainstreaming that the parents in *A. W.* requested, it could have concluded that both proposed

101. 673 F.2d 141, 145 (6th Cir. 1982).
102. A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).
103. *Id.*
104. *Id.* at note 8.

programs were appropriate, and that since the institutionalized program was more cost-effective, it was the appropriate program for A.W. If both the proposed programs in *A. W.* were appropriate, the fact that the child would not benefit substantially from the more costly program would result in the ruling rendered and would not in fact be inconsistent with precedent in *Springdale School District #50.*

The most recent ruling by the Eighth Circuit strongly endorsed the use of benefit-to-the-child and cost factors in determining a least-restrictive-environment issue. In *Schuldt v. Mankato Independent School District No. 77,*[105] the court reveiwed a situation involving a child placed in an attendance center other than that closest to her residence, because the more distant school was handicapped-accessible. It concluded that a brief district court reference to cost as a factor was insignificant to the lower court's analysis.[106] Yet, the court went out of its way in dicta to say that the lower court was entitled to rely on *A. W.* "as a matter of law" for the proposition that schools may consider both the benefit to the child and the cost to the district when determining issues of least-restrictive-environment.[107] The court stated that even though the evidence indicated that the relative cost of the competing placements was not considered by the school district, the district court could recognize that the greater cost of the placement requested by the parents might have financial implications for the school district's ability to provide other education programs and services.[108]

The issue of excessive costs involved with mainstreaming having a negative impact on scarce school district revenues without significant benefit to the child was important in a Nebraska federal district court ruling.[109] The school district in the case established that a student would not benefit more from a mainstream environment[110] that cost $67,000 than from a more restrictive program costing only $4,000.[111] The court concluded that cost could be a factor to be considered in the decision to mainstream because the mainstream program would result in excessive spending for one student's program with detrimental impact on other school district programs.[112]

The clearest ruling to date stating that the cost of least-restrictive-environment alternatives is an appropriate consideration for determining

105. 937 F.2d 1357 (8th Cir. 1990).

106. *Id.* at 1361.

107. *Id.* at 1362.

108. *Id.*

109. French v. Omaha Public Sch., 766 F.Supp. 765 (D. Neb. 1991).

110. *Id.* 785-86.

111. *Id.* at 790. The $67,000 cost estimate included $32,000 for the salary of a new teacher and a one-time initial cost of $35,000 for the purchase of a portable classroom.

112. *Id.*

whether a child with disabilities can be served appropriately in a regular classroom placement has been issued by the Eleventh Circuit. The facts in *Greer v. Rome City School District*[113] involved a ten-year-old girl with Down's Syndrome. When the parents first brought their daughter, Christy, to school for kindergarten at age five, school district staff requested parental consent for evaluation. The parents declined and withdrew their daughter until age seven, the state age for mandatory school entrance. The parents, again, refused evluation, but on appeal by the school district, the regional and state hearing officers ruled in favor of an evaluation by the school. Evaluation results indicated that Christy was moderately mentally handicapped and had significant deficits in language and articulation skills.[114] The school recommended placement for Christy in a self-contained special education class, but her parents insisted on placement in a regular class with assistance only for her speech deficits.[115] The school and parents did not consider other options, such as placement in a regular class with supplemental aids and services.[116]

The issue before the Eleventh Circuit was whether the school's proposed placement in a self-contained class violated the least-restrictive-environment requirement of federal law that children with disabilities be educated to the maximum extent appropriate with children who do not have disabilities.[117] Recognizing that it had not previously established a standard for evaluating mainstreaming issues, the court proceeded to do so. It articulated a two-part test for determining whether a school was in compliance with the mainstreaming requirement. First, it must be determined whether education of a child with disabilities can be achieved satisfactorily in a regular classroom with the use of supplementary aids and services. If the answer is in the negative, it then must be determined whether the school has mainstreamed the child in an alternate placement to the maximum extent appropriate.[118]

The Eleventh Circuit identified several factors to be considered in determining whether a school district could satisfactorily provide an appropriate education in the regular classroom. In addition to comparing the potential benefit between a regular class and a special education class setting and considering potential disruption factors, the court stated that the

113. 950 F.2d 688 (11th Cir. 1991).

114. *Id.* at 691.

115. *Id.*

116. *Id.*

117. *Id.* at 690.

118. *Id.* at 696. These tests were borrowed from the Fifth Circuit's ruling in Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

financial cost of supplemental aids and services may be used in such considerations.[119]

> The school district must balance the needs of each handicapped child against the needs of other children in the district. If the cost of educating a handicapped child in a regular classroom is so great that it would *significantly impact* upon the education of other children in the district, then education in a regular classroom is not appropriate.[120] (emphasis added)

Thus, a school would not generally be required to provide a one-on-one, full-time teacher for a child in order to allow the child to remain in the regular classroom. However, the school would be expected to condsider the full range of supplemental aids and services that would permit the child to be placed in the regular classroom.[121]

Because the school district in *Greer* did not consider all the available supplemental aids and services that could assist Christy in the regular classroom and did not discuss them with her parents, the court concluded that the school district did not meet the mainstreaming requirement of federal law.[122] The court found that without such a consideration, the school could not determine the extent of educational benefit Christy would have received in the regular classroom, and the school had not established that the provision of appropriate supplemental aids and services in the regular classroom would have been cost-prohibitive.[123]

Thus, the Eleventh Circuit in *Greer* has established that the costs of providing supplemental aids and services in providing a mainstreamed program may be a consideration so long as the expense is significant. At first glance, this position may appear to be in conflict with the earlier ruling of the Eleventh Circuit in *In re Smith.*[124] In that decision, the court reversed a district ruling refusing to accept a settlement agreement between parties in a special education dispute. The parties had agreed to a $100,000-a-year education program and the district court had ruled that such an expensive program was not "within the intent" of the EAHCA or state statutes and was, therefore, "against public policy."[125] Without express discussion of cost as a factor in special education programming, the Eleventh Circuit ordered the district court to vacate its order and approve the settlement.[126]

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119. *Id.* at 697.
120. *Id.*
121. *Id.*
122. *Id.* at 698.
123. *Id.* at 698-99.
124. 926 F.2d 1027 (11th Cir. 1991).
125. *Id.* at 1029.
126. *Id.* at 1030.

The Eleventh Circuit's upholding of considerations of significant cost factors in mainstreaming and not accepting cost considerations in determining appropriate special education programs for indiviudal students is consistent with other jurisdictions on treating the two issues distinctly. Cost considerations are not generally upheld in determining individual special education programs unless more than one appropriate program is available,[127] but considerations of cost in issues of least-restrictive-environment are appropriate.[128]

Two court decisions on transportation of handicapped students have ruled that special transportation needs must be met even when they are extraordinary and involve additional cost to the district. The Fifth Circuit was asked to rule in a situation in which parents requested school transportation to the home of a baby-sitter, even though the sitter resided outside the boundary of the school district.[129] The court concluded that transportation was clearly a related service for handicapped students, and unless the provision of transportation outside the district was "unreasonable" or "created "substantial expense" for the school district, it would be considered a required related service.[130] A similar result occurred before a federal district court in Rhode Island where school district officials objected to special modifications and assistance needed to transport a physically handicapped student.[131]

An earlier pre-*Tatro* ruling by the Ninth Circuit deserves special note. It involved the issue of reimbursement of a tuition payment to parents for a unilateral private school placement for their daughter because the resident school district refused to provide health-related care, including suctioning of mucus from her lungs.[132] The primary issue for one of the years of programming in dispute was whether the girl should have been provided related services to allow her to attend school in the least-restrictive-environment, rather than receive a homebound program proposed by the school.[133] In dicta, the court noted that the public school was not required to provide the "best possible education" for handicapped children. It cited the pre-*Rowley* decision in *Tokarcik*[134] and a post-*Rowley* decision that quoted the pre-*Rowley* district court ruling it was reviewing[135] for the position that budgetary constraints require schools to accommodate stu-

127. *See, e.g.*, Clevenger v. Oak Ridge Sch. Bd. 744 F.2d 514 (6th Cir. 1984).
128. *See, e.g.*, A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987).
129. Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986).
130. *Id.* at 1160.
131. Hurry v. Jones, 560 F.Supp. 500, 511 (D.R.I. 1983), *aff'd* 734 F.2d 879 (1st Cir. 1984).
132. Department of Educ. of Haw. v. Katherine D., 727 F.2d 809, 812-14 (9th Cir. 1984).
133. *Id.*
134. *See infra* text accompanying note 41.
135. Doe v. Anrig, 692 F.2d 800, 806 (1st Cir. 1982).

dent needs within financial reason.[136] On the facts, however, the Ninth Circuit ruled in favor of the parents.

Summary of Post-Rowley Rulings

Subsequent to the *Rowley* decision, the lower courts have been in general consensus that cost issues are not a proper consideration in determining the components of an appropriate education program contained in an IEP for a specific child with disabilities. Only when more than one appropriate program is available may cost be a relevant consideration.

On the specific issue of least-restrictive-environment, however, the courts have generally recognized the legitimacy of financial considerations. Schools would be well advised, however, to not become overly protective of school funds when doing so results in failure to provide a full continuum of alternative appropriate placements for children with disabilities,[137] or when the school cannot establish that a least-restrictive-environment has not been provided because its cost would have a significant rather than an incremental impact on the school.[138]

There are a number of other areas of litigation in special education where cost and expense issues related to general programming, rather than programming for a specific child, have been involved. Those decisions must be considered for a more complete understanding of the role of economic cost as a factor of consideration in providing special education programs.

State Appropriations and FAPE

When states apply for and are granted federal funds under the EAHCA, they must make assurances that rights provided to students and parents under the Act will be guaranteed and that the state and local school district responsibilities under the Act will be carried out.[139] One of the mandated assurances is the right of all handicapped children to a free appropriate public education (FAPE).[140] What officials in some states fail to realize is that their assurance to provide all handicapped children with a FAPE is not altered during times that states experience financial problems. The reduction of state funding for special education, even as a result of budgetary shortfall, cannot result in a reduction in programs and services to handicapped children below that to which they are entitled. If a handi-

136. Department of Educ. v. Katherine D., 727 F.2d 809, 813 (9th Cir. 1984); *See infra* text accompanying notes 138-144.

137. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983).

138. Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991).

139. 20 U.S.C. §§ 1408-1413 (1988).

140. 20 U.S.C. § 1412 (1988).

capped child's program is to be changed, a state must follow a specific process outlined in the federal statutes.[141] There are no shortcuts for states and school districts that want to reduce programs and services to handicapped students due to budgetary constraints.

An important case in point has been litigated in the State of Oregon. In exchange for receipt of federal special education funds, Oregon has agreed to ensure that all handicapped children in the state receive a FAPE pursuant to the EAHCA. Due to an anticipated budgetary shortfall, the Oregon legislature, in 1981, changed the state appropriation procedure for certain special education programs for handicapped children in state-funded programs. Funding was altered from an open-ended appropriation that covered the actual costs of special education, to one that made future appropriations subject to the availability of funds.[142] For the 1982-83 school year, the legislature appropriated fewer funds than were actually needed to pay the cost of providing appropriate programs and services for the education of handicapped children residing in certain institutions. Local school districts that had been providing special education programs to children residing in those institutions had to make up the shortfall from their own budgets, to unilaterally reduce the special education programs offered to the children residing in the institutions, or to stop providing the programs. Many stopped providing such programs.[143]

Parents of children in one state program sought administrative and then judicial intervention. The federal district court concluded that the state education agency had primary responsibility under the EAHCA for providing a FAPE to all handicapped children in the state, and it found that state statutes placed financial responsibility for the student's education directly on the state.[144] Because the state legislature had not furnished adequate funds to provide for appropriate special education programs, the state had violated its assurance that it would provide handicapped students with a FAPE. In a subsequent ruling, the district court stated that "budgetary constraints do not excuse the State of Oregon from the obligations arising from the acceptance of federal funds," and ruled that the state legislature had to appropriate adequate funds to meet the handicapped students' FAPE requirements.[145]

The Ninth Circuit affirmed on review that portion of the district court ruling that found the state in violation of the EAHCA.[146] The court

141. 20 U.S.C. § 1415 (1988).

142. Kerr Center Parents Ass'n v. Charles, 842 F.2d 1052, 1056 (9th Cir. 1988).

143. *Id.* at 1056.

144. Kerr Center Parents Ass'n v. Charles, 572 F.Supp. 448 (D. Ore. 1983).

145. Kerr Center Parents Ass'n v. Charles, 581 F.Supp. 166, 168 (D. Ore. 1983).

146. Kerr Center Parents Ass'n v. Charles, 842 F.2d 1052 (9th Cir. 1988), *amended,* 897 F.2d 1463 (9th Cir. 1990) (amendments dealt with Eleventh Amendment considerations).

agreed that the State of Oregon had assured a FAPE to all its handicapped children, but was not meeting its obligation due to the appropriation of insufficient funds. The circuit court found that the district court had erred, however, in directing the reinstatement of an earlier statutory funding program. The Ninth Circuit concluded that the specific manner of providing the funds should be left to the state.[147]

A similar result occurred earlier on a smaller scale in New Jersey.[148] A local school district challenged a state board of education ruling that the cost of residential placements for educational purposes was to be paid by the school district making the placement. The school alleged that it could not afford the cost of residential special education placements because the federal special education funds "have now dried up." The state court was not sympathetic to the argument and suggested that the school district approach the governor and state legislature to change the law: "If a true economic dilemma exists, and remedy is through the normal political process, not through judicial emasculation of regulatory power."[149]

In Massachusetts, a school district challenged a state hearing officer's ruling that the school district had to pay the tuition of a student to a private school.[150] On the first day of trial, the school district filed a motion to amend its pleadings to allege a lack of funds due to budgetary restrictions to pay for the ordered placement. The trial judge denied the amendment on the ground that budget restrictions were irrelevant, and the state supreme court affirmed. The supreme court concluded that budgetary constraints do not relieve a school district from its educational responsibility to special education students.

The result of the rulings in Oregon, Massachusetts and New Jersey is that handicapped children are entitled to a free appropriate public education regardless of the ready availability of funds. Once a state has promised to provide an appropriate special education program for all handicapped children, it cannot renege on its promise on the ground that it cannot easily find the money to fund the program. A state must meet its obligations to provide an appropriate special education program to handicapped children as guaranteed in exchange for receipt of federal funds.

Centralization of Services

Centralization of services to groups of handicapped children is generally approved by the courts as an economical way to deliver related services to

147. *Id.* at 1062-63.
148. D.S. v. Board of Educ., 458 A.2d 129 (N.J. Super. Ct. App. Div. 1983).
149. *Id.* at 140.
150. School Comm. of Brookline v. Bureau of Special Educ. Appeals, 452 N.E.2d 476 (1983).

handicapped students. Both the pre- and post-*Rowley* court rulings are in agreement on this point.

A good example is the pre-*Rowley* decision in *Pinkerton v. Moye.*[151] In that case, the resident school district determined that a girl identified as having a learning disability with related emotional problems should be placed in a self-contained learning disabilities program. The problem was that the nearest program was located in another school district 25 miles from the girl's home. The girl's mother objected to her daughter being transported six miles further than the elementary attendance center closest to her home and into an adjoining school district. The mother demanded that an appropriate self-contained program be established in the elementary attendance center closest to their home. The court noted that educational funding has its limitations and the competing personal needs of the individual child had to be considered within the framework of those limitations. Excessive expenditures made to meet the needs of one handicapped child, according to the court, would reduce the amount of funds available for other handicapped children and would work to circumvent the intent of the EAHCA to educate all handicapped children.[152] The court concluded that a reasonable accommodation should be made which recognizes the distinction between providing the best possible program and merely opening the schoolhouse door to the handicapped without providing any special assistance. In the opinion of the court, Congress intended the states to balance the competing interest of economic necessity against the special needs of the handicapped through the establishment of state priorities.[153] If state resources were not relevant and states had unlimited funds, there would be no need for states to establish priorities. Establishing special education programs at centralized locations for low incidence handicaps was found to be a "reasonable accommodation" of the competing interests for limited funds.[154]

The approval of the efficiency and economy of centralizing specialized programming services for handicapped children did not end with the *Rowley* ruling. In a decision involving a vision-impaired elementary student who had been assigned to an attendance center ten miles further from his residence than the nearest attendance center, the boy's parents demanded provision of all programs and services available at the attendance center nearest their home. A South Carolina federal district court expressed sympathy for the wishes of the parent, but ruled in favor

151. 509 F.Supp. 107 (W.D. Va. 1981).
152. *Id.* at 112-13.
153. 20 U.S.C. § 1412(3) (1988); 34 C.F.R. § 300.320 (1989).
154. Pinkerton v. Moye, 509 F.Supp. 107, 113 (W.D. Va. 1981).

of a local school district decision to centralize services.[155] The primary educational justification for the school assignment was the availability of a staff person who provided specialized orientation and mobility training services and a teacher trained to teach the visually impaired. In declining the parental request the court noted that an arrangement disbursing the specialized staff to schools nearest students' homes would result in a loss of efficiency and concluded that concentration of resources at satellite schools was legal.[156]

A more recent federal district court ruling, affirmed by the Fourth Circuit, considered a parental challenge to the location of a special education program for a hearing-impaired high school student who was provided the use of cued-speech interpreters in the regular classroom.[157] The parents wanted the program provided at the school nearest their home, five miles closer than the school assigned. Again, the court recognized that financial resources available for the education of handicapped children are finite, and that cost-effective methods, such as centralized programs, must be used to provide all handicapped children with appropriate programs and services.[158] The court found that centralization of services allows a school system to effectively manage and supervise therapists, interpreters, and other personnel who provide important services to students. It concluded that if exceptions were made for one student, all other similarly situated students would expect individual services at the attendance center closest to their home, and efficiency would be lost.[159]

In its review of the district court ruling, the Fourth Circuit discussed a parent argument that the district court was wrong to consider cost issues in its deliberation.[160] The court agreed with the parents' contention that schools should not make placement decisions on only financial considerations. It stated, however, that the framework of the EAHCA allowed states the latitude in establishing priorities of service, which meant that Congress intended the state to achieve a balance between the needs of children with disabilities and the competing interest of "economic necessity" when making general program decisions.[161]

As stated previously, the Eighth Circuit has recently joined the line of case law upholding the centralization of services to serve the needs of children with disabilities, so long as they are served in a mainstreamed en-

155. Troutman v. School Dist., EHLR Dec. 554:487 (D.S.C. 1983).
156. *Id.* at 490.
157. Barnett v. Fairfax County Sch. Bd., 721 F.Supp. 757 (E.D. Va. 1989).
158. *Id.* at 761.
159. *Id.* at 762.
160. Barnett v. Farifax County Sch. Bd., 927 F.2d 146 (4th Cir. 1991).
161. *Id.* at 154.

vironment.[162] The case involved a student in a wheelchair who could not be accommodated at the attendance center nearest her home. After indicating that the district court's brief mention of cost factors was not significant, it upheld the district court's reliance on the stated law in that Circuit that both cost to school district and benefit to the child may be considered in evaluating a school district's compliance with the least-restrictive-environment requirement.[163]

There is a considerable difference, however, between the issue of appropriate programming for an individual student with disabilities and the issue of economy associated in decision making regarding the provision of programs to groups of handicapped students. This distinction is very important and should not be forgotten by educational decision makers.

Mental Health Services

The provision of mental health services as a required related service has frequently resulted in court discussions of cost considerations. Discussions have not involved issues of the cost of individual special education programs as much as on the public policy issue recognized by Congress that educational funds should not go to pay costs associated with medical treatment, especially those associated with mental health. The Ninth Circuit considered the case of a unilateral parent placement of an emotionally disturbed child in an acute care psychiatric hospital.[164] The school district and the state argued that hospitalization in a psychiatric hospital was not the kind of residential placement or related services contemplated by Congress in enacting the EAHCA, and the court agreed.[165] The student's parents argued that all costs related to the placement, except those expressly provided by a physician, should be considered mandated related services. The court did not agree and stated that agreement with the parent's position would result in "hugh expenditures" by schools for "curing" psychiatric illness, but would not require similar expenditures for other handicapped students who may require more traditional "medical" services. The result would be an unfair advantage to those handicapped students with psychological illnesses, to the detriment of all other handicapped students.[166] The court concluded that the child had

162. Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357 (8th Cir. 1991); *See infra* text accompanying note 105.

163. *Id.* at 1362, *citing* A.W. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987).

164. Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990).

165. *Id.* at 644.

166. *Id.*

been placed in the more expensive placement ($150,000 per year) by his parents primarily for medical rather than educational reasons, as opposed to the less expensive placement ($50,000 per year) recommended by school authorities.

In a case before a federal district court in Illinois, the court reviewed the educational placement of a girl with a severe behavior disorder in a psychiatric hospital.[167] The local school district had requested the placement, but the State Board of Education refused to approve it. The court concluded that psychiatric services are medical services and, therefore, could not be considered related services. Any other ruling would result in "imposing a great indeterminate financial burden on the states, and would divert limited funds available for special education to subsidize the high cost of psychiatric care for a relatively small number of mentally disturbed children. . . ." The court also concluded, as a result of the *Rowley* ruling, that limited availability funding neither permits nor requires that each handicapped child be educated in an ideal learning environment, only the one which is "appropriate."[168] The court found that psychiatric treatment was properly excluded from the related services requirement of the EAHCA.

A New York federal district court expressly recognized the congressional intent to limit costs associated with medical treatment by a psychiatrist and ordered the parties to provide evidence regarding a separation of educational and medical expenses for a residential placement.[169] In Illinois, a federal district court acknowledged the congressional intent to limit costs through the physician-provided services exclusion of related services, but found that where the school had not provided psychotherapy services as provided in an IEP, and had not established how much psychotherapy would have cost the school district, the parents should be reimbursed for privately provided psychiatric expenses.[170]

Extensive Medically-Related Services

A few courts have been influenced by extraordinary student medical needs and extensive costs to rule that the provision of extenisve medically-related services is not a responsibility of education funding. They have effectively disregarded the Supreme Court's holding in *Irving Independent*

167. Darlene L. v. Illinois State Bd. of Educ., 568 F.Supp. 1340 (N.D. Ill. 1983).

168. *Id.* at 1345.

169. Vander Malle v. Ambach, 667 F.Supp. 1015 (S.D. N.Y. 1987).

170. Max M. v. Illinois State Bd. of Educ., 629 F.Supp. 1504, 1519 (N.D. Ill. 1986). *See also* Tice vs. Botetourt County Sch. Bd., 908 F.2d 1200, 1209 (4th Cir. 1990) (medical exclusion was designed to protect schools from undue medical expense, but when educational and counseling services can be separated from medical services, the former are subject to school district payment).

School District v. Tatro,[171] which excluded only medically-related services actually required to be performed by a physician. In *Detsel v. Board of Education,*[172] a New York federal district court reviewed a school's refusal to provide extensive medically-related services to a handicapped child. The seven-year-old girl's health needs placed her in a constant life-threatening situation requiring around-the-clock supervision by a specially trained nurse. The county department of human services acknowledged responsibility for providing the girl with nursing and health care but refused to provide those services during school hours due to the school's alleged duty under the EAHCA to provide related services during school hours. The court concluded that requiring the school to provide the girl with extensive medically-related services would subject the school to excessive costs. Because of the potentially heavy fianancial burden such health care would impose on the education system and the extensive nature of the student's medial needs, the court concluded that such care should not be considered a related service under the EAHCA.[173] The court distinguished the *Tatro* ruling on the ground that the medically-related services needed in *Detsel* were far more extensive than the clean intermittent catheterization involved in *Tatro*; even though the services did not require the direct aid of a physician, they should be excluded as being within the "spirit" of the physician exclusion.[174] In subsequent litigation, the court determined that medicaid payments could subsidize the necessary nursing care services that a handicapped child would require while attending public school.[175]

A federal district court in Pennsylvania expressly followed *Detsel* a year later and held that extensive medically-related services necessary to keep a child alive in an education setting were too time-consuming and expensive to be considered an educational responsibility under the EAHCA.[176] The court also distinguished the situation before it from that in *Tatro,* holding that the student's needs in the current situation were greater than had been anticipated under the EAHCA and its regulations. Forcing a school to pay for such extensive medically-related services was not consistent with the EAHCA.[177] In conclusion, however, the court warned that its ruling should not be interpreted to mean that related services include only those services that can be provided at low cost or performed by non-medically

171. 468 U.S. 883 (1984).
172. 637 F.Supp. 1022 (N.D. N.Y. 1986), *aff'd,* 820 F.2d 587 (2d Cir. 1987) (per curiam).
173. *Id.* at 1027.
174. *Id.*; 34 C.F.R. § 300.13(b)(4) (1989).
175. Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990).
176. Bevin H. v. Wright, 666 F.Supp. 71 (W.D. Pa. 1987).
177. *Id.* at 75.

trained school staff. It underscored the facts in the case — the varied, extensive, and costly nursing services required — and concluded that they were more in the nature of medical services and not education-related services.[178]

A subsequent ruling by a federal district court in Michigan expressly criticized the rationale and result in the two previous rulings and found that extensive medically-related services that a handicapped student required during transportation to and from school were required by the EAHCA.[179] The school considered certain services that it provided during the day, such as the positioning and suctioning of the student's tracheostomy tube, to be too hazardous to provide during transportation. The court interpreted the *Tatro* ruling strictly to allow exclusion from related services only those services expressly requiring a licensed physician.[180] The court repeated the *Tatro* conclusion that services provided by a medical professional such as a nurse, no matter how extensive, cannot be excluded as medical services under the EAHCA.[181] Unlike the two previous rulings, this court refused to take into account the extent of cost and effort factors determining the relates services needed for an appropriate special education program.

Extended Year Programming

Several states have attempted to limit handicapped student programs and services to the typical school year in an effort to keep down the costs of providing those programs and services. Such limitations in available programming have not been upheld on the ground of limited financial resources. The clearest court disucssion of the issue occurred in a decision involving a state policy of limiting IEP's to nine-month program in Mississipi.

In *Crawford v. Pittman,*[182] the Fifth Circuit noted that Mississippi's refusal to extend any special education programs beyond the 180 days of school for non-handicapped students actually prevented the state from ever determining whether any handicapped students could benefit from extended-year programming.[183] Thus, the state could not accurately determine whether the prohibition of funding for extended-year programming for handicapped students more severely impacted the handicapped students than it did the non-handicapped. The post-*Rowley* ruling cited

178. *Id.* at 75-76.
179. Macomb County Intermediate Sch. Dist. v. Joshua S., 715 F.Supp. 824 (E.D. Mich. 1989).
180. *Id.* at 827-28.
181. *Id.*
182. 708 F.2d 1028 (5th Cir. 1983).
183. *Id.* at 1035.

the legislative history of the EAHCA[184] and concluded that funding limitations could not be allowed to restrict the availability of programs and services to handicapped students more severely than it did to non-handicapped students.[185] The court concluded that the rigid prohibition against extended-year programs violated the EAHCA's provision for appropriate programming and that the restriction on available state funds was improperly borne more heavily by handicapped than non-handicapped students.[186]

A similar discussion and result occurred in a decision involving Missouri's refusal to provide more than 180 days of education for even the severely handicapped students. In *Yaris v. Special School District,*[187] the federal district court expressly concluded that scarcity of funding could not be borne more greatly by the severely handicapped than the non-handicapped and mildly handicapped. The court stated ". . . inadequacy of funds does not relieve a state of its obligation to assure the handicapped child of equal access."[188]

Conclusion

Early confusion and inconsistency among court rulings on the issue of economic cost considerations in the provision of appropriate special education programs had arisen out of a lack of express or implied reference to cost considerations in federal statutes and regulations, and lack of Supreme Court clarification. The majority of the court rulings issued prior to *Rowley* concluded that cost was a relevant factor in planning a child's special education program, but the courts were split in result based on the individual facts of each case.

The author of a previous commentary on the issue published three years after the *Rowley* decision was issued found the existing court interpretations to be "unsettled,"[189] "inconsistent,"[190] and suffering from a "lack of firm consensus."[191] Perhaps that assessment suffered from being too close in time. Court rulings issued subsequently have removed much of the apparent inconsistency that was present when that commentary was published.

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184. S. Rep. No. 168, 94th Cong., 1st Sess. 23, *reprinted* in 1975 U.S.C.C.A.N. 1425, 1429-30, 1433, 1447.

185. Crawford v. Pittman, 708 F.2d 1028, 1035 (5th Cir. 1983).

186. *Id.*

187. 558 F.Supp. 545 (E.D. Mo. 1983).

188. *Id.* at 559.

189. Bartlett, *supra* note 6, at 2.

190. *Id.* at 13.

191. *Id.* at 61.

The *Rowley* decision focused the determination of the appropriateness of programming on those elements that would allow a child to benefit from instruction. There was no express reference to cost considerations. Because an appropriate special education program need not be the "best" that money can buy, the cost of providing a free appropriate public education and related services is not a relevant factor in determining appropriateness. Following that lead, the lower court rulings issued since then have eliminated cost as a relevant consideration in developing appropriate education programs in IEPs.

The current majority position is exemplified by rulings in the Sixth Circuit where the court has stated that cost cannot be a factor in programming considerations when only one appropriate program is available.[192] When two or more appropriate alternatives are available for individual special education programming, cost and preservation of limited financial resources can be a legitimate factor for consideration.[193] That is, perhaps the reason why the Eleventh Circuit did not find the expenditure of $100,000 to provide a special education program and services to a single handicapped child to be excessive and against public policy.[194]

When considering issues of mainstreaming children with disabilities to the maximum extent appropriate, more leeway is granted by the courts to the consideration of cost as a factor. Mainstreaming appears to be the transition point between individual programming cost issues and district-wide concerns of cost containment. The greater the extent to which the placement issue is perceived as one of general educational planning and administration, as opposed to strictly financial considerations of an individual child's appropriate program, the more likely the courts are to uphold the validity of cost as a consideration. The Sixth,[195] Eighth[196] and Eleventh[197] Circuits have made it quite clear that cost can be a factor in least-restrictive-environment issues, especially when little or no educational benefit is likely from a proposed placement in the least-restrictive-environment or when cost of providing a mainstreamed environment would have a significant negative impact on the school.

Courts continue to recognize, however, that the reality of limited educational funds and the need to provide quality programs efficiently and

192. Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984). *See also* Matta v. Board of Educ., 731 F.Supp. 253, 259 (S.D. Ohio 1990) (following *Clevenger* in denying parent request for tuition reimbursement).

193. *Id.* at 517.

194. In re Smith, 926 F.2d 1027 (11th Cir. 1991).

195. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983).

196. A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987).

197. Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991).

economically are legitimate factors to be considered in the general planning of special education programs. Issues such as whether to centralize services, whether to offer programs locally or elsewhere, whether to provide services directly or by contract — the when, where, and how of providing special education programs — remain within the discretionary domain of local and state school officials. Limited cost factors, such as exclusion of medical treatment by a physician, are inherent in the statutory and regulatory framework of the IDEA.

The implications of the post-*Rowley* court rulings are important. State and local education officials are not greatly restricted by cost considerations in their planning and providing special education programs and services to all children with disabilities. They are, however, greatly limited in making cost a relevant factor in the planning and implementation of special education programs for individual children. Those decisions are left to the discretion of the educational staffing team members, including parents, and cost considerations are not legally relevant. Education staffing team members and administrative law judges ruling on challenges to appropriateness must focus on the factors that will allow a child to benefit from education without express considerations of cost. Subsequent administrative or policy decisions based on economic factors cannot usurp or conflict with a special education staffing team's decision of appropriateness. Not even state legislatures can reduce funding for special education programs when the result would deprive a child with disabilities of a free appropriate public education.

With many state and school district budgets operating in deficit, there have been and will continue to be political and other efforts to hold down expenditures for individual special education programs. The current trend of court interpretations runs counter to the political and economic expediency of the situation and a distinct tension is building, whether the tension will result in Congressional action is speculative. For the immediate future, educators at the state and school district levels would be well advised to expend their resources in providing appropriate individual special education programs rather than litigating the dollars and cents issues of those programs.