V I R G I N I A:

SPECIAL EDUCATION DUE PROCESS HEARING

MICHAEL "GLENN" WHITE, *et. al*. **Plaintiffs,**

v.

VIRGINIA DEPARTMENT OF EDUCATION
and
VIRGINIA BOARD OF EDUCATION, **Defendants.**

PLAINTIFF'S MEMORANDUM
IN
RESPONSE TO
DEFENDANT'S ANTICIPATED MOTION TO DISMISS

On December 18, 1999 the Plaintiffs requested a special education due process hearing against the defendants. The defendants have refused to implement the decision of the state level review officer in violation of law.

On January 17, 2000, an evidentiary hearing is scheduled. The final decision is due by February 3, 2000.

The defendant, through counsel, has advised that the Commonwealth will move to dismiss the hearing arguing that:

- the Hearing Officer does not have jurisdiction over the State Board of Education and the State Department of Education, (hereinafter SEA); and that

- the SEA should not have to fund Glenn's educational placement at The New Community School arguing that it is not his current educational placement.

The Code of Federal Regulations mandates that "If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section." 34 C.F.R. § 300.514(c)

The Virginia Department of Education does not agree.

FACTS

The facts are fairly simple and, except for paragraphs 17 through 20, should not be subject to dispute.

1. On May 30, 1997, Steve and Jan White requested a special education due process hearing against Henrico County Public Schools on behalf of their son, Michael "Glenn" White. They were seeking reimbursement for their son's education at The New Community School. Their request stated:

> Glenn is a twelve year old boy who has been enrolled in the Sixth Grade at The New Community School during this past academic year. Before entering The New Community School, Glenn attended Henrico County Public Schools for six years, from Kindergarten through Fifth Grade.
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> Glenn was identified very early as a youngster who had significant speech language problems. As you know, speech-language problems signal that the child is at risk for learning disabilities. As Glenn continued in school, it was clear that he was far below the average youngster in the acquisition of reading and writing skills. Glenn began receiving special education services in 1991, when he was in First Grade.
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> In March, 1994, Glenn was retested. Despite the fact that he was receiving special education in his areas of deficit, he had regressed significantly in areas where we have reported scores . . .
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> Between 1991 and 1994, in the areas of Reading and Written Language, Glenn's scores declined steadily. For example his Letter Word Identification Score dropped from the 13th to the 5th percentile (SS = 76). Yet, Glenn also scored at the 99th+ percentile level in Social Studies (SS = 139) and at the 98th percentile level in Broad Mathematics (SS = 131), and Mathematics Reasoning (SS = 132). In these areas, he functioned at the "very superior" level. Thus, by 1994, Glenn's scores ranged from the "very superior" or "superior" levels in Math, Science and Social Studies to "low" or "low average" in Reading and Written Language.
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> By Spring, 1996, when Glenn finishing Fifth Grade, his parents were alarmed at his inability to read, write or spell. They observed that their son's reading and writing skills were "non existent." These parents based their analysis on facts like Glenn could not read simple traffic signs -- like "No Left Turn," or "Stop".
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> The last IEP developed for Glenn by Henrico County Public Schools included three annual goals: to "improve overall Reading skills," "improve overall Written Language skills," and "to improve overall work habits." Glenn's progress toward these goals would be evaluated by "daily work," "quizzes," and "teacher observation." This IEP did not include any means to objectively measure Glenn's progress or lack of progress. Next to the Short Term Objectives, statements like the following were written: "improvement noted," "big improvement noted" "really trying" "doing great," or "doing better."
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> . . .
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> In the Spring of 1996, Glenn was tested at The New Community School. This objective testing showed that his reading and spelling skills had fallen even lower,

> to the 1st percentile level. His reading comprehension and phonetic analysis were at the 4th percentile level. On other tests, his spelling and sight reading skills were measured at the 2nd percentile level. Unfortunately for Glenn, this testing showed that his parents' dismal assessment of his reading and language skills was accurate. He was not "making progress." After five years of special education, Glenn could not read or write.
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> . . .
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> In Dictation, he was functioning at the 2.0 grade level (SS = 62). In Broad Reading he was at the 2.7 grade level (SS = 70). In Broad Written Language, he was functioning at the 2.3 grade level (SS = 61). At this time, Glenn had attended Henrico Public Schools for six years and received special education for five years. During these years, he had not acquired even the most rudimentary skills in reading, spelling or written language. Glenn's failure to acquire these basic skills was not due to any lack of ability.

A special education hearing officer found that many of the factual allegations were correct, but failed to award tuition reimbursement to the Whites. The case was appealed to a state level Review Officer.

2. On July 10, 1998 state level Review Officer Frazier found that:

> The child herein, Michael Glenn White, was born April 20, 1985 and is presently a young man of the age of thirteen years who has been receiving Special Education for the past six years (kindergarten through the Fifth Grade). He is not retarded. He has an average IQ and his reasoning skills are significantly above average. Glenn, as he is known, also has dyslexia. (Page 4)
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> . . .
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> The facts here are and were not in dispute, that Michael Glenn White has been receiving Special Education from the Henrico County Public Schools for the first through the fifth grades. Notwithstanding that his education through the fifth grade had been and was then governed by an (IEP) calling for Glenn to receive individualized intense remediation to teach him basic reading skills, he was, without the consent of his parents or any modification of his IEP, unilaterally withdrawn by the principal of his fifth grade school, from his prescribed educational program and placed, without any re-evaluation or revision of the then current IEP, into less intensive, full sized, regular education classes in a so called "Collaborative" program in which a special education teacher merely collaborated with his regular education classroom teacher.
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> . . .
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> It is notable, that the results of this change in placement were described by direct testimony of Glenn's former teacher, Mrs. Batalio in her testimony before the Hearing Officer, apparently without impacting his decision. "I increased Glenn's time because I knew that Glenn needed a little extra before he was ready to go to middle school, and I wanted to make sure be got that," and in response to the question "Why . . ." she added "Because he was not reading (emphasis added) and not making the progress with the amount of time on his two-hour IEP, and I felt

> that if gave him that extra time and worked with him and went that extra mile for him that he would be able to learn more and make more progress prior to getting to the end of the year in June and then starting into middle school for the next year (Transcript of the Due Process Hearing before the Hearing Officer below, at page 236). . . Clearly the unilateral program change by the principal without resort to the IEP or the IEP committee, and clearly without the parents consent constituted a major change of placement and in an inappropriate manner and more than just a technical violation of the IEP, and was in clear violation of IDEA.
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> The Due Process Hearing Officer clearly evinced an awareness that Henrico County Public Schools had failed in its IDEA requirement to provide Michael Glenn White with a Free Appropriate Public Education and recognized that notwithstanding the credibility of the Henrico County Public Schools' witnesses, the Henrico County Public Schools had failed to provide Michael Glenn White with a Free Appropriate Public Education. This became more evident with the June 1996 IEP and was significantly compounded by the principal's unilateral change of Michael Glenn White's placement by her unilateral action in removing him from a Resource setting and into a Collaborative setting. . . (Review Officer Decision, page 5-7)
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> . . .

In his conclusion, the State Level Review Officer reported that:

> The Henrico County Public Schools has failed to provide for a Free Appropriate Public Education of Michael Glenn White for the school year 1996-1997. The education offered for Michael Glenn White for 1996-1997 was inappropriate. The IEP for Michael Glenn White for the 1996-1997 school year was invalid and did not provide for a free appropriate public education. The IEP for Michael Glenn White for the 1997-1998 school year was invalid and did not provide for a free appropriate public education. Therefore, Michael Glenn White is entitled to reimbursement for tuition and costs attendant to his enrollment at New Community School for the year 1996-97 as a result of the inappropriateness of the education by Henrico County Public Schools that year and for the year l997-98 and in the future for the invalidity of the 1997-98 IEP and the failure of the Henrico County Public Schools to provide for Free Appropriate Public Education for Michael Glenn White then as well as its inability to do so in the future. (Review Officer Decision, page 10-11)

3. After the Review Officer issued his decision, Henrico appealed to the Circuit Court of Henrico County. Henrico County Public Schools refused to implement the decision of the Review Officer. The Virginia Department of Education was made aware that the School Board was refusing to implement the decision of the Review Officer and yet took no action against the County.

4. On May 25, 1999, Mr. and Mrs. White wrote to the Virginia Board of Education and the Virginia Department of Education, and advised that:

> We are now very concerned and financially burdened because Henrico County appealed the decision of the State Level Review Officer, less than one week before Glenn started the 1998-99 school year. This meant that we again had to pay tuition and additional attorney fees . . . We make an average income and find that we are unable to continue to pay these expenses . . .
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> We have been so financially burdened that we have even sold the piano that my great-grandmother and great-grandfather gave me when I was eight. We are in such financial trouble now that we are worried we will never get financially sound again. Our mortgage payments are behind, we cannot make our payments to our attorney or the hospitals and this will affect our credit rating for years if not forever. We feel the legal system has failed us and Glenn. We were entitled to reimbursement and thought that we would get some relief last summer when the State Level Review Officer made his decision. It has now been nine months and Henrico County has done nothing but appeal the decision. They have not paid what they were ordered to pay. We do not have any resources left and are not sure how we will make any additional tuition payments. We are unable to pay for the additional attorney fees that result from Henrico County's noncompliance of the decision and that of the Federal Regulations. In addition we are at risk of losing our home if we do not get some immediate relief.

5. Approximately two and a half months later, on August 9, 1999, the Virginia Department of Education ordered Henrico County to "Submit payment to the private placement in accordance with the review officer's decision, thereby providing for Michael's (Glenn's) tuition during the pendency of the appeal in accordance with the requirements of the newly enacted legislation of June 4, 1997, and its implementing regulations of May 11, 1999" and to provide documentation "which verifies payment in accordance with the reviewing officer's order."

6. The Order from the SEA included the following:

> A summary of our office's analysis of the issues concludes that:
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> 1. That the stay-put provision outlined in Section 1415(j) of the IDEA Amendment of 1997 and 34 C.F.R. § 300.514 applies in this case.
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> 2. That the stay put provision requires Michael to remain in his current placement pending the appeal by HCPSA.
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> 3. That Michael's current placement is The New Community School.
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> 4. That HCPS is responsible for maintaining Michael's placement at The New Community School.

5. That HCPS is responsible for Michael's tuition during the pendency of their appeal which shall include reimbursement for the 1998-1999 school year.

7. Previously, when local school districts appealed decisions of state level Review Officers, the Virginia Department of Education refused to require school districts to comply with the Orders of their Review Officers.

8. The SEA's August 9, 1999 letter reflected a change from past practices and policy.

9. Henrico County refused to obey the Order and continued to file letters and objections. On November 15, 1999, the SEA re-asserted their position as stated in their August 9, 1999 letter.

10. In early December, Superintendent Paul Stapleton resigned "effective immediately." Dr. Jo Lynne DeMary, a former Henrico County school administrator, was appointed Acting Superintendent of the Virginia Department of Education.

11. On December 2, 1999, the Virginia Department of Education reversed their position, saying that the "Department of Education will defer to the decision of the Court." The Department offered no explanation for this sudden reversal.

12. The plaintiff White contacted the Virginia Department of Education and asked why the Department abandoned their position. She did not receive any explanation for the Department's sudden reversal.

13. The Individuals with Disabilities Education Act requires that the Virginia Department of Education provide written notice whenever such agency "refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c) or the provision of a free appropriate public education to the child. The content of such notice shall include an explanation of why the agency proposes or refuses to take the action; other options that were considered, and the reasons why those options were rejected. 20 U.S.C. § 1415(b)(3) and § 1415(c) The Department has failed to comply.

14. The SEA failed to comply with 20 U.S.C. § 1415(j) and 34 C.F.R. § 300.514.

15. Glenn's "current educational placement" is The New Community School.

16. The Virginia Board and Department of Education is ultimately responsible for implementing the state Review Officer's Order.

17. The plaintiff's are entitled to reimbursement for Glenn's tuition in the approximate amount of $55,000.00, and interest on the award from the date of the Review Officer's decision.

18. The parents have sustained additional damages occasioned by the Virginia Department of Education's failure to enforce the Order of the Review Officer since July, 1998.

19. The refusal to enforce an Order of a state level Review Officer constitutes a deliberate and reckless disregard for the rights of the plaintiffs, justifying an award of punitive damages against the Virginia Department and Board of Education and specific individuals.

20. The plaintiffs are entitled to an award of attorney's fees.

LAW

Individuals with Disabilities Education Act
The State can be Sued

The Individuals with Disabilities Education Act states that "The procedures required by this section (Procedural Safeguards) shall include an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. 20 U.S.C. § 1415(b)(6)

A parent can initiate a due process hearing in respect to **any matter** relating to the provisions of FAPE. A state is not "immune under the eleventh amendment to the Constitution of the United States from suit in Federal Court for a violation of this Act." 20 U.S.C. § 1403(a)

However, "before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part." 20 U.S.C. § 1415(l) (Rule of Construction) (Section 1415 (f) and (g) relate to the special education due process and review hearings.)

In other words, the state is not immune from suit. However, the parents may be required to exhaust their administrative remedies against the state prior to filing suit.

The state department of education is the primary agency responsible for the education of children with disabilities. 20 U.S.C. § 1412(a)(11)

The case law is clear that a parent can sue the state jointly or individually in special education litigation.

IDEA - Current Educational Placement - Statute
20 U.S.C. § 1415(j)

(j) Maintenance of Current Educational Placement.--

(j) Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

IDEA - Current Educational Placement - Regulation
34 C.F.R. § 300.514(c)

The U. S. Department of Education issued regulations that explain and interpret the statute.

Child's status during proceedings.
(c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

Commentary to Regulation § 300.514

The U. S. Department of Education's explanation of the special education Regulations in Vol. 64, No. 48 of the March 12, 1999 issue of the Federal Register at page 12615 states:

Paragraph (c) is based on **longstanding judicial interpretation** of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposed of determining the child's current placement **during subsequent appeals**. See *e.g., Burlington School Committee v. Dept. of Educ*. 471 U.S. 359, 371 (1985) *Susquenita School District v. Raelee S*., 96 F.3d 78, 84 (3rd Cir. 12996); *Clovis Unified v. Office of Administrative Hearing*, 903 F.2d 635, 641 (9th Cur, 1990). Paragraph (c) of this section incorporates this interpretation. However, this provision does not limit either party's right to seek appropriate judicial review under 300.512, it only shifts responsibility for maintaining the parent's proposed placement to the public agency **while an appeal** is pending in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate. (Emphasis added.)

In summary, 34 C.F.R. § 300.514 and the supporting commentary clearly establish that if the "State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposed of determining the child's current placement during subsequent appeals." Section 300.514 does not limit either Henrico or the State's right to appeal the decision of the Review Officer, but it does shift "responsibility for maintaining the parent's proposed placement to the public agency **while an appeal** is pending in those instances . . ."

It seems that the Commonwealth is asserting that this Hearing Officer does not have jurisdiction over the state, that the state cannot be the sole defendant, and that neither Henrico nor the SEA has "responsibility for maintaining the parent's proposed placement . . . (at The New Community School) **while an appeal** is pending."

While the commentary to 34 C.F.R. § 300.514 cited *Clovis* and *Susquenita,* this regulation has been the rule of law since 1977.

The legal quotations in the chronological listing of cases below contains portions that are **highlighted in bold**. This emphasis is not a part of the published decision but was inserted by this counsel as an aid to reviewing the voluminous law on this subject.

U. S. Department of Education's Prior Ruling in 1977
Review Order is Current Placement

In 1977, the State of Massachusetts requested an opinion from the U. S. Department of Education about a stay of implementation of a State Review decision while judicial review was pending. (Bureau of Education Policy Letters, 211:28 EHLR, May 4, 1978) Massachusetts noted that:

> The effect of non-finality of a decision could mean significant numbers of children remaining in inappropriate settings for years. (At EHLR 28)
> . . .
> **Second, if decisions are not final there will very likely be a significant increase in appeals to Court solely to delay implementing the Hearing Officer's decision** . . . This policy would favor the school where the school's plan is inadequate and a private placement is ordered. The public school could delay its payment of private school costs for one, two, or even three years. (At EHLR 29)

The Response from the U. S. Department of Education stated that:

> The Bureau could approve a State procedure which allowed the Massachusetts Department of Education to implement the decision of a hearing officer when the Department and a parent of the handicapped child agreed that the decision should be implemented, but the local educational agency disagreed with the decision and was appealing the decision in the courts. However, the DOE could not implement a decision which the parents were appealing in the courts.

> This interpretation is based on § 615(a)(3) of the Education of the Handicapped Act [§1415] which provides that unless the State or local educational agency and the parents agree, the child must remain in the current educational placement during the pendency of any administrative or judicial proceeding.
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> Whether the local educational agency would be responsible for the costs of the placement during the pendency of any proceeding in which the local educational agency were challenging the hearing officer's decision is a matter between the State and the local educational agency. Of course, the parents could not be charged. (At EHLR 30)

Office of Civil Rights Ruling in 1987
California Violates Federal Law by Failing to Enforce Decisions of Review Officers

In 1987, the Office of Civil Rights advised California that:

> This will advise you that the Office for Civil Rights (OCR) has completed its investigation and findings in the complaints filed by Ms. Joan Honeycutt, Attorney at Law, and Protection and Advocacy, Inc., against the California State Department of Education (CSDE). The complainants alleged in two separate complaints that CSDE does not enforce State fair hearing decisions when a local education agency (LEA) refuses to comply, in violation of Section 504 of the Rehabilitation Act of 1973. EHLR 352:549

On June 30, 1987 OCR found that the Department of Education of California failed to enforce decisions of Reviewing Officers. The Office stated that:

> If CSDE were allowed to abdicate its responsibility for the enforcement of hearing decisions, parents who have in good faith pursued the necessary procedural avenues to resolve disputes concerning their handicapped children would be unable to rely upon the results they obtain. **If the State fails to carry out its obligations, school districts inclined to be recalcitrant will receive a message that they have little to fear from doing so, and parents will have no choice except to initiate litigation at their own expense to obtain compliance.** Conversely, if the State is required to carry out its responsibilities vigorously, LEAs which disagree with hearing decisions rendered against them still have the option of obtaining a stay of the decision through a court of law, as required by the statutory scheme. EHLR 352:549

Caselaw

Jose P, Second Circuit 1982
State is a Proper Defendant

In 1982 the Second Circuit, in an award of attorneys fees against the state, held that the SEA "shall be responsible for assuring that the local agencies comply with the policies of EHA." *Jose P. v. Ambach, et. al*., 669 F. 2d 865, EHLR 553:486 (2nd Cir. 1982)

Blazejewski, New York 1983
Review Order is Current Placement

The first published decision in regard to a school district refusing to implement a Review Officer's Order appears to be *Blazejewski v. Board of Educ*., 560 F. Supp. 701, EHLR 554:426 (W. D. NY 1983). Brian and his parents prevailed at the Review Hearing and the school would not implement the decision because they planned to appeal.

> In January 1983, plaintiffs' attorney wrote to the defendant Board requesting that the COH schedule a meeting as soon as possible to discuss the services to be provided to the plaintiff. On February 3, 1983, the Board's attorney replied, stating that the Board intended to commence an Article 78 proceeding within four months of the Commissioner's decision and that in view of the status quo provision of the New York Education Law, it would be (not) be appropriate to begin implementation of the Commissioner's decision until all proceedings are completed. (Page 2)
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> Under the circumstances, the decision of the Hearing Officer, as implemented by the Commissioner of Education, constitutes an "agreement" with the plaintiffs that Brian be provided special educational services. At oral argument, plaintiffs' counsel said that his clients agree to the services directed by the commissioner. Plaintiffs' position is supported by a policy letter authored in 1978 by the Bureau of Education for the Handicapped, United States Department of Education. (citing EHLR 211:28)

Burlington, First Circuit 1984
Review Order is Current Placement

In 1984, the U. S. Court of Appeals issued the landmark decision in *Burlington*.

> . . . Cognizant of other situations, the State points out that where a state agency orders a town to fund a private placement, after ruling against a town's IEP, parents will be placed in the difficult position of having to choose between the state directive to maintain the child in the private placement at the risk of ultimately using their own funds, or of moving the child to the town's placement which the state agency has determined to be inadequate. Choosing the latter

option would contravene the express congressional policy of consistency and adequacy in a disabled child's education during an IEP contest; should the judicial decision uphold the State and parents, the child will have spent two and possibly three years in an inappropriate school. In sum, the State and Does argue that in order for the Act to provide appropriate education for disabled children from wealthy and poor families alike, parents must be entitled to rely on a state administrative decision in their favor, and not be put at risk for reimbursement by a judicial judgment which reverses that decision.

Considering the Act as a whole and the interests it seeks both to protect and to further, we conclude that appellants' contentions must be sustained in part in the present case. Retroactive reimbursement by parents is not "appropriate" relief within the meaning of 1415(e)(2) where they relied on and implemented a state administrative decision in their favor ordering a particular placement. We emphasize again that our interpretation is guided by the cooperative federalism *Rowley* elaborated. The states are the chief arms of the federal Act's enforcement; their decisions should not be disregarded because of potential parental financial liability. **Implementation of a state agency's determination of the appropriate education for a disabled child should not be delayed until the statute of limitations on an appeal has run or until a final judicial decision has been rendered where an appeal has been taken**.

Congress, though the principal author of the Act, has spoken unequivocally in this regard: "I cannot emphasize enough that delay in resolving matters regarding the educational program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development." 121 Cong. Rec. 37416 (Nov. 19, 1975) (remarks of Sen. Williams, explaining Conference Committee bill to the Senate). *Town of Burlington v. Dept. of Ed. of Mass.*, 736 F.2d 773, 1983-84 EHLR DEC. 555:526, 541 (1st Cir. 1984) (Page 18-19)

Burlington, U. S. Supreme Court 1985
Review Order is Current Placement

In 1985, the U. S. Supreme Court affirmed *Burlington* and, in regard to the "agreement" about the current educational placement, stated that:

As an initial matter, we note that the section calls for agreement by *either* the *State* or the *local educational agency*. (Note: emphasis included in original decision.) The BSES's decision in favor of the Panicos and the Carroll School placement would seem to constitute agreement by the State to the change of placement. The decision was issued in January 1980, so from then on the Panicos were no longer in violation of 1415(e)(3). This conclusion, however, does not entirely resolve the instant dispute because the Panicos are also seeking reimbursement for Michael's expenses during the fall of 1979, prior to the State's

concurrence in the Carroll School placement. *Burlington School Comm. v. Dept. of Education*, 471 U.S. 359, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385, 1984-85 EHLR DEC. 556:389, (1985)

Dept. of Educ., Hawaii 1986
Review Order is Current Placement

In 1986, after *Burlington*, the same issue surfaced in *Dept. of Educ. v. Mr. S.*, 632 F. Supp. 1268, 557:344 EHLR (D. HI 1986). In Hawaii, the parents prevailed at the Review Hearing. The District Court concluded "20 U.S.C. Sec. 1415(e)(3) requires that the child 'remain in the then current educational placement' unless either the State or the local educational agency agrees otherwise with the guardian. . . The decision by the Hearing Officer is the decision by the State educational agency. . . As the decision in . . . *Burlington* . . . 'would seem to constitute agreement by the State to the change of placement,' so too it appears that the decision by the Hearing Officer herein would constitute agreement by the State to the change of placement." (Page 3-4)

The Court found that:

> Because placement of Cynthia in a residential program after January 7, 1986 would be by agreement with the "State educational agency" and, thus, not in violation of 20 U.S.C. Sec. 1415(e)(3); a preliminary injunction requiring such placement, also, would not be a violation of 20 U.S.C. Sec. 1415(e)(3). As such 20 U.S.C. Sec. 1415(e)(3) is not a bar to preliminary injunction. (Page 4)

Robinson, Fourth Circuit 1987
Review Order is Current Placement
SEA is a Proper Defendant

In *Robinson v. Pinderhughes,* 810 F.2d 1270, EHLR 558:239 (4th Cir. 1987), after the parents prevailed at the Due Process Hearing, the school district did not appeal nor implement the Hearing Officer's Order. The parents filed suit in federal court alleging violations of both the Education for the Handicapped Act and pursuant to 42 U.S.C. § 1983. The district court dismissed asserting that the parents should have appealed to a Reviewing Officer. The Fourth Circuit found that the parents had the right to pursue their 1983 claim because the school district violated EHA, but the Fourth Circuit dismissed the EHA claim. In *Robinson*, the parents did not file suit against the state under EHA to enforce the due process decision.

> The (district) court found that the state board possessed the power to enforce the local hearing officer's decision had the plaintiffs asked it to: **"Had they done so and had the State Board refused or failed to enforce a decision of the local board, clearly plaintiffs could have come here [to the district court] for enforcement." (Page 2)**

> The (district) court also dismissed the plaintiffs' Sec. 1983 claim. Although it recognized that exhaustion of administrative remedies could not be a prerequisite for a Sec. 1983 action, the court found that this claim was precluded by the recent Supreme Court case of *Smith v. Robinson*, 466 U.S. 922 (1984). It construed *Smith* as holding that the EHA provided the exclusive remedy. (Page 3)
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> But, while *Smith* precluded an equal protection claim under Sec. 1983 based on the EHA, it did not foreclose other EHA claims under Sec. 1983 which constituted, under color of state law, violations of rights secured by the Constitution and laws of the United States. *Smith* itself, for example, recognized without deciding that a due process challenge to state procedures under the EHA might be asserted under Sec. 1983. 468 U.S. at 1014, n.7. (Page 3)
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> . . .
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> In our case, the Education of the Handicapped Act insures benefits to handicapped children and requires participating States to set up an elaborate administrative procedure for deciding complaints. The federal statute specifically provides for the finality of administrative orders. 20 U.S.C. Sec. 1415(e)(1). It further provides for access to state and federal courts for review of adverse administrative orders. 20 U.S.C. Sec. 1415(e)(2). But the statute does not contain any provision for enforcing final administrative orders. Access to the courts is provided only to review adverse administrative orders, i.e., to the "party aggrieved." Neither does Maryland law provide any such enforcement provision, the district court to the contrary. No authority is cited and we find none for that proposition. Md. Code, Education, Sec. 8-415(f)(g) and (h) provide for state court review under "applicable federal law and regulations," subsection (f); and similarly "under applicable federal law," subsection (h). Thus, the plaintiffs are left with a favorable final administrative decision which they are powerless to enforce upon the city, or at least that is the city's position. While the existence of a wrong without a remedy is not itself a reason for the application of Sec. 1983, the existence of such a state of affairs enters into our reasoning in finding that the city has, under color of state law, violated the federal statute on education of the handicapped. The statute can only be fairly construed to contemplate that once a final favorable administrative decision has been gained by a plaintiff, **the State will carry out that decision** although it may have opposed the position of the plaintiff in the administrative proceedings. (Emphasis added) (Page 4)
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> . . .
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> Our decision is not approval of an end run around the EHA in order to circumvent or enlarge the remedies available under the EHA. See *Smith*, supra. The plaintiffs in fact did proceed under the EHA until the city simply declined to enforce the final decision of the hearing officer. At that point, and not before, plaintiffs were entitled to rely upon Sec. 1983. We are of opinion the dismissal of their Sec. 1983 claim was error. (Page 5)

The Court then discussed dismissal of the EHA claim.

> The plaintiffs here are not parties aggrieved. Thus, the statute does not provide for their access to either the state or federal courts. For that reason, their claim under the EHA was properly dismissed. (Page 5)
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> . . .
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> The judgment of the district court dismissing the plaintiffs' claims under the EHA and under state law is affirmed. The judgment of the district court dismissing the plaintiffs' claims under Sec. 1983 is vacated, and the case is remanded for action not inconsistent with this opinion. (Page 5)

Under the Fourth Circuit's 1987 decision in *Robinson*, it would appear that **successful plaintiffs do not have an EHA remedy against a school district, except under § 1983, but do have a viable claim against the State Department of Education for failure to implement or enforce the due process decision.**

The Whites are exercising that claim against the Virginia Department of Education.

Kantak, New York 1990
Review Order is Current Placement

However, in New York, the Court approved of using EHA to enforce decisions of Hearing and Reviewing Officers. In *Kantak v. Liverpool Central Sch. Dist*., 16 EHLR 643, (N.D. NY 1990) the school had requested that the Reviewing Officer reconsider the decision and the parents filed suit in District Court. The Court found that the award was an "automatic preliminary injunction." The Court reported that the:

> Plaintiffs have also made a sufficient showing that they are likely to succeed on the merits of this action. 20 U.S.C. § 1415(e)(3) provides in relevant part as follows: "During the pendency of any proceedings conducted pursuant to this section, unless the State or local education agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . ." (emphasis added). There is persuasive authority for the proposition, as cited by plaintiffs, that a decision of an independent hearing officer which is upheld by the State Education Commissioner and which is supported by the parents, constitutes an "agreement" within the meaning of section 1415(e)(3). See *Blazejewski*, 560 F.Supp. at 704*; Department of Education v. Mr. and Mrs. S.*, 632 F.Supp. 168, 1270-71 (D. Hawaii 1986). (At EHLR 644)
>
> . . .
>
> **The significance of the above cited authorities for the motions before the court is that since the State Commissioner and plaintiffs have "agreed" to implement a new educational placement for Cynthia Kantak, see Affidavit of Edward Luban, P 20, plaintiffs are entitled to have that agreement presently implemented even though the defendants have commenced an Article 78 proceeding that is still pending.** Defendants have not offered any persuasive arguments to challenge the reasoning of Chief Judge Curtin's decision in *Blazejewski* or to meaningfully distinguish it from the present case. Moreover,

> contrary to defendants' contention, the fact that the Commissioner's order may not be "final" given the pendency of defendants' Article 78 action, see 20 U.S.C. § 1415(e)(1); 34 C.F.R. § 300.510(c), does not mean that the Commissioner's order is not presently enforceable. Defendants in this regard have not cited any authority for the proposition that the filing of a proceeding to review an administrative order that is supported by the parents automatically stays the enforcement of that administrative order. As discussed above, under the reasoning of *Blazejewski*, plaintiffs are entitled to presently enforce the existing "agreement" requiring Cynthia to be provided with a full-time teacher of the deaf notwithstanding the pendency of defendants' Article 78 proceeding. Finally, section 1415(e)(3) acts as an "automatic preliminary injunction" only where the state or a local agency and the parents do not otherwise agree, unlike this case, to a change in placement. . . Accordingly, plaintiffs have demonstrated a likelihood of prevailing on the merits and have also stated a claim upon which relief can be granted at least with respect to defendant Board of Education. (At EHLR 644-645)

Clovis - Ninth Circuit 1990
Review Order is Current Placement
SEA is a Proper Defendant

Several months later, in *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635, 16 EHLR 944 (9th Cir. 1990), the Court found that the "principal issue to which the supplemental briefs were directed was whether the 'stay put' provisions required Clovis to maintain the child in King's View throughout the course of the court review proceedings which followed the agency decision that King's View was the appropriate placement."

> Clovis argues that under the stay put provisions the Shoreys should bear the King's View cost because the Shoreys originally placed the child at King's View on their own initiative. Clovis maintains it is irrelevant that the Shoreys won administrative and district court decisions holding that the placement was the appropriate one.
>
> **The Shoreys, however, argue persuasively that the school district and the state are responsible for the costs of Michelle's placement during the court review proceedings regardless of which party prevails in this appeal.** They argue that the purpose and the language of the Act support a holding that Clovis, under the stay put provisions, was responsible for keeping Michelle in the King's View placement after the administrative decision that the placement was appropriate, and until a court directed otherwise.
>
> The Shoreys' position is supported by the decision of the United States Supreme Court in *School Committee of the Town of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). The Supreme Court there considered a situation, like this one, in which parents had unilaterally changed a

placement, but had received a state administrative agency decision in favor of their choice.

The Supreme Court there said that the agency's decision in the parents' favor "would seem to constitute an agreement by the State to the change of placement." The Court refused to give the stay put provisions a reading that would force parents to leave a child in what they feel may be an inappropriate educational placement, or act at their peril in keeping a child in their chosen placement, after a successful administrative ruling. *Burlington School Committee* at 372-373.

The Court took the view that once the State educational agency decided that the parents' placement was the appropriate placement, it became the "then current educational placement" within the meaning of section 1415(e)(3). ***Burlington*** **concluded that the school was required to maintain that placement pending the court review proceedings pursuant to section 1415. We reach the same conclusion here. The district was responsible for maintaining the King's View placement through the pendency of court review proceedings.** (At EHLR 946)

Clovis was one of the cases cited as the basis for the language contained in 34 C.F.R. § 300.514.

Cordero, Pennsylvania 1992
SEA is a Proper Defendant

In 1992, a Pennsylvania District Court Judge in *Cordero v. Pennsylvania Dept. of Educ*. 795 F.Supp. 1352, 18 IDELR 1099 (M.D. PA 1992) criticized the state for their perception of their role.

Defendants (SEA) characterize the Commonwealth's duties under the IDEA essentially as providing funds, promulgating regulations and reviewing individual complaints. See 20 U.S.C. § 1412. Defendants further argue that the Commonwealth has carried these functions out, and is, therefore, in compliance with the Act. Procedures are available to process parental complaints regarding undue delays in placement, assistance to districts in locating placements is at the ready, and direction and training are given to the districts.

The Judge was harsh.

As defined by the IDEA, the state's role amounts to more than creating and publishing some procedures and then waiting for the phone to ring. The IDEA imposes on the state an overarching responsibility to ensure that the rights created by the statute are protected, regardless of the actions of local school districts. *Honig v. Doe*, 484 U.S. 305 (1988); *Kruelle v. New Castle County School Dist*., 642 F.2d 687, 696-97 (3d Cir.1981); *Lester H. v. Gilhool*, C.A. No. 86-6852, slip op. (E.D. Pa. Nov. 9, 1989), aff'd, 916 F.2d 865 (3d

> Cir.1990), cert. denied, 111 S.Ct. 1317 (1991); *Hendricks v. Gilhool*, 709 F.Supp. 1362, 1367-69 (E.D.Pa.1989). The state must assure that in fact the requirements of the IDEA are being fulfilled. 20 U.S.C. § 1412(6); 34 C.F.R. § 300.600.
>
> Accordingly, with regard to the state's liability in this action, the fact that local agencies are not performing up to par or that parents are not fulfilling their duties becomes **irrelevant**. It is the state's obligation to ensure that the systems it put in place are running properly and that if they are not, to correct them. This is the crux of the state's liability in this matter. (At IDELR 1104)

K.P., Connecticut 1995
SEA is a Proper Defendant

In K.P. v. Juzwic, 891 F.Supp. 703, 23 IDELR 5 (D. CT 1995), the district court opined that the SEA should be a party to a special education due process hearing.

> This question of financial responsibility should be raised, in the first instance, in a due process administrative hearing by joining as parties the appropriate state agencies. The Supreme Court has held that a "post hoc determination of financial responsibility was contemplated in the legislative history" of the Act, observing that the question of "who remains financially responsible is a matter to which the due process procedures established under [the predecessor to § 1415] apply." *Burlington Sch. Comm.*, 471 U.S. at 371, 105 S.Ct. at 2003 (quoting S.Rep. No. 94-168, p. 32 (1975)).

Earlier in the opinion, the Court noted that:

> **Ultimately, financial responsibility for K.P. under the IDEA rests with the State Board of Education.** The statutes, regulations, and legislative history all make clear that the state educational agency, in this case the Connecticut Board of Education, has the ultimate responsibility for assuring that all disabled children have the right to a free appropriate public education. See 20 U.S.C. § 1412(6); 34 C.F.R. § 300.600; S.Rep. No. 168, 94th Cong., 1st Sess. 24, reprinted at 1975 U.S. Code Cong. & Ad. News, 1425, 1448. See also 20 U.S.C. § 1413(a)(4)(B)(i); 34 C.F.R. § 300.401 (responsibility of state educational agency for children placed in private facilities).
>
> The regulations reflect that Congress intended the state educational agency to be "a central point of responsibility and accountability in the education of children with disabilities within each State." 34 C.F.R. § 300.600 (comments). Quoting a Senate report, the comment states,
>
> > Without this requirement, there is an **abdication of responsibility** for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the committee

> understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (At IDELR 10)

In *White*, the state abdicated their responsibility and should be held accountable.

Susquenita, Third Circuit 1996
Review Order is Current Placement

In *Susquenita Sch. Dist. v. Raelee S. by Heidi S.*, 96 F.3d 78, 24 IDELR 839, (3rd Cir. 1996) the Court held that the current educational placement was the private school, even though an appeal by the school district was pending. The Court explained that:

> The broadest issues in this litigation are those relating to the adequacy of the IEP proposed by Susquenita; these are the merits issues yet to be addressed by the district court. **The issues underlying the district court's denial of the stay are narrow, involving practical questions of where Raelee should attend school while the review process proceeds, who must pay for Raelee's placement, and when that payment must be made.** Susquenita argues that it has no financial obligation to Raelee's parents because the private school is not the appropriate pendent placement. Alternatively, Susquenita contends that any financial obligation which it may have can be assessed only at the end of the appellate process. These issues of pendent placement and financial responsibility are linked; in order to evaluate the payment questions, we must first assess the legal impact of the education appeals panel directive that the private school be deemed Raelee's pendent placement during the review process. (At IDELR 841)
>
> . . .
>
> In its decision the appeals panel found that the IEP which Susquenita proposed for Raelee was inadequate and that the private school placement was appropriate. The panel directed that the private school be deemed Raelee's pendent placement in any future disputes "unless the [panel] order is overturned in a Commonwealth or federal district court." (Typescript at 14 n.27). Relying on this panel directive, the parents argue that a new pendent placement was created and that, from the time of the panel decision forward, Susquenita is required to bear the financial burden of maintaining Raelee at the private school. The parents' position is derived directly from the language of the statute. As we have noted, section 1415(e)(3) of the Act reads as follows: "During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement. . ." The decision of the Supreme Court in *Burlington* established that a ruling by the education appeals panel in favor of the parents' position constitutes agreement for purposes of section 1415(e)(3). In *Burlington*, the Supreme Court noted that while parents who unilaterally remove their child from a prior placement

> contravene[ ] the conditional command of Section(s) 1415(e)(3) that "the child remain in the then current educational placement,". . .we note that the section calls for agreement by either the state or the local educational agency. The [appellate panel]'s decision in favor of the [parents] and the [private school] placements would seem to constitute agreement by the state to the change of placement.471 U.S. at 372. (At IDELR 842-843)

> Susquenita argues that a pendent placement appropriate at the outset of administrative proceedings is fixed for the duration of the proceedings and cannot be altered by an administrative ruling in the parents' favor. Accepting this position would contravene the language of the statute and the holding in Burlington. Furthermore, it would mean that the panel decision in favor of the parents is of no practical significance unless and until it is affirmed by a decision that cannot be or is not appealed.
>
> As we have explained, section 1415(e)(3) was drafted to guard the interests of parents and their children. We cannot agree that this same section should be used here as a weapon by the Susquenita School District to force parents to maintain a child in a public school placement which the state appeals panel has held inappropriate. It is undisputed that once there is state agreement with respect to pendent placement, a fortiori, financial responsibility on the part of the local school district follows. Thus, from the point of the panel decision forward--academic years 1995-1996 and following--Raelee's pendent placement, by agreement of the state, is the private school and Susquenita is obligated to pay for that placement. (At IDELR 843)

Susquenita was cited in the U. S. Department of Education's commentary to Section 300.514.

Gadsby, Fourth Circuit 1997
SEA is a Proper Defendant

In *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 25 IDELR 621 (4th Cir. 1997), the Fourth Circuit held that a state department of education can be a defendant in a special education dispute that develops initially between a parent and school district. The Gadsbys alleged that the Maryland State Department of Education (MSDE) violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400-1485, and should be held liable for the costs of Eric's private school placement for the 1993-94 school year."

The Fourth Circuit discussed the history of IDEA and noted that:

> In the event that an LEA has no program for a free appropriate public education in place or fails to maintain an existing program, § 1414(d)(1) provides a stop-gap measure, ensuring the provision of a free appropriate public education:

> Whenever. . .a[n] [LEA]. . .is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) . . . the [SEA] **shall** use the payments which would have been available to such [LEA] to provide special education and related services directly to handicapped children residing in the area served by such [LEA]. Id. § 1414(d)(1). (At IDELR 622)

The Fourth Circuit, quoting the statute, made it clear that the SEA has no discretion, the SEA "shall use the payments." The Court clarified the role of supervision and the importance of "ultimate responsibility."

> Although the SEA's role under IDEA is primarily supervisory, § 1412(6) places the ultimate responsibility for the provision of a free appropriate public education to each student on the SEA:
>
> > The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. . . 20 U.S.C § 1412(6). (At IDELR 623)
>
> In addition, the legislative history indicates that § 1412(6) was included in the statute to "assure a single line of responsibility with regard to the education of handicapped children." S. REP. NO. 94-168, at 24 (1975). This report states further that while different agencies may deliver services under IDEA, "the responsibility must remain in a central agency overseeing the education of handicapped children, **so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency**." Id. (At IDELR 623)

Henrico County and the Virginia Department and Virginia Board of Education have failed to deliver services. The ultimate responsibility vests with Virginia. In *White*, there is no dispute that the LEA and the SEA failed to maintain Glenn White's current educational placement at The New Community School as ordered by the Reviewing Officer one and a half years ago.

In *Gadsby*, the issue was similar and the violation was not at issue, but the remedy. In *White*, after the parents filed a complaint with the SEA, Henrico County was found to be in violation of the law. However, the State refused to enforce the law and refused to pay Glenn's tuition at The New Community School. This default by the State has left the

parents without a remedy, except to litigate the state's default through this proceeding. *Gadsby* addresses this problem and the remedy.

> There is no dispute in this case that the LEA failed to develop an IEP for Eric Gadsby prior to the beginning of the 1993-94 school year, thus violating IDEA. See 20 U.S.C. § 1414(a)(5) (requiring LEA to ensure that IEP will be developed or revised for each child at the beginning of each school year). The dispute, rather, revolves around the remedy for the violation. (At IDELR 626)
>
> IDEA provides a civil cause of action for parents who disagree with a decision rendered by an SEA and specifically authorizes the district court to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e). (At IDELR 626)

The remedy is to hold the State responsible and direct the state to immediately pay Glenn's tuition to The New Community School.

> In answering the first question, whether an SEA may be held responsible for the failure to provide a particular child with a free appropriate public education, "[w]e begin, as we must, by examining the statutory language." *Murphy*, 35 F.3d at 145. As noted above, IDEA's remedial provisions do not explicitly state what governmental entity shall be responsible for remedying a particular violation. Instead, § 1415(e) gives the district court broad authority to "grant such relief as the court determines is appropriate." 20 U.S.C. 1415(e); see also *Burlington*, 471 U.S. at 369 (recognizing that this language confers "broad discretion" on district court). However, § 1412(6) states that "[t]he State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out." 20 U.S.C. § 1412(6). This language suggests that, **ultimately, it is the SEA's responsibility,** to ensure that each child within its jurisdiction is provided a free appropriate public education. Therefore, it seems clear that an SEA may be held responsible if it fails to comply with its duty to assure that IDEA's substantive requirements are implemented.
>
> This conclusion is further supported by § 1414(d)(1), which provides that where an LEA is either unable or **unwilling** to establish and maintain programs for the provision of a free appropriate public education, "the [SEA] shall use the payments which would have been available to such [LEA] to provide special education and related services directly to handicapped children residing in the area served by such [LEA]." 20 U.S.C. § 1414(d)(1). Under this provision, once an LEA is either unable or unwilling to establish and maintain programs in compliance with IDEA, **the SEA is responsible for directly providing the services to disabled children in the area.** See *Todd D. v. Andrews*, 933 F.2d 1576 1583 (11th Cir. 1991) (holding that SEA must take responsibility for providing free appropriate public education where disabled student is better served by regional or state facility than local one); *Kruelle v. New Castle County Sch. Dist*., 642 F.2d 687, 696-98 (3d Cir. 1981) (upholding district court's order

requiring SEA to provide student with full-time residential program where LEA failed to provide adequate program). It follows, therefore, that the SEA in such a case could be held liable if it fails to provide those services.

Our conclusion that an SEA may be held liable under IDEA where the state fails to provide a free appropriate public education to a child with a disability is buttressed by the legislative history of § 1412(6). This legislative history indicates that § 1412(6) was included in the statute to "assure a single line of responsibility with regard to the education of handicapped children." S. REP. NO. 94-168, at 24 (1975). **Therefore, we hold that the SEA is ultimately responsible for the provision of a free appropriate public education to all of its students and may be held liable for the state's failure to assure compliance with IDEA.** (At IDELR 628)

. . .

Finally, we address the question of when an SEA, as opposed to an LEA, may be held liable for the reimbursement costs of a child's private school tuition, where the parents or guardians of the child are entitled to reimbursement under *Burlington* and *Carter*. The Gadsbys assert that an SEA may under any circumstance be held liable where a disabled child is not provided with a free appropriate public education and the parents unilaterally place the child in a private program. MSDE argues, however, that because the LEA has the duty to develop an IEP for each child, only the LEA is liable for reimbursement costs where it fails to fulfill that duty. (At IDELR 629)

. . .

There is nothing in either the language or the structure of IDEA that limits the district court's authority to award reimbursement costs against the SEA, the LEA, or both in any particular case. By contrast, both the language and the structure of IDEA suggest that **either or both entities may be held liable** for the failure to provide a free appropriate public education, as the district court deems appropriate after considering all relevant factors. See *Carter*, 510 U.S. at 16 ("Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors. . .") (At IDELR 629)

After the Fourth Circuit's March, 1997 ruling in *Gadsby*, several courts cited *Gadsby* as they addressed the role of the State Department of Education in disputes similar to *White*.

St. Tammany Parish, Fifth Circuit 1998
Review Order is Current Placement
SEA is a Proper Defendant

In *St. Tammany Parish Sch. Bd. v. State of Louisiana*, 142 F.3d 776, 28 IDELR 194 (5th Cir. 1998), the Fifth Circuit relied upon *Gadsby*. In *St. Tammany Parish*, the parents and child prevailed in a unilateral placement tuition reimbursement review hearing. They petitioned the U. S. District Court for an award of attorney's fees. They also filed a suit for damages against the school district and the state. The school district also filed suit in federal court, "named as defendants, in addition to the Slocums, were the State of

Louisiana, the State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the Louisiana Department of Health and Hospitals." Interim orders of the District Court were appealed. The parent's initial action was stayed pending the outcome of the interlocutory appeals.

The Fifth Circuit summarized the procedural nature of the case:

> In these two interlocutory appeals, concerning the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., **the primary issue is, pending a ruling on the merits, payment of costs for a disabled student placed at an out-of-state facility.** The State of Louisiana, the State Board of Elementary and Secondary Education, the Louisiana Department of Education, and the Louisiana Department of Health and Hospitals (collectively, the State defendants) appeal from four orders regarding the placement of Daniel Slocum at a private residential facility in Kansas, at the expense of the Louisiana Department of Education, during the pendency of this IDEA litigation. We AFFIRM, and REMAND for further proceedings. (At IDELR 195)
>
> On 30 June, the Slocums moved, pending resolution on the merits, for keeping the placement at Heartspring, pursuant to 20 U.S.C. § 1415(e)(3), referred to as the "stay-put" provision. The section provides:
>
> > During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . . 20 U.S.C. § 1415(e)(3) (emphasis omitted).
>
> In that motion, and also pursuant to § 1415(e)(3), the Slocums also requested that, during the pendency of the litigation, the School Board pay the costs of Daniel Slocum's education and related services at Heartspring. They did not seek relief from the State of Louisiana or its Department of Education. But, the School Board countered that the State should share in any assessment of such stay-put costs.
>
> In mid-August 1997, **the district court** granted the Slocums' motion. It concluded that . . . Heartspring was Daniel Slocum's § 1415(e)(3) "current educational placement." . . . And, it **ordered the Department of Education, not the School Board, to pay the cost of Daniel Slocum's education** and related services during this "current educational placement." On 25 September, the district court denied the State defendants' motion for rehearing.
>
> The State has appealed both orders. The district court denied the State defendants' motion for a stay pending appeal, and **ordered immediate enforcement** of the stay-put order. Likewise, our court and the Supreme Court denied a stay pending appeal. (At IDELR 196)
>
> . . .

We agree with *Gadsby* that "[t]here is nothing in either the language or the structure of IDEA that limits the district court's authority to award reimbursement costs against the [state educational agency], the [local educational agency], or both in any particular case." *Gadsby*, 109 F.3d at 955. We also agree that "both the language and the structure of IDEA suggest that either or both entities may be held liable for the failure to provide a free appropriate public education, as the district court deems appropriate after considering all relevant factors." Id. (At IDELR 198)

First, IDEA places primary responsibility on the state educational agency, by providing that it "shall be responsible for assuring that the requirements of this subchapter are carried out." 20 U.S.C. § 1412(6).

. . .

That the district court did not err by interpreting IDEA to allow it to impose liability upon the Department, rather than the School Board, for the costs pending a merits-decision is further supported by § 1414(d)(1):

Whenever a State educational agency determines that a local educational agency . . . is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements [for the provision of a free appropriate public education], . . . **the State educational agency shall use the payments which would have been available to such local educational agency** to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. 20 U.S.C. § 1414(d)(1).

"Under this provision, once [a local educational agency] is either unable or unwilling to establish and maintain programs in compliance with IDEA, the [state educational agency] is **responsible for directly providing the services** to disabled children in the area." *Gadsby*, 109 F.3d at 953. See also *Todd D. by Robert D. v. Andrews*, 933 F.2d 1576, 1583 (11th Cir. 1991) (state educational agency must take responsibility for providing free appropriate public education where disabled student is better served by regional or state facility than local one); *Kruelle v. New Castle County Sch. Dist*., 642 F.2d 687, 696-98 (3d Cir. 1981) (affirming district court's order requiring state educational agency to provide student with full-time residential program where local educational agency failed to provide adequate program). (At IDELR 198)

. . .

The district court's imposition of interim liability upon the Department is based, in part, on its conclusion that, for purposes of the stay-put determination, **the State Level Review Panel's decision constituted an "agreement" between the Slocums and the State that Heartspring is the appropriate placement for Daniel Slocum.** The State defendants challenge this conclusion, claiming the Independent Hearing Officer and Review Panel members are completely independent of the Department. (At IDELR 200)

. . .

> Consistent with *Burlington*, the district court did not abuse its discretion by concluding that, for purposes of § 1415(e)(3), the Review Panel decision constituted an "agreement" between the State and the Slocums that, during the pendency of this action, Heartspring was the appropriate educational placement.
>
> . . .
>
> By virtue of the State Level Review Panel's decision, the state has agreed as a matter of law with the child's placement. Even if the Court were to eventually decide that the panel's decision was in error, an agreement still exists for the period of time leading up to this Court's decision [on the merits] and the parents would not be deemed in violation of the law during that time frame. The parents, therefore, should not be made to reimburse the state or school board for a placement with which the state agreed and for which no violation of law took place. In this interim period, the parents are deemed in compliance with IDEA and Daniel is entitled to a free, appropriate public education. . . (At IDELR 201)
>
> A primary purpose of the stay-put provision is to protect a child from being put in an unsuitable placement and possibly incurring harm while awaiting the lengthy outcome of the litigation. If parents who are in compliance with the IDEA are required to reimburse the school district or the state, parents without substantial means could be forced to leave a child in the less suitable placement because they cannot afford to pay for the private interim placement. Additionally, parents may be forced to withdraw their child from a placement which they and the state agree is appropriate because the parents might not have the financial resources to repay the educational costs which accumulate during the litigation. This is directly contrary to the purpose of IDEA. (At IDELR 201)

K.Y., Illinois 1998
Review Order is Current Placement
SEA is a Proper Defendant

In *K.Y. v. Maine Township High Sch. Dist. No. 207*, 28 IDELR 23 (N.D. IL 1998), the parents sought tuition reimbursement for a private placement. After an adverse decision, they appealed to federal court and the school district joined the Illinois Department of Education as a defendant. The parents and school district settled and the parents continued their suit against the state. The state attacked the settlement agreement asserting that it enlarged the parents rights. The Court disagreed, noting that:

> [T]he ISBE argues that the settlement agreement has "enlarged" K.Y.'s parents' legal entitlements to proceed against the ISBE. This Court does not agree. (At IDELR 26)
>
> Initially, the Court finds that K.Y.'s parents receive no additional benefits and ISBE retains the same obligation to provide reimbursement under IDEA that each had before the existence of the settlement agreement. The normal procedure under IDEA is for the parents to seek reimbursement from the school district and for the school district, in turn, to seek reimbursement from the ISBE. Whether ISBE is

> forced to reimburse the parents directly, or whether ISBE is forced to reimburse the school district, who then pays the parents, the parents ultimately retain the same legal right to reimbursement under IDEA.

Relying in part on *Gadsby*, the Court held that:

> **Moreover, there is nothing in IDEA that suggests that K.Y.'s parents are precluded from bringing a cause of action directly against the state educational agency ("SEA").** To the contrary, the IDEA specifically provides that "the State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out . . . " 20 U.S.C. § 1412(6). Hence, "while the local schools and the children's parents are the 'front line' providers of educational services for children with disabilities, the IDEA squarely places the ultimate responsibility for ensuring compliance with its mandates on the state educational agencies, such as the ISBE." *Corey H. v. Board of Educ. of the City of Chicago*, __ F.Supp. __ (N.D. Ill. Feb. 19, 1998) (citing 20 U.S.C. § 1412(6)); see also, *Kruelle v. New Castle County Sch. Dist*., 642 F.2d 687, 696-97 (3d Cir. 1981) (no error in assigning ultimate responsibility for implementing requirements of EHA [now IDEA] to the state board of education); *Parks v. Pavkovic*, 557 F.Supp. 1280, 1288 (N.D. Ill. 1983), modified on other grounds, 753 F.2d 1397 (7th Cir. 1985) ("the responsibility for assuring compliance with EHA lies with it [the state agency] and it alone"); *Todd D. v. Andrews*, 933 F.2d 1576, 1583 (11th Cir. 1991) (SEA retains the ultimate responsibility for providing eligible students with an appropriate education when the local educational agency is unwilling or unable to do so). The legislative history of 20 U.S.C. § 1412(6) suggests that this provision was included in order to "assure a single line of responsibility with regard to the education of handicapped children." *Gadsby v. Grasmick*, 109 F.3d 940, 953 (4th Cir. 1997) (quoting S. REP. NO. 94-168, at 24 (1975)). (At IDELR 26)

Continuing, the Court noted that parents have rights directly against the state, whether there was or was not a settlement agreement.

> In addition, under 20 U.S.C. § 1415 and § 1412, the procedural safeguards of IDEA are ensured to "children with disabilities and their parents." **In a situation where no settlement agreement exists, but the local district has failed to reimburse parents for their child's special education, the parents would have standing to sue the state agency directly in order to enforce the provisions of IDEA.** Here, the settlement agreement simply assigns K.Y.'s parents the right to proceed against the ISBE for those portions of the placement which the ISBE is statutorily obligated to pay. See 105 ILCS 5/14-7.03. Thus, ISBE fails to demonstrate how the settlement agreement "enlarges" K.Y.'s parents' legal entitlements. (At IDELR 26-27)

Gordon, Maryland 1998
Review Order is Current Placement
SEA is a Proper Defendant

In *Gordon ex rel. Gordon v. Board of Educ. of Howard County,* ___ F. Supp. ___, 29 IDELR 47 (D. MD 1998) the parents appealed an adverse due process decision to the U. S. District Court. As a part of their appeal, they joined the Maryland Department of Education. The District Court dismissed the state as a defendant because the parents had not first filed a complaint with the State. The District Court discussed *Gadsby* and the State's liability.

> In *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997), the Fourth Circuit addressed the issue of whether a State education agency, like the MSDE, may be liable when the local education agency fails to provide a free appropriate public education. **Applying well-worn canons of statutory interpretation, see id. at 952-53, the court found as a general matter that the State education agency is liable under the IDEA if it fails to ensure that the local education agency complies with the Act.** Id. at 952. The court further found that when a local department is either unable or unwilling to establish and maintain programs that comply with the IDEA, **the State agency must provide those services**. Id. at 953.
>
> . . .
>
> The State Defendants correctly note that Plaintiff has failed to produce evidence that Plaintiff complained to the MSDE about the HCBE's failure to provide a free appropriate public education. Further, the State Defendants have produced evidence supporting their cross-motion that Plaintiff only complained to MSDE about the HCBE's alleged failure to provide a free appropriate public education **after** the due process hearings at the OAH were underway . . .
>
> . . .
>
> Under these circumstances, even assuming that the HCBE failed to provide a free appropriate public education under the IDEA, the Court cannot as a matter of law consider the State Defendants primarily responsible under *Gadsby*. The MSDE cannot ensure that the HCBE lived up to its obligations under the IDEA when Plaintiff failed to bring the issue to the State's attention until after the institution of administrative review proceedings. Nor has Plaintiff produced evidence demonstrating that the State, in the exercise of due diligence, should have been aware of the problem in this specific case. (At IDELR 48)

In *White*, unlike *Gordon*, the parents did file a complaint with the Department of Education. The Department found that Henrico County violated the law. The Department ordered corrective action. After Henrico County objected and contemporaneous with the appointment of the new Acting State Superintendent of Instruction, a former Henrico County Public Schools employee, the Department reversed themselves.

CONCLUSION

The Plaintiffs have an independent cause of action against the Virginia Department of Education and the Virginia Board of Education. Contrary to established case law, IDEA, and the federal regulations, the defendant's have refused to enforce a decision of a state level Review Officer. This refusal is a conscious and deliberate disregard for the civil rights of the plaintiffs and is without legal justification or excuse.

The plaintiffs request entry of an ORDER that directs the defendant's to immediately comply with the Final Order of the Review Officer.

The plaintiffs request entry of an ORDER that directs the defendant's to immediately reimburse the plaintiffs the educational costs and to pay Glenn's tuition to The New Community School.

The plaintiffs request entry of an ORDER that finds that the defendants have recklessly disregarded the civil rights of the plaintiffs.

The plaintiffs request entry of an ORDER that finds that the plaintiffs have suffered damage as a result of the reckless disregard for the civil rights of the plaintiffs.

The plaintiffs request entry of an ORDER that finds that the defendants have never required that a Final Order of a Review Officer be implemented if a local education agency has appealed such Final Order.

The plaintiffs request entry of an ORDER that finds that the defendants, by refusing to enforce Final Orders of a Review Officers, have maintained a policy and practice that violates the civil rights of children and families protected by Section 504 of the Rehabilitation Act and the Individuals with Disabilities Education Act.

MICHAEL "GLENN" WHITE
By Counsel

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CERTIFICATE

I, Peter W. D. Wright, hereby certify that I mailed a true copy of this Memorandum to Joan Murphy, counsel for the Virginia Department and Board of Education on this 7th day of January, 2000.

_____
Peter W. D. Wright