

The Legislative and Litigation History of Special Education

Edwin W. Martin
 Reed Martin
 Donna L. Terman

Abstract

Between the mid 1960s and 1975, state legislatures, the federal courts, and the U.S. Congress spelled out strong educational rights for children with disabilities. Forty-five state legislatures passed laws mandating, encouraging, and/or funding special education programs. Federal courts, interpreting the equal protection and due process guarantees of the Fourteenth Amendment to the U.S. Constitution, ruled that schools could not discriminate on the basis of disability and that parents had due process rights related to their children's schooling.

Congress, in legislation now retitled the Individuals with Disabilities Education Act (IDEA), laid out detailed procedural protections regarding eligibility for special educational services, parental rights, individualized education programs (IEPs), the requirement that children be served in the least restrictive environment, and the need to provide related (noneducational) services. Decisions on instructional matters such as curricula and the elements of the IEP remain the province of local and state authorities.

Advocates for students with disabilities have continually sought separate (categorical) funding for special education services. Current movements toward block grants rather than categorical programs and toward greater inclusion of special education students in general education classrooms raise concerns in some quarters about whether students with disabilities will continue to have full access to the special services they need.

While the cost of special services may be an unexpressed criterion in many decisions made by school districts, nowhere does the IDEA explicitly allow cost to be considered. Where a service is *necessary* for an individual child, cost considerations would not allow a school district to escape its obligations to the child. However, in instances where more than one *appropriate* configuration of services is available to meet a child's needs, the school district may be allowed to consider the cost of different alternatives.

Edwin W. Martin, Ph.D., is president emeritus at the National Center for Disability Services, Albertson, NY.

Reed Martin, J.D., is a partner in the Houston, Texas law firm of Martin and Bishop, which specializes in representing persons with disabilities.

Donna L. Terman, J.D., is the issue editor of this journal issue, and is a policy analyst/editor at the Center for the Future of Children.

The legal requirement that public schools serve all children with disabilities is a recent one. Prior to the 1970s, millions of children with disabilities were either refused enrollment or inadequately served by public schools.¹ After securing some initial government support for special

education efforts, advocates shifted to an emphasis on educational rights, an orientation strongly influenced by the civil rights movement.

Although it is widely assumed that a federal statute (Public Law 94–142, now named the Individuals with Disabilities Education Act, or IDEA), created educational rights for children with disabilities, in fact some of these rights were first established in state statutes (although not implemented) and also grew out of federal court cases based on the U.S. Constitution. The congressional bills which became Public Law 94–142 in 1975 were originally introduced in 1971, and their consideration by Congress had an impact on the nation, fueling the interest in state legislation and in litigation. In the context of the times, state law, federal law, and the federal and state courts provided a series of reinforcing actions.

The educational rights of students with disabilities are also ensured by two other federal laws: Section 504 of the Rehabilitation Act (Amendments of 1973) and the 1990 Americans with Disabilities Act (ADA).

Historical Background

Persons with physical and mental disabilities have been the target of discrimination across cultures for thousands of years. On virtually every continent there are records of isolation, exclusion, and even destruction of persons with disabilities.² Governmental treatment of persons with disabilities, beginning with their placement in institutions and moving slowly into the educational system and the workplace, is a relatively recent pattern.

Through most of the history of public schools in America, services to children with disabilities were minimal and were provided at the discretion of local school districts. Until the mid-1970s, laws in most states allowed school districts to refuse to enroll any student they considered “uneducable,” a term generally defined by local school administrators. Some children with disabilities were admitted to public schools but were placed in regular education, with no special services. Others were served in special programs in public schools, though the services provided to them were often inadequate.³ Only after Public Law 94–142 became effective in 1978 and, in several states, after federal and state court cases, did “education for all” policies become a fact.

Evolving Federal and State Roles

Early Federal Efforts

Prior to the 1950s, few federal laws authorized direct education benefits to persons

with disabilities. There were acts in the early and mid-1800s making grants to the states for “asylums for the deaf and the dumb”⁴ and to promote education of the blind.⁵ But after these early efforts, the federal government had extremely limited involvement in public schools. The first major federal efforts in the modern era to improve public elementary and secondary schools came in 1958 and 1965, and neither included provisions for education of children with disabilities.

The National Defense Education Act

When the Soviet Union launched Sputnik in the 1950s, the perceived threat inspired Congress to pass the National Defense Education Act of 1958 (NDEA),⁶ which provided grants to improve science and math teaching in the earlier grades. The NDEA opened the door for federal involvement in elementary and secondary education. Four days after signing the NDEA, President Dwight Eisenhower signed a small act (Public Law 85–926) providing financial support to colleges and universities for training leadership personnel in teaching children with mental retardation.⁷ In 1963 Congress expanded Public Law 85–926 to include grants to train college teachers and researchers in a broader array of disabilities.⁸

The Elementary and Secondary Education Act

The Elementary and Secondary Education Act (ESEA) of 1965⁹ was the first major federal effort to *subsidize direct services* to selected

populations in public elementary and secondary schools, and it remains the primary vehicle for federal support of public schools today. While the original ESEA did not provide for direct grants on behalf of children with disabilities, in the second year of that Congress, Public Law 89–313 provided that children in state-operated or state-supported schools “for the handicapped” could be counted for entitlement purposes, and special Title I funds could be used to benefit this relatively small population of children in state schools.

Consolidation of Federal Leadership and Categorical Funding

In the 1960s, advocates for children with disabilities wanted (1) a single entity that would coordinate federal educational efforts for children with disabilities; (2) increased categorical funding, that is, funding for the exclusive purpose of educating students with disabilities; and (3) an enforceable entitlement, which was eventually obtained through the courts.

Experience with federal and state education agencies convinced advocates that children with disabilities were shortchanged by agencies that were enforcing broader federal mandates. They lobbied for a special administrative unit at the highest level, a bureau, in the U.S. Office of Education. Congress in 1966 mandated a Bureau for the Education of the Handicapped (BEH) under Title VI of the ESEA, which also provided grants to states to initiate, expand, or improve programs for educating children with disabilities.¹⁰ This program, popularly known as Title VI, had a legislative title that made it the first “education of the handicapped act.”

Increased federal funding to assist state and local service programs was harder to achieve. During the Johnson and Nixon administrations, the concept of using federal aid to stimulate local and state programming in special education was accepted, as was the concept of federally supported resources for the states, for example, trained teachers, research, and model programs. From 1967 through 1975, when Public Law 94–142 was passed, the BEH stimulated a number of federal programs aimed at specific priority populations, for example, early

childhood education, education of children who were deaf/blind or multiply handicapped, and model programs for children with specific learning disabilities.

Disappointed in their efforts to increase federal grants for special education, advocates pursued a strategy of earmarking portions of general education programs. Fifteen percent of the ESEA’s Title III (which funded innovative and exemplary local programs) was set aside in 1970 for programs and projects serving children with disabili-

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ties.¹¹ (Later, when this program became part of a block grant, it stopped serving children with disabilities.¹²) Legislation effective in 1982 required that 10% of each Head Start program’s enrollment be available to children with disabilities, without requiring these children to meet other Head Start eligibility criteria.¹³ A similar program earmarked 10% of the funds under the Vocational Education Act.¹⁴

As separate programs for the disabled—and earmarked portions of general education programs—proliferated, the BEH recommended that many existing federal programs be codified into a more comprehensive Education of the Handicapped Act (EHA). In 1970, Congress passed the EHA.¹⁵

State Laws

During the 1960s and early 1970s, no state served all its children with disabilities. Many states turned children away. Still other states placed children in inappropriate programs. For example, children of normal intelligence with physical disabilities were placed in classes designed for children with mental retardation. In response, parents pursued a second generation of laws, known colloquially as “mandatory” laws. These state laws provided partial funding and required local school districts to offer special education to children with disabilities. By 1973, some 45

states had passed some form of legislation for educating children with disabilities.¹⁶

Despite these supplementary funds and mandatory laws, many children with disabilities remained unserved or underserved by public schools. Many of the laws had loopholes (such as applying only to children “who could benefit from education”) or were simply not enforced by state officials. Problems of insufficient funding remained, and many school districts were reluctant to reallocate funds from general education to special education. In growing frustration, parents and advocates turned to Congress and to the courts.

Litigation Determining Constitutional Rights to Education, 1971–1973

In the span of a few years (1971 through 1973), the federal courts made it clear that schools owed students the equal protection of the law without discrimination on the basis of disability, just as the Supreme Court had ruled in *Brown v. Board of Education*¹⁷ in

tion up to age 21. That case also established the standard of appropriateness—that is, that each child be offered an education appropriate to his or her learning capacities—and established a clear preference for the least restrictive placement for each child.

In the following year, in *Mills v. Board of Education*, seven children between the ages of 8 and 16 with a variety of mental and behavioral disabilities brought suit against the District of Columbia public schools, which had refused to enroll some students and expelled others, solely on the basis of their disability. The school district admitted that an estimated 12,340 children with disabilities within the district’s boundaries would not be served during the 1971–72 school year because of budget constraints. The U.S. District Court ruled that school districts were constitutionally prohibited from deciding that they had inadequate resources to serve children with disabilities because the equal protection clause of the Fourteenth Amendment would not allow the burden of insufficient funding to fall more heavily on children with disabilities than on other children.

Because Section 504 and the ADA offer more remedies to parents than does the IDEA, these laws have been the main vehicles for litigation during the past few years.

regard to race. The due process clause of the Fourteenth Amendment was interpreted to give parents specific rights to prior notice, to discuss changes in a child’s education plan before they occurred, and to appeal decisions made by school districts. Two critical cases laying out these rights were *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*¹⁸ and *Mills v. Board of Education*.¹⁹

The seminal 1971 case of *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* contested a state law that specifically allowed public schools to deny services to children “who have not attained a mental age of five years” at the time they would ordinarily enroll in first grade. Under a consent decree, the state agreed to provide full access to a free public education to children with mental retarda-

The ruling in *Mills* was pivotal and far-reaching. Children with disabilities had an equal right to public education offered in a form that was meaningful for them, and when the school considered a change in their status (including suspension, expulsion, reassignment, or transfers out of regular public school classes), the children were entitled to full procedural protections, including notice of proposed changes, access to school records, a right to be heard and to be represented by legal counsel at hearings to determine changes in individual programs, and regularly scheduled status reviews. All of these protections were eventually incorporated into Public Law 94–142 by Congress. The *PARC* and *Mills* cases caused a flurry of litigation. By 1973, more than 30 federal court decisions had upheld the principles of *PARC* and *Mills*.²⁰

The Evolution of Federal Law Through Litigation, 1975 to Present

Federal Statutes

This spate of new state laws and federal court decisions created major new responsibilities,

which the states and local school districts were not prepared to meet. Congressional hearings in 1975 revealed that millions of children with disabilities were still being shut out of American schools: 3.5 million children with disabilities in the country were not receiving an education appropriate to their needs, while almost one million more were receiving no education at all.²⁰ By 1971–72, despite the fact that every school district in the United States had some kind of ongoing special education program, seven states were still educating fewer than 20% of their *known* children with disabilities, and 19 states, fewer than a third. Only 17 states had even reached the halfway figure.¹⁶

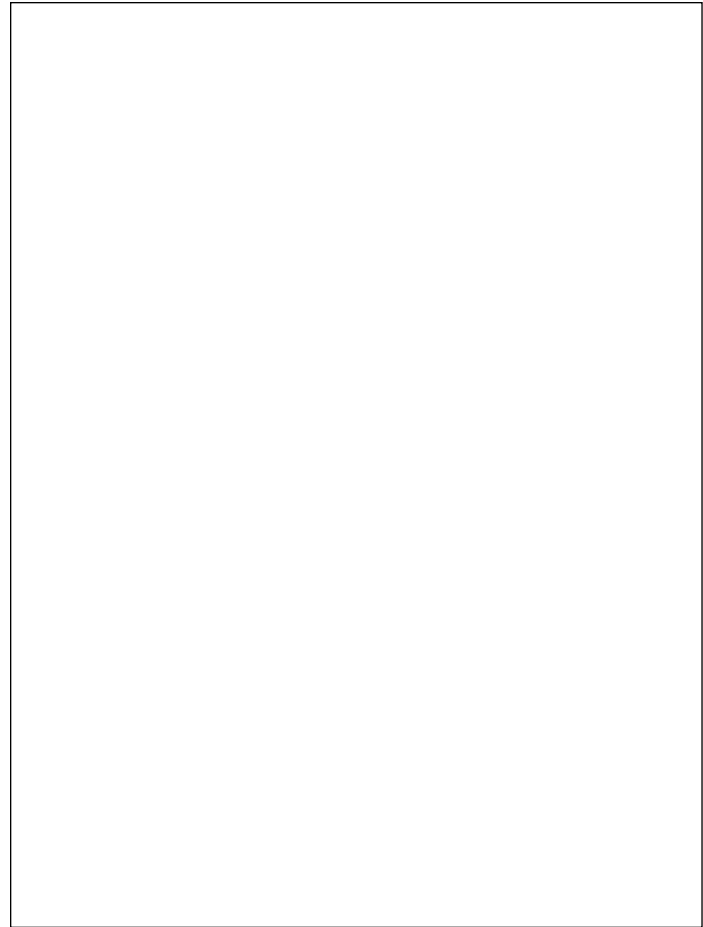
Once state laws and federal court decisions made clear the states' responsibility for providing a free, appropriate, public education to all children, regardless of disability, states joined advocates in seeking the passage of federal legislation to provide consistency, federal leadership, and federal subsidy of the costs of special education.

Congress's response to this national problem took two approaches: nondiscrimination (through the Rehabilitation Act) and an educational grant program (through the Education for All Handicapped Children Act).

Nondiscrimination—The Rehabilitation Act

In 1973, Public Law 93–112, the Rehabilitation Act, at Section 504, provided that any recipient of federal financial assistance (including state and local educational agencies) must end discrimination in the offering of its services to persons with disabilities. Section 504 of the Rehabilitation Act, however, included no funding and no monitoring, and so was virtually ignored by local and state educational agencies for 20 years. Although parents had the right to bring suit under Section 504 as early as 1973, most preferred to pursue the administrative remedies available under Public Law 94–142.

In 1990, Congress passed the Americans with Disabilities Act (ADA),²¹ which expanded the rights of people with disabilities by outlawing discriminatory practices in employment, public accommodations, transportation, and telecommunications. Because Section 504 and the ADA offer



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more remedies to parents than does the IDEA,²² these laws have been the main vehicles for litigation in special education during the past few years.

Educational Grant Program—The Education for All Handicapped Children Act

Congress used the second approach, an educational grant program, in 1975 in Public Law 94–142, the Education for All Handicapped Children Act. This act required that all students with disabilities receive a free, appropriate public education and provided a funding mechanism to help with the excess costs of offering such programs.

The title of the act was changed by amendments in 1983 and again in 1990²³ when it was renamed the Individuals with Disabilities Education Act. Throughout this article, this act is referred to as the IDEA. With the creation of the Department of Education in 1980, the Bureau for the Education of the Handicapped was replaced

by the Office of Special Education Programs (OSEP), OSEP, the Rehabilitation Services Administration (RSA), and the National Institute for Handicapped Research (now entitled the National Institute for Disability and Rehabilitation Research) were combined into one Office of Special Education and Rehabilitative Services (OSERS), headed by an assistant secretary of education. Despite periodic amendments and changes in title, the critical elements of the statute discussed remained highly consistent.

Public Law 94-142 was prescriptive of certain procedures: to receive funds, the state departments of education and local school districts had to put in place a system of “child find” to locate all students with disabilities; perform evaluations to determine the effect of the disability on educational per-

The IDEA is a comprehensive scheme set up by Congress to aid the states in complying with their Constitutional obligations to provide public education for children with disabilities.

formance; conduct annual meetings which produced an individualized education program (IEP) for each student with disabilities; and ensure that the plan was carried out in the least restrictive environment. Decisions about curricula, the elements of the IEP, and other instructional matters were left to local and state authorities. Only the broad protections of the law were federally prescribed.

■ **Passage and Funding.** Signed into law in 1975 by President Gerald Ford, the Education for All Handicapped Children Act (Public Law 94-142) took effect on October 1, 1977. Although the legislation passed by an overwhelming majority (there were only 14 votes against it in the House and Senate combined¹⁶), Public Law 94-142 was not without its critics. President Ford felt the bill would be too expensive, would interfere with state responsibility, and would upset the balance of relationships between parents and local schools.²⁴

It is important to understand that states are not required to participate in the IDEA.

In the case of *Smith v. Robinson*,²⁵ the Supreme Court explained that the IDEA is “a comprehensive scheme set up by Congress to aid the states in complying with their Constitutional obligations to provide public education for children with disabilities,” not a legislatively created mandate to serve children.

The IDEA authorizes funding in accordance with a formula, a key variable of which is the average per pupil expenditure (APPE) for nondisabled students. The act authorized Congress to appropriate a sum equal to 5% of APPE in 1977, 10% in 1978, 20% in 1979, and 40% by 1980. Though the act authorized funding according to this formula, the actual dollars must come through the appropriations process. In the case of Public Law 94-142, appropriations have never approached the authorization level. The amounts requested by the President and appropriated by Congress peaked at 12% of APPE under President Jimmy Carter, declining to 8% in the Reagan years, and remain at 10% or less today. The dollars appropriated increased from approximately \$250 million in the first year of funding to more than \$2 billion in 1995, as inflation had an impact, the number of children served increased, and costs per pupil rose.

Critical Elements of the IDEA

The IDEA lays out broad mandates for services to all children with disabilities, yet those children are a large and heterogeneous group—from the first-grader with a speech impediment to the college-bound high school student in a wheelchair to the junior high student with emotional disorders and a history of school suspensions. Many lawsuits have been brought to determine the responsibilities of school districts for particular types of services within the IDEA’s broad mandates for all children with disabilities.

“Child Find” and Funding Based on Child Count

In 1975, Congress’s first concern was that children with disabilities be identified by the schools so that they could be served. The funding mechanism of Public Law 94-142, which provides reimbursement based on the number of children with disabilities served in special education (rather than, for example, on the total number of children in the school district), was designed to encourage

districts to identify children with disabilities and provide them with special services.¹⁶

Today, it is generally acknowledged that the goal of “child find” has been achieved. Many in the field argue that the IDEA (and, to a greater extent, state funding structures) give financial incentives for separate special education services that are no longer needed to encourage districts to identify eligible children. These observers suggest that such incentives lead to unnecessary segregation of children with disabilities from regular education classrooms.^{26,27}

Other advocates fear that funding which is not based on individual child counts would lose its categorical (targeted) nature and could be sent to the states in block grants with other education dollars. Some states have wanted to implement this approach, but federal law does not permit it with federal funds. A few states today (notably Iowa and Vermont) are experimenting with removing categorical restrictions on state funds. In the 1960s, New York combined regular and special education funding. A few years later, after some state legislators noted an alarming drop in the number of children with disabilities who were receiving services, they reinstated the funding.

Mingling special education and regular education dollars might promote the placement of special education students in mainstream classes without guaranteed financial support for special educational services. Advocates are also concerned that it would increase the use of disciplinary sanctions to rid the system of special education students who do not fit in.²⁸

Evaluation and Eligibility Determination

A child suspected of having a disability is evaluated to determine the child’s eligibility for services under the IDEA. Since *Mills*, school districts are constitutionally prohibited from planning special education programs in advance and offering them to students on a space available basis.

Evaluation

The child must be evaluated before school personnel can begin special programming, and the parents are to be involved in the

evaluation process. The child must be evaluated in all areas related to the suspected disability. Reevaluation is required at least every three years or when requested by a parent or when conditions warrant. When a parent disagrees with the school’s evaluation, the parent may procure an independent evaluation, which the school must consider in programming decisions.²⁹

Eligibility Determination

Once found to be disabled and in need of special services, a child is entitled to appropriate services. If the school district finds the child to be ineligible, the parents have a right to appeal (see the discussion of due process, Box 1).

Parental Input and Due Process

The IDEA provides many specific procedural protections for the parents of children with disabilities (see Box 1). These include notice to parents of proposed actions, attendance at

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meetings concerning the child’s placement or IEP, and the right to appeal school decisions to an impartial hearing officer.

Although the IDEA provides these protections, some parents and advocates feel that schools frequently flaunt the law.³⁰ While schools are required to provide parents with a full explanation of procedural safeguards available under federal law,²⁹ a 1989 survey conducted by Louis Harris and Associates for the International Center for the Disabled found that 61% of the parents surveyed knew little or nothing about their rights under Public Law 94-142 and Section 504.³¹

Some see the IDEA’s elaborate set of procedural protections as encouraging adversarial relationships between parents and schools.³² This is particularly true since Congress in 1986 amended the IDEA to allow courts to order schools to reimburse parents for their legal fees. Congress reasoned, after hearing testimony, that parents

Box 1

Procedural Safeguards for Children and Parents Under the IDEA^a

- 1. Notice of school's proposed actions and of parents' rights.** When a school seeks an initial evaluation or a change in placement of a child with disabilities, the parents are entitled to a full explanation of all procedural safeguards under the IDEA; a description of the action proposed by the school district, along with the reasons for the action and a description of alternatives considered; and a description of each evaluation procedure, test, record, report, or other factors the school district used as a basis for the proposed action.^b The school must ensure communication in a form understandable to the parent, including providing a written summary in the native language of the parent, or use other appropriate means of communication if the parent does not use a written language.
- 2. Consent to evaluate.** Children must be evaluated in accordance with the IDEA regulations before they can be placed in special education. Parental consent must be obtained before conducting an evaluation of a child who is suspected of having a disability. If the parent refuses to consent, the school district may appeal to an impartial hearing officer, who may order evaluation without parental consent. However, state law may override this provision.
- 3. Appropriate evaluation.** Testing and evaluation materials must be selected and administered so as not to be racially or culturally discriminatory, be provided and administered in the child's native language by trained personnel, and must have been validated for the specific purposes for which they will be used. When a test is to be administered to a child with impaired sensory, manual, or speaking skills, the test must be selected and administered so as best to ensure that results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure.

No single procedure (such as an IQ test) may be used as the sole criterion for determining an educational program for a child. The evaluation must be made by a multidisciplinary team, including at least one specialist in the area of suspected disability. The child must be assessed in all areas related to the suspected disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communication skills, and motor abilities.
- 4. Independent evaluation.** If the parent disagrees with the evaluation prepared by the school district, the parent may obtain (and the school district must consider) an independent evaluation conducted by a qualified examiner. Under certain circumstances, the independent evaluation may be obtained at the school district's expense.
- 5. Consent to placement.** Parental consent must be obtained before placement of a child with a disability in a special education program. If parental consent cannot be obtained, the school district may appeal to an impartial hearing officer.

Box 1 (continued)

6. Input in Individualized Education Program (IEP). The IEP lays out the school's goals for the child and services to be provided, including the extent to which the child will participate in regular educational programs. At each meeting discussing the child's IEP, the school district must ensure that the parents of the child are afforded the opportunity to participate, including advance notification, scheduling the meeting at a mutually agreeable time and place, and providing an interpreter if needed.

7. Appeal to impartial hearing officer. If the parents and school district are unable to agree about placement or about services to be provided, either the parents or the school district may initiate a hearing before an impartial hearing officer, who will issue a binding decision. The hearing officer must not be an employee of a public agency that is involved in the education or care of the child. Any party to the hearing has the right to be accompanied and advised by legal counsel and by individuals with special knowledge regarding the problems of children with disabilities. They may present evidence and cross-examine witnesses. Parents also have the right to have the child attend the hearing and to open the hearing to the public.

The IDEA does not require mediation, but the regulations note that many states have had success with mediation prior to conducting a formal hearing.

8. The “stay put” provision. Once placement has begun, it can only be changed by the IEP committee. If the parents do not consent to a proposed change in placement and request a hearing, the child must “stay put” in the current placement until the hearing process is concluded. Disciplinary sanctions of 10 days or less are not a change in placement, and are not subject to this restriction, unless a series of shorter-term suspensions has the cumulative impact of more than 10 days. Disciplinary sanctions greater than 10 days (expulsions) can be proposed by a school district if it finds that the misbehavior was not related to the disability, but if the parent disagrees and requests a hearing on the relatedness issue, the student stays put in the current placement until after the hearing. In that instance, if the school district believes that maintaining the student in the current placement is substantially likely to cause injury to the student or to others, the school may go to court and the court can change the placement.^c

9. Private right of action in federal court. Any party aggrieved by the decision of the hearing officer has the right to bring a civil action in federal court.

10. Attorney's fees. Courts may, at their discretion, award reasonable attorney's fees to parents who prevail in court.

^a These procedural safeguards are spelled out in the *U.S. Code of Federal Regulations*, Title 34, Subtitle B, Chapter III, Part 300.

^b Some advocates state that these safeguards are not always enforced. See *Hall v. Vance County Board*, 774 F.2d 629 (4th Cir. 1985). For example, IEP meetings may be given on short notice, without regard to parents' schedules; last only a few minutes, without parents receiving information about their rights; and may not be open to parent input, that is, be held only to inform parents of decisions already made by the school.

^c See *Honig v. Doe*, 484 U.S. 305, and OSEP 95-16 Memorandum to Chief State School Officers. As this issue goes to press, Congress is considering changes to the “stay put” regulations.

could not afford in many instances to challenge the school systems' greater resources and so provided the legal fee remedy.

Appropriate Education and the Individualized Education Program (IEP)

Although Congress specified that the education provided to the child must be appropriate to his needs, interpreting this standard has proven to be difficult because of the diversity of the special education population. Neither the statutory language of the

IEP be designed to obtain the maximum possible benefit to the child, that is, the child is not entitled to every service that could conceivably confer a benefit. Rather, the Court concluded that "the basic floor of opportunity provided by [the IDEA] consists of access to specialized instruction and related services that are individually designed to provide educational benefits to the handicapped child." The Court noted that the IDEA "leaves to the states the responsibility for developing and executing educational programs for handicapped children" within the broad requirements of the IDEA.

Socialization and mental health are legitimate and, in some cases, required goals to include in the Individualized Education Program (IEP).

IDEA, the regulations interpreting the IDEA, nor court cases interpreting the law specify in detail what constitutes an appropriate education for the entire special needs population. Instead, court cases have laid out broad principles to be applied to individual circumstances.

In general, the standard for judging appropriateness is whether the child's educational program is (1) related to the child's learning capacity, (2) specially designed for the child's unique needs and not merely what is offered to others, and (3) reasonably calculated to confer educational benefit. However, the entitlement is not open-ended: the child is not entitled to every service that could conceivably offer a benefit.

The requirements of appropriateness were interpreted by the Supreme Court in *Board of Education v Rowley*.³³ Amy, a profoundly deaf six-year-old girl, had an IQ of 122, and her parents were concerned that Amy's "energy and eagerness" were not spent in achievement but rather were used to compensate for her disability. The court held that the total package of services furnished to Amy (which included an hour of tutoring each day from a certified teacher of the deaf, as well as three hours of speech therapy each week) was reasonably calculated to enable her to benefit from her education. The law does not require that the

Other cases have established that the school district must consider more than just the narrowly defined educational needs of the child. Socialization and mental health are legitimate and, in some cases, required goals to include in the IEP.

In *Howard S. v. Friendswood Independent School District*,³⁴ the court found that Douglas, an emotionally disturbed teenager, had enjoyed reasonable scholastic and personal successes when enrolled in special education in junior high school. However, when he entered high school and began to manifest behavioral problems, the school chose to treat Douglas's behavioral problems as a disciplinary matter and refused the parents' requests for evaluation of Douglas's special needs.³⁵ The court was persuaded by testimony that, without appropriate behavioral programming, Douglas would probably develop a worsening behavioral pattern, likely ending in incarceration. The court ordered the school district to provide behavioral programming and to reimburse Douglas's parents for the cost of a private school with a therapeutic program recommended by Douglas's psychiatrist.

Least Restrictive Environment (LRE)

Under the IDEA, whenever appropriate, the disabled child must be educated in the regular classroom.²⁹ Judgments on appropriateness have led to wide variations between jurisdictions. However, state funding schemes often included weighted formulas that provided more funding for children with severe disabilities who were placed in separate classrooms.^{26,27}

Modification of the Regular Classroom and Training Regular Teachers

The IDEA requires the school to consider modifications in the regular classroom before moving the child to a more restrictive placement.²⁹ This means that regular classroom teachers sometimes need specialized training to deal with a child's special needs. The IDEA requires state educational agencies to develop plans for personnel development, requires school districts to provide such training,²⁹ and does not allow the district to plead "lack of qualified staff" as a justification for removing a child from the regular classroom.³³

Placement in a More Restrictive Environment

There is a persistent tension between the requirements of appropriate education and least restrictive environment. In some instances, the most appropriate services may be most successful in a separate classroom. What parameters govern the decision to move a child to a more restrictive environment? A two-part test was spelled out by the Fifth Circuit in the case of *Daniel R. R. v. State Board of Education*.³⁶ Daniel was an elementary school student with Down's syndrome. The school district claimed that, because Daniel could not perform at the same academic level as his classmates, he would obtain no benefit from inclusion in the regular classroom.

The Fifth Circuit Court created a two-part inquiry to determine the child's placement. First, the school must determine whether placement in the regular classroom, with supplementary services, could be achieved satisfactorily. To make that determination, the school must ask the following questions:

- Has the school taken steps to provide supplementary aids and services to modify the regular education program to suit the needs of the disabled child?
- Once modifications are made, can the child receive an educational benefit from regular education?
- Will any detriment to the child result from placement in the regular classroom?
- What effect will the disabled child's presence have on the regular classroom environ-

ment and, thus, on the education the other students are receiving?³⁷

Second, if the decision is made to remove the child from the regular classroom for all or part of the day, then the school must also ask whether the child has been mainstreamed (spending some time in the regular classroom) to the maximum extent possible. As the court stated, "The [IDEA] and its regulations do not contemplate an all-or-nothing educational system in which children with disabilities attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services."

The Ninth Circuit Court recently adopted a slightly different standard in the case of *Sacramento City Unified School District, Board of Education v. Rachel H.*³⁸ The Ninth Circuit Court examines four factors in determin-

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ing appropriate placement: (1) the educational benefits available to the child in the regular classroom, (2) the nonacademic benefits of interaction with children who are not disabled, (3) the effect of the disabled child's presence on the teacher and other children in the classroom, and (4) the cost of mainstreaming.

If incorrectly interpreted, the third and fourth criteria spelled out by the Ninth Circuit Court could pose a threat to the spirit of the IDEA. The effect of the presence of the child with disabilities on the other children in the classroom should be a concern only if the child is so disruptive or requires so much of the teacher's time that the teacher is unable to teach.

While there is little doubt that the cost of mainstreaming is an unexpressed criterion in many placement and service decisions made by school districts, nowhere does the IDEA explicitly allow cost to be considered. Certainly, where a service is *necessary* for an individual child, cost considerations would

not allow a school district to escape its obligations to the child. However, in instances where more than one *appropriate* program or configuration of services is available to meet a child's needs, then the school district may be allowed to consider the cost of different alternatives.

Inclusion in General Education

While enthusiasm for inclusion remains high among some parents and professionals, many others are concerned that inclusive programs have not been demonstrated to be effective by any comprehensive research. (Regarding this matter, see the article by Hocutt in this journal issue.) On the other hand, data exist to support the belief that some specially designed separate

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programs are effective for children with certain disabilities.³⁹ There are also reports that inclusive programs vary greatly from school to school and that some attempts at inclusion do not offer specific, individually designed, educational approaches to the students with disabilities who are included.⁴⁰ The IDEA requires that a range of educational placements be available to meet the unique needs of each individual student.

Related Services

Under the IDEA, schools must provide the related services needed for the child to benefit from his or her schooling. Related services include transportation and such developmental, corrective, and other supportive services as are required to assist a child to benefit from special education, including physical therapy, occupational therapy, speech therapy, psychological services, school health services, social work services, and parent counseling and training.²⁹

■ *Access to the Classroom.* The school must provide those related services that are essential for the child to have access to the school. Amber, a young girl born with spina bifida, was the subject of *Irving Independent*

*School District v. Tabro*⁴¹ in which the Supreme Court addressed the issue of related services. Amber's school district was willing to provide her with special education but not with one critical service: Amber needed someone to accompany her to the bathroom and assist with catheterization at least once each day. The school argued that this was a medical procedure which was beyond its responsibility as an educational agency. Amber's counsel argued that the relatively simple service of catheterization was the only barrier between Amber and public school attendance. The Supreme Court established this standard: when (1) a service is necessary or the student will otherwise be barred from receiving an appropriate education and (2) the service can be provided by someone with less training than a physician, then the school must provide the service.

■ *Assistive Technology.* In the 1990 amendments to the IDEA, Congress made schools responsible for ensuring that students with disabilities have access to assistive technology. For children who require medical devices or technology to benefit from schooling and have no other way of obtaining them, the schools in effect become the payer of last resort.⁴²

■ *Extended School Year and Extended School Day.* Although all children to some extent lose school-based skills during summer vacation, some children with severe disabilities stand to lose a great deal, including critical life skills. The courts required that educational programs be designed so that youngsters with severe disabilities do not regress in terms of skills needed for self-sufficiency and independence.

In the case of *Alamo Heights v. State Board of Education*,⁴³ the court held that, if the absence of summer services would place the previous year's gains in jeopardy, then summer services must be offered. The plaintiff, Steven, suffered from cerebral dysplasia, an abnormal development of the brain. He had an unusual laxity in his joints, could walk only with assistance, and had been diagnosed as severely mentally retarded. Although Steven had taken his first unaided steps, the absence of programming over the summer caused him to lose the skill of walking unaided, which he never regained. The

court ordered the school to provide summer services for Steven.

In *Garland Independent School District v. Wilks*,⁴⁴ a severely autistic boy named Sterling moved between extended-day, private treatment (where his mother enrolled him when her resources permitted) and the public schools (which limited services to the six-hour school day). In public school, Sterling's behavior regressed to the point where he caused injury to himself and others unless he was kept in restraints and tied to a chair. When enrolled in the private, extended-day program, however, Sterling was able to sit in a chair without restraints. The court upheld the right to an extended school day.

Services to Infants, Toddlers, and Preschoolers

Under the IDEA, states must provide services to children with disabilities who are between the ages of 3 and 21.²⁹ The 1986 amendments to the IDEA, Public Law 99-457, stated that all children with disabilities become eligible for services from their school district at age three, a change to be implemented in all states by the 1991-92 school year.

The 1986 amendments also established the Handicapped Infants and Toddlers Program, Part H of the IDEA.⁴⁵ Part H supports services to infants and toddlers, from birth through age two, who meet at least one of three criteria: the child (1) is experiencing developmental delay in cognitive, physical, communication, social/emotional, or adaptive development, (2) has been diagnosed with a physical or mental condition that has a high probability of resulting in developmental delay, or (3) is at risk of having developmental delays if early intervention services are not provided.

The states are required to provide services to children in the first two categories and have the option of using federal funds to support services to children in the third category. In addition, members of the child's family are entitled to services to enable them to assist in the development of their child. To receive federal funds, the state must have in place a comprehensive, statewide interagency service delivery system.

Like the IDEA, Part H is not mandatory for the states, but at this writing, all 50 states

have opted to receive federal support under Part H. Unlike services provided under the IDEA, Part H services are not always the responsibility of the local school district; Part H services are to be provided by multiple agencies, coordinated through a state interagency coordinating council, and administered by a lead agency selected by the state.

The Part H program is still relatively new. The initial legislation allowed states five years to develop their programs. In the 1991-92 school year, the number of states in full compliance with Part H jumped from 18 to 41.⁴⁶

Conclusion

The due process and equal protection clauses of the Fourteenth Amendment protect the educational rights of children with disabilities. State law cannot override this constitutional protection. Some state laws spell out additional specific rights of chil-

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dren with disabilities, and some federal antidiscrimination laws, such as the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, also provide important protections. However, for the purposes of understanding the obligations incumbent upon school districts, most of the law guiding current programs is spelled out in the IDEA and in cases interpreting the IDEA.

The IDEA's procedures are designed to encourage parents and school districts to work together in creating an appropriate education program for the child with disabilities. Ideally, there will be agreement between parents and schools about appropriate placement and services for individual children. Where there is not agreement, the IDEA spells out strong due process rights to ensure parental input to the process.

For some children, inclusion in the general classroom, with modifications or

supplemental services, is most appropriate. For other children, separate programs may be more effective and appropriate. At this time, it seems likely that a range of educational placements will continue to be necessary to meet the requirements of the IDEA.

1. U.S. Congress, Committee on Education and Labor, Ad Hoc Subcommittee on the Handicapped. *Hearings*. Testimony of Dr. Samuel Kirk, director, Institute for Research on Exceptional Children, University of Illinois. 89th Cong., 2d sess., 1966.
2. Weintraub, F., and Abeson, A. New education policies for the handicapped: The quiet revolution. In *Public policy and the education of exceptional children*. F. Weintraub, A. Abeson, J. Ballard, and M. LaVor, eds. Washington, DC: Council for Exceptional Children, 1976, pp. 7–13.
3. U.S. Congress, Committee on Education and Labor, Subcommittee on Select Education. *Hearings*. Testimony of James A. Harris, president, National Education Association. 94th Cong., 1st sess., 1975.
4. Public Law 34–5 (2/16/1857) An Act to Establish the Columbian Institute for the Deaf and the Dumb.
5. Public Law 45–186 (3/3/1879) An Act to Promote the Education of the Blind.
6. Public Law 85–804 (1958) National Defense Education Act.
7. Public Law 85–926 (9/6/58) An act to Encourage Expansion of Teaching in the Education of Mentally Retarded Children through Grants to Institutions of Higher Learning and to State Educational Agencies.
8. Public Law 88–164 (10/31/63) Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963.
9. Public Law 89–10, 64 Stat. 1100(1965) Elementary and Secondary Education Act.
10. Martin, E. Breakthrough for the handicapped: Legislative history. *Exceptional Children* (March 1968) 34:493–503.
11. Public Law 91–229 (1970) Elementary and Secondary Education Act Amendments of 1970.
12. Public Law 93–380 (1974) Education of the Handicapped Act.
13. 42 U.S.C. 9835(d) (1995).
14. Public Law 90–576 (1968) Vocational Education Amendments of 1968.
15. Public Law 91–229 (1970) Education of the Handicapped Act, as included within the Elementary and Secondary Education Act.
16. U.S. Congress, Committee on Labor and Human Resources, Subcommittee on Disability Policy, and Committee on Economic and Education Opportunities, Subcommittee on Childhood, Youth and Families. *Joint Hearing on the Individuals with Disabilities Education Act, Part B*. Testimony of Dr. John Brademas. 104th Cong., 2d sess., 1995.
17. *Brown v. Board of Education*, 347 U.S. 483 (1954).
18. *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. PA 1971).
19. *Mills v. Board of Education*, 348 F. Supp. 866 (1972).
20. U.S. Congress, Committee on Education and Labor, Select Subcommittee on Education. *Hearings*. 93rd Cong., 1st sess., 1973.
21. Public Law 101–336(1990) Americans with Disabilities Act.
22. *Franklin v. Guinnett County Pub. Sch.*, 503 U.S. 60 (1991).
23. Public Law 101–476 (1990) Individuals with Disabilities Education Act.
24. Gerald R. Ford. Statement on signing the Education for All Handicapped Children Act of 1975. *Public Papers of the President of the United States*. Vol. II. Washington, DC: Office of the Federal Register, National Archives and Records Service, General Services Administration, 1975, p. 1935.
25. *Smith v. Robinson*, 468 U.S. 992 (1984).
26. The National Association of State Boards of Education. *Winners all: A call for inclusive schools*. The report of the NASBE Study Group on Special Education. Alexandria, VA: NASBE, October 1992.

27. Fruchter, N., Berne, R., Marcus, A., et al. *Focus on learning*, a report on reorganizing special education in New York City. New York: New York University Institute for Education and Social Policy, October 1995.
28. Martin, R. Is this where we came in? *Learning Disabilities Association Newsbriefs* (July/August 1995) 30,4:3-5.
29. *Code of Federal Regulations*, Title 34, Subtitle B, Chapter III, Part 290.
30. See *Speilberg v. Henrico County Board*, 853 F.2d 256 (4th Cir. 1988).
31. Louis Harris and Associates, Inc. *The ICD survey III: A report card on special education*. New York: International Center for the Disabled, 1989.
32. Zirkel, P. Special education: Needless adversariness? *Phi Delta Kappan* (June 1993)74:809-10.
33. See *Board of Education v. Rowley*, 458 U.S. 176 (1982).
34. *Howard S. V. Friendswood Independent School District*, 454 F. Supp.634 (1978).
35. Martin, R. *Extraordinary children, ordinary lives: Stories behind special education case law*. Champaign, IL: Research Press, 1991. See chapter 2.
36. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989).
37. Specifically, the IDEA's regulations recognize disruptive behavior by the disabled child as inappropriate (see note no. 29, Code of Federal Regulations). Even if the child is not disruptive, if the disabled child requires so much of the teacher's time (despite the use of supplementary services, such as a teacher's aide) that the rest of the class suffers, then, the court held, the balance will tip in favor of removing the child to a more restrictive environment.
38. *Sacramento City Unified School District, Board of Education v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994)
39. Fuchs, D., and Fuchs, L.S. Special education can work. In *Issues in educational placement: Students with emotional and behavioral disorders*. J.M. Kauffman, J.W. Lloyd, D.P. Hallahan, et al., eds. Hillsdale, NJ: Erlbaum, 1995, pp.363-77.
40. Baker, J., and Zigmond, N. The meaning and practice of inclusion for students with learning disabilities: Themes and implications from the five cases. *The Journal of Special Education* (1995) 29:163-80.
41. *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).
42. EdSource. *Clarifying complex education issues*. EdSource Report. Menlo Park, CA: EdSource, June 1995, p.8.
43. *Alamo Heights v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986).
44. *Garland Independent School District v. Wilks*, 657 F.Supp. 1163 (N.D.Tex. 1987).
45. *Code of Federal Regulations*, Title 34, Subtitle B, Chapter III, Part 303.
46. Office of Special Education Programs. *Implementation of the Individuals with Disabilities Education Act: Sixteenth annual report to Congress*. Washington, DC: U.S. Department of Education, 1994, p. 30.