

Special Protections for Students with Disabilities

by *Laura A. Athens*

Students with disabilities have a wide range of procedural and substantive rights available to them. While students with disabilities are legally entitled to these rights, parents often encounter difficulties when attempting to assert these rights on behalf of their children. The key federal legislation concerning special education for students with disabilities is the Individuals with Disabilities Education Act (IDEA). Other federal statutes addressing the rights of students with disabilities include Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

Purpose of IDEA

IDEA mandates that public schools provide a free appropriate public education emphasizing special education and related services for children with disabilities from 3 to 21 years old.¹ Children with disabilities include those with mental retardation; specific learning disabilities; speech, language, hearing or visual impairments; serious emotional disturbance; autism; traumatic brain injury; and other health impairments. To be eligible under the Act, a child must, by virtue of his or her disability, require special education and related services.² Under the statute, special education is defined as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability."³

Children with disabilities are entitled to not only specially designed instruction but also related services, such as speech therapy, audiology, physical and occupational therapy, social work, transportation, rehabilitation counseling, and psychological and health care services, if required to assist the child to benefit from special education.⁴ Older children are entitled to a consideration of prevocational and vocational education needs and transition services designed to promote progression from school to post-secondary education, vocational training, employment and independent living.⁵

IDEA requires local educational agencies to adopt procedures to ensure that all children residing within the school district who require special education are properly identified and evaluated.⁶ Evaluation for special education programs and services must be performed in a timely and comprehensive manner, and must assess the educational needs of the child as well as eligibility.⁷

The Michigan Mandatory Special Education Act (MMSEA) goes beyond federal law in two important respects. First, the special education programs and services must not only be appropriate, but must be "designed to develop the maximum potential" of each student. Second, eligible children are entitled to special education programs and services from birth up to age 26.⁸

IDEA Amendments of 1997

IDEA's predecessor, the Education for All Handicapped Children Act, was originally enacted in 1975. Congress most recently reauthorized and amended IDEA in 1997. When IDEA was amended, Congress found that the Act

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had been successful at ensuring access to education; however, the effectiveness of the Act had been impeded by low expectations for children with disabilities and insufficient application of teaching methods proven effective by research.⁹ The 1997 amendments were intended to highlight the importance of having high expectations; ensuring access to the general education curriculum to the maximum extent possible; providing meaningful opportunities for parents to participate in their child's education; and promoting high-quality, intensive professional development. Other objectives included properly meeting the needs of minority and limited-English-proficiency students. Thus, the intent of the statute shifted from access to accountability and high-quality intervention for all children with disabilities.¹⁰

Individualized Education Program

An individualized education program (IEP) must be developed for each student with a disability and reviewed at least annually.¹¹ The IEP team, including the parents, school personnel, other interested persons, and the child, if appropriate, meet to establish educational goals and objectives and to determine the appropriate educational program and services.¹² An IEP report is written to document the educational program and services and annual goals and objectives for the child.¹³

The IEP team meeting is intended to provide an opportunity for the parents and school district staff to jointly decide what programs and services will be provided to meet the child's needs. The parents are expected to be actively involved and should be treated as "equal participants" in developing the child's IEP.¹⁴ The IEP must contain all of the specific special education and related services needed by the child, not just those available from the district. If the required services are not directly available from the district, the district must provide them by contract

or other arrangement.¹⁵ The IEP must specify the type of services required, and clearly indicate the amount, frequency and duration of services to be provided.¹⁶

Least Restrictive Environment

A key concept embodied in IDEA is the right of children with disabilities to be educated with their non-disabled peers in the least restrictive environment (LRE). The LRE provision mandates that children with disabilities should be educated in regular classrooms with children who are not disabled to the "maximum extent appropriate."¹⁷ Placement in special classes or separate schools is permitted "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹⁸ Supplemental aids and services are broadly defined to include any aids, services or supports that are provided in the regular education setting to enable children with disabilities to be educated with their non-disabled peers.¹⁹ Examples of supplementary aids and services include paraprofessional support, assistive listening devices, visual schedules, computers and calculators.

The LRE mandate reflects Congress' view that inclusion is essential to providing equal educational opportunity to children with disabilities. Historically, segregated educational placement has resulted in "watered-down curricula, low expectations, and substandard education." The LRE requirement was intended to remedy these inequities.²⁰

IDEA regulations concerning general LRE requirements parallel the statutory language, and further elaborate that placement should be "as close as possible to the child's home."²¹ Typically, the child should be educated in the school that he or she would attend if he or she was not disabled unless the IEP "requires some other arrangement."²² Placement must be based on the child's unique abilities and needs; it is impermissible to base placement

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solely on factors such as "category of disability, significance of disability, availability of special education and related services, configurations of the service delivery system, availability of space or administrative convenience." In addition, a student with a disability does not have to "demonstrate achievement of a specific performance level as a prerequisite for placement into a regular classroom."²³ The pertinent inquiry is whether the child with the disability can make progress on his or her own IEP goals within a regular education classroom with the appropriate supplemental aids and services.

While Congress has expressed a strong preference for mainstreaming children with disabilities, mainstreaming is not appropriate in every case.²⁴ The concept of an "appropriate" education is not intended to be static. An educational program that may be effective for one child may not be appropriate for another. School districts must maintain a continuum of options ranging from regular education placement to special classrooms to separate facilities designed to meet the unique needs of special education students.²⁵

Procedural Safeguards

IDEA contains a number of procedural safeguards including the parent's rights to be notified of any change in the child's placement, to examine educational records, to obtain an independent educational evaluation at public expense, and to present disputes at "an impartial due process hearing."²⁶ After administrative review, "any party aggrieved by the findings and decision" rendered in the administrative proceedings has a right to bring a civil action in state or federal court.²⁷

A two-part test for assessing the appropriateness of an IEP was enunciated in the landmark United States Supreme Court case, *Board of Education of the Henrick Hudson School District v. Rowley*.²⁸ The first step involves an inquiry as to whether the district has complied with the procedural requirements of IDEA. The second step addresses whether the substance of the IEP is reasonably calculated to provide the student with educational benefit. In Michigan, the higher maximum potential standard applies since it has been incorporated into IDEA's definition of free appropriate public education.²⁹

IDEA provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child."³⁰ The "stay put" provision is intended to maintain the status quo, to keep the child in his existing program until the dispute with the school district is resolved.³¹ The United States Supreme Court noted that one of the purposes of the stay put provision is "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings."³² The stay put provision "guarantees" that a student's education will not be interrupted while a pro-

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posed program is being contested.³³ The right to stay put is "unequivocal,"³⁴ and operates essentially an "automatic preliminary injunction."³⁵

Private Placement

IDEA does not apply to private schools or institutions of higher education; however, a public school district may be required under IDEA to evaluate or provide various related services to a child in a private school³⁶ or may be ordered to reimburse a parent for private school placement. IDEA provides for reimbursement for private placement when the school district has failed to provide a free appropriate public education to a child with a disability.³⁷ Under United States Supreme Court precedent, parents who unilaterally place their child in a private school are entitled to reimbursement from the public school district if: (1) the IEP proposed by the school district is inappropriate, and (2) the private placement is proper.³⁸ Equitable factors are relevant in determining the relief granted. The court or hearing officer has broad discretion in fashioning relief.³⁹ Parents must notify the school district of their intent to enroll their child in a private school at public expense or risk forfeiting the right to tuition reimbursement.⁴⁰

Under IDEA regulations, if residential placement is necessary to provide special education and related services, the placement, including non-medical care and room and board, must be provided at public expense.⁴¹ The residential placement must, however, be necessary for educational purposes as opposed to medical, social or emotional problems that are separable from the learning process.⁴² Courts have found school districts liable for the cost of private residential placement in a variety of circumstances including when the student has interrelated emotional and educational difficulties necessitating residential placement, when emotional problems prevent the student from making educational progress, when the public school staff is not trained or equipped to deal with the student's problems, or when the student needs intensive intervention in a highly structured setting. Tuition reimbursement is generally not awarded if placement is primarily for non-educational reasons such as substance abuse, runaway behavior, or defiant behavior that only occurs at home.

Section 504 of the Rehabilitation Act

Students who do not meet the eligibility criteria of IDEA may be eligible for special education services and accommodations under Section 504 of the Rehabilitation Act of 1973. Section 504 prohibits discrimination on the basis of disability by programs and activities that receive federal financial assistance.⁴³ Public school districts receive federal financial assistance, and therefore are subject to the requirements of Section 504. Under Section 504, it is not necessary for a student to meet the criteria of a specific disability category. Disability is broadly defined under Section 504 as a physical or mental impairment that substantially limits

one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.⁴⁴ Major life activities include learning, seeing, hearing and breathing.⁴⁵

School districts must establish standards and procedures for identification, evaluation and placement of persons who need special education and services.⁴⁶ Section 504, like IDEA, requires that eligible students be provided a free appropriate public education in the least restrictive environment.⁴⁷ A child with a disability may be entitled to special education under IDEA or Section 504 or both.

Americans with Disabilities Act

Title II of the Americans with Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability in all services, programs and activities of state and local governments, including public schools.⁴⁸ A public school is obligated to provide reasonable modifications; auxiliary aids and services; and to remove architectural, communication and transportation barriers to afford students with disabilities an equal opportunity to participate and enjoy the benefits of programs and services provided by the school.⁴⁹ Reasonable modifications in policies, practices and procedures must be made when necessary to avoid discrimination based on disability unless the school can demonstrate that the modifications would fundamentally alter the nature of the program or services.⁵⁰ Auxiliary aids and services include interpreters, readers, taped texts and augmentative communication devices.⁵¹

Title II of the ADA also requires public schools to administer their programs in the most integrated settings appropriate to the needs and abilities of individuals with disabilities.⁵² It is not permissible to impose a fee or surcharge on individuals with disabilities to cover the cost of auxiliary aids and services or program accessibility.⁵³

In cases involving discrimination against students in a private school, college or university, Title III of the ADA, which prohibits discrimination by public accommodations, mandates "reasonable modifications" to accommodate individuals with disabilities unless it would impose an "undue burden," and requires removal of architectural barriers when removal is "readily achievable."⁵⁴

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Footnotes

- 1 20 U.S.C. Sec. 1401(d), 1411(a).
- 2 20 U.S.C. Sec. 1402(3).
- 3 20 U.S.C. Sec. 1402(25).
- 4 20 U.S.C. Sec. 1402(22).
- 5 20 U.S.C. Sec. 1402(30).
- 6 20 U.S.C. Sec. 1412(a)(3).
- 7 20 U.S.C. Sec. 1414(a)(1)(B).
- 8 M.C.L. Sec. 380.1711, 380.1751.
- 9 20 U.S.C. Sec. 1401(c)(3)&(4).
- 10 20 U.S.C. Sec. 1401(c)(5)&(7).
- 11 20 U.S.C. Sec. 1414(d)(1)&(4).
- 12 20 U.S.C. Sec. 1414(d)(1)(B).
- 13 20 U.S.C. Sec. 1414(d)(1)(A).
- 14 34 C.F.R. Part 300, Appendix A - Notice of Interpretation, Questions 5 and 9.
- 15 *Id.* at Question 31.
- 16 *Id.* at Question 35.
- 17 20 U.S.C. Sec. 1412(a)(5).
- 18 *Id.*
- 19 20 U.S.C. Sec. 1402(29).
- 20 *Back to School on Civil Rights, Advancing the Federal Commitment to Leave No Child Behind*, National Council on Disability 253 (January 25, 2000).
- 21 34 C.F.R. Sec. 300.550, 300.552(b)(3).
- 22 34 C.F.R. Sec. 300.552(c).
- 23 34 C.F.R. Part 300, Appendix A - Notice of Interpretation, Question 1.
- 24 *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).
- 25 34 C.F.R. Sec. 300.551.
- 26 20 U.S.C. Sec. 1415(b).
- 27 20 U.S.C. Sec. 1415(e)(2).
- 28 458 U.S. 176 (1982).
- 29 *Brimmer v. Traverse City Area Public Schools*, 872 F. Supp. 447 (W.D. Mi. 1994).
- 30 20 U.S.C. Sec. 1415(j); 34 C.F.R. Sec. 300.514(a).
- 31 *Stacey G. v. Pasadena Indep. Sch. Dist.*, 695 F.2d 949, 953 (5th Cir. 1983).
- 32 *School Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373 (1985).
- 33 *Board of Educ. of Comm. High School No. 218 v. Illinois State Board of Education*, 103 F.3d 545, 550 (7th Cir. 1996).
- 34 *Honig v. Doe*, 484 U.S. 305, 325 (1988).
- 35 *Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996).
- 36 20 U.S.C. Sec. 1412(a)(10); *see also*, Michigan Auxiliary Services Act, M.C.L. Sec. 380.1296.
- 37 20 U.S.C. Sec. 1412(a)(10)(C)(ii).
- 38 *Florence City Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).
- 39 *School Comm. of the Town of Burlington*, 471 U.S. at 374.
- 40 20 U.S.C. Sec. 1412(a)(10)(C)(iii).
- 41 34 C.F.R. Sec. 300.302.
- 42 *Tennessee Dep't of Mental Health and Mental Retardation v. Paul B. and the Hamilton County Board of Educ.*, 88 F.3d 1466, 1471 (6th Cir. 1996).
- 43 29 U.S.C. Sec. 794.
- 44 34 C.F.R. Sec. 104.3(j).
- 45 34 C.F.R. Sec. 104.3(j)(2)(ii).
- 46 34 C.F.R. Sec. 104.32, 104.35.
- 47 34 C.F.R. Sec. 104.33, 104.34.
- 48 42 U.S.C. Sec. 12132.
- 49 42 U.S.C. Sec. 12131(2).
- 50 28 C.F.R. Sec. 35.130(b)(7).
- 51 28 C.F.R. Sec. 35.104(1)-(4).
- 52 28 C.F.R. Sec. 35.130(d).
- 53 28 C.F.R. Sec. 35.130(f).
- 54 42 U.S.C. Sec. 12182.

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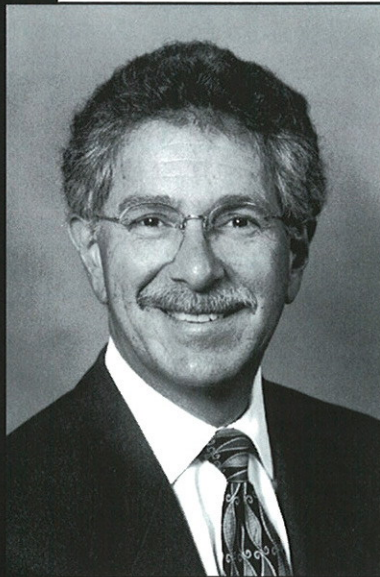
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