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Mark C. Weber

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The End of Responsible Relative Liability

MARK C. WEBER

ABSTRACT: *Responsible relative liability laws exist to shift some of the cost of care of residentially placed handicapped children from the state to the children's parents. Because residential placement of handicapped children, particularly developmentally disabled children, would not be undertaken but for the need to teach these children life skills, the Education for the Handicapped Act would dictate that these placements be free of cost to parents. Recently, the courts have resolved the tension between the preexisting state-responsible relative laws and the Education for the Handicapped Act. Ruling in favor of the parents, they have invalidated the responsible relative charges. This article describes the conflict, its resolution in the recent case Parks v. Pavkovic, and some of the implications of that decision.*

■ On July 1, 1985, the second last day of its 1984-85 term, the United States Supreme Court denied review in *Parks v. Pavkovic* (1985), a decision of the federal Court of Appeals in Chicago. In the *Parks* case, the Court of Appeals held that it was a violation of the Education of the Handicapped Act (1970) for the State of Illinois to fail to pay private schools of handicapped children a responsible relative liability charge, a monthly fee that applied to all children placed by the Illinois Department of Mental Health and Developmental Disabilities. The fee, which the schools attempted to collect from the children's parents, increased with the parents' income to a statutory maximum of \$100 monthly for an income of \$15,600. The Court of Appeals affirmed an injunction against the practice of leaving the fee unpaid, and ordered that the State of Illinois pay any unpaid bills that parents had for the fee, back to September 1978. The court ruled, however, that the State did not have to reimburse parents who had paid the charge to the schools.

Because the Supreme Court's decision was a denial of review, and not a decision on the

merits of the case, it does not set a binding precedent for all the courts in the country. Nevertheless, the Court of Appeals decision is a conclusive interpretation of the law for federal courts in Illinois, Wisconsin, and Indiana. It has already been followed in a federal court in Florida, and the Supreme Court's refusal to review it may further enhance its persuasive value. Thus the ruling could have an important effect in the many states that charge parents some of the cost of placements of handicapped children made by mental health, welfare, and other state agencies.

THE CONCEPT OF RESPONSIBLE RELATIVE LIABILITY

Responsible relative liability statutes long predated the Education for the Handicapped Act (1970). Responsible relative liability is a means to defray some of the cost of caring for those persons who are maintained in public or private institutions. Historically, in jurisdictions where responsibility for care of the poor, insane, crippled, or feeble-minded was assigned to local governments, these governments were permitted to make charges against the estates of the people cared for or against relatives with a legal obligation for their support. As states took over responsibility for the care of the dependent,

MARK C. WEBER is Assistant Professor, De Paul University College of Law, Chicago, Illinois.

state agencies were granted similar power to make charges.

Illinois's system was typical. Before the implementation of the Education for All Handicapped Children Act in 1978, the public schools routinely excluded retarded or mentally ill children. Even since that time, they have often failed to act promptly (or act at all) to place those in need of residential schooling. Either on the advice of school authorities or on their own, the parents of a handicapped child would apply to the state Department of Mental Health and Developmental Disabilities, which, if it judged that residential placement of the child was advisable, would issue an "individual care grant," a commitment to fund the placement of the child. The Department would find a school or other institution and process the papers for enrollment. The Department would also calculate the amount that the parents were expected to pay. If placement was in a private school, the amount would simply be deducted from what the Department paid on the child's behalf, leaving the school to collect the difference.

COLLISION WITH THE SPECIAL EDUCATION LAWS

The Education for All Handicapped Children Act of 1975, now codified as part of the Education of the Handicapped Act (EHA), mandated that all handicapped children, including the mentally retarded and mentally ill, are to be given a free, appropriate public education in those states that receive federal subsidies for special education.

One of the main concerns of the framers of the 1975 legislation was that parents needed to be free of cost disincentives if their children were to receive appropriate services. Regulations issued to enforce the Act state unequivocally that where a child is so severely handicapped that "placement in a public or private program is necessary to provide special education and related services...., the program, including non-medical care and room and board, must be at no cost to the parents of the child" (Code of Federal Regulations sec. 300.302, 1987).

Another regulation makes it irrelevant that a mental health department or other state agency whose primary responsibilities are not educational made the placement (Code of Federal Regulations sec. 300.2(b), 1987). Responsible

relative liability charges, by definition, are charges to the parents of a handicapped child for a residential program. Even if they are specifically tagged to costs that are not strictly "educational," such as room and board, they are forbidden under the EHA whenever the placement "is necessary to provide special education and related services."

One can imagine the shock of a state mental health administrator upon learning that because the state education agency receives federal money, the mental health agency can no longer impose a charge that it has long counted on to make up some of the cost of a very expensive benefit to families of the handicapped. The mental health agency's criteria for placement may not even directly consider what setting the child needs for education. And now the agency is faced with the full cost when another agency is getting the federal reimbursement.

RESPONSIBLE RELATIVE LIABILITY LITIGATION

Early Challenges

In the face of reluctance by state officials to comply with the law, parents who want the benefit of a free residential schooling for their handicapped children have been forced to resort to litigation. The cases on responsible relative liability got off to a halting start. Between 1978 and 1980, various state courts in New Jersey and New York upheld responsible relative charges against somewhat oblique challenges based primarily on state law (*Guempel v. State*, 1978; *Levine v. State*, 1980). In the only case in which the EHA was extensively discussed, the court relied on the fact that the parents never challenged the placing authority's determination that the child did not need a residential school to meet his educational needs (*Lawrence T. v. Julia T.*, 1980).

A successful challenge to responsible relative liability charges was a relatively obscure feature of *Smith v. Robinson*, the 1984 United States Supreme Court case in which the Court ruled that attorneys fees were not available under the EHA. The trial court in that case ruled that a placement offered by a state mental health agency was not "appropriate" because it entailed a responsible relative charge to the parents of the handicapped child. Nevertheless, this

June 1981 decision, affirmed in an unpublished opinion by a federal appeals court, did not consider the general practice of making the charge.

The Parks Case

Lester Parks was excluded from the Chicago Public Schools when he was five because he was autistic. His mother searched for alternative educational settings for him, ultimately applying to the Illinois Department of Mental Health and Developmental Disabilities (DMHDD) on the Chicago Board's advice. DMHDD placed Lester at a private residential school; a responsible relative liability portion of the cost was left unpaid. The Parks family filed an administrative appeal with DMHDD, arguing that the charge violated the EHA. They lost and appealed to state court. DMHDD admitted to the court that Lester's residential placement was needed for him to make educational progress, but contended that since DMHDD did not receive EHA funds, it was not bound by the Act. The court found that the agency was bound and barred it from making the charge. The Appellate Court affirmed the trial court (*Parks v. Illinois Department of Mental Health and Developmental Disabilities*, 1982). The Illinois Supreme Court refused to accept the agency's further appeal.

While the state court case was pending, Lester's school notified parents of children there that it was about to close. The Parks family requested that DMHDD and the Chicago school system move their son to a different placement. They did, placing him at Willowglen Academy in Milwaukee. But because the court action was an administrative review proceeding only of the charges at the first school, DMHDD refused to apply the court's decision to the new placement. Exercising their rights under the EHA, the Parks family filed a due process hearing request over the responsible relative liability charge for the Willowglen placement. The hearing officer ordered the Chicago Board of Education to pay the totality of the cost of the placement in the future, but ruled that there was no administrative authority to order the Board to pay back charges. The Board ignored the order; appeals were filed to the review section of the State Board of Education, which failed to make any decision. Meanwhile, Willowglen issued a dis-

charge notice because of the failure to pay the accumulated monthly charges.

The Parks family filed suit in United States District Court asking for an immediate injunction to make the State of Illinois and the Chicago Board of Education pay the entirety of Lester's bill and thus keep him at school, and also asking for a classwide, permanent injunction to prevent the charging of responsible relative liability for other children. Both orders were ultimately entered.

In the District Court, the public authorities defending the case broke into two groups. Those associated with the State Board of Education had no clear defense of the charges, but argued that no remedy existed under the EHA against the State Board. Those associated with the Department of Mental Health and Developmental Disabilities defended the charges, saying that if the EHA required free residential placement it was unconstitutional, because elimination of the financial disincentive to residential placement would lead to unnecessary restrictions of handicapped children's liberty.

Prentice Marshall, the District Judge, felt that the practice of charging responsible relative liability was blatantly illegal. "This is a disturbing case," he wrote. "Plaintiffs have brought to our attention one of the most blatant violations of federal law imaginable. It appears that the State of Illinois has been openly violating the rights of handicapped children." The judge characterized the arguments of the State Board of Education as "finger-pointing": Essentially, all it did was claim that it was not responsible for the mental health department's violation of the law, despite the fact that under the EHA the state education agency has the ultimate responsibility to ensure that no handicapped child is denied a free education. The judge labeled the DMHDD's argument on the EHA's supposed incentive for unnecessary residential placement as "frivolous," given the fact that the EHA requires all placements—residential or not—to be free, and that there are other, independent guarantees in the Act for placement in the least restrictive environment (*Parks v. Pavkovic*, 1983).

In June 1983, the District Court certified the case as a class action on behalf of roughly 1,200 families, and entered an injunction that the State of Illinois and the Chicago Board of Education

not leave DMHDD responsible relative liability unpaid for handicapped children in private special education placements. A "special education placement" was defined as a placement made pursuant to an Individualized Education Plan (IEP) which provided for the placement. The court order also required the defendants to pay the back liability charges or reimburse parents for them from September 1, 1978, forward.

The defendants appealed, arguing for the first time that the children whose placements carried responsible relative liability were a special category of handicapped children, those placed for reasons of developmental disability. But the defendants never denied that the developmentally disabled children who were subject to the charges needed their placements in order to learn; in fact, the definition of "developmental disability" they advanced led the Court of Appeals to equate it with mental retardation and conclude that placement for reasons of mental retardation had to be placement for educational reasons.

The court noted that the EHA was plainly designed to cover children who are mentally retarded, and that a mentally retarded child would not necessarily require a residential placement apart from the need for education and training in life skills. The court stressed that living expenses are not "caused by educational needs, for they would be incurred whether or not any effort is made to educate the child" (*Parks v. Pavkovic*, 1985). But that does not matter. What matters is that placement outside the home is needed to educate. In that instance, all the living expenses have to be met.

The Court of Appeals modified the monetary relief ordered for the class by the District Court. It held that the EHA did not permit reimbursement of parents for the money they had sent to the schools to cover the responsible relative liability charge. Nevertheless, it ruled that the State had to pay any responsible relative liability bills the parents had left unpaid. The Court reasoned that the former relief was mere damages, which were not intended to be a remedy under the EHA, while the latter payments were related to keeping the children in school in the future (*Parks v. Pavkovic*, 1985).

Subsequent Litigation

On June 21, 1985, in *Jenkins v. State of Florida*, a federal judge in Florida ruled that the state could not charge parents a responsible relative fee for placements of the developmentally disabled. The court relied on *Parks v. Pavkovic* in entering a classwide injunction and order to pay unpaid bills. Expert testimony at the trial of the *Jenkins* case had stressed the role of the non-school-day hours of residential placement of the severely retarded in teaching them life skills. Both the objectives and methods used were the same as those of the program during the school-day hours. Calling the residential program "habilitation" rather than "education" was a distinction without a difference.

IMPLICATIONS

The *Parks* case applied only to private special education placements in one state, and it eliminated the responsible relative liability charges of only one state agency, the Illinois Department of Mental Health and Developmental Disabilities. But its logic should apply to placements in public institutions, to state agencies other than departments of mental health, and to other states. A trend in this direction may already be developing with the *Jenkins* (1985) decision. Responsible relative liability charges are a remnant of the system that existed before passage of the EHA. They cannot be defended in the face of the duty to provide a free education to all handicapped children.

The absence of retroactive reimbursement for parents who paid the charges in *Parks* (1985) might be an incentive for states to keep responsible relative liability systems in place until they are forced to change by the court action. But the refusal to order reimbursement may not be followed by other courts. The United States Supreme Court ruled in April 1985 that reimbursement of the costs of a residential placement is a proper remedy in a lawsuit under the EHA. The case, *Burlington School Committee v. Department of Education* (1985), interpreted the court remedies language of the EHA in a manner totally contrary to the approach of the Court of Appeals in *Parks* (1985). It said that reimbursement of the costs of the school were part of the "appropriate relief" that is permitted under the EHA, where the *Parks* (1985) court

had said that these payments to parents were not.

Under *Burlington* (1985), reimbursement is not automatic in every case. *Burlington* involved parents unilaterally moving their child to a private residential school while pursuing through due process procedures a dispute over the appropriateness of the placement proposed by a school district. The Court held that where the parents in such a case ultimately prevailed, that is, where their placement was found appropriate and that proposed by the district was found inappropriate, the parents were entitled to reimbursement for the cost of the placement. But if the district's proposal were found to be appropriate, the parents would bear their own expenses.

This restriction does not, however, affect the situation of parents seeking reimbursement of responsible relative liability charges. In these cases the placement is in no sense unilateral. Instead, it was made by a public agency. And there will be no doubt but that the placement was appropriate, for it will be that agreed to by the parent and the public agency. Thus *Burlington's* interpretation of the EHA would appear to require reimbursement of charges paid by parents.

A final issue is whether, if responsible relative liability is eliminated, state mental health and welfare agencies will simply eliminate all placement of handicapped children, leaving the total responsibility of these children to the state education agency and the local school districts. Although the EHA does not require any particular state agency to be the one that provides services to handicapped children, it does provide some controls on abandonment of responsibility by agencies currently providing services. One of these is that such an agency cannot simply end its services without affording the children it serves the procedural protections of the EHA. The EHA regulations are quite clear that each agency in a state is responsible for ensuring that the protections of the Act are given to children referred to or placed in private schools and facilities by that agency (Code of Federal Regulations sec. 300.2(c), 1987).

The second control is that no state receiving EHA money can diminish the funds that it allocates to education of the handicapped in the face of funding increases from the federal

government, nor can it use federal moneys to supplant state or local funds currently being used (Education of the Handicapped Act, 20 U.S.C. sec. 1414 (a)(2)(B); Code of Federal Regulations sec. 300.230, 1987). Thus if state mental health or welfare agencies get out of the business of making new placements for the handicapped, the money that they currently spend for doing so could not simply be saved. It would have to be reallocated to other activities that are part of the education of handicapped children, such as residential placements made by local school districts or the state education agency. Moreover, the duty of the state as a whole remains to provide a full continuum of alternative placements for handicapped children, including residential placement when it is appropriate. This duty is absolute, and applies no matter which state agency is charged with making placements.

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