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The Expanding Understanding of Educating Students with Disabilities and the Increased Focus on Inclusion

by Robin S. Ballard

The rights of students with special education needs are being zealously safeguarded and litigated in New Jersey and throughout the country. These rights are asserted under the Individuals with Disabilities Education Act (IDEA), and were formally enacted less than 40 years ago. Due to the cumbersome nature of special education litigation and the ever-expanding issues involving children with disabilities and their education, many aspects of the implementation of the law remain undefined, and have been left for the courts to consider.

The IDEA requires public school districts to provide any student who is eligible for special education and related services with a free, appropriate public education.[1] While Congress does not define "appropriate public education," the U.S. Supreme Court defines it as an education that is "reasonably calculated to provide meaningful educational benefit to the individual child."[2] This ruling overturned a lower court's holding that the IDEA required states to maximize a student's potential.[3]

Education is commonly thought of as referring to learning and developing academic skills. The IDEA has interpreted education much more broadly. Under the IDEA, what education is for a student depends upon that student's individual needs. While certainly academics enter into special education programs, delivered through an individualized education program (IEP), the Third Circuit has held that: "Where basic self help and social skills such as toilet training, dressing, feeding, and communication are lacking, formal education begins at that point."[4] Some students' needs are even more basic than these identified areas.

The IDEA does not require school districts to provide the best possible education for students with disabilities. Instead, it provides a "basic floor" of opportunity that consists of "access to specialized instruction and related services" individually designed for each child.[5] Accordingly, an appropriate education differs from student to student, depending on a myriad of factors affecting the student's ability to assimilate information.[6]

The Third Circuit has required more than the basic floor of education, and has clarified that it expects an IEP to "provide 'more than a trivial educational benefit.'"[7] According to the Third Circuit, for an IEP to be sufficient it must provide "significant learning" that confers "meaningful benefit," which is "gauged in relation to [each] child's potential."[8]

New Jersey has adopted the standards set forth by the U.S. Supreme Court and the Third Circuit for reviewing the sufficiency of IEPs.[9] Consequently, if an IEP is reasonably calculated to provide more than a *de minimus* benefit, taking into account the child's potential, the school district has met its obligations under the IDEA.[10]

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As noted above, in determining whether learning is 'meaningful,' an analysis is required to compare the benefits with the child's potential and specific challenges. In *Rowley*, the United States Supreme Court utilized Congress's emphasis on a disabled child's achievement of a "reasonable degree of self-sufficiency" as a measure of whether an IEP offered an appropriate education.[11] Educational programming must be reasonably calculated to provide a benefit for the student and work toward helping the student transition through the phases of life, including life beyond secondary education when the student graduates or ages out of an entitlement to educational services from the district. The IEP is to contain activities that will assist the student in day-to-day activities, both now and in the future. With older students, consideration in IEPs is given to transition needs, including social, academic and vocational development; the agencies from which consultation is needed; and development of postsecondary goals, including employment, further education, independent living and training.[12]

Since *Rowley*, the Supreme Court has considered several cases arising under the IDEA. The IDEA does not provide for students to receive medical services beyond diagnostic and evaluation purposes.[13] Medical care in the form of catheterization was determined to be part of the services required through the IDEA in 1984.[14] Also, in 1993, one-to-one nursing services were held to be required through the IDEA, if necessary for a student with a ventilator to participate in his or her educational program.[15]

In 1985, the Supreme Court found the IDEA permitted parents to seek reimbursement for a unilateral placement of their disabled child in a private school.[16] The Court found that parents were entitled to access this as an equitable remedy, if faced with the alternative of placing their child in an inappropriate program.[17] Also in 1993, the Supreme Court expanded placement options available to students with disabilities to include schools that were not expressly approved by the Department of Education of the state in which the student lived.[18]

In 1993, the Supreme Court found no violation to the establishment clause of the U.S. Constitution in a school district funding a sign language interpreter to attend a sectarian school with a hearing-impaired child, since the service provided was neutral.[19]

In 2005, the Supreme Court considered the issue of which party had the burden of proof in special education matters, and determined that absent a state law to the contrary, there was no reason to depart from the general rule of placing the burden on the party bringing the action.[20] New Jersey did not have a state law assigning the burden of proof in special education cases; however, shortly after this decision, one was enacted to place the burden of proof on school districts in special education matters.[21]

In 2007, the Court held that parents have independent, enforceable rights with regard to the education of their disabled children through the IDEA.[22] In 2009, the Supreme Court found the IDEA contained no categorical bar that would prevent parents from pursuing an action to seek reimbursement for a unilateral placement, even when the placement was made prior to the student being found eligible for special education and related services.[23]

Reflecting on the time period in which these protections have been in place, there have been many positive societal shifts toward inclusion of students not only in public schools, but within general education classes. Students with disabilities are given opportunities to participate in general education, extracurricular and non-academic activities with their non-disabled peers, with or without support, to the greatest extent appropriate.[24] In 2008, New Jersey took an affirmative step toward fully including students with disabilities in general education activities by passing a law that permits special education students to participate in graduation activities after four years of high school and receive a certificate of attendance, if the student is not graduating at that time.[25]

All students eligible for protection under the IDEA are also eligible for the protections of 29 U.S.C. Section 794 of the Rehabilitation Act, which is part of the Americans with Disabilities Act. The Office for Civil Rights (OCR), part of the United States Department of Education, is charged with enforcing anti-discrimination laws. Earlier this year, the OCR took a position regarding inclusion of students with disabilities in extracurricular activities, including clubs and athletics, that requires public entities to ensure equal opportunities for participation.[26] Recognition was provided to the competitive nature of many extracurricular activities, and the OCR assures public entities they may continue to use selection criteria for participation, as long as they are non-discriminatory. Students with disabilities, if otherwise qualified, must be afforded equal access to participation, and the OCR urges against using stereotypes or presumptions about such participation.[27]

Although the OCR encourages public entities to make modifications to include students with disabilities, fundamental alterations to the activity, such as moving the location of a base in a baseball game, would not be required. The OCR details the individualized inquiry public entities must undertake to determine if a modification might be made to an activity to allow participation by a qualified student with disabilities. This includes investigating whether using an alternative approach to some aspect of the activity, such as how the competition begins, would allow a student with disability-related limitations to participate without fundamentally altering the activity or competition (*i.e.*, using a flag to start a race rather than shooting a gun, to allow a student with a hearing impairment to participate).[28]

School districts in New Jersey regularly include students with disabilities in extracurricular activities. In fact, one student diagnosed with autism is currently seeking a deviation from the rules of the New Jersey State Interscholastic Athletic Association to participate on his high school's football team for a fifth year.[29]

This guidance from the OCR memorializes the trend toward ensuring equal rights and equal opportunities for inclusion in all relevant aspects of education without discrimination on the basis of disability. Equal opportunities are not tantamount to equal results, however, and this guidance from the OCR may have the effect of increasing litigation over whether a modification to an activity constitutes a fundamental alteration.

The focus is on inclusion of students with disabilities, although case law clarifies that students with disabilities are to be educated with non-disabled peers to the greatest extent appropriate.[30] In accordance with the mandate of the IDEA in this regard, New Jersey offers a full continuum of educational placements to meet the needs of students with disabilities, ranging from the general education classroom to private schools for the disabled, hospitals and home instruction.[31]

The courts have already been faced with determining when inclusion is appropriate. An IEP placing a student completely in a self-contained setting with only students with disabilities has been found to be appropriate by the Third Circuit, even when the parents sought inclusion for their child.[32] With the increased societal focus on including students with disabilities in general education settings, courts are likely to encounter additional challenges in determining to what extent this inclusion is appropriate for a student with disabilities, given the limitations faced by each child.

Endnotes

1. 20 U.S.C.A. §1412(a)(1).
2. *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 192 (1982).
3. *Id.*
4. *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980).
5. *Id.* at 197–201.
6. *Id.* at 198.
7. *Ridgewood Board of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999).
8. *Ibid.*
9. *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High School Dist.*, 116 N.J. 30, 47–48 (1989) (noting that districts are not required to provide the "best" education available). *See also K.G. and J.G. o/b/o O.G. v. Morris Board of Ed.*, OAL Dkt. No. EDS 11872-06 (2007) (explaining that districts are not required to provide their special education students "with an education beyond a meaningful 'benefit'"); *R.D. and A.D. for C.D. v. Delran Board of Education*, OAL Dkt. No. EDS 8594-99 (2001) (noting the same).
10. *C.J. and D.J. o/b/o B.J. v. Ocean City Board of Education*, OAL Dkt. No. EDS 6499-02 (2004).
11. *Rowley, supra*, 458 U.S. at 201. *See also Oberti v. Clementon Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993) (stressing Congress's recognition of the importance of teaching skills that foster independence).
12. N.J.A.C. 6A:14-3.7(e).
13. 34 C.F.R. 300.34.
14. *Irvington Independent Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
15. *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66 (1998).
16. *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985).
17. *Id.*
18. *Florence County Sch. Dist. Four v. Carter, by and through Carter*, 510 U.S. 7 (1993).
19. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).
20. *Schaffer v. Weast*, 546 U.S. 49 (2005).
21. N.J.S.A. 18A:46-1.1.
22. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).
23. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).
24. *Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist.*, 995 F. 2d 1204 (3d Cir. 1993).
25. N.J.S.A. 18A:7C-5.2.
26. Jan. 25, 2013, dear colleague letter from U.S. Dep't of Educ. Office for Civil Rights.
27. *Id.*
28. *Id.*
29. *Starego v. New Jersey State Interscholastic Athletic Assn.*, Docket No. 3:13-cv-3172.
30. *Oberti, supra.*
31. N.J.A.C. 6A:14-4.3.
32. *L.G. v. Fair Lawn Bd. of Educ.*, 486 Fed. Appx. 967 (3d Cir. 2012).

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