1996 WL 48515
United States District Court, N.D. Illinois, Eastern Division.

MARIE O., Gabriel C., Kyle G., and Joanna B., by their parents and legal guardians, individually and on behalf of all other similarly situated individuals, Plaintiffs,
v.
Jim EDGAR, Governor and Joseph H. Spagnolo, State Superintendent of Education, Defendants.

No. 94 C 1471.
|
FEB. 2, 1996.

MEMORANDUM OPINION

KOCORAS, District Judge:

***1** This matter is before the court on the parties' cross motions for summary judgment. For the reasons set forth below, the plaintiffs' motion is granted. The defendants' motion is denied.

BACKGROUND

This action arises out of the state of Illinois' alleged failure to provide critical early intervention services to developmentally-delayed infants and toddlers. The plaintiffs purport to represent a class of infants and toddlers who are eligible for but not receiving the educational and developmental services needed to prevent or ameliorate their developmental-delay and other disabling conditions. Part H of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1471 *et seq.* ("Part H") provides the statutory framework around which these services are to be structured. The present case involves roughly 26,000 eligible children whom the plaintiffs maintain are not presently receiving the early intervention services to which they are allegedly entitled under Part H.

Part H is a federal program pursuant to which federal funds are granted to states developing and implementing coordinated systems for the provision of early intervention services to developmentally-delayed infants and toddlers. Congress enacted Part H for the purpose of addressing five "urgent and substantial" needs:

> (1) to enhance the development of handicapped infants and toddlers and to minimize their potential for developmental delay,
>
> (2) to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after handicapped infants and toddlers reach school age,
>
> (3) to minimize the likelihood of institutionalization of individuals with disabilities and maximize the potential for their independent living in society,
>
> (4) to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities, and
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> (5) to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of historically unrepresented populations, particularly minority, low-income, innercity, and rural populations.

20 U.S.C. § 1471(a)(1)-(5).

In 1987, the State of Illinois opted to participate in the Part H program, and since that time, Illinois has received more than $34 million dollars in federal funds for use in planning and implementing a coordinated statewide system of service. Upon entering into its fifth year of participation in the program, Part H requires assurances in a state's application for federal funds that the state has in effect a statewide system providing early intervention services to all eligible infants and toddlers with disabilities and their families. 20 U.S.C. §§ 1475(c) and 1476(a). On September 23, 1991, the Illinois Early Intervention Services System Act, 325 ILCS 20/1 *et seq.* ("the Illinois Act"), became effective. On December 1, 1992, Illinois began its fifth year of participation in Part H, thus allegedly requiring Illinois under federal law to serve all eligible infants and toddlers.

***2** The plaintiffs allege that Illinois has not complied with several components of Part H. Among other shortcomings, the plaintiffs allege that the state has failed "to develop policies and procedures for standards for training early intervention personnel, has not established a procedure securing timely reimbursement of funds used to provide services, and has not established a system for

compiling data on the numbers of infants and toddlers with disabilities in need of services, the number served, and the types of services provided." *See* Class Action Complaint, ¶ 33. According to the plaintiffs, Illinois was required by federal law to have these policies, procedures, and services implemented at the beginning of Illinois' fifth year of participation in the Part H program. Instead, numerous eligible children have been placed on waiting lists for services. The plaintiffs allege that as a result of the state's noncompliance, the plaintiffs have been denied adequate early intervention services to which they are allegedly entitled under Part H.

The plaintiffs bring this action on their own behalf, and on behalf of all others similarly situated, seeking declaratory and injunctive relief. Plaintiffs seek a judgment declaring that the defendants' acts and omissions are in violation of the rights of the plaintiffs and other similarly situated Illinois children under both Part H and 42 U.S.C. § 1983. The plaintiffs further seek an injunction directing the defendants "to recognize Part H as an entitlement for all eligible children, begin providing early intervention services to all children entitled by law to those services, and bring the State of Illinois into compliance with the components of a statewide system of early intervention required under Part H." In addition, the plaintiffs seek an award of attorneys' fees and costs as allowed under 42 U.S.C. § 1988. Both parties have moved for summary judgment.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other material show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R.Civ. P. 56(b). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The party seeking summary judgment carries the initial burden of showing that no such issue of material fact exists. Pursuant to Rule 56(b), when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue as to any material fact and that the moving party is not entitled to judgment as a matter of law. *Anderson,* 477 U.S. at 250.

In making our determination, we are to draw inferences from the record in the light most favorable to the non-moving party. We are not required, however, to draw every conceivable inference, but rather, only those that are reasonable. *De Valk Lincoln Mercury, Inc. v. Ford Motor Co.,* 811 F.2d 326, 329 (7th Cir. 1987); *Bartman v. Allis-Chalmers Corp.,* 799 F.2d 311, 313 (7th Cir. 1986), *cert. denied,* 479 U.S. 1092 (1987). The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; rather he must go beyond the pleadings and support his contentions with proper documentary evidence. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986); *Howland v. Kilquist,* 833 F.2d 639, 642 (7th Cir. 1987).

***3** The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 322. "In such a situation there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial". *Id.* at 323.

It is in consideration of these principles that we examine the parties' motions.

DISCUSSION

The plaintiffs brought this action pursuant to 42 U.S.C. § 1983, alleging violations of Part H of the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1471 *et seq.* Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Although § 1983 does not create any new substantive rights, section 1983 nevertheless provides a federal cause of action for violations of certain federal rights. *See Chapman v. Houston Welfare Rights*

Org., 441 U.S. 600, 617-18 (1979). A § 1983 action may be used to remedy constitutional and federal statutory violations by state agents. *Maine v. Thiboutot,* 448 U.S. 1, 5-6 (1980). However, the availability of § 1983 as a mechanism by which to enforce federal statutory violations is not absolute. Specifically, no such action is available either where Congress has explicitly foreclosed enforcement of the statute in the statute itself, or where a statutory remedial scheme is so comprehensive that there exists an implication that it provides the exclusive remedy, effectively foreclosing all other remedies. *Wright v. City of Roanoke Redevelopment & Housing Authority,* 479 U.S. 418, 424-25 (1987). The existence of a comprehensive remedial scheme notwithstanding, the use of § 1983 will not be precluded where Congress explicitly states that it did not want its enactment construed to restrict or limit the remedies otherwise available. *Mrs. W. v. Tirozzi,* 832 F.2d 748, 754 (2nd Cir. 1987).

In 1984, the Supreme Court noted the extensive remedial scheme of the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.* (subsequently retitled the IDEA), and concluded that the EHA was the exclusive avenue through which a plaintiff could assert an EHA claim. *Smith v. Robinson,* 468 U.S. 992 (1984). Congress swiftly responded to the Court's holding in *Smith* and enacted the Handicapped Children's Protection Act of 1986. In section 3 of that Act, Congress added a new subsection to 20 U.S.C. § 1415, specifically providing that individuals could seek redress under other federal statutes, such as section 1983:

> ***4** Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. § 790 *et seq.*], or other Federal statutes protecting the rights of children and youth with disabilities....

20 U.S.C. § 1415(f). In passing § 1415(f), Congress expressed its intention to "reestablish statutory rights repealed by the U.S. Supreme Court in *Smith v. Robinson*" and to "reaffirm, in light of this decision, the viability of... 42 U.S.C. § 1983 and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R.Rep. No. 296, 99th Cong., 1st Sess. 4 (1985). Congress' objectives thus could not have been more clear. Section 1415(f) of the IDEA states that nothing in this "chapter" shall be construed to restrict the rights available under federal statutes such as § 1983. *See* 20 U.S.C. § 1415(f). As we indicated earlier during the course of this litigation (*see* June 13, 1994 Memorandum Opinion), Congress explicitly used the word "chapter" in setting forth its pronouncement. Less comprehensive terms such as "section" or "subsection" were deliberately avoided. Since Congress has expressed an intention for a private right of action to exist under § 1983 for violations of the IDEA and Part H is an unequivocal component of the IDEA, we reaffirm our previous conclusion that Part H of the IDEA may be enforceable under 42 U.S.C. § 1983.

As presented by the plaintiffs, the matter before the court is simple. Illinois has voluntarily chosen to participate in Part H. As a participant in the federal program, Illinois is required to provide certain services to all eligible children. Illinois' failure to adequately accomplish this renders the state liable. Although we agree with the defendants that the realities surrounding full compliance with the mandates of Part H are not quite so straightforward as the plaintiffs suggest, we are nonetheless obligated to follow the law, and the law on the issue ultimately favors the plaintiffs.

Part H defines two groups of infants and toddlers who must be served by a state's early intervention system and one group which a state may, at its discretion, choose to serve. 20 U.S.C. § 1472(1). The two groups which must be served by a state's early intervention system are defined as "infants and toddlers with disabilities" from birth to age 2, inclusive, who need early intervention services because they--

> (A) are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: cognitive development, physical development, language and speech development, psychosocial development, or self-help skills, or
>
> (B) have a diagnosed physical or mental condition which has a high probability of resulting in developmental delay.

20 U.S.C. § 1472. In addition, a state may, at its option, elect to serve "individuals from birth to age 2, inclusive, who are at risk of having substantial developmental delays if early intervention services are not provided." 20 U.S.C. § 1472(1). The Illinois Act provides that all three groups of children are eligible for early intervention services in Illinois. 325 ILCS § 20/3.

***5** As specified by Part H, the "early intervention services" which a state is required to provide include family training, counseling, home visits, special instruction, speech pathology and audiology, occupational therapy, physical therapy, vision services, psychological

services, case management services, diagnostic medical services, assistive technology, early identification and screening services, and transportation. 20 U.S.C. § 1472(2)(E). Moreover, these services are to be provided by specially qualified personnel and at no cost (except where federal or state law provides). 20 U.S.C. § 1472(2)(B) and (F).

Section 1476(2) of the federal statute sets forth the early intervention programs which a state is to have in effect by the beginning of its fifth year of participation in Part H. According to this section, a "statewide system of coordinated, comprehensive, multidisciplinary, interagency programs providing appropriate early intervention services to all infants and toddlers with disabilities and their families shall include, ... at a minimum":

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(2) timetables for ensuring that appropriate early intervention services will be available to all infants and toddlers with disabilities in the State....

(3) a timely, comprehensive, multidisciplinary evaluation of the functioning of each infant and toddler with a disability in the State and the needs of the families to appropriately assist in the development of the infant or toddler with a disability,

(4) for each infant and toddler with a disability in the State, an individualized family service plan... including case management services in accordance with such service plan,

(5) a comprehensive child find system, ... including a system for making referrals to service providers that includes timelines and provides for participation by primary referral sources,

(6) a public awareness program....

(7) a central directory which includes early intervention services, resources, and experts available in the State and research and demonstration projects being conducted in the State,

(8) a comprehensive system of personnel development,

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(11) a procedure for securing timely reimbursement of funds....

(12) procedural safeguards with respect to the programs under this subchapter....

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(14) a system for compiling data on the numbers of infants and toddlers with disabilities and their families in the State in need of appropriate early intervention services....

20 U.S.C § 1476(b). As a prerequisite for continued federal funding under Part H (commencing the fifth year of participation and for each year thereafter), the state must file an application providing "information and assurances demonstrating to the satisfaction of the Secretary that the State has in effect the statewide system required by section 1476 of this title and a description of services to be provided...." 20 U.S.C. § 1475(c). On December 1, 1992, Illinois began its fifth year of participation in Part H. Although the deficiencies in implementation to which the plaintiffs cite are necessarily detailed in the state's yearly application for funding, to date, Illinois has not been denied federal funds.

***6** The plaintiffs set forth some disturbing statistics as to the numbers of children who are purportedly not receiving the full range of services afforded them under Part H. According to the plaintiffs, at any one point in time, only about one-fourth of the eligible population of disabled youngsters is being serviced under Part H in Illinois. Hundreds and hundreds of Illinois children are routinely placed on waiting lists for Part H services. Moreover, the state has reportedly been delinquent in its efforts to identify and evaluate the needs of all of the state's eligible children. By allowing these circumstances to exist, the plaintiffs maintain that these children have been denied early intervention services at a time critical to their future development. Supported by statements of representatives in the United States Department of Education, the plaintiffs assert that Part H is an entitlement program and that at the start of a state's fifth year of participation in Part H, a state must have in place fully implemented program under which all eligible children are receiving services.[1] This, the plaintiffs maintain, the defendants have plainly failed to do.

In establishing a statewide system of service, Part H affords a considerable amount of discretion to the state. The state may, for example, elect whether to serve children in the "at risk" population, 20 U.S.C. § 1472(1), and state law may also impact who pays for the services under Part H. 20 U.S.C. § 1472(2)(B). The Illinois Act, which went into effect on September 23, 1991, in many ways mirrors Part H and establishes as a matter of state

law the system requirements embodied in Part H. Section 20/7 of the Illinois Act, for example, incorporates many of the requirements set forth in 20 U.S.C. § 1476(b), explicitly referencing the federal laws and regulations. 325 ILCS 20/7. The Illinois Act, however, further provides:

> Within 60 days of the effective date of this Act, a five-fiscal-year implementation plan shall be submitted to the Governor by the lead agency with the concurrence of the Interagency Council on Early Intervention. The plan shall list specific activities to be accomplished each year, with cost estimates for each activity....

325 ILCS 20/7. Having become effective in late 1991, the Illinois Act, by its own terms, does not contemplate full implementation until late 1996. The defendants note that this five-year time frame for implementation has never been raised by the United States Department of Education as being inconsistent with the state's federal obligations under Part H.

Consistent with the state's ongoing efforts at implementation, a new Central Billing Office ("CBO"), designed "to receive and dispense all relevant State and federal resources, as well as local government or independent resources available, for early intervention services," is presently being developed. 325 ILCS 20/13. Under the new system, individualized family service plans ("IFSP") will be standardized state-wide,[2] enabling the family to seek out services from any provider it chooses (whether under Part H or not). Moreover, a more equitable distribution of funds will ensue, because funds will be spent on a fee-for-service basis rather than to providers in lump sum grants. The CBO will also provide a means by which to fully utilize available Medicaid funds, significantly increasing the funds brought into the early intervention system. Although the CBO is not yet implemented, the defendants attest that the State Board is presently attempting to begin experimental operations of the CBO in certain regions of the state.

***7** Section 1476 of Part H requires that a state have a statewide system in place to serve all eligible children. Although not yet fully implemented, the defendants attest that Illinois has a statewide system. As summarized in its Year 7 Annual Report, Illinois at present serves thousands of children in all parts of the state. Forty-five Local Interagency Councils exist throughout the state, and numerous committees are devoted to personnel standards, public awareness, and financial issues. An interagency staff team works on early intervention issues. Numerous state agency officials and departments participate in the statewide early intervention system, in addition to the over 100 providers of services (56 receiving Part H funds) throughout the state.

However, surveys conducted by the Illinois State Board of Education have indicated that the early intervention system needs more capacity. Children are routinely placed on waiting lists for services. The plaintiffs take issue with a portion of the Illinois Act which states that the Act shall be implemented "as appropriated funds become available." *See* 325 ILCS 20/14. However, as the defendants submit, financial considerations account for only part of the problem. It is not disputed that outside resources such as private insurance and Medicaid are tremendously under-utilized under the present system. Nevertheless, even if the federal and state funds devoted to early intervention services were greatly increased, a state and national shortage of professionally trained personnel still would remain. Moreover, even if there was sufficient personnel to accommodate the mandates of Part H, additional problems would emerge as to their proper distribution. Difficulties exist in attracting doctors to rural areas. A conspicuous consequence of this is the dearth of professionals involved in early intervention services in parts of southern Illinois.

Section 1476 declares that a statewide system must serve "all" infants and toddlers with disabilities. *See* 20 U.S.C. § 1476. However, a strict reading of the term "all" cannot conform to present realities. In a report prepared by the National Early Childhood Technical Assistance System ("NECTAS") at the University of North Carolina, an agency providing technical assistance to the states on early intervention services, a 1995 briefing paper in a section entitled "Moving Part H into the 21st Century" stated:

> The promises and expectations of Part H of IDEA, although not fully realized, have become a reality, through the development of partnerships among families, governmental agencies, and public and private providers. Through continued needed resources, the intent of the law-- a contract with American citizens to meet the needs of their infants and children with disabilities and families-- will be fully realized in the next century.

As indicated by this report, the notion of serving "all"

eligible children is understood to be a goal to be attained in the future. It is not-- and indeed cannot be-- a rigid legal standard activated on a state's first day of full participation in Part H. Given the breadth of the requirements set forth in Part H, it is doubtful if any state could ever meet such a standard as the plaintiffs suggest.[3] By consistently approving the state's annual application for federal funding of its early intervention system, the federal government has not held Illinois to so rigid a standard. Given the practicalities of the situation, neither should we.

***8** That is not to say, however, that the plaintiffs are not entitled to relief. Part H was enacted by Congress with the desire that, by encouraging states to develop and implement coordinated systems for the provision of early intervention services to developmentally-delayed infants and toddlers, the disabilities which these children ultimately experience might be lessened or suspended. In its efforts to relay the importance of these goals, Congress expressly chose to frame Part H in definite, explicit terms, declaring that, after five years, a state "shall" have in effect "at a minimum" certain programs serving "all" eligible children. Recognizing the value which such a system might provide, Illinois, in 1987, voluntarily elected to participate in Part H. Illinois subsequently set about creating a statewide system in accordance with the provisions of Part H. Illinois' efforts at implementation, however, have been far from perfect.

Section 1475 of the federal statute contemplates that, by the beginning of its fifth year of participation in Part H, a state must have in place the minimum components enumerated in 20 U.S.C. § 1476. However, as suggested above, rigid enforcement under such a timetable would render state participation in Part H a virtual impossibility. Still, the mandates of the statute must not be neglected. Meaningful compliance by the state, at the very least, should be required by the state's fifth year. Eight years into the Part H program, Illinois' efforts remain well below this standard.

The plaintiffs seek an injunction by this court, recognizing Part H as an entitlement to all eligible children and directing the state to begin providing early intervention services to all eligible children and to bring the state of Illinois into full compliance with the requirements of Part H. Although the practical impact of this court's intervention to achieve these goals remains unclear, we nevertheless are obligated under the law to honor the plaintiffs' request to become involved. The state's failure, for example, to adequately develop and implement programs which train early intervention personnel and seek out and inform eligible youngsters of available services must not be condoned. The regularity with which disabled children are placed on waiting lists for services and evaluations-- some waiting for up to one year-- should not be tolerated. The existence of waiting lists is especially tragic given that the time lost is so often critical to the future development of these disabled youngsters.

As the opinion above reflects, certain problems in implementation are inevitable.[4] We remain ever mindful of this reality. However, after eight years of "dragging its feet", the state needs to do better. Critical to the future of Part H is the continued participation of the state, and we recognize that judicial intervention which might ultimately threaten this participation may not be a step forward. As the above cited NECTAS report indicates, the goal of Part H is to create an entitlement which will be fully realized in the next century. That is not to say, however, that the thousands of disabled infants and toddlers in Illinois *today* are not entitled to reap the benefits of Part H. The statutory language makes no mention of the next century. To the contrary, Part H bestows upon the state five years. After eight years without meaningful compliance, court intervention has thus become justified. Summary judgment will be entered in favor of the plaintiffs. The defendants' motion for summary judgment is denied.

CONCLUSION

***9** For the reasons set forth above, the plaintiff's motion for summary judgment is granted. The defendants motion for summary judgment is denied.

All Citations

Not Reported in F.Supp., 1996 WL 48515, 14 A.D.D. 871

Footnotes

1 A March, 1990 policy memorandum issued by Dr. Judy A. Schrag, former Director of the Office of Special Education Programs, United States Department of Education states:

Part H is an entitlement program. This means that subject to specific provisions in the Act and regulations, each eligible child

in a State and the child's family are entitled to receive the rights, procedural safeguards, and services that are authorized to be provided under a State's early intervention program.

Each State must ensure that appropriate early intervention services will be available to all eligible children in the State no later than the beginning of the fifth year of a State's participation in Part H.

March 1990, Policy Memorandum by Judy A. Schrag, Ed.D, Director of Office of Special Education Programs, (1 Early Childhood Law and Policy Reporter ("ECLPR") ¶ 10) (3/20/90).

In 1988, G. Thomas Bellamey, former Director of the Office of Special Education Programs for the United States Department of Education responded to an inquiry as follows:

Part H is interpreted to be an entitlement program on behalf of each eligible child and the child's family, based on statutory provisions.

Response by G. Thomas Bellamey, Ph.D., Director, Office of Special Education Programs (1 ECLPR ¶ 38) (12/20/88).

Finally, Dr. Thomas Hehir, the current Director of the Office of Special Education Programs of the United States Department of Education, stated the following:

States in full implementation of the Part H early intervention program are required to provide appropriate early intervention services to all children who are eligible and their families.

Response by Thomas Hehir, Director, Office of Special Education Programs (2 ECLPR ¶ 59) (11/30/93).

[2] Although the IDEA does not set forth any specific timelines under which a family must receive an IFSP, the Code of Federal Regulations do so provide. The plaintiffs moreover suggest that the state's failure to abide by the regulations in this regard constitutes a violation of § 1983. The Circuits are at present split on the issue of whether a violation of a federal regulation may be cognizable under § 1983. *See, e.g., West Virginia University Hospitals v. Casey,* 885 F.2d 11, 18 (3rd Cir. 1989) (holding valid federal regulations create enforceable rights under § 1983), *aff'd on other grounds,* 499 U.S. 83 (1991). *Cf., Beth V. v. Carroll,* 876 F.Supp. 1415, 1426 (E.D.Pa. 1995) (holding IDEA regulations do not create enforceable rights under § 1983). The Seventh Circuit has not explicitly addressed the issue, nor are we compelled to do so now. We do, however, take note of a dissenting opinion written by Justice O'Connor in *Wright v. Roanoke Redev. & Housing Authority,* 479 U.S. 418 (1987), which expresses concern over such a possibility:

... it is necessary to ask whether administrative regulations *alone* could create such a right. This is a troubling issue not briefed by the parties, and I do not attempt to resolve it here.... I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.... Such a result, where determination of § 1983 "rights" has been unleashed from any connection to congressional intent, is troubling indeed.

Id. at 479 U.S. 437-38 (Emphasis in original).

[3] Susan Mackey-Andrews, a consultant hired by the Illinois State Board of Education to assist in planning the state's early intervention system, testified that, at the present time, *no* state was serving one hundred percent of its eligible children.

[4] Acknowledging our relative inexperience in the area, we defer to the experts in the field as to how Part H may best be implemented.