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EDITOR'S NOTE

This issue of the Journal is a paper symposium on special education. In this issue, you will hear many voices. We have tried to bring together a wide variety of contributors. There are, of course, the voices of students, professors, practitioners, and educators. In and behind their articles, however, you will also hear the voices of parents, children, school staff, and many others. Our intent is to raise a dialogue; that is, after all, the purpose of a symposium.

This is the Journal's first paper symposium. It is also the Journal's longest issue by far. Putting together this Journal has been a tremendous team effort. I would like to thank the entire staff for working admirably under a very tight schedule. Their dedication to the Journal is especially heartening to a graduating Editor-in-Chief. I look forward to reading their work as a subscriber.

Special education is a difficult and emotional issue. So, as you read on, it might be helpful to recall that symposium was defined by the Greeks to mean a drinking feast. We hope that you will enjoy the feast in the best of spirits.

Adam Mizock

Editor-in-Chief

The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary

MARK C. WEBER *

Least restrictive environment obligations would appear to be a form of negative rights: A person is entitled to be free from intrusion or control to the greatest extent possible. In many contexts, courts have given the right that construction. For example, in *Olmstead v. L.C.*,¹ the Supreme Court ruled that under the Americans with Disabilities Act, a person involuntarily confined on account of mental retardation has the right to placement in the least restrictive setting that would serve her needs, consistent with professional judgment concerning treatment and the legitimate cost concerns of the government.² Similarly, in *Youngberg v. Romeo*,³ the Court construed due process to require that any confinement of persons with mental disabilities be in “reasonably nonrestrictive” conditions.⁴ The right is consistent with other

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¹ 527 U.S. 581 (1999). See generally Michael L. Perlin, “*Their Promises of Paradise*”: *Will Olmstead v. L.C. Resuscitate the Constitutional “Least Restrictive Alternative” Principle in Mental Disability Law?*, 37 HOUS. L. REV. 999 (2000) (discussing significance of *Olmstead* with respect to treatment in the least restrictive environment).

² See 527 U.S. 581 at 596.

³ 457 U.S. 307 (1982).

⁴ See *id.* at 324. These holdings are of a piece with *O’Connor v. Donaldson*, 422 U.S. 563 (1975), which found that a non-dangerous individual who was not receiving treatment could not be involuntarily confined on account of mental illness.

constitutional rights, which are typically rights to be free from some form of intrusion, rather than rights to a specified good or service.⁵

In special education law, the situation is different. The Individuals with Disabilities Education Act (IDEA)⁶ recites the general obligation, “To the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled”⁷ The statute goes on to provide:

[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment [must] occur[] only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁸

When a court asks if a school district has provided all the services that could make special classes or separate schooling unnecessary, it effectively creates a positive entitlement to services. This positive entitlement has two dimensions, one heightening the level of services to which a child is entitled under the special education law, the other

⁵ See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (finding no due process right to protection from maiming by violent custodial parent despite government agency’s awareness of danger to child). See generally Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (criticizing conventional wisdom that Constitution provides individuals only negative rights).

⁶ 20 U.S.C. §§ 1400-1487 (2000). Some of the ideas in the discussion that follows are developed at greater length in MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE §§ 3.1, 8.4, 9.2-3 (1992 & Supp. 2000).

⁷ 20 U.S.C. § 1412(a)(5) (2000).

⁸ *Id.* Other laws may require some affirmative measures to permit education in the least restrictive environment, though none contains language as emphatic as that in IDEA. See *Essen v. Bd. of Educ.*, No. 92 CV-1164 (FJS) (GJD), 1996 WL 191948 (N.D.N.Y. Apr. 15, 1996) (denying motion to dismiss claim under section 504 of Rehabilitation Act of 1973 and Americans with Disabilities Act based on policy of failing to modify curriculum to permit education in the least restrictive environment).

lessening the degree of deference to local decision making that the law requires.

First, the positive command in the statute provides a basis for services that are at a higher level than the standard of meaningful access to education, which *Board of Education v. Rowley*⁹ found to be the basic entitlement to appropriate education conferred by the statute that is now IDEA.¹⁰ In *Rowley*, the parents of a deaf first-grader challenged an individualized education program that failed to include the services of a qualified sign-language interpreter in each of her academic classes.¹¹ Although she performed better than the average child in her class and was advancing from grade to grade, her hearing aid and lip-reading abilities allowed her to understand less than sixty percent of what was being said in class.¹² The Court reversed the lower court's decision to require the sign-language interpreter, declaring that by requiring schools to provide appropriate education, Congress intended to impose no "greater substantive educational standard than would be necessary to make . . . access [to education] meaningful."¹³ Although the education provided has to confer some educational benefit in order to meet the statutory standard of appropriate education, the benefit does not need to be commensurate with that received by children without disabilities.¹⁴

⁹ 458 U.S. 176, 192 (1982).

¹⁰ For an extended discussion of ways in which the lower courts have departed from *Rowley's* apparent limits on what the special education law requires, see Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349 (1990). For criticism of *Rowley*, see for example, Bonnie P. Tucker, *Board of Education of the Hendrick Hudson Central School District v. Rowley: Utter Chaos*, 12 J.L. & EDUC. 235 (1983).

¹¹ See *Rowley*, 458 U.S. at 184-85. The program provided her with a wireless hearing aid, an hour of tutoring a day, and three hours of speech therapy each week. See *id.*

¹² See *id.* at 185.

¹³ *Id.* at 192.

¹⁴ See *id.* at 200-01. The Court, however, restricted its analysis to the facts of the case; a child already receiving significant services was performing better than average in the regular classroom of her grade. See *id.* at 202. The Court did not say whether the restriction was of the entirety of the

In *Department of Education v. Katherine D.*,¹⁵ decided just a year after *Rowley*, the Ninth Circuit ruled that a school district had to provide a girl with multiple severe disabilities with suctioning of mucus from her tracheostomy tube and a variety of other health services.¹⁶ The services permitted her to attend class at a public school rather than receive individual services at home.¹⁷ The court reasoned that the least restrictive environment provision required the child to be offered all the services needed to keep her in the public school.¹⁸ The court quoted the provision of the statute that forbids removal from classes including children without disabilities if supplementary aids and services can make education there satisfactory.¹⁹

Other courts have also ruled that the limits that *Board of Education v. Rowley* placed on the duty to provide appropriate education do not control when mainstreaming is at issue.²⁰ For example, in *Board of Education v. Illinois State Board of Education*,²¹ the court required a school district to reimburse a parent for the unilateral placement of a child with disabilities in a mainstreamed private preschool, noting that the *Rowley* standard fails to apply to least restrictive environment requirements.²² Many other cases illustrate the willingness of courts to order school districts to provide services to enable children to learn in mainstreamed settings. In *Woolcott v. State Board of Education*,²³ the court required

discussion of appropriate education or simply the application to children like the plaintiff.

¹⁵ 727 F.2d 809 (9th Cir. 1983).

¹⁶ *See id.* at 815.

¹⁷ *See id.* at 815-16.

¹⁸ *See id.* at 815.

¹⁹ *See id.* (citing 20 U.S.C. § 1412(5)(B) (1982)).

²⁰ *See Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 695-96 & n.25 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025, *reinstated in part*, 967 F.2d 470 (1992); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 n.7 (8th Cir. 1987).

²¹ 184 F.3d 912 (7th Cir. 1999).

²² *See id.* at 916 n.1.

²³ 351 N.W.2d 601 (Mich. App. Ct. 1984) (relying on state educational standards as well as federal law).

the district to provide a cued speech interpreter to keep a child in regular education. In *Blazejewski v. Board of Education*,²⁴ the court ordered resource room services to enable a child to compete in a regular classroom. In *Stacey G. v. Pasadena Independent School District*,²⁵ the court ordered behavior management training for the child's parents to keep a child in a more normal setting.

Second, the statute's affirmative entitlement to services gives hearing officers and courts a basis not to defer to local school districts' decisions about educational methodology, an area in which *Rowley* otherwise requires deference to school authorities' decision making. *Rowley* said that it was "highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories," and so the educational methods proposed by the school had to be respected.²⁶

However, the courts need not defer to decisions on methodology when they contravene the obligation to provide services to enable the child to succeed in the least restrictive educational setting. In *Roncker v. Walter*,²⁷ decided only a year after *Rowley*, the Sixth Circuit vacated and remanded a ruling that had placed a child with multiple disabilities in a county school for children with mental retardation.²⁸ The district court had determined that the program in the county school was better than that in a regular school, and that the child had failed to make progress while in an interim placement in a regular school.²⁹ The court of appeals ruled

²⁴ 501 F. Supp. 701 (W.D.N.Y. 1983).

²⁵ 547 F. Supp. 61 (S.D. Tex. 1982); *see also* *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990) (requiring goals and methods for behavior control and parent counseling and training); *Thornock v. Boise Indep. Sch. Dist.*, 767 P.2d 1241, 1249 n.5 (Idaho 1988) (requiring aide to be provided at parochial school for child with mental retardation, declaring: "Related services which make mainstreaming possible should take priority over other related services.").

²⁶ *See Rowley*, 458 U.S. at 208.

²⁷ 700 F.2d 1058 (6th Cir. 1983).

²⁸ *See id.* at 1064.

²⁹ *See id.* at 1061. The court of appeals chastised the district court for not giving due weight to due process hearing and administrative review

that the district court erred by deferring to the decision of the school board and failing to give adequate attention to the least restrictive environment obligation.³⁰ Analyzing what the district court had done in deferring to the local school district's decision, the court of appeals declared that "[t]he perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept."³¹ The court went on to require that services provided in a setting containing only children with disabilities be provided first in a regular education setting, before consideration of the child's removal from regular education:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.³²

What this test requires is not just that the school district must try to avoid separate schooling for children with disabilities, nor that the courts must give the local school authorities the benefit of the doubt on that effort. The test is instead a command that services be provided to render separation of the child with disabilities unnecessary and that

decisions calling for the child to be mainstreamed with children without disabilities at least for part of the day. *See id.* at 1062.

³⁰ *See id.* at 1063.

³¹ *Id.*

³² *Id.* The court noted that limits apply to the obligation to place in the least restrictive environment, acknowledging the possibility that some children with disabilities would not benefit from mainstreaming, or that the marginal benefits of mainstreaming would be far less than the benefits from services that could not be provided in that setting, or that the child would be an overly disruptive force in a regular education setting. The court said that cost is a proper factor to consider, but that cost is no defense if the school has not provided a proper continuum of alternative placements for children with disabilities. *See id.*

the court make an independent decision on whether that has been accomplished.³³

Two cases that appeared in the mid-1990s combined the willingness to disregard the limited concept of appropriateness for least restrictive environment cases with the unwillingness to defer to local decision making that departs from the requirement of providing services to maximize education in the least restrictive environment. *Sacramento City Unified School District v. Rachel H.*³⁴ and *Oberti v. Board of Education*³⁵ marked a turning point in least restrictive environment case law.

In *Rachel H.*, the Ninth Circuit upheld the placement of a nine-year-old child with moderate mental retardation in a full-time regular education program with a part-time aide and assorted other related services.³⁶ The Ninth Circuit affirmed the findings of the district court that the child was receiving academic and nonacademic benefits from a mainstreamed program, that an aide was needed on only a part-time basis, and that the school district's claimed loss of special education funding for the child failed to take account of state law permitting waiver of the rule that a child had to be in special education fifty-one percent of the time to qualify for state special education reimbursement.³⁷

³³ The court distinguished *Board of Education v. Rowley*, 458 U.S. 176 (1982). On the standard of review employed by the district court, it stated that *Rowley* had established the duty of giving due weight to administrative proceedings, not automatic deference to decision of the school district. *See Roncker*, 700 F.2d at 1062. On the question of the proper placement for the child, the court stated that *Rowley* decided the meaning of appropriate education, whereas it was now examining the mainstreaming requirement. *See id.* at 1060. *Rowley* was thus a dispute over methodology in which deference had to be applied; *Roncker* was a dispute over whether the school district had satisfied the least restrictive environment requirement, so *Rowley* did not control. *See id.*

³⁴ 14 F.3d 1398 (9th Cir. 1994). The child's IQ tested 44. *See id.* at 1399.

³⁵ 995 F.2d 1204 (3d Cir. 1993).

³⁶ *See Rachel H.*, 14 F.3d at 1405.

³⁷ *See id.* at 1404-05. The district court opinion contains an example of conflicts in the attitudes of the witnesses that might serve as a parable about least restrictive environment ideas in general. Two witnesses

In *Oberti*, the court of appeals affirmed the district court's ruling that a second-grader with Down Syndrome be placed in a mainstreamed class, reversing a hearing officer's decision in support of the district's self-contained classroom.³⁸ The court observed that the child had thrown tantrums and acted aggressively toward the teacher and the other students in a developmental kindergarten class, but it stressed that the class had offered no supportive services.³⁹ It accepted the district court's finding of fact that services could be delivered to support the child in a regular classroom without disruption, and that the child would benefit academically and socially from the placement in the mainstream.⁴⁰ The court relied on the district court's determination that a properly trained teacher in a regular classroom could apply many of the special education techniques used in a separate class.⁴¹

Rachel H. and *Oberti* called attention to a split between the circuits regarding the tests used to evaluate least restrictive environment cases.⁴² The *Daniel R.R.* test, which *Oberti* followed, asks first whether education in the regular classroom can be achieved satisfactorily with supplementary aids and services. If it cannot, the court asks second if the school has made efforts to include the child in school

observed Rachel holding a book upside down in a Hebrew class at a private school. The school district witness said the incident was evidence that the child was gaining nothing from the mainstreamed instruction. The parents' witness noted that another child helped Rachel turn her book over and find her place in the text. The witness said this was an example of positive peer interaction of the kind that would help Rachel in developing the ability to live in the world. *See Bd. of Educ. v. Holland*, 786 F. Supp. 874, 881 (E.D. Cal. 1992), *aff'd sub nom.*, Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

³⁸ *See Oberti*, 995 F.2d at 1224.

³⁹ *See id.* at 1221, 1223.

⁴⁰ *See id.* at 1221.

⁴¹ *See id.* at 1222.

⁴² *Oberti*, 995 F.2d at 1215 (applying *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048, (5th Cir. 1989)); *Rachel H.*, 14 F.3d at 1403-04. The *Rachel H.* court noted that the Third Circuit (*Oberti*), Fifth Circuit (*Daniel R.R.*), and Eleventh Circuit (*Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025, *reinstated*, 967 F.2d 470 (1992)) have employed the *Daniel R.R.* test.

programs with children without disabilities whenever possible. In applying part one, the court evaluates (1) steps the school district has undertaken to accommodate the child in the regular classroom, (2) the child's educational benefit from regular schooling, (3) the child's overall educational experience in regular education, and (4) the effect the child's presence has on the regular classroom.⁴³ For the second factor, courts compare the educational benefits received in the regular classroom against those of a separate special education class.⁴⁴

Various other courts apply a multifactor framework based on *Roncker v. Walter*. These courts ask whether a nonintegrated setting is considered educationally superior, and if so, whether the services that make it superior could feasibly be provided in an integrated setting.⁴⁵ If they can, the court rejects the more restrictive environment. Courts making use of the test (1) compare the benefits the child receives in special education against those from regular education; (2) consider if the child would disrupt a regular classroom; and (3) evaluate the cost of mainstreaming.

Both tests consider educational benefit and feasibility, and both apply a strong presumption in favor of the provision of extra services to make the least restrictive environment succeed for a given child.⁴⁶ The Ninth Circuit's test in *Rachel H.* combined both approaches and considered (1) the

⁴³ One court has added an inquiry whether the cost is so high as to significantly affect the education of the other children in the district. *Greer*, 950 F.2d at 697.

⁴⁴ *Oberti*, 995 F.2d at 1216; *Greer*, 950 F.2d at 697.

⁴⁵ 700 F.2d 1058, 1063 (6th Cir. 1983). The Fourth Circuit (*DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989)), Sixth Circuit (*Roncker*), and Eighth Circuit (*A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987)) have applied *Roncker's* approach. See *Rachel H.*, 14 F.3d at 1403-04.

⁴⁶ The appeals court in *Oberti* preferred the *Daniel R.R.* test because it makes clear that the child should be included with children who do not have disabilities even if placement in the regular classroom cannot be achieved for major portions of the child's program. *Oberti*, 995 F.2d at 1215. See generally *Millersburg Area Sch. Dist. v. Lynda T.*, 707 A.2d 572 (Pa. Commw. Ct. 1998) (applying *Oberti* test to find that least restrictive environment standard had not been met and that compensatory education was properly awarded).

educational benefits of full-time placement in regular education, (2) the nonacademic benefits of placement in regular education, (3) the effect the child had on the teacher and children in the class, and (4) the costs of the placement in the mainstreamed setting.⁴⁷

Rachel H. and *Oberti* are significant much less for the multifactor tests they adopted than for their results. In both cases, the parents persuaded courts of appeals to overturn school district determinations in favor of separate schooling, and in both cases the parents achieved total or near-total inclusion, along with substantial in-class services, for children with very severe disabling conditions. The cases thus demonstrate the application of the least restrictive environment duty as a positive obligation to provide services.⁴⁸

With all that has already been discussed as context, the Supreme Court's most recent decision on the IDEA, *Cedar Rapids Community School District v. Garret F.*,⁴⁹ may take on a slightly different meaning than the one it is usually given. In *Garret F.*, the Court affirmed a due process hearing decision requiring the school district to provide bladder catheterization,

⁴⁷ *Rachel H.*, 14 F.3d at 1404.

⁴⁸ See also *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572 (3d Cir. 2000) (requiring consideration of options beyond existing special preschool program for child with disabilities in least restrictive environment); *St. Johnsbury Acad. v. D.H.*, 20 F. Supp. 2d 675 (D. Vt. 1998) (overturning school policy forbidding mainstreaming of high school students not testing at fifth-grade level in reading, writing, or mathematics); *Hunt v. Bartman*, 873 F. Supp. 229 (W.D. Mo. 1994) (compelling state to order local school districts to consider the least restrictive environment and use of supplemental aids and services in an individualized education program meeting with the parents before referral or re-referral of a child for state school placement); *Mavis v. Sobol*, 839 F. Supp. 968 (N.D.N.Y. 1994) (ordering placement of child with moderate mental retardation in regular classroom with aids and services). Systemic cases also require the application of this approach to least restrictive environment. See, e.g., *Corey H. v. Bd. of Educ.*, No. 92 C 3409, 1998 WL 81630 (N.D. Ill., Feb. 19, 1998), in which the court required a state educational agency to correct failure by a local school district to comply with least restrictive environment obligations.

⁴⁹ 526 U.S. 66 (1999).

tracheotomy suctioning, ventilator maintenance and monitoring (and administration of air by bagging during maintenance), and other services for a ventilator-dependent child with quadriplegia.⁵⁰ The Court reasoned that none of the services had to be performed by a physician, and so, under the text of the IDEA and the controlling precedent, the services were school nursing and other school health services that the school district had to provide.⁵¹

The Court decided the case under the rubric of the related-services provision of the IDEA, but the case is every bit as much a least restrictive environment case as a related services case. Education could have been provided to the child at home, in a nursing facility, or in any number of other settings in which services and personnel would be more readily available.⁵² But the law requires education with children without disabilities to the maximum extent appropriate, and it requires supplemental aids and services, without any stated limit, in order to achieve that requirement. Thus, the services required in *Garret F.* were obligatory because they were services needed to enable the child to succeed in the mainstream. The least restrictive environment doctrine lay in the background, but the case could not have been decided the way it was without it. The doctrine had its effect as an affirmative duty to provide services.

⁵⁰ See *id.* at 79.

⁵¹ See *id.* at 73-79 (relying on 20 U.S.C. § 1401(a)(17) (1994) and *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984)).

⁵² In a similar vein, one writer contends that *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), in which catheterization was required during the school day for a child who could not urinate normally, effectively raised the level of services required above that imposed in *Rowley*. See Note, *School Health Services for Handicapped Children: The Door Opens No Further*, 64 NEB. L. REV. 509, 529 (1985). The writer reasons that the child could have received meaningful access to education had she gone to school only four hours a day and received catheterization at home. See *id.* An unstated acceptance on the part of the Court of the obligation to provide services to permit maximal mainstreaming may be a more plausible interpretation of what the Court did.

This tour of the case law illustrates the central point that in special education law, the least restrictive environment obligation has a unique role as a positive obligation to provide services. The duty is not subject to the limits imposed by the Supreme Court's interpretation of the term "appropriate education," and the duty entails the provision of extensive services to children, including those with the severest of disabilities who need services of great intensity and wide scope.

When It's Not Apparent: Some Modest Advice to Parent Advocates for Students with Disabilities

STEPHEN A. ROSENBAUM*

The team approach to developing an IEP [Individual Education Program] involves communication and cooperation among you (the parents), your child's teacher(s), and other specialists with different kinds of skills... Think of the team as a circle of participants with your child at the center.

- *Special Education Parent Handbook*¹

In regard to the IEP process itself, I wish it stood for "Individual Encouragement to Parents." If we could change it, I would change it. In many ways this public law has become our enemy.

*Kathy Davis*²

Over the last eleven years we have seen what a legacy has been created. I can't imagine how it must feel to be a part of the creation of this sad, sad mess — where children are pariahs, their families are the enemy, "special" means "can't-be-done," and education has long been forgotten....For the record, the culture of the Special Education Administration is a closed-mouth, non-collaborative, non-responsive, anti-family fortress.

Sincerely,
*Ann M.*³

* Staff Attorney, Protection & Advocacy, Inc.; Lecturer, University of California, Berkeley School of Law (Boalt Hall); and Affiliate, Boalt Hall Center for Social Justice. J.D., 1980, M.P.P., 1979, University of California, Berkeley. The views expressed here are those of the author and not necessarily those of Protection & Advocacy, Inc. or the University of California.

¹ Oakland Unified Sch. Dist., 21 (1998-99).

² Parent, testifying at Nov. 4, 1994 regional hearing of federal agency on disability in Des Moines, Iowa. National Council on Disability, IMPROVING THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: MAKING SCHOOLS WORK FOR ALL OF AMERICA'S CHILDREN 57 (1995). The Council, established as an independent agency in 1984, "work[s] with the President and the Congress to increase the inclusion, independence, and empowerment of all Americans with disabilities." *Id.* at 253.

Introduction

The process by which parents and school officials sit down once a year — if not more often — to collaboratively make decisions about the education of students with disabilities is a radical departure from the typical model for delivery of government services.⁴ As one commentator observed a decade ago, this process or “arena for controlled interaction” is one which “places both parents and educators in highly unfamiliar — and often uncomfortable — roles.”⁵

When the Supreme Court first reviewed the federal special education statute,⁶ it envisioned parental involvement this way: “[P]arents and guardians will not lack ardor in seeking to ensure that handicapped⁷ children receive all of the benefits to which they are entitled under the Act.”⁸ Standing in stark contrast to the law is the frustration and anger expressed by parents like Kathy Davis and Ann M.

³ Excerpt from an e-mail message to S.P., a California school district special education manager, Mar. 1, 2001 (on file with author).

⁴ David M. Engel, *Law, Culture and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 168 (1991).

⁵ *Id.*

⁶ The Education for All Handicapped Children Act of 1975 (Pub.L. No. 94-142, 89 Stat. 773).

⁷ I strive for “people first” language in this article in describing “*students with disabilities*” or “*children with disabilities*,” but use the historically appropriate “handicapped,” when it is a legal term of art or part of a direction quotation. Unlike other marginalized groups in our society, I am unaware of any youth disability rights movement reclaiming epithets like “retard” or “moron” for children in specialized education programs, although some adult activists do use “crip” or “quad” in self-reference. *See, e.g.,* John Hockenberry, MOVING VIOLATIONS: WAR ZONES, WHEELCHAIRS, AND DECLARATIONS OF INDEPENDENCE 31, 87, 220 (1995). On the practice of self-naming and appropriation of prejudicial terms, *see* Stephen A. Rosenbaum, *The Alien Cloak of Confidentiality: Look Who’s Wearing It Now*, 4 JOHN F. KENNEDY L. REV. 23, n.8 (1992).

⁸ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 209 (1982) (citation omitted). The Senate Report on Public Law 94-142 referred to the importance of the IEP meetings as an extension of the evaluation and placement process and as a means for parents to frequently monitor their child’s progress. S.REP. No. 168, 94th Cong., 1st Sess. 11, *reprinted in* 1975 U.S.S.C.A.N. 1425, 1435.

Even before studies were conducted, observers of the shift in federal special education policy after passage of the Education for All Handicapped Children Act⁹ predicted “far less effective cooperation between school and parents,” perhaps culminating in “open warfare.”¹⁰ In a survey of parent-administrator interactions conducted more than twelve years ago, researchers discovered that “[m]ost parents describe themselves as terrified and inarticulate” when confronting the special education planning team, perceiving the process as “judgmental rather than...cooperative” and experiencing “feelings of vulnerability and disempowerment”¹¹ rather than influence and mutual respect.

The parental reaction is all the more troubling because, in theory, parents of students with disabilities have been granted more control over the education of their children than almost every other parent in the nation’s public schools,¹²

⁹ The Act since has been renamed the Individuals with Disabilities Education Act (IDEA) and was most recently amended in 1997. 20 U.S.C. § 1400 *et seq* (2000).

¹⁰ Guy Benveniste, *Implementation and Intervention Strategies: The Case of PL 94-142*, in David L. Kirp & Donald N. Jensen, eds., *SCHOOL DAYS, RULE DAYS* 156 (1986).

¹¹ Engel, *supra* note 4, at 188. One commentator adds: “Most parents . . . would confess that it is often difficult to keep a rational perspective when dealing with their own children.” Anne P. Dupré, *Disability, Deference, and the Integrity of the Enterprise*, 32 GA. L. REV. 393, 463 (1998).

¹² Professor Engel notes that outside the disability context, the requirements for face-to-face meetings and cooperative planning are something that few public school parents and teachers would expect. Engel, *supra* note 4 at 187. However, there are parent involvement parallels for other students with special or compensatory needs, *e.g.*, those enrolled in bilingual or migratory education programs. See Stephen Rosenbaum, *Educating Children of Immigrant Workers: Language Policies in France & the USA*, 29 AM. J. COMP. L. 429, 450-51 & nn.167-69 (1981). On the importance of parental involvement in a variety of educational issues, see Ronald S. Brandt, ed., *PARTNERS: PARENTS & SCHOOLS* (1979). Unfortunately, an individualized learning plan for *all* school-age children, developed jointly by school and family, is a mandate waiting to happen. *But see* Assembly Bill 1238, introduced during the 2001-03 California legislative session, establishing a “personal learning agreement” for low-achieving students to be developed by a team at participating schools, at http://www.info.sen.ca.gov/pub/bill/asm/ab_1201-1250. See, also, Martha Minow, *MAKING ALL THE DIFFERENCE:*

through an elaborate planning and review process founded on principles of due process. Parental rights include notice of the individualized planning meeting and the rights to attend and invite others, to review a child's records, to request an independent evaluation, to receive notice of change of placement, and to withhold approval of changes in placement or service.¹³

One commentator asserted early in the life of the federal special education law that the statute focuses on the parental role in order "to prod districts into implementation."¹⁴ In effect, parents are "the logical agents of change" where there is no forceful oversight by state or federal agencies.¹⁵

To some extent the tension that has always been inherent in the Individualized Education Program or IEP¹⁶ procedures has become intensified with the growth of the "full inclusion" movement. While not a legal term of art, full inclusion," or simply "inclusion," refers to the mainstreaming of students with disabilities into regular classes, and participation in activities of the total school environment.¹⁷

INCLUSION, EXCLUSION, AND AMERICAN LAW 94 (1990) on the possibility of extending the individualized approach to *all* students — from gifted to disabled — where "the very meaning of 'different' is remade."

¹³ See 20 U.S.C. §§ 1401(a)(20), 1415(b)(1) (2001); 34 C.F.R. §§ 300.500-300.528 (2001).

¹⁴ Benveniste, *supra* note 10 at 153.

¹⁵ *Id.*

¹⁶ The IEP, perhaps the one part of special education jargon known to the general public, is a written statement of a child's educational needs and specific goals, and methodologies for meeting them. 20 U.S.C. § 1401(19) (2000); 34 C.F.R. §§ 300.340-300.350 (2001). To speak of the "IEP procedures" or "IEP process" involves everything from the team deliberation and drafting of the statement to its implementation by instructional personnel and specialists to its revision and redrafting by the IEP team of parents, school officials and independent evaluators.

¹⁷ On the educational philosophy and practices, see, e.g., Ann T. Halvorsen & Wayne Sailor, *Integration of Students with Severe and Profound Disabilities: A Review of Research* in Robert Gaylord-Ross, ed., ISSUES AND RESEARCH IN SPECIAL EDUCATION 110-173 (1990); Mary A. Falvey, *Inclusive & Heterogeneous Schooling* (1995); Pam Hunt & Lori Goetz, *Research on Inclusive Educational Programs, Practices, and Outcomes for Students with Severe Disabilities*, 31 J. SPECIAL EDUCATION 3-29 (1997); Gail MacGregor & Timm Vogelsberg, INCLUSIVE SCHOOLING PRACTICES

This is the ultimate “least restrictive environment” as that term has been used in statutory and decisional law.¹⁸ In addition, the congressional reports accompanying the most recent amendments to the IDEA¹⁹ support a stronger role for parents, with an emphasis on public agency and parent partnerships.²⁰

Many manuals and fact sheets produced in recent years, by government agencies²¹ and non-governmental organizations,²² attempt to help parents wend their way

(1998). *See also*, Michael A. Rebell and Robert L. Hughes, *Special Educational Inclusion and the Courts: A proposal for a New Remedial Approach*, 25 J. L. & EDUC. 523, 537-45 (1996) for an overview of the inclusion and “placement diversity” advocacy perspectives.

¹⁸ One of the landmark decisions upholding the inclusive education concept is *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994) (combining factors from various circuits to determine appropriateness of full inclusion placement). Attorney Kathryn Dobel gives a personalized account of this case, *see infra Representing Rachel*, 5 UC DAVIS J. JUV. L. & POLICY 219 (2001). For criticism of the full inclusion model, *see, e.g.*, Dupré, *supra* note 11; Anne Proffitt Dupré, *Disability and the Public Schools: The Case Against Inclusion*, 72 WASH. L. REV. 775 (1997); Theresa Bryant, *Drowning in the Mainstream: Integration of Children With Disabilities after Oberti v. Clementon School District*, 22 OHIO N.U. L. REV. 83 (1995); *infra* Tamera Wong, *Falling Into Inclusion: Placing Socialization over Individualized Education*, 5 UC DAVIS J. JUV. L. & POLICY 275 (2001).

¹⁹ “IDEA” is the acronym for the current federal special education statute. *See supra* note 9.

²⁰ *See* H.R. REP. No. 95, *reprinted in* 1997 U.S.C.C.A.N. 78, 79 and S. REP. No. 17 (1997).

²¹ *See, e.g.*, Oakland Unified Sch. Dist., SPECIAL EDUCATION PARENT HANDBOOK, *supra* note 1; Area Board 4 on Developmental Disabilities, INCLUSIVE EDUCATION: A GUIDE FOR FAMILIES, EDUCATORS AND ADVOCATES (n.d.); and Minnesota Dep’t of Children, Families & Learning, MAKING THE TRANSITION TEAM WORK (1997).

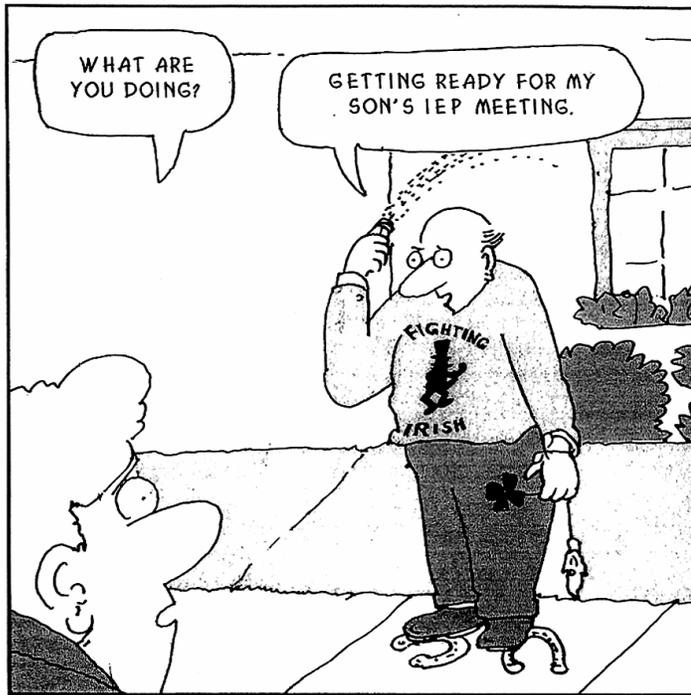
²² *See, e.g.*, Protection & Advocacy, Inc. and Community Alliance for Special Education, SPECIAL EDUCATION RIGHTS & RESPONSIBILITIES, ch. 4 at 1-32 (8th ed. 2000); Ellen S. Goldblatt, *18 Tips For Getting Quality Special Education Services for Your Child* (Jan. 1, 1997), at <http://www.pai-ca.org/pubs/401601.htm>; Bazelon Center for Mental Health Law, *Una Nueva IDEA* (1998); and Barbara E. Buswell & Judy Veneris, BUILDING INTEGRATION WITH THE IEP (1998). *See also* the website established by FAPE (Families and Advocates Partnership for Education), at <http://www.fape.org>, for multicultural, family and advocate-oriented

through this process. While they may be instructive or insightful, these primers do not necessarily equip parents for the operational or implementation — not to mention emotional — issues that are likely to surface throughout their child’s educational career, much less for tackling systemic problems.

In this article, I explore some of the ways in which parents can more effectively participate in educational decision making and oversight.²³ I begin by describing the limitations of litigation against local school districts and problems of the parent-school team mechanism in responding to demands for long-term change. I then suggest forms of advocacy and problem resolution that may better advance parental objectives.

materials. FAPE is one of a network of parent-directed PTIs or “parent training and information centers” authorized by Congress to educate and train parents on their rights under IDEA. 20 U.S.C. § 1483 (2001).

²³ My perspective is informed not only by my professional experience as a litigator with Protection & Advocacy, Inc. in California, part of a federal network of non-profit organizations representing people with disabilities in the attainment of their legal, service and human rights. 42 U.S.C. § 6000 *et seq* (2000). I am also the father of David Rafael, a young teenager with significant developmental and physical disabilities, who has been in full inclusion classrooms since kindergarten. Moreover, I have served for several years on the Berkeley school district’s committee which oversees the Berkeley Parents Advisory Comm. v. Berkeley Unified Sch. Dist. settlement agreement (No. C88-3001) (N.D. Cal.), and on the now dormant Inclusive Education Advisory Committee. Some of the observations I make in this article are not based on any one conversation. I have chosen not to reveal the names of individuals or school districts where this would breach confidentiality, cause embarrassment or otherwise damage a relationship.



LOOKING FOR LUCK
IN ALL THE WRONG PLACES.

Michael F. Giangreco, *FLYING BY THE SEAT OF YOUR PANTS: MORE ABSURDITIES AND REALITIES OF SPECIAL EDUCATION* © 1999 Peytral Publications, Minnetonka, MN. Reprinted with permission.

A List of Limitations

The IDEA is grounded in legal rights — rights that speak more to procedural protections for children and their families than to any substantive standard of educational quality.²⁴ Parents are assigned a substantial role in decision making, aptly characterized as “significant bargaining power,”²⁵ through the IEP. It is one thing to say that school

²⁴ *Rowley*, 458 U.S. at 193-95.

²⁵ Bruce Meredith and Julie Underwood, *Irreconcilable Differences? Defining the Rising Conflict Between Regular and Special Education*, 24 J. L. & EDUC. 195, 200 (1995). The parent-school relationship, according to

districts and parents must jointly plan a youngster's education,²⁶ but quite another to actually put this into practice, balancing the needs for strong student advocacy, respect for professional judgment and a continuing constructive relationship.

One commentator describes the IEP model for resolution as taking the form of a "contract" or "political deal" between family and school. When that model does not work, she posits, the district must turn to a "managerial discretion" approach in which decision-making is deferred to an education administrator or manager.²⁷ The deference does not always work so easily in real life.

Frustrations inherent in the planning process do not all stem from mutual hostility or from parental feelings of intimidation and vulnerability.²⁸ Sometimes, there is simply an inability to "get things done," notwithstanding clearly written goals and objectives and a plan of action. One parent, herself a university trainer of special educators, set out a very detailed chart of her issues and concerns for an upcoming meeting with the special education director. In the "Issues" column, e.g., she wrote:

one commentator, is unlike the typical "continuing relationship" insofar as it is highly regulated by statute and involves a government agency and its clients, rather than two private parties. Engel, *supra* note 4 at 167.

²⁶ *Rowley*, 458 U.S. at 176 (state and local education agencies to plan education in cooperation with parents).

²⁷ Dupré, *supra* note at 463 (citing Professor Lon Fuller's discussion of polycentric problem-solving). See also David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, in Kirp & Jensen, *supra* note 10 at 36 (quoting an anonymous policymaker who, notwithstanding the protestations of the National School Boards Association, described the IEP "as a way of individualizing and contractualizing the relationships and involving parents in the process...While it's said not to be a contract, it is a contract for service delivery.").

²⁸ Professor Engel's study found that "[m]ost parents describe themselves as terrified and inarticulate" in approaching team planning meetings. Engel, *supra* note 4 at 188. Some liken themselves to prisoners awaiting their sentence, and this courtroom imagery emphasizes their perception of the judgmental rather than cooperative quality of the decision making..." *Id.*

Accountability:

- Timeliness of Response
- Lack of Response

In the corresponding “Concerns” column, she listed:

- Huge delay between team meeting and actually getting formal IEP document
- Meeting Oct. 23, 2000; received IEP Jan. 9, 2001
- School principal has not been involved in any team meeting
- Lip service, lack of timely, if any, follow-through
- No case manager
- Action only when parents initiate or put other systems in place.²⁹

Unfortunately, what appears to be a basic parental expectation about accountability and an almost mundane menu of service delivery gaps ends up as the fodder for protracted meetings, correspondence or administrative or judicial filings. This is the stuff of which many disputes are made and one ought not need to “make a federal case” of it to reach resolution.

Before Congress’ adoption of a special education statute, it was the filing of lawsuits, together with the momentum of the disability rights movement, that opened the doors of the nation’s schools and classrooms to disabled students. The resulting court orders and consent decrees formed the cornerstone of concepts that have since been codified in federal and state law.³⁰

Since the passage of IDEA, lawsuits have been filed against local and state school authorities attempting, like most

²⁹ Chart prepared by Kathy D. and presented to Dr. G., Jan. 18, 2001 (on file with author).

³⁰ For an overview of the key events — in the judicial, legislative, research and grassroots arenas — culminating in adoption of special education legislation, *see* Rebell & Hughes, *supra* note 17 at 527-36 and Neal & Kirp, *supra* note 17 at 345-48. “The civil rights movement and the War on Poverty provided the key ideas and context for the movement on behalf of handicapped people.” *Id.* at 346.

public interest litigation, to “force large, politically unresponsive bureaucracies to follow the clear mandate of the law.”³¹ Litigation is also effective as part of a larger strategy to increase public awareness, deter illegal agency action or force the disclosure of facts.³²

Yet litigation is by no means the ideal vehicle for enforcing statutory rights, in part because it simply heightens the adversarial nature of the relationship between school and family. In one case that ultimately advanced the jurisprudence, by expanding the concept of less restrictive classroom placement, the court nevertheless remarked: “It is regretful that this matter has ended up in litigation where the parties are pitted against each other instead of working together. It is difficult to imagine a worse scenario from the point of view of the child.”³³

In another case, the court wrote:

[L]itigation tends to poison relationships, destroying channels for constructive dialogue that may have existed before the litigation began. This is particularly harmful here, since parents and school officials must – despite any bad feelings that develop between them – continue to work closely with one another.³⁴

³¹ John Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133, 1135 (1976) (citations omitted). Professor Denvir writes about agencies as varied as the welfare department, housing authority and redevelopment agency. He also describes a suit brought against a state board of education for improperly placing a Spanish-speaking child in a class for what was then known as “educable mentally retarded” students. Once the lawsuit was publicized in the press, however, the board agreed to retest the children and reduce cultural bias in the testing process. *See id.* at 1138.

³² *See id.* at 1136-37. *See also* Randy Shaw, *THE ACTIVIST’S HANDBOOK: A PRIMER* 206 (2001) (litigation can be part of a broader strategic effort to provoke public scrutiny).

³³ *Oberti v. Bd. of Educ.*, 789 F. Supp. 1322, 1337 (D.N.J. 1992), *aff’d*, 995 F.2d 1204 (3d Cir. 1993).

³⁴ *Clyde K. and Sheila K. v. Puyallup Sch. Dist.*, No. 3, 35 F.3d 1396, 1400 n. 5 (9th Cir. 1994).

According to the critics, lawyers aggravate the process. They sow hostility, delay, expense and mistrust of administrators and thereby inhibit reliance on professional judgment.³⁵ Equally distressing is the perception that parents accomplish their goals only by bullying their way, with threats of due process hearings³⁶ or suits.³⁷ It is not simply harried or disgruntled school officials who have complained. Parents, too, have been found to be dissatisfied with some of the formalized adversarial proceedings.³⁸

Even where litigation has been successful in addressing systemic education issues,³⁹ the courts are

³⁵ See e.g., Neal & Kirp, *supra* note 27 at 355-57. In reviewing early implementation studies of the due process aspects of the federal statute, Professors Neal and Kirp write: "Parents generally reported both considerable expense and psychological cost in the hearing process. They often felt themselves blamed either for being bad parents or for being troublemakers." *Id.* at 355. See also Dupré, *supra* note at 445-46 and note 294 (IEP team forum is overtaken by protracted legal battles in which parents challenge academic judgment of other team members).

³⁶ See 20 U.S.C. §§ 1414(b) & 1415 (2000) for description of IDEA procedural safeguards and 34 C.F.R. §§ 300.503-300.512 (2001) for due process notice and hearing procedures.

³⁷ School districts "may choose to mollify an unsatisfied parent" rather than proceed with a costly and time-consuming hearing process. Meredith and Underwood, *supra* note 25 at 200. See also, discussion of the special education administrative mindset in notes 60, 77, 79 *infra*. Professor Engel quotes a parent in his empirical study as saying, "I really think that unless you open your mouth and you fight, you have no say what goes on with your kid." Engel, *supra* note 4 at 193. See also, the 1994 testimony of one parent at a public hearing in Milwaukee: "I have come to call myself 'Bonnie the bitch' because of what I have had to become to fight the system..." National Council on Disability, *supra* note 2 at 123.

³⁸ See, e.g., Steven S. Goldberg & Peter J. Kuriloff, *Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education*, 42 EDUC. L. REP. 491, 492-93 (1987) (early research suggesting that hearing outcomes do not provide participants "a sense of subjective justice" and adherence to formal procedures may not be sufficient to satisfy perceptions of fair treatment or full participation during hearing).

³⁹ See, e.g., *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990) (action by two individuals on behalf of students with emotional disturbance) and *Roncker v. Walker*, 700 F.2d 1058, 1064 (6th Cir. 1983) (appellate court held District Court's refusal to hold hearing on motion for class certification was error in action challenging restrictiveness of placements for students with mental retardation). For case studies of

becoming less receptive to class actions concerning special education rights and services.⁴⁰ The Ninth Circuit has set a particularly high standard for exhaustion of administrative remedies. In *Hoefl v. Tucson Unified School District*,⁴¹ parents of four disabled children sued a local school district for not providing “extended year” services to their children beyond the regular school year. Two of the claims involved a challenge to policies as unlawful on their face.⁴² The Court of Appeals held that plaintiffs had failed to pursue their remedies under IDEA, as they had not allowed the state education agency an opportunity to consider and correct errors in local district policy through its investigation procedure before proceeding to court.⁴³ That the state department of education had not timely responded to a complaint filed by the parents or even completed its investigation before the filing of the suit was discounted, as was the fact that the injunctive relief they sought was unavailable through the administrative process.⁴⁴

This rigid reading of the exhaustion doctrine was reiterated more recently in *Doe v. Arizona Department of*

structural reform in Boston and New York City schools as the result of lawsuits, see Michael E. Rebell, *Educational Opportunities for Children with Handicaps*, in Barbara Flicker, ed., JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 23 (1990).

⁴⁰ *But see, e.g.*, *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1990), *cert. denied*, 452 U.S. 968 (1981); *José P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982). In both cases, the court found elements of class certification.

⁴¹ 967 F.2d 1298 (9th Cir. 1992).

⁴² These were claims that Tucson provided a uniform amount of extended year programming and that the parents were given inadequate notice of procedural rights and failed to state the reasons for denial. 967 F.2d at 1306-07.

⁴³ The court held that two of the claims were technical or factual in nature and the plaintiffs’ failure to exhaust deprived the court of the benefit of agency expertise and development of an administrative record. *See id.* at 1305-06.

⁴⁴ As to the former, the court found that as the state had requested an extension, its “failure to comply strictly with administrative time limits” did not outweigh the potential benefits of a written investigative report. *Id.* at 1308. On the inadequacy of injunctive relief, the court suggested that pursuing individual administrative determinations “would alert the state to local compliance problems and further correction of any problems on a state-local level. *Id.* at 1309.

Education,⁴⁵ where the court found that plaintiffs' claim — a local jail's failure to provide special education and related services to a class of all juveniles — was not systemic.⁴⁶ Any alleged illegal policy or practice by the jail authorities, the court held, was capable of relief that could be provided by a state administrative forum.^{46b} In yet another Ninth Circuit case, the district judge dismissed the class action suit, ruling that before challenging an explicit policy to terminate speech and language therapy for over 400 secondary school students in a large urban school system, plaintiffs had to first exhaust their individual due process remedies in an administrative forum where injunctive relief was unavailable.⁴⁷

Over time, the nature of the special education problem has evolved from the failure to identify, assess and/or place students to a question of appropriateness — or quality — of the classroom placement and related services. The ability to achieve those objectives through the individualized planning team process has become increasingly elusive. To effectively engage the district authorities, parents and their advocates must exercise a delicate mix of reserve and verve.

⁴⁵ 111 F.3d 678 (9th Cir. 1997).

⁴⁶ The court held that a claim is "systemic" only when "it implicates the integrity or reliability of the IDEA dispute resolution procedures" or "requires restructuring of the education system" in order to comply with the Act. *Id.* at 682. Doe's claim involved only "limited components" of the special education program — i.e. the deprivation of children at one facility that the state department did not know about. And, once alerted, the department took remedial action. *Id.*

^{46b} *Id.* at 683-84.

⁴⁷ The case, *Charles v. Oakland Unified Sch. Dist.*, No. C99-296 (N.D. Cal.), is unpublished and was curiously ordered not to be made a part of the court's database. As one of plaintiffs' counsel, I could not have written a more textbook illustration of an exception to the exhaustion doctrine than the Oakland speech and language policy: The District explicitly eliminated services to hundreds of middle and high school students in order to preserve therapists for elementary students, which was tantamount to "robbing Peter to pay Paul." Moreover, one of the plaintiffs had earlier filed a complaint with the California Department of Education (No. S-0341-98/99), in accordance with the teachings of *Hoelt* and *Doe*, but found the Department's corrective action plan to be minimal and vague.

What's A Parent to Do?

Focus on the Big Picture

As with any agenda that must be accomplished in the space of an academic year, parents should have a short list of goals and objectives. “Goals and objectives” means more than the laundry list of specific learning expectations one has for the student and teaching staff. Choosing one or two things — macro or micro — should allow for some measure of success. Examples include: improving the skills of the instructional aide or working to replace the aide; purchasing an assistive technology device; or truly implementing a behavior plan.⁴⁸

The quality of the special education program and personnel are some of the hardest things to both ensure and monitor. On the importance of recruiting and maintaining high quality staff, one parent wrote in a blistering note to a school administrator about the nonchalant hiring of an aide for her son:

... I can never truly determine why the [instructional assistant] support he requires, to be fully-included instead of fully-*excluded*, has been approached as casually as ‘look at whoever happens to walk in the door’ once a month.⁴⁹

For this parent, her whole school year may need to be devoted to getting a proper aide or to clamoring for change in the district’s recruitment and hiring process.

⁴⁸ The grievances or shortcomings to be redressed must be prioritized. One can surely sympathize with my client, whose disappointment and anger in not having a son with Tourette’s syndrome deemed eligible for special education services was compounded by unprofessional and damaging behavior at the hands of a temporary home instructor. Telephone Interview with client (Mar. 22, 2001). Nonetheless, this parent must sort out her priorities: obtaining special education eligibility or trying to fire the teacher who no longer had contact with her son. Time and energy are only one consideration. Risking further alienation, or distraction, of district administrators while working on her primary objective — eligibility — is another consideration.

⁴⁹ E-mail message, *supra* note 3.

The ritual of writing lengthy IEPs⁵⁰ should be reconsidered in instances where parents have confidence in the abilities of the instructional staff and the integrity of school administrators to follow through. This laborious practice seems to follow less from the law than from district or parent culture.⁵¹

At the risk of stating the obvious, an IEP — the *plan* — should be a document that is easy to follow on a daily basis by general education teacher, support teacher, therapist and paraprofessional alike. An IEP — the *meeting* — should be limited in time and have a focused agenda. Parents and school staff are too busy to assemble around a table on under-sized chairs for a marathon session of reading aloud from reports that could be circulated in advance.⁵²

There is also no need to engage in group wordsmithing, whereby a team scribe painstakingly handwrites goals and objectives in small boxes on pre-cybernetic forms of goldenrod, pink and canary. A district that promotes advance preparation, a smaller list of invitees, and more productive group time could go a long way to

⁵⁰ Public Policy Professor Eugene Bardach posits that the IEP is perhaps the quintessential example of multi-party educational planning, albeit one “marked by not insubstantial piles of paperwork.” Eugene Bardach, *Educational Paperwork*, in Kirp & Jensen, *supra* note 10 at 128. It has the potential to serve as a “useful attention-focusing” device for divergent or opposed interests, who might otherwise lack a forum for participation. *Id.* at 127-28.

⁵¹ Several years ago, commentators observed the phenomenon of formalistic IEP meetings and routinely written legalistic reports. Benveniste, *supra* note 10 at 156-58 and Neal & Kirp, *supra* note 27 at 353. Education Professor Guy Benveniste noted that so-called “legal regulatory” school districts worship forms over function. *Id.* Professors Neal and Kirp reported on second-hand accounts of two IEP prototypes: the legalistic meeting “in which half the time is devoted to narrow procedural requirements” or “the parent is pressured to sign on the dotted line...” This was contrasted with the child-oriented meeting “faithful to the spirit of the law.” *Id.*

⁵² The IEP “can easily run five or six single-spaced pages,” Professor Bardach wrote some fifteen years ago. Bardach, *supra* note 50 at 129. He also noted about joint planning generally that “[t]he more parties involved in the plan...the less likely it is to be meaningful.” *Id.* Plans can easily exceed six pages in length and the team membership can be unwieldy.

insuring satisfaction with both process and outcomes. In addition, training for parents and staff — with an emphasis more on group decision making dynamics than legalistic elements of the IDEA — will also improve the IEP process.⁵³

Acknowledge the “Other Kids”

One of the factors to be explicitly considered by the district in placing a disabled student in a general education classroom is the effect of that student’s presence on the classroom environment and on the education the other children are receiving.⁵⁴ Like the cost of providing a child’s program, this factor is a big invisible elephant sitting at the tiny formica IEP table.⁵⁵ It is sometimes mentioned in whispers.

Although it is counter to the statutory and case law and the philosophical underpinnings of an individualized planning process, parents should themselves consider how their child’s program may impact on the larger classroom or school community.⁵⁶ Sometimes it will be useful to explicitly acknowledge this at a meeting and other times it is an element to be considered as part of one’s advocacy approach. The value is both pragmatic and strategic.

⁵³ On the need for more parent training about special education rights and procedures, *see, e.g.*, National Council on Disability, *supra* note 2 at 104-05, 114 and Christopher Borreca, Lucretia Dillard & Michael O’Dell, *The Adversarial Process: Helpful or Hurtful to Achieving the Ends of the IDEA?* in LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES 10 (1999).

⁵⁴ *See, e.g.*, *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1049 (5th Cir. 1989); and *Sacramento City Unified Sch. Dist.*, 14 F.3d. at 1401, 1404. The inquiry involves not only whether there are any disruptive behaviors, but the extent to which the child with a disability requires the teacher’s attention to the exclusion of the other students.

⁵⁵ Actually, the image I prefer for the fiscal component is that of a big dollar sign hanging over the table.

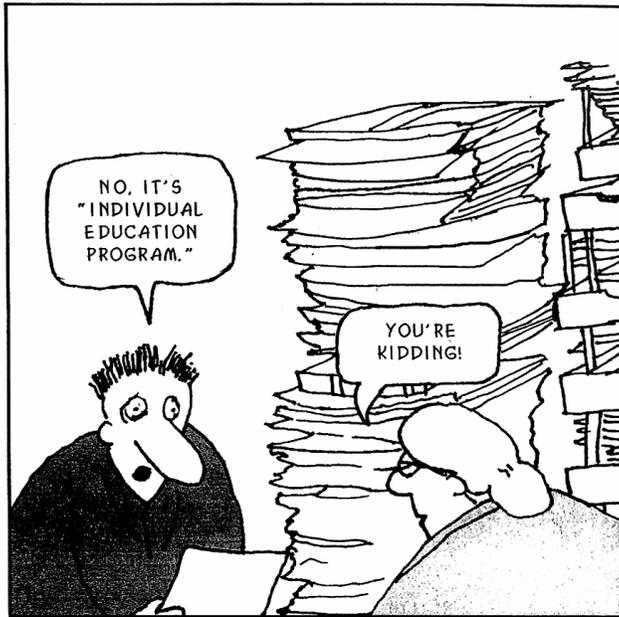
⁵⁶ I do not, however, share the view of some commentators that a child’s IEP is “not a proper setting for assessing and implementing an inclusion program” simply because one must identify the impact of the disabled student’s presence on others. *Rebell & Hughes, supra* note 17 at 565.

Understanding how a child fits into the larger educational picture allows a parent to think through the fiscal and logistical implications of a particular classroom placement or purchase of services. This enhances bargaining power at the IEP or mediation table. Strategically, it is often useful to acknowledge the constraints or concerns of other players, whether it be the special education administrator, classroom teacher or parents of children without disabilities.

One critic chides inclusionists for their failure to take account of the non-disabled students: "The full inclusion advocates, in their zeal to elevate placement over academic achievement, seem uninterested in a searching examination of the extent to which academic achievement is a function of the classroom as a community."⁵⁷ Without giving credence to this observation, it is fair to say that an educational scheme for disabled students which is driven by individual rights may indeed overlook the interests of the larger school community. To that end, a decision making process that involves more stakeholders in the school community may be welcome.⁵⁸

⁵⁷ Anne Proffitt Dupré, 72 WASH. L. REV *supra* note 8 at 842. The inclusion movement perhaps has heightened tensions already existing between special education teachers and advocates on the one hand and the rest of the education community. There are too few resources to distribute equitably amongst all children with disabilities, much less between disabled and non-disabled students. Neal & Kirp, *supra* note 27 at 359. Professors Neal and Kirp argued a number of years ago that the potential for IDEA to distort the allocation of resources "is aggravated by the legal model which treats the parties to a dispute [disabled students and special education administrators] as discrete from the system in which they are located." *Id.*

⁵⁸ Policy advocates Michael Rebell and Robert Hughes have proposed a "community engagement dialogic" model to address the broader school and community interests, in particular where it would help to successfully implement inclusion policies on a district basis. Rebell & Hughes, *supra* note 17 at 568-74. This "CED" model involves six steps of broad-based community participation, agenda setting, discussion, ratification of policy resolutions, implementation and evaluation/reconsideration. Key to its success is the role played by a "community dialogue organizer (CDO)," who remains strictly neutral as a facilitator while actively promoting the public interest. This exercise in dialogue may be useful for introducing new educational practices or concepts, such as "inclusion," or even for a periodic program review. However, it can never take the place of the



MRS. SNIPPETT HAD LONG
THOUGHT I.E.P. STOOD FOR
"INCREDIBLY EXCESSIVE PAPERWORK."

Michael F. Giangreco, *FLYING BY THE SEAT OF YOUR PANTS: MORE ABSURDITIES AND REALITIES OF SPECIAL EDUCATION* © 1999 Peytral Publications, Minnetonka, MN. Reprinted with permission.

Don't Fight the Wars of Attrition

"Why do we always have to be the ones to make sure it happens?" That has become the special education parent's refrain. Sometimes the only answer that comes to mind is the same one that our own parents told us, not necessarily leaving us convinced of their wisdom: "Just because." Ann M. writes:

The silence and inaction are systemic...
Administration means a body will show up, then go away until the next time, when the issues are still the same and the team merely restates the obvious. There is no follow through unless the family takes it upon

student-level decision making that is required in designing and implementing a program of support for students with disabilities — or any other school population or subgroup.

themselves to dog the system far beyond any reasonable person's patience.⁵⁹ There is no compliance unless the family secures legal backup, and even then the district feels no urgency or responsibility to comply.⁶⁰

This is a complaint that transcends class as well as educational and cultural background. It can be uttered by people like Kathy D., who is a married, white university professor living in a middle class Bay Area community or by Francisco R., an ex-Marine, divorced father residing in an East Oakland *barrio*, who shared his own chronicles about “*los pendejos*” and non-compliance at a recent workshop for Spanish-speaking parents.⁶¹ Perhaps it should not fall to parents to monitor the most mundane of IEP-determined follow-up tasks. But then, it may not be possible to have the power to make very detailed decisions about our children’s day-to-day education and not assume some of the unglamorous responsibility for overseeing implementation. Or, one can protest assumption of this task and attempt to restore it to its rightful “owners” — aides, teachers and administrators. One can also profit from the opportunity to get a first-hand view of classroom management and school administrative dysfunction and store it away in the intelligence file for future skirmishes.

The military and espionage metaphors cannot be overstated. In a bold display of the bunker mentality, one administrator recently shared her IEP maxims with a conference audience — spelled out on the *de rigueur* overhead transparency :

1. Law is not fair.

⁵⁹ The National Council on Disability came to almost the same conclusion after taking testimony on parent participation in ten cities a few years prior to the reauthorization and amendment of IDEA: “...parents must assume the at times daunting responsibility to ensure that their children receive appropriate services.” National Council on Disability, *supra* note 2 at 62.

⁶⁰ Excerpt from e-mail message, *supra* note 3.

⁶¹ Francisco R. made his comments at a Mar. 21, 2001 workshop at the Centro de Vida Independiente in Oakland. See text acc. note 29 *supra* regarding Kathy D.

2. Law is not logical.
3. It is almost always about money.
(Unless it's a righteous cause, then be afraid).
4. Ten percent of your cases will take ninety percent of your time.
5. The best way to avoid going to court is to be completely ready to go.
6. There is no way to surrender.⁶²

Cynicism on the part of educators is an unfortunate by-product of the special ed wars and sometimes it breeds an inappropriately displayed black humor.⁶³

⁶² These are the "Rotter's Rules" utilized by Kathleen M. Rotter, Ed.D., *Managing Due Process in Special Education Cases: 'The Court Proof IEP Process' in LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES 1* (1999) (handbook on file with author). Professor Benveniste must have had the Rotters of the world in mind when he wrote fifteen years ago about "IEP reports...less designed to address the problems of the child than to defend the district against potential attack." Benveniste, *supra* note 10 at 156. *See also*, Neal & Kirp, *supra* note 27 at 355 on schools' defensive strategies. *But See* the "talking points" put forward by Texas schools' defense counsel as reasons for parent-school hostility, *e.g.*, overemphasis on procedural protections, as opposed to substantive guarantees, and treatment of parents as "a required nuisance" rather than members of a team. Borreca, *et al. supra* note 53 at 7.9. The attorneys' parting advice is: "Be kind, be gentle, be respectful." *Id.* at 11.

⁶³ Joking and venting in the faculty (or cocktail) lounge is one thing, but the crude performance I witnessed at a recent convention of a special education professional association was quite another. The group's parent organization has been a major federal lobbyist on behalf of disabled children, with 90% of its membership composed of special education teachers. Neal & Kirp, *supra* note 27 at 347 & note 25. One keynote speaker — a former administrator — began his *schtick* with a transparency depicting three raccoons next to a pig wearing a mask. "Who's the one trying to fit in?" he asked his audience in an obvious attack on the full inclusion philosophy. He continued with a story about a boy named Fidel — "Ever notice how they always have names like Fidel?" — whose finger was constantly thrust in his nose and who could never find his way home. Most of the audience of special educators was in stitches. Interestingly, the mockery came not from critics of the law protecting disabled students, but from its purported supporters. On the phenomenon of popular backlash against disability rights legislation, see Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476,

The thirst for battle is not exclusively on the part of district officials.⁶⁴ School district counsel can regale students' attorneys with tales of parents who litigate for the sake of it. It is said that they lose perspective and cannot seem to get out of combat mode. Sometimes these tales are harmless, but inaccurate, expressions of the lawyer's — and her administrator client's — own frustration. Sometimes they are a strategic ploy. And, sometimes they contain a kernel or more of truth about one's own client. Katy L. is one such client. After an initial bout with her small Silicon Valley school district, in which we succeeded in keeping her "behaviorally challenging" son Ran in a regular fourth grade classroom, there was no shortage of issues on her agenda — some big and some small. The IEP process was interminable and Katy filed compliance complaints with the state education agency⁶⁵ right and left, as one mediation merged into the next. The district eventually sought a restraining order to change Ran's placement⁶⁶ and the saga is still ongoing.

At times, parents must simply cut the administration some slack. Just because the district is out of compliance on a notice issue, the procurement of a service, or the timing of a meeting does not mean one should fire off a letter to the state complaints and monitoring unit, any more than one automatically resorts to filing a judicial complaint because of a contractual breach or civil wrong. Discretion on filing must

493 (2000) (efforts to subvert or de-legitimate new legal regime may include parades of horrors supported by vivid anecdotes, rhetorical attacks and derisive humor leveled at the law).

⁶⁴ See Benveniste, *supra* note 10 at 156 (noting the "open warfare" in so-called high conflict school districts and perceived adversary role of parents, even where "belligerent parents" are small in numbers) and Neal & Kirp, *supra* note 27 at 355 (on generalizing about parents and stereotyping).

⁶⁵ State education agencies are required to adopt complaint procedures for alleged violations of state or federal special education laws or non-compliance with a child's IEP. See 34 C.F.R. §§ 300.660-300.662 (2001) and 5 C.C.R. §§ 4640-4670 (2001). See *infra* note 92 on "grievance overkill."

⁶⁶ *Oak Grove Sch. Dist. v. R.L.* (Santa Clara Co. Superior Court No. CV 973347 (Oct. 20, 2000)). The names of the mother and son are fictitious.

prevail,⁶⁷ and goodwill can come as much from withholding action as taking affirmative steps.⁶⁸

It is not hard to see why parents, who must be ever-vigilant, develop a fighter's instinct and a mistrust or skepticism that colors all thinking about what their children need or what services they *should* be receiving.⁶⁹ Moreover, there is no question that parents of disabled children are forever mindful of their own precarious social and psychological status.⁷⁰

⁶⁷ Legal Aid folklore has it that new or deadwood attorneys suffer from a "fear of filing" when it comes to lawsuits, but the opposite can be said of the special education parent who is overly prone to filing a compliance complaint. Filing should be strategic in its timing and nature, and the complainant must understand the limitations of the investigative and corrective action processes.

⁶⁸ To file or not to file, however, should not be determined simply by a desire to preserve good relations with local school staff. One commentator notes that the strong desire of parents to maintain a relationship with the district, rather than assert claims against it, may lead to capitulation or unwarranted compromise. Engel, *supra* note 4 at 199.

⁶⁹ School personnel may perceive parent behavior as misplaced anger or sadness. Some schools' attorneys posit that the due process hearing may serve as a substitute for parental grieving. Borreca *et al.*, *supra* note 53 at 7. Other commentators have noted that, unlike parents of non-disabled students, special education parents have considerable power to take out their frustration on staff as well as district personnel. Meredith & Underwood, *supra* note 25 at 57. *Accord*, Borreca *et al.* at 8. This was vividly conveyed to me at the end of a recent unsuccessful mediation session when Rob, a labor union activist and father of a high school student seeking a modest curriculum change, broke his long simmering silence by yelling "F--- You!" at the special education program specialist. As his lawyer, I had to be mildly apologetic, but as a fellow parent I could secretly empathize or rejoice.

⁷⁰ On the immense grieving and coping that accompany the birth and care of a child with a disability, see, e.g., Audrey T. McCollum, *Grieving Over the Lost Dream*, in THE EXCEPTIONAL PARENT 9 (Feb. 1984); Jerry Adler, *What If Your Worst Nightmare Came True?* ESQUIRE 147 (June 1988). Professor Engel's interviews also reveal a parental perspective that places one's child as part of a larger school community — or community of children with disabilities — and avoids a "selfish" demand for more services. Engel, *supra* note 4 at 195-97 (citing the now classic works by Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 19, 24-63 (1982) and Minow, *supra* note 12 at 105-12, 124-27, 131-39).

That IDEA has a built-in parent oversight component is no coincidence. It is a recognition of *individual* parental insight and *collective* political influence. Yet, parents do not always know best and do not always know *who* to trust or *when*, including themselves. Unfortunately, the uncertainty and ambivalence can lead more readily to warfare than to peace negotiations talks.

Respect Professional Judgment

Parents are encouraged to delineate their own goals and objectives for their disabled youngsters, as a matter of law and sound educational practice. However, they are often either dependent on, or intimidated by, the professionals sitting on the IEP team. In interviews conducted in New York State in the late 1980s,⁷¹ some of the reasons for this were revealed. One mother complained of the patronizing tone from team members whose educational background and training were superior to hers.⁷² The experience is not much different today, as parents describe the isolation, disrespect or marginalization they experience at an IEP meeting.⁷³

⁷¹ See Engel, *supra* note 4. Although the study involved exclusively children with *physical* disabilities, I believe its findings ring true for other youths receiving special education instruction or services. According to Engel, some findings indicate that some parents of *non-orthopedically impaired* youngsters — e.g. whose children received only speech therapy — were actually satisfied with the special education process. See *id.* at 97.

⁷² See *id.* at 193, 112-13. The interviewee spoke of being intimidated by “those suit-and-tie guys” and criticized for not fostering her daughter’s independence (“Well, he said, are you sure that ‘Mother’ wasn’t afraid to let her go?... You can call me anything, but don’t talk down to me.”) *Id.* at 193. It is not simply distinctions in social class, as Professor Engel suggests, that lead to perceptions of patronizing behavior. It does not seem that long ago that I bristled when a doctor at the CCS (formerly “Crippled Children’s Services”) physical therapy clinic examining my young son addressed me directly as “Dad.” “I’m not your *Dad*,” was my indignant unspoken response.

⁷³ See, e.g., parent testimony at Boston and Milwaukee public hearings. National Council on Disability, *supra* note 2 at 107 (“I had a ninth grade education and I sat at [team meetings] with people I perceived to have the knowledge to teach my child and felt that, even though my gut told me it wasn’t right, they must know.”) and at 108 (“I was one of those parents

It is supremely difficult for parents to know just when inclusion works and whether it works for their own child.⁷⁴ Advocates, too, may be uncertain and must rely on client and expert predilection.⁷⁵ Finding a neutral expert is no easier in this context than in civil litigation generally.⁷⁶ Not surprisingly, the parent who is unhappy with an assessment provided by district staff or a district contractor, tends to seek a specialist more amenable to his position regarding program eligibility, choice of placement, or need for services or therapy.⁷⁷

who left...IEPs like someone who has left a foreign movie without the subtitles. I felt a very small and incidental part of this procedure...”).

⁷⁴ For studies of facilitated social interactions between students with and without disabilities, *see, e.g.*, Pam Hunt, Morgen Alwell, Felicia Farron-Davis & Lori Goetz, *Creating Socially Supportive Environments for Fully Included Students Who Experience Multiple Disabilities*, 21 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 53 (1996) and SoHyun Lee & Samuel L. Odom, *The Relationship Between Stereotypic Behavior and Peer Social Interaction for Children with Severe Disabilities*, 21 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 88 (1996). I recall the principal at my son's elementary school introducing the teacher of "our included students" at an open house. In the same vein, I once overheard Zack, a middle schooler, telling his teacher that he had been waiting "with the other inclusion students." In this sense, "included" simply becomes a euphemism for "retarded" or "special ed." In fact, I just learned at David's transitional IEP meeting that Berkeley High School has an "inclusion room." How does this differ from a resource room or special day class? If one is truly "included," the word itself should fade away as a modifier.

⁷⁵ As Katy and Ran L's lawyer, *see supra* text acc. note 64, I was obliged to advocate zealously on their behalf. More often than not, however, I was uncertain about the appropriateness of a full inclusion setting for Ran as the parents and district officials came to such radically opposite conclusions.

⁷⁶ In a major appellate case favoring a full inclusion placement, the court relied exclusively on the testimony of the parents and their experts regarding success of the student in the regular classroom, discounting the testimony of the school district officials. *Oberti v. Bd. of Educ.*, 995 F.2d at 1210, note 10. *See also*, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 294-95 (7th Cir. 1988) (deferring to parents' experts on placement decision).

⁷⁷ The IDEA permits a parent to obtain an independent evaluation at public expense if, *e.g.*, she disagrees with the accuracy of the school district's evaluation or classification. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502. In addition to specialized instruction, eligible students may also receive

Nevertheless, if the IEP team is to have any collaborative success, parents must find a way to be receptive to the analyses and recommendations made by specialists employed or retained by the school district, without always suspecting bias, incompleteness or incompetence.⁷⁸ This does not mean, however, that one must abandon rights or acquiesce.⁷⁹

such “related services” as are required to benefit from special education, *e.g.*, speech and language therapy, occupational or physical therapy, behavioral intervention, adaptive physical education, counseling and guidance, diagnostic medical services, etc. 20 U.S.C. § 1401(22); 34 C.F.R. § 300.24 (2001).

⁷⁸ Some commentators have argued that the legalization of special education policy leads to a mistrust of schools and inhibits the discretion of professionals who may now find themselves in the role of defendants. Neal & Kirp, *supra* note 27 at 359. Another notes the tendency of some parents to distrust the school’s assessment when exposed to outside advice. Benveniste, *supra* note 10 at 158. Professor Benveniste’s early 1980s critique about distrust may be as valid today, but not necessarily because a parent seeks a private or “non-public” school placement.

⁷⁹ Professor Engel writes convincingly about the trust dilemma when he suggests that there are trade-offs in the emphasis on continuing relationships, rather than rights. Engel, *supra* note 4 at 199-203. Relatively disempowered parents “frequently forego the assertion of claims that could move their children out of segregated settings and inadequate programs.” *Id.* at 205. Only through power-sharing by members of the planning team and a commitment to a “relationships perspective” can there be more integration of children with disabilities in schools. *Id.*



MRS. GREEN RESORTS TO BRINGING A LIFE-SIZED CARDBOARD REPLICA OF THE COUNTY'S MOST TENACIOUS ADVOCATE TO HER CHILD'S IEP MEETING

Michael F. Giangreco, *FLYING BY THE SEAT OF YOUR PANTS: MORE ABSURDITIES AND REALITIES OF SPECIAL EDUCATION* © 1999 Peytral Publications, Minnetonka, MN. Reprinted with permission.

Articulate the Parental Perspective

As a counterpoint to respect for professional judgment, parents must be willing to make interventions that are appropriate to their part as the child's primary caregiver. This may again be stating the obvious, but it is a role that has been obscured by specialists and bureaucrats who expect submissiveness⁸⁰ or gratefulness.⁸¹ It is also a role forgotten

⁸⁰ The submissive role may be all too easily assumed for members of some non-dominant cultural groups. Three Korean-born middle class mothers of children in special education classes told me recently that they have been

by parents who believe they are supposed to be educational experts themselves.⁸² Parents *are* experts in knowing and

taught to never question the teacher's authority. "It's part of our culture," one of them said, echoing a trait to which a great many ethnic minorities lay claim. (Interview with author, Mar. 28, 2001).

⁸¹ Although writing about resistance to disability rights in another context — court opinions interpreting accommodation claims of disabled employees under the ADA — the remarks of English Professor Lennard Davis are *à propos* of how parents seeking supports or services for their children are viewed by school officials: When "special needs" are invoked, "too often the requester is seen as overly self-concerned, overly demanding." Lennard Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 197 (2000). "Compliance is now seen as an act of 'generosity' with all its resonance of charity, almsgiving, philanthropy, and altruism — that general attitude that disability activism and laws have sought to change into a discussion of rights, fairness and equity." *Id.* at 204. Professors Neal and Kirp wrote several years ago that special educators were inclined to view some parents as " 'ripping off' the school system, depriving other children of benefits..." Neal and Kirp, *supra* note 27 at 355. Again, the perceived "rip-off" or "looting the public treasury," *id.* at 358, by today's administrator is not necessarily because a parent seeks private placement, but may be due to her request for a one-on-one instructional aide or high-tech assistive technology.

⁸² Not surprisingly, the level and quality of parental involvement varies according to wealth, formal education and child's degree of disability. Benveniste, *supra* note 10 at 154. *See also* National Council on Disability, *supra* note 2 at 101 (former special education student from Boston attributed his success in school to his parents' advanced education and relative wealth, which gave them "the ability and knowledge to essentially face down the educational system...") and 122 ("...parents who are poor, or [from] minority communities, have other family stress or have limited English proficiency, continue to be disenfranchised," according to a parent testifying at Philadelphia public hearing). The different perspective — or confusion — about what attitude or role should be adopted by the lay parent yields different responses in Professor Engel's study: One parent confesses her being "unschooled as far as the therapies and teaching and whatnot" and not wanting to second-guess the professionals. In response, a planning team chair offered: "That's a very intelligent approach to education. I wish more people felt that way...We are fallible too, but maybe we are a little better [able] to make a judgment than parents." Engel, *supra* note 4 at 190 & notes 99-101.

raising their own children⁸³ and have the legal and moral obligation to plan for, and dream about, them.⁸⁴

It may be hard for non-lawyers to adhere to the jurist's maxim: reasonable people may differ — but it is worth recalling this when confronting educators and administrators across the table. It has become almost a cliché for parents to bring cookies⁸⁵ to an IEP meeting — at least the *first* time — as a way to offset tensions and display friendliness and cooperation. Willingness to step outside of a district-conceived caricature or profile of a whiny or demanding parent will help to facilitate collaboration and mutual understanding. Parents should also try to be seen by school personnel and by other parents at times when they are not wearing their special ed parent hats.⁸⁶ Just like their children, they risk being pigeon-holed and stereotyped.

⁸³ See, e.g., Marilyn Patterson, *Being A Professional Parent*, THE EXCEPTIONAL PARENT 22 (Aug. 1983) and Patricia L. Howey, *Preparing for Team Meetings: The Parents' Report to the IEP Team*, THIRD ANNUAL COPAA (COUNCIL OF PARENT ADVOCATES & ATTORNEYS) CONFERENCE L-1, L-3 (2000) (on file with author) on the important contribution parents make as information gatherers and accumulators of knowledge about their children through daily interactions with their child at home, with the family, in the community.

⁸⁴ The concept of “person-centered planning” is at the forefront of self-determinist disability thinking and is easily adapted to student “transition plans” for older students or IEPs generally in the IDEA context. See, e.g., J. Stephen Newton, Robert H. Horner & Lori Lund, *Honoring Activity Preferences in Individualized Plan Development: A Descriptive Analysis*, 16 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 207 (1991); California Dep't of Developmental Services, *INDIVIDUAL PROGRAM PLAN RESOURCE MANUAL: A PERSON-CENTERED APPROACH* (2000), Capitol People First and Protection & Advocacy, Inc., *Your IPP (Individual Program Plan): It's Not Just a Piece of Paper*, at <http://www.pai-ca.org/pubs/401001.htm> (1998).

⁸⁵ Donuts, croissants, or even organic baby carrots, may be brought instead of cookies, depending on the culinary and cultural milieu or the statement one chooses to make.

⁸⁶ I took great pleasure in initiating construction of a poetry garden on a vacant plot at my son's elementary school. Quite apart from the intrinsic satisfaction, I was not oblivious to the fact that this allowed me to be seen by the principal, teachers and other parents not merely as the (demanding) father of a disabled child, but as someone who contributes to the greater good of the school community — including the leveraging of \$10,000 in

Organize!

In what has become a classic text for community lawyers, a former legal aid attorney writes that there are four ways to help clients use the attorney's knowledge:

- (1) informing individuals and groups of their rights, (2) writing manuals and other materials, (3) training lay advocates, and (4) educating groups for confrontation. None is particularly glamorous, but all are extremely important.⁸⁷

Another experienced practitioner and law school clinician makes a similar observation in suggesting that there are two ways attorneys can empower people: first, individually within a "supportive attorney-client relationship" and second, through the process of group organizing in the public sphere.⁸⁸ Indeed, one commentator declares that "[c]ommunity organizing is *the* essential element of empowering organizational advocacy."⁸⁹ Empowerment and self-advocacy

gardening funds from the City Council. I also helped serve food at school events, wrote items for the PTA newsletter and actually enjoyed a level of "normal" school involvement that was *not* centered on developing and monitoring David's special education plan. It also helps to be the parent of other children *without* disabilities attending the same school.

⁸⁷ Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1056 (1970). On the value of community legal education and lay advocacy, see Stephen A. Rosenbaum, *Pro Bono Publico Meets Droits de l'Homme: Speaking a New Legal Language*, 13 LOY. L.A. INT'L & COMP. L. REV. 499, 504-05 and publications cited in notes 29 & 31 (1991).

⁸⁸ Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 PUB. INT. L. REP. 49, 50 (1991). It is the second role that is the most challenging, largely because professional legal education does not promote organizing skills or the value of community work. Moreover, there are limited resources for advocates to do organizing work. *Id.* at 54.

⁸⁹ William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 456 (1994) (emphasis in original). Professor Quigley goes on to say that if an organization had to choose as its sole advocate an accomplished traditional lawyer or a good community organizer, "it had better, for its own survival, choose the organizer." *Id.* In contrast to Quigley and others, Professor Trubek sees a leadership role for lawyers to "effectively promote transformative strategies." Trubek, *supra* note 88, at 54. For more on the empowerment perspective, see articles *cited in* Paul R. Tremblay,

approaches must therefore complement the traditional legal devices.⁹⁰

Much of the literature about lawyers and organizers is directed at communities of color, poor people and other marginalized groups. Why should parents of children with disabilities be concerned about organization and mobilization? First, children with disabilities *are* a historically marginalized population, whose struggles or campaigns continue to be waged, if only to preserve the *status quo*. Second, as noted above, the fact that their and their parents' legal entitlement is procedurally strong, does not necessarily translate into substantive success in the IEP conference room, much less the classroom. Third, as a disabled children's parents subgroup, parents of color and those who are non-English speakers, immigrants, less educated or reside in poorer school districts, are not necessarily positioned to wield the legal club.

Sometimes, when discussions, negotiations, pleading or demanding, go nowhere when pursued on behalf of one student by one family, it takes a larger voice to make the disability community heard.⁹¹ This is particularly true with personnel or systemic problems, such as the lack of training of aides, the poor quality of support provided by a given teacher, the failure to establish a new school site for full inclusion

Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy, 43 HASTINGS L.J. 947, note 3 (1992).

⁹⁰ In addressing ways to reverse resistance to the larger disability rights movement, one commentator notes that "while law can be very enabling, reliance on legal strategies can also be a problem in bringing about social change." Michael S. Wald, *Comment: Moving Forward, Some Thoughts on Strategies*, 21 BERKELEY J. EMP. & LAB. L. 473, 474 (2000).

⁹¹ Special education administrators do not like it when parents talk to each other. "Parents may get too much information" was the response of one Bay Area director to a request from a student teacher that the parents of middle school full inclusion students greet parents of incoming students at the middle school open house. Instead, the student teacher, herself a parent of a disabled child, passed out a simple questionnaire to parents of "included students," asking such harmless questions as: "In retrospect, what information do you wish you could have received prior to your child's entry into middle school?" and "What information regarding your experience at W — [School] would you like to pass on to elementary students?" (Apr. 3, 2001 questionnaire) (on file with author).

classrooms, and the lack of a private changing area for students who need assistance with personal hygiene.

These issues require the same kinds of tactics successfully used by other social groups seeking control over bureaucratic decision making. It could take the form of letter-writing or calling meetings with high-level school authorities.⁹² It could also mean speaking at public meetings of the Board of Education, mobilizing a large number of requests to convene IEP teams, the *en masse* filing of compliance complaints or due process hearing requests,⁹³ or contacts with the print or broadcast media.⁹⁴ It can be used to supplement a litigation strategy or, better yet, in lieu of litigation. To be successful does not take a large number of individuals, but it does mean having a narrow focus, a clear agenda and operating in a short time frame.

A few years ago, a key support teacher left the Berkeley schools at the end of the spring semester. The teacher had pioneered the full inclusion model at two different elementary schools and was instrumental not only in supporting a number of students, but in nurturing the still new concept of inclusive education.⁹⁵ Her departure would mean

⁹² But beware the tendency to write a four-page, single-spaced letter for the least infraction to the Superintendent, with copies sent to each member of the board of education, the local state representative and both United States senators. Parents would do well to subscribe to their own exhaustion of remedies doctrine before embarking on such "grievance overkill."

⁹³ See *supra* note 65 on the filing of compliance complaints and requests for due process hearings.

⁹⁴ Successful organizing has been accomplished through the use of "media activism" in which members of a particular community are involved in the development and implementation of a media plan. Robert Bray, *SPIN WORKS!: A MEDIA GUIDE FOR COMMUNICATING VALUES AND SHAPING OPINION* 98 (2000). See also, Wald, *supra* note 90 at 475 (media strategy has to be part of any mobilization effort to shape public opinion on the disability rights movement).

⁹⁵ The teacher, Morgen Alwell, a protégée of Professor Pam Hunt of San Francisco State University and outspoken in-house advocate of full inclusion, was also one of the researchers who facilitated social interactions between students with and without disabilities at this elementary school. See Hunt *et al.*, *supra* note 74. Successful implementation of inclusion can be achieved where institutions of higher

not only a loss for individual students who just had been placed successfully in regular classrooms, but a void at a critical juncture for the district. Despite requests from individual parents, the special education director would not commit to hiring a replacement who had the training or experience to run a successful inclusion program. In addition, she increased the caseloads of the remaining support teachers and dissolved the parent-teacher task force which had been active in promoting inclusion and serving as an information clearinghouse and support group.⁹⁶

Parents of the students at the affected school, together with a number of parents of “included students” at other sites, quickly rallied behind two ad hoc parent leaders. Following a few face-to-face meetings and many phone calls, the group agreed on the text of a letter. A temperate but forceful letter, signed by a number of parents, was faxed to the program director before the staff summer vacation.⁹⁷ By summer’s end, the director had agreed to a reconstituted task force, now designated an “advisory committee,” but there was no word on the new support teacher.

Days before school began, a new teacher was hired. It was evident to the parents from her professional background and initial interactions that she had no clue about working in a full inclusion environment.⁹⁸ They decided to give her a

learning or information and referral networks work in partnerships with school districts.

⁹⁶ Some of these problems had already been alluded to in a survey conducted by the district’s information and referral network “partner.” See California Confederation on Inclusive Education Needs Assessment Summary of Berkeley U.S.D. (Mar. 1996) (identifying “extensive need for assistance” to district’s full inclusion plans in areas of personnel, preparation and parent involvement) (on file with author).

⁹⁷ The parents also expressed dismay about the size of teacher caseloads and the qualifications of instructional assistants. Letter of July 16, 1997 (on file with author). Incidentally, changing technology benefits activists as much their disabled children: Today that same letter would be more expeditiously sent by *e-mail*, as the parent senders and recipient administrators are now on-line.

⁹⁸ Although cheerful and well-meaning, she failed to grasp concepts as basic as “curriculum adaptation” and asked parents to modify their children’s math homework assignments.

“probationary period” of sorts, before clamoring for her termination. After less than a month, the parents began complaining to the special education director — through faxes, a phone call-in day, and eventually a meeting. Just before the winter holiday break, the new teacher was transferred to a special day class at another school and a replacement began just after the New Year. Where school years and the education of young children is concerned, the trial periods are of necessity very short. Despite the parents’ determination to wait only two weeks before protesting, it still took almost a full semester to remove the teacher.

There is a downside to the absence of community organizing — even when the law appears to be favorable. For example, Paul S. and his parents sued the Santa Bonita School District⁹⁹ for using improper suspension and disciplinary procedures and for failure to identify Paul as a student needing special education services. A complaint and petition for writ of mandate¹⁰⁰ was filed in state court on behalf of Paul, a first grader, and taxpayers against the school district for violations of the California Education Code and IDEA concerning assessment for special education, referral to a community day school program and due process & equal protection violations. The case was not filed as a class action,¹⁰¹ but the attorneys

⁹⁹ Fictitious names are used here for the defendant school district and student plaintiff as the parties are barred from revealing any of the terms of the settlement. (Ventura Co. Superior Ct. No. CIV-193789). The student, from a poor Spanish-speaking family, was expelled from his regular school program for exhibiting unacceptable behaviors. The complaint charges that the District failed in its duty to assess Paul for specific learning disabilities or other eligibility for specialized instruction. Instead, he was referred to a “Student Study Team (SST),” which is a typical, but often inadequate, school district response to children who are not achieving at grade level. Many districts use the SST process to delay assessment or evaluation for special education eligibility. *See infra* note 108.

¹⁰⁰ A writ of mandate may be issued by any superior court to compel performance of an act which the law specifically enjoins as a duty resulting from one’s office, trust or station. CAL. CIV. PROC. CODE § 1085 (West 2000).

¹⁰¹ California Rural Legal Assistance, my co-counsel in the Paul S. case, is prohibited from filing class action lawsuits under the terms of its grant from the Legal Services Corporation. 42 U.S.C. § 2996e(d)(5) (2001).

were hoping to make policy changes in the rural and largely poor Latino district, based on the experience of the one student.

A few weeks before trial, a recalcitrant superintendent agreed to some very basic policy clarifications and bilingual publication of the policies in parent notices and handbooks, allowing the case to settle.¹⁰² The modest victory might have been greater had the plaintiff's legal team been able to mobilize a large number of parents to attend informational and training workshops in tandem with the lawsuit. As it was, the district authorities felt little public heat and almost no pressure from parents, except from the mother of Paul S. In the end, the goal of organizing is to make parent constituents an effective voice in making decisions about the education of their disabled children — with or without a lawyer at their side.¹⁰³

Neither Protection & Advocacy, Inc. nor its counterparts in other states operate under such a restriction. However, Rep. James C. Greenwood has asked the General Accounting Office (GAO) to conduct a study of class action litigation undertaken by protection and advocacy agencies across the country. (Telephone Interview with GAO Asst. Director Jim Musselwhite, Apr. 5, 2001). One advocate of progressive lawyering writes that despite formal restrictions, if legal aid and non-profit lawyers are to achieve institutional change, they must engage in lobbying, power-brokering, organizing, educating and representing controversial clients. Angelo N. Ancheta, *Review Essay: Community Lawyering*, 81 CAL. L. REV. / 1 ASIAN L.J. 1363, 1399 (1993).

¹⁰² Ventura Co. Superior Ct. No. CIV-193789. Petition for Order Authorizing Minor's Compromise (Feb. 13, 2001). The district refused any proposal that would invite Protection & Advocacy, Inc. to train teachers or parents or even a joint advocate-district training workshop. Even the suggestion of a joint press statement announcing the settlement — as a positive and collaborative development — was nixed by the superintendent.

¹⁰³ Professor Tremblay summed up the view of “rebellious advocates” this way: “[T]he most important function of mobilization is the creation of political influence that impacts upon the ability of the community to control bureaucracy — even in the absence of professional assistance.” Tremblay, *supra* note 89 at 958.

Form Alliances

Related to the need for organizing and mobilizing is the necessity of building alliances with other organizations that are not involved, exclusively, in special education or matters affecting persons with disabilities. Common sense suggests that there is truth in the slogan of farmworkers, immigrants, internationalists and other activists:

*¡El pueblo unido jamás será vencido!*¹⁰⁴

Most organizers would agree that there is unity in numbers and more can be accomplished both long- and short-term if different interest groups unite around issues of common concern.¹⁰⁵ In the schools context, there are a host of constituencies who could potentially form coalitions: parents of other subordinated or marginalized students. These include students of color, immigrants, speakers of English as a second language, gay and lesbian youth, students from families with incomes below the poverty level, and under-achieving students. There are as well the standard school and community groups: PTA, school board advisory committees, seniors' organizations, religious congregations and faith-based organizations, city commissions and other ad hoc government and educational associations.¹⁰⁶

That these organizations exist does not mean the alliances are easily forged. It can take a long time to eradicate barriers, demonstrate areas of mutual concern, raise consciousness and build trust and confidence. Sometimes groups can meet each other in the absence of a political emergency, as when the organization of parents of Berkeley secondary school special education students held a joint meeting with the newly established group, Parents of Children of African Descent. The latter group had just been awarded

¹⁰⁴ "The people united will never be defeated!"

¹⁰⁵ See e.g., Ancheta, *supra* note 101 at 1393.

¹⁰⁶ Professor Wald suggests that in creating "a new social vision" for the disability rights movement the search for allies must be even broader and should include women, gays and lesbians, poor people, labor and business. Wald, *supra* note 90 at 475.

school board funds to create an intensive tutoring program for failing high school students. Both groups had an interest in the implementation of new policies on proficiency testing and high school exit exams. At other times, it may take a crisis to unite.

Lawyers and other advocates can be instrumental in making inter-organizational contacts.¹⁰⁷ In two rural communities, for example, a Protection and Advocacy, Inc. attorney has joined forces with local California Rural Legal Assistance attorneys. In Guerneville, the lawyers met with a group of parents of mainly Latino students, some of whom were already identified as eligible for special education and others who were formally or informally labeled “at risk.”¹⁰⁸ In San Miguel, the lawyers hope to bring together a similar group of parents for information and training on special education, discipline and English language policies, having learned from the recently-settled lawsuit¹⁰⁹ about the importance of building coalitions.

¹⁰⁷ Trubek, *supra* note 89 at 54.

¹⁰⁸ California law provides for “student study teams” to assist students at risk of academic failure in the “regular education” context. CAL. EDUC. CODE § 54726(b) (West 2000). School districts must first consider and utilize the resources of the regular education program before referring a student for special education instruction and services. The line dividing the at-risk students and those identified as special education-eligible is not a particularly bright one and is sometimes a barrier to students receiving necessary services or accommodations. See issues raised in *Paul S. v. Santa Bonita Elem. Sch. Dist.*, *supra* note 99. The Guerneville meeting was unusual in the attendance and support level by parents whose children were *not* enrolled in special education services, but who came from a common ethnic and social milieu.

¹⁰⁹ See *supra* note 102.



DUE PROCESS

THE GAME WHERE EVERYBODY GETS A
TURN, NOBODY HAS FUN, AND EVEN IF
YOU WIN, YOU FEEL LIKE YOU'VE LOST!

Michael F. Giangreco, FLYING BY THE SEAT OF YOUR PANTS: MORE ABSURDITIES AND REALITIES OF SPECIAL EDUCATION © 1999 Peytral Publications, Minnetonka, MN. Reprinted with permission.

Don't Litigate — When You Can Mediate

Alternative dispute resolution (ADR) is not new in the special education context. Experimentation with ADR models of negotiation, conciliation,¹¹⁰ arbitration and mediation were reported from the early years of the IDEA forerunner

¹¹⁰ Conciliation is one model that tends to be overlooked. One Oregon county uses a team approach to conflict resolution, with an emphasis on mending relationships. See A. Engiles, M. Peter, S.B. Quash-Mah, & B. Todis, CONCIILIATION PROGRAM: TEAM-BASED CONFLICT RESOLUTION IN SPECIAL EDUCATION (1996).

statute.¹¹¹ In fact, there has been a great deal of success with informal resolution of disputes that would otherwise go to a due process hearing.¹¹² The 1997 amendments to the IDEA strongly encourage parties to mediate disputes.¹¹³

Other ADR options also have the potential to resolve decision making disputes in a non-adversarial fashion¹¹⁴ and can be utilized before reaching the request for due process hearing threshold. Still nascent in the world of IDEA, mediation and other forms of ADR could benefit from more

¹¹¹ See Goldberg & Kuriloff, *supra* note 38 at 496 and sources cited therein.

¹¹² One special education director explains how he was convinced that “there must be a better way to deal with problems” after his first year on the job, when “I spent more time talking with our attorney than I did with any of my teachers.” Vernon Shaw, *Alternative Dispute Resolution: Why and How?*, LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES 1 (1999). Shaw also notes the high cost of going to hearing and the hardening of positions that “destroy[s] any possibility of building trust....” *Id.* But see National Council on Disability, *supra* note 2 at 126-27 (dissatisfaction expressed by parents who did not view mediation process as impartial or who had difficulty implementing mediated agreements).

¹¹³ 20 U.S.C. § 1415(e); 34 C.F.R. § 300.506. See also, CAL. EDUC. CODE §§ 56500.3 & 56503 (West 2001). For an account of the special education mediation experience in California, see *infra* Elaine Talley, *Mediation of Special Education Disputes*, 5 UC DAVIS J. JUV. L. & POLICY 239 (2001). But see, Shaw *supra* note 112 at 1 (school district proponent of ADR faults California mediation model as akin to arbitration or settlement conference, whereby “[t]he mediator shuttles between the parties and pressures the parties to make an agreement.”).

¹¹⁴ For more on ADR models in the special education context, see Steven S. Goldberg & Dixie S. Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 EDUC. L. REP. 703 (1995); Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35 (1997); Andrea Shemberg, *Mediation as an Alternative Method of Dispute Resolution for the IDEA: A Just Proposal?*, 12 OHIO ST. J. DISP. RESOL. 739 (1997); Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J. L. & EDUC. 37 (1999).

creative experimentation. The limitations are imposed only by the imagination of the involved parties.¹¹⁵

It is perhaps less obvious that some *systems-wide* problems, that are otherwise the subject of a compliance complaint, are also amenable to mediation.¹¹⁶ This is particularly the case with grievances about the quality or delivery of programs and services. The failure to engage in “best practices” is not easily labeled as a *legal* violation. Mediation is less costly and time-consuming for the state than an investigation. For the advocate, there are fewer risks of a finding of (*pro forma*) compliance or a weak corrective action plan.

In a recent complaint filed against a Marin County school district, for example, the parents — unhappy with their experience in a high school full inclusion program — alleged failure to implement IEPs and furnish properly trained staff. They recommended changes in the case management system, training of aides and other staff, upper level program coordination and mechanisms for local parent input.¹¹⁷ While

¹¹⁵ Mediator and Consultant Lyn Beekman promotes a number of non-traditional, common-sense options, including a mutually “ready cop” to quickly resolve post-agreement disputes or a “God” to fact find and make decisions for a limited time. Lyn Beekman, *King Solomon Approach: Mediating Special Education Disputes*, LRP TWENTIETH NATIONAL INSTITUTE ON LEGAL ISSUES OF EDUCATING INDIVIDUALS WITH DISABILITIES 8 (1999). A mediation agreement can cover non-special education matters as well. *See id.* at 7. Appointing a neutral facilitator to run an IEP meeting to change the environment is another ADR technique. *Id.* at 8 and Shaw, *supra* note 113 at 2.

¹¹⁶ *See, e.g.*, California regulations allowing for mediation of compliance complaints filed with the state education agency. 5 C.C.R. §§ 4660(a)(1)-4661 (2001). There is no explicit authorization under federal law for mediation of state complaints, but the preamble to the regulations implementing the 1997 IDEA amendments suggests that mediation be utilized to attempt resolution of complaints as well as due process hearing requests. 64 FED. REG. 12,418, 12,611-12,612 (Mar. 12, 1999). Moreover, there is a regulatory requirement that state education agencies include negotiations and technical assistance activities among those procedures designed to implement resolution of state complaints. 34 C.F.R. § 300.661(b)(2) (2001).

¹¹⁷ Cal. Dep’t of Educ., Special Educ. Div., Compl. No. S-0638-00/01 (on file with author).

requests for mediation of compliance complaints — as opposed to due process petitions — are not that routine, the state agency furnished one of its deputy general counsels as a mediator. The district’s lawyer has taken a narrow view of the compliance process as well as the complaint itself, but agreed to the mediation and continuing dialogue.¹¹⁸

This effectiveness of approach depends, of course, on the disposition of the district or its counsel and the skill and mindset of the mediator.¹¹⁹ Where successful, group complaint mediation can also enhance parent satisfaction with the process and outcome.¹²⁰

Conclusion

My message is not to avoid litigation and conflict with professionals at all costs. Lawsuits and individualized parental pressure tactics, even those that are adversarial, have their place in the development and implementation of special education programs. Parent advocates must, however, search for ways to break out of conventional school-family relationship models and explore new ways of resolving differences. This will ultimately enhance parents’ role in the collaborative decision making process and assure that our students with disabilities receive the kinds of instruction, services and support they need to fulfill their educational goals.

¹¹⁸ See Letter from S.W. to Stephen Rosenbaum, Apr. 10, 2001 (on file with author).

¹¹⁹ The California regulation requires appointment of “a trained mediator or mediation team...” 5 C.C.R. § 4661(a)(3). Neither the mediator nor I, as complainants’ attorney, could convince opposing counsel to use the mediation forum to resolve systemic issues, despite her willingness to entertain allegations of *individual* violations of law or IEP transgressions and despite her clients’ efforts at the mediation conference to go beyond posturing and the parameters of what constitutes compliance under the law.

¹²⁰ Rebell and Hughes argue, in support of their “CED” model, *supra* note 58, that where all the stakeholders are included in candid, open dialogue, the result is effective communication, mutual understanding and a desire to search for the common good. Rebell and Hughes, *supra* note 17 at 568 and notes 235-238.

Is the *Rowley* Standard Dead? From Access to Results

JOYCE O. ECKREM* & ELIZA J. MCARTHUR**

Introduction

Since the enactment of the Education for All Handicapped Children Act in 1975 (Act)¹, popularly known as P.L. 94-142, school districts, parents, advocates, hearing officers and courts have struggled to define the standard for the delivery of a free, appropriate public education to students with disabilities. “Free, appropriate public education” (FAPE) is defined in the law and regulations as:

- [S]pecial education and related services that—
- (a) Are provided at public expense, under public supervision and direction and without charge;
 - (b) Meet the *standards* of the [state educational agency];
 - (c) Include preschool, elementary school, or secondary education in the State; and

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¹Pub. L. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.), amending Pub. L. 91-230 (1970) and Pub. L. 93-380 (1974).

(d) Are provided *in conformity with the individualized education program . . .*²

Obviously, this definition is not practical. The definition assumes that states have articulated standards for the education of students with disabilities; yet, it is only recently that states have developed identifiable curriculum and performance standards for the general education population. The states are still developing correspondingly consistent goals for students with disabilities.³ In addition, the definition of FAPE incorporates the unique, varied and individualized nature of the Individualized Education Program (IEP), diminishing whatever emphasis Congress may have originally placed on consistent state educational standards for all students.

Over the years, the debate has raged; are we to measure FAPE against a standard of performance and service for all students, or does the disabled student's performance supersede, in relation to his or her own unique needs and abilities? The vague definition of FAPE raises the following questions: what are we expected to teach students in special education, and what are students with disabilities expected to learn? This article examines how the standard for measuring educational benefit in special education is changing.

Access as the Original Purpose

The original Act focused on “access” to public education, rather than a substantive educational standard. Public law number 94-142 was based, in part, on Congressional findings that one million children with disabilities were *excluded* from public education, that many disabled children were receiving an inappropriate education because their disabilities went *undetected*, and that the *lack of adequate public services* often forced parents, at their own

²20 U.S.C. § 1401(8) (2000) [emphasis added]; 34 C.F.R. § 300.13 (2001).

³ See, e.g., 20 U.S.C. § 5801 et seq. (1996); Improving America's School Act, 20 U.S.C. § 6311 (2000); Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(16) (200) [hereinafter IDEA].

expense, to find services outside the public school system.⁴ Thus, the major goal of the 1975 Act was to include students with disabilities in public education by: (1) identifying, locating and evaluating all children with disabilities (Child Find); (2) making a free, appropriate public education available to all children with disabilities, from birth to 21, through publicly supported special education and related services in accordance with an IEP; (3) providing procedural protections to parents and children that ensure their right to a free, appropriate public education; and (4) providing assistance to states in meeting the educational needs of this special population.⁵

Indeed, the Act's legislative history demonstrates that Congress was concerned primarily with states' unlawful exclusion of a class of students — those with disabilities — from the education promised to *all* children. Congress explicitly based the Act, not upon any preconceived level or quality of education, but upon a long line of “right to education” cases.⁶

Five years after the effective date of public law number 94-142,⁷ in *Board of Education v. Rowley*,⁸ the United States Supreme Court addressed the meaning of “appropriate” education. The critical issue was whether Congress established or intended any substantive standard of educational benefit.⁹ In an extensive review of the statute and its legislative history, the Court stated:

Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access . . . Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly “recognize[d]

⁴ 20 U.S.C. § 1400(c)(2) (200)

⁵ Act, Pub. L. 94-142 (1975).

⁶ 2 U.S.C.C.A.N. 1430-32 (1975).

⁷ Act, Pub. L. 94-142, became effective in October, 1977.

⁸ 458 U.S. 176 (1982).

⁹ *See id.* at 190.

that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome.” [Citations omitted.] Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.¹⁰

The Court next addressed the “right to education” cases upon which Congress based the Act, and attempted to address the meaning of “equal educational opportunity”:

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors . . . The requirement that states provide “equal” educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of “free appropriate public education”; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential, is we think, further than Congress intended to go . . . The theme of the Act is “free appropriate public education,” a phrase which is too complex to be captured by the word “equal” whether one is speaking of opportunities or services.¹¹

The Court thus concluded:

Assuming that the Act was designed . . . to provide a “basic floor of opportunity” consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal

¹⁰ *Id.* at 192.

¹¹ *Id.* at 198-99.

protection required anything more than equal access. Therefore, Congress' desire . . . cannot be read as imposing any particular substantive educational standard upon the States.¹²

Next, the Court considered the role of the courts in determining whether a child was receiving sufficient benefits to satisfy the requirements of the Act. Repeatedly cautioning that courts are not at liberty to impose their own notions of sound educational policy upon the States¹³, the Court once again noted the lack of any precise substantive educational standard in the Act. It focused instead on the extensive procedural protections and requirements, concluding:

When the elaborate and highly specific procedural protections embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonition contained in the Act, we think the importance Congress attached to these procedural safeguards cannot be gainsaid. . . . Congress placed every bit as much emphasis upon compliance with the procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard. [This] demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content of the IEP.¹⁴

Finally, in *Rowley* the Supreme Court established a two-part test to determine whether a child is receiving a free, appropriate public education. The Court asked:

¹² *Id.* at 200.

¹³ *See id.* at 206-08.

¹⁴ The Court further stated:

We find nothing . . . to suggest that merely because Congress was rather sketchy in establishing substantive requirements . . . it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself.

Id. at 205-06.

1. Has the district complied with the procedures of the Act? and
2. Is the IEP reasonably calculated to enable the child to receive some educational benefit?¹⁵

The *Rowley* test has been the standard, implemented by hearing officers and the courts for the past nineteen years. *Rowley* has been hailed as the “seminal” case under public law number 94-142. The application of the *Rowley* standard, however, has demonstrated its inadequacy in providing clarity on the issue of appropriateness. The question of how to measure benefit was as cryptically addressed in *Rowley* as the statutory definition itself.¹⁶ The Supreme Court did note that the standard was not to “maximize” benefit.¹⁷ The Court recognized that “the benefits obtainable by children at one end of the [disability] spectrum will differ from those at the other end, with infinite variations in between.”¹⁸ The Court acknowledged that for disabled students capable of participating in the general education classroom, advancement from grade to grade would be an “important factor” in determining benefit.¹⁹

The struggle to quantify the substantive benefit continued after *Rowley*, and continues today. Three years after the *Rowley* decision, in *Hall v. Vance County Board of Education*, the Fourth Circuit declared:

Nor was the district court compelled by a showing of minimal improvement on some test results to rule that the school had given [the student] FAPE. *Rowley* recognized that a FAPE must be tailored to the individual child's *capabilities* and that while one might demand only minimal results in the case of the most

¹⁵ *Id.* at 206-07.

¹⁶ *Id.* Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent. *Id.* at 188.

¹⁷ *Id.* at 198.

¹⁸ *Id.* at 202.

¹⁹ *Id.* at 202-03.

severely handicapped children, such results would not be sufficient in the case of other children.²⁰

The Fourth Circuit recognized that educational benefit has varied meanings depending on the student's capabilities. Yet, the Fourth Circuit focused exclusively on the subjective measuring of performance against capabilities without regard for any objective standard.

The appellate courts continued to debate the amount of benefit due. Some of them also began to address other difficulties inherent in the substantive benefit analysis. In *Fuhrmann v. East Hanover Board of Education*,²¹ the Third Circuit admonished against "Monday Morning Quarterbacking," recognizing that a student's subsequent failure to make progress does not retrospectively render an IEP *per se* inappropriate. The Third Circuit reasoned that under the second prong of the *Rowley* test, the analysis must focus on whether the IEP was reasonably calculated to provide benefit at the time it was developed, not on whether it resulted in the expected benefit when judged in hindsight.²²

More recently, faced with evidence of minimal, below-grade-level achievement by a seventeen year-old student with learning disabilities, the Third Circuit stated that the IDEA calls for more than trivial educational benefit.²³ Attempting to quantify satisfactory educational benefit under the Act, the Third Circuit held that educational benefit must be gauged in relation to the student's potential.²⁴ Although P.L. 94-142 had been amended substantively at the time of the decision, the Third Circuit did not look to its new provisions to assist in quantifying the benefit required.²⁵ The court's disapproval of a

²⁰ *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985) (emphasis added).

²¹ *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031 (3d Cir. 1993).

²² *See id.* at 1034.

²³ *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

²⁴ *Id.* at 247. As another court put it, the standard of education cannot be so low as to squander the student's potential for learning. *See T.H. v. Bd. of Educ. of Palatine County Consol. Sch. Dist. 15*, 1999 WL 342317 (E.D. Ill. 1999).

²⁵ *Ridgewood*, 172 F.3d at 247-48.

high school junior with limited skills was clearly evident, and consistent with Congress' disdain when enacting the amendments.

As a practical matter, another line of cases interpreting the first prong of the *Rowley* test—compliance with the procedures—began to supersede the “benefit” standard, because determining compliance is much easier than determining “benefit” under any standard. For example, without even reaching the question of individual benefit to the child in *W.G. v. Board of Trustees of Target Range School District*,²⁶ the Ninth Circuit held that procedural flaws related to the required participants in the development of the IEP was tantamount to a denial of FAPE to the child. In a subsequent case, *Union School District v. Smith*,²⁷ the Ninth Circuit held that failure to provide the required prior written notice of a placement offer was a sufficiently grave procedural error to cause a denial of FAPE.²⁸

The courts' remedies for procedural errors have been far-reaching and costly. For example, in *Union*, after dissatisfaction with the district's verbal placement offers, the parent personally located a private day program over 300 miles from the parent's home.²⁹ The parent unilaterally placed the child in that day program, and rented an apartment.³⁰ In her request for relief, the parent sought and was awarded the tuition for the day program, the rental costs for the remote residence, reasonable travel reimbursement so that the family could be reunited in their primary residence from time to time throughout the year, and attorneys' fees.³¹

The certainty with which a procedural flaw could destroy FAPE reverberated throughout the special education community. No school district attorney would recommend pursuing a dispute with a parent through the Act's

²⁶ 960 F.2d 1479, 1485 (9th Cir. 1992).

²⁷ 15 F.3d 1519, 1526 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 428 (1994).

²⁸ *See id.* at 1526.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.* at 1527-28.

administrative hearing process and the courts, without first carefully analyzing the district's compliance status. And no parent advocate would formulate a case on the basis of a "benefit" analysis without vigorously pursuing the district's procedural compliance. The weak "benefit" standard of the Act seemed all but lost, both in cases and in actual practice in the schools.

Refocusing on Results

The first twenty years of the Act's implementation indicate that efforts at the local level were focused primarily on interpreting procedural requirements, developing mechanisms for program management and compliance monitoring, as well as developing services and filling the gaps in programs for specific categories of disabled students.³² As Congress looked to reauthorize the Individuals with Disabilities Education Act in 1997 (now known as IDEA '97)³³, the serious information gaps became evident and the few available figures were appalling. Little was (or is currently) known about the academic performance of students with disabilities, in contrast to their general education peers who are routinely subjected to various sorts of national achievement testing.³⁴ The limited available information indicated that students with disabilities performed poorly compared to their general education peers.³⁵ Dropout rates for students with disabilities were unmistakably higher than for

³² J. Pyscha, *A National Survey of Individualized Educational Programs for Handicapped Children*, Research Triangle Institute, NC: Center for Educational Research and Evaluation, SRI (1980); *Local Implementation of PL 94-142: Final Report of a Longitudinal Study*, SRI Project 7124, Menlo Park, CA: SRI International (1982).

³³ By amendments in 1990, Pub. L. 101-476, was renamed the Individuals with Disabilities Education Act. 20 U.S.C. § 1412.

³⁴ K.S. McGrew, M.L. Thurlow, & A.N. Spiegel, *An Investigation of the Exclusion of Students with Disabilities in National Data Collection Programs*, 15 EDUC. EVALUATION & POL'Y ANALYSIS 339-52 (1993).

³⁵ G. Munger & B. Loyd, *Effect of Speededness on Test Performance of Handicapped and Nonhandicapped Examinees*, 85 J. EDUC. RES. 53-57 (1991); J. McFarland, *A Comparison of Regular Education Students and Students with Learning Disabilities on a Performance-Based Assessment in the Area of Science*, 8 LEARNING DISABILITIES 109-15 (1997).

their general education peers,³⁶ and graduation rates were significantly lower.³⁷ As Congress noted, “Despite the progress, the promise of the law has not been fulfilled.”³⁸

Prior to the IDEA reauthorization in 1997, Congress already had altered substantially its approach to accountability in federal grant programs. In 1993, Congress passed the Government Performance for Results Act³⁹, requiring all federal agencies responsible for federal grant programs (such as the IDEA) to make systematic attempts to measure the success of federal programs. In other words, instead of looking at whether recipients of federal grants were complying with the terms of the grant, or auditing recipients for appropriate expenditures of federal grant funds, Congress was now asking whether the grants were producing the intended results. In addition, the “reauthorization of IDEA occurred within a context of intense change in American education . . . [and] an array of laws and other programs . . . that have created new initiatives such as new content and performance standards, assessments, [and] new graduation policies . . .”⁴⁰ Thus, it was not accidental that Congress substantially altered the explicit focus of IDEA '97, from access to results.

IDEA '97 is based, in part, on Congressional findings that while the Act provided “access,” its implementation was impeded by low expectations for children with disabilities, and it did not sufficiently focus on applying research-based methods of teaching and learning for these children. Congress

³⁶ S. B. Hasazi et al., *A Statewide Follow-up Survey of High School Exiters: A Comparison of Former Students With and Without Handicaps*, 23 J. SPECIAL EDUC. 243-55 (1989).

³⁷ U.S. Dep't of Education, Office of Special Education Programs, *21st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*; pp. IV-35-36. Data from this report demonstrate that in 1996-97 only about 24.5% of students with disabilities were graduating with a high school diploma. This figure varied among the states this figure varied from a high of 38.2% to a low of 6.8%.

³⁸ 2 U.S.C.C.A.N. 82 (1997).

³⁹ Pub. L. 103-62; 107 Stat. 289 (codified as amended in scattered sections of 31 U.S.C. §§ 1115-1119 (1994)).

⁴⁰ *21st Annual Report to Congress*, *supra* note 39 at IV-7.

found that the education for children with disabilities could be made more effective through the following objectives:

- High expectations;
- Strengthening the role of families;
- Coordination with other school improvement efforts;
- Providing special education, services, and supports in the regular classroom whenever appropriate;
- Supporting high quality, intensive professional development; and
- Preparing children to lead productive, independent, adult lives to the *maximum* extent possible.⁴¹

The major goals of the IDEA '97 are: (1) to ensure that a free, appropriate public education is available that meets the unique needs of the child *and prepares the child for employment and independent living*, (2) to ensure the protection of student and parent rights, (3) to ensure that educators and parents have the necessary tools to improve educational *results* for children, and (4) to assess the effectiveness of efforts to educate students with disabilities.⁴²

The introductory materials in the Federal Register acknowledge the relationship between the IDEA '97 goals and the National Education Goals.⁴³

⁴¹ See 20 U.S.C. § 1400 (2000)

⁴² § 1400 (d).

⁴³ The materials state in relevant part that: All children in America will start school ready to learn; The high school graduation rate will increase by at least 90 percent; All students will leave grades 4, 8 and 12 having demonstrated competency in challenging subject matter . . . and all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment; United States students will be first in the world in mathematics and science achievement; Every adult American will be literate and will possess the knowledge and skills necessary to compete . . . and exercise the rights and responsibilities of citizenship; Every school in the United States will be free of drugs,

In IDEA '97, Congress refocused attention on results for children with disabilities. This focus is a strong contrast to the legislative history, purpose and intent of original Act reviewed by the *Rowley* court. Through IDEA '97 Congress expects that all students, including those with disabilities, will have access to and demonstrate competency in a rigorous academic curriculum, and will finish school with a diploma, prepared to face adult life. Congress expects not only “access,” but “results.”

In addition, where the *Rowley* court found little in the original Act itself to point to a substantive standard of educational benefit, IDEA '97 and its governing regulations contain numerous substantive educational requirements. Although the definition of FAPE remains cryptic, a reviewing court asked to revisit the modicum of benefit owed a student with a disability would have to address the “benefit” analysis in a new light.

Involvement And Progress in the General Curriculum and Accountability

While the Supreme Court in *Rowley* eschewed any comparison of educational benefit between general and special education students and focused on “equal access,”⁴⁴ IDEA '97 by its explicit terms, establishes just such a comparison. P.L. 94-142 did not mention curriculum content for students with disabilities,⁴⁵ but IDEA '97 is replete with demands that

violence . . . firearms and alcohol and will offer a disciplined environment conducive to learning; The Nation's teaching force will have access to programs for the continued improvement of their professional skills and the opportunity to acquire the knowledge and skills needed to instruct and prepare all American students for the next century; and, every school will promote partnerships that increase parental involvement and participation in promoting the social, emotional, and academic growth of children. 64 Fed. Reg. 12416 (March 12, 1999).

⁴⁴ See *Rowley*, 458 U.S. at 198.

⁴⁵ The *only* substantive curricular content noted in P.L. 94-142 referred to a disabled child's right to participate in physical education. This was most likely the result of strong lobbying on the part of physical educators, and not any particular concern on the part of Congress for curriculum comparability.

students with disabilities, as appropriate, be involved and progress in the general curriculum.⁴⁶ Notably, the regulations state that the “General curriculum” means “the *same* curriculum as for non-disabled children.”⁴⁷ The U.S. Department of Education has explained that the IDEA Amendments of 1997:

emphasize providing greater access by children with disabilities to the general curriculum and to education reforms, as an effective means of ensuring better results for these children . . .

The new focus of the IEP is intended to address the accommodations and adjustments necessary to enable children with disabilities to be able to participate in the general curriculum to the maximum extent possible . . .

Clearly, the intent of the IDEA is full participation of each child with a disability in the general curriculum to the maximum extent appropriate . . . and the IDEA Amendments of 1997, as reflected in these final regulations, have given greater emphasis to that intent.⁴⁸

The Department of Education notes that while school districts may offer a variety of choices to students, “there is still a common core of subjects and curriculum that is adopted by...the [states] that applies to all children within each general age grouping.” The Department of Education states that in considering appropriate access to this common curriculum, the IEP team must focus on “having high, not low expectations for the child.”⁴⁹ Although the *Rowley* court found no clear substantive educational standard, IDEA '97 has firmly

⁴⁶ See, e.g., 34 C.F.R. §§ 300.26(a)(3)(ii) (2000) [definition of “special education”]; 300.532(b) and 300.533 [assessment]; 300.344(a)(4) [IEP team participants]; 300.343(c)(2)(i) [IEP revision]; 300.347(a)(1), (a)(2)(i), (a)(3), (a)(4) and (a)(7) [IEP contents]; 300.552(e) [placements].

⁴⁷ 34 C.F.R. § 300.347(a)(1)(ii), (a)(2)(i) (2001) (emphasis added).

⁴⁸ See Federal Register *supra* note 45, at 12594 - 95. See also *id.* at 12545.

⁴⁹ Participation in the core curriculum is not dependent upon a child’s placement in a general education setting, but must be addressed, regardless of the student’s placement. *Id.* at 12637.

established the notion of a common core of curriculum between general and special education, and introduces the standard of age appropriate “reading, writing, and arithmetic” into the rubric of special education.⁵⁰

Students with disabilities must have the appropriate opportunity to participate in the general curriculum. Further, their achievement must be measured against consistent state standards. States and school districts *will be held accountable for results*. IDEA '97 requires the states to develop “goals for the performance of children with disabilities that . . . are consistent to the maximum extent appropriate with other goals and standards for all children established by the State.”⁵¹ The states must establish performance indicators to assess progress toward achieving those goals.⁵² Further, all disabled students must be included in statewide achievement testing and reporting programs to the same extent as their non-disabled peers.⁵³ In *Rowley*, the Court rejected the feasibility of a benefit standard that compared the achievement of disabled and non-disabled students, stating that this would “present an entirely unworkable standard requiring impossible measurements and comparisons.”⁵⁴ Since *Rowley*, educational accountability has increased significantly. Standards-based curriculum, accountability through high stakes testing and public reporting, and the imposition of high academic standards for *all* students, including disabled students, is now common educational rhetoric—and perhaps an achievable reality in the future.

The revision to the regulation governing IEP accountability is particularly notable.⁵⁵ While the former regulation held school districts responsible for providing the

⁵⁰ Since the IDEA covers children beginning at birth, the statute and regulations recognize that a common curriculum may include age appropriate activities and experiences for infants and preschoolers. *See* 34 C.F.R. § 300.347(a)(2); 64 FED. REG. 12592 (March 12, 1999).

⁵¹ 20 U.S.C. § 1412(a)(16) (2001).

⁵² *Id.*

⁵³ *Id.* § 1412(a)(17).

⁵⁴ *Rowley*, 458 U.S. at 198.

⁵⁵ 34 C.F.R. § 300.350 (2001).

services specified in a student's IEP, the IDEA '97 regulation adds the requirement that a school district "make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP." While both the former regulation and the IDEA '97 do not require teacher or individual accountability for the child's lack of anticipated progress, the IDEA '97 regulation alters accountability by stating, "Nothing in this section limits a parent's right to . . . invoke due process procedures if the parent feels that the [good faith] efforts required . . . are not being made."⁵⁶ This is an extraordinary regulatory provision, and read in the context of the IDEA '97 revisions, it will change the nature of future IDEA litigation. Former versions of the IDEA permitted parents to challenge a district's decisions regarding the identification, assessment, placement, and FAPE through administrative due process hearing procedures and judicial appeals.⁵⁷ The new regulatory provision will force the courts to address seriously the expected standard of student achievement, and to assess the school district's efforts to assist the child in achieving that standard.⁵⁸

Rowley Revisited

Would the Supreme Court reach the same result on the meaning of FAPE if asked the question today? Is the purpose of the IDEA '97 still merely to provide access to education and provide some ambiguous educational benefit? Although the courts have not yet addressed these questions, the answer is, "not likely," given the major new directions of IDEA '97.⁵⁹

Over the past twenty years of implementation at the local level, the major focus has been on the development of

⁵⁶ Federal Register *supra* note 45 at 12598.

⁵⁷ 20 U.S.C. § 1415 (2001).

⁵⁸ Undoubtedly, the first phase of litigation under this provision will be to test the authority of U.S. Department of Education to promulgate such a regulation.

⁵⁹ The directions include: 1. Focus on results and high expectation for students with disabilities; 2. Involvement and progress in the general curriculum; 3. Establishment of a common curriculum and standards; 4. Participation in district and statewide achievement tests; and 5. Accountability for results.

programs and services for special education students, not on general curriculum participation, strategies, and academic achievement and testing. As the educational community moves toward higher expectations for students with disabilities, case law will reflect this change. For example, in a recent case over statewide assessment and graduation requirements, one court noted that the opportunity to participate in the curriculum being tested was critical to the decision to uphold a statewide testing program.⁶⁰

Preparing For Results

For parents and school districts alike, the message of IDEA '97 is clear. We should not, as a community, have to spend the next twenty years litigating the meaning of FAPE. Rather, the question should be whether students with disabilities are indeed receiving the benefits Congress intended through the enactment of IDEA '97. If those benefits are not being achieved, then needs assessments should be conducted at the district and state levels. A needs assessment should analyze past actions and strengths and weaknesses of the program. Although increases in services, systems, inclusion and standards can be meritorious, their effectiveness must be assessed honestly.⁶¹

The solutions are not easy. It is axiomatic that special education has played second fiddle to the rest of the educational system. The annual expenditure of billions of dollars for special education has ignored key objectives, such as the provision of substantial services to students with disabilities, significant student inclusion in the general education classrooms, and high expectations for special

⁶⁰ *Rene v. Reed*, 726 N.E.2d 808 (Ind. Ct. App. 2000).

⁶¹ The basic facts may state: more students have been served; more services have been provided; systems are in place; more students have been included; more options are available; standards and testing have been established; and, flexible funding is available. A proper needs assessment will ask key questions about these facts, such as: 1. Are services making a difference? 2. Is there "compliance" over substance? 3. Is "inclusion" working? 4. Are the options needs and curriculum-based? 5. Is special education being excluded from standards and testing? 6. Is flexible funding being used?

education students. The legislative history of IDEA '97 clearly indicates that Congress intended to ameliorate this problem:

Once a child has been identified as being eligible for special education, the connection between special education and related services and the child's opportunity to experience and benefit from the general curriculum should be strengthened . . . This provision is intended to ensure that children's special education and related services are in addition to and are affected by the general curriculum, not separate from it.⁶²

As the U.S. Department of Education has noted, there is little research on how students with disabilities can best access the general curriculum.⁶³ Despite increasing inclusion in general education classes, research is just beginning to inform classroom staff on the best practices.⁶⁴ Indeed, policy implementation is a slow process⁶⁵, but the litigation stakes are high if the educational community does not act quickly.

To meet the challenges of IDEA '97, the educational community as a whole—parents, general and special educators, legislators and control agencies—must recognize that the whole system needs reevaluation. As one administrator stated: “I realized that the problem was not the Special Education Department, but that special education is a responsibility of the district as a whole. I had to start by asking: What if the Special Education Department did not exist at all?”⁶⁶

The following questions might help the educational community to consider how and why special education does not have to be a separate system. What if special education

⁶² 2 U.S.S.C.A.N. 97 (1997).

⁶³ *21st Annual Report to Congress*, *supra* note 39, at IV-11.

⁶⁴ *See, e.g.*, G. McGregor & P.T. Vogelsberg, *Inclusive Schooling Practices: Pedagogical and Research Foundations. A Synthesis of the Literature That Informs Best Practices About Inclusive Schooling*. Pittsburgh, PA: Allegheny University of Health Science (1998).

⁶⁵ *21st Annual Report to Congress*, *supra*, note 39, at IV-54.

⁶⁶ Discussion with Pat Anderson, Assistant Superintendent, Special Education Services, San Francisco Unified School District (1999).

teachers where informed about the general curriculum in the school district? What if general education teachers had the support and knowledge to provide modifications to the general curriculum? What if special education students, tested on “reading, 'riting and 'rithmetic”, were actually taught those subjects? What if funding models supported, rather than discouraged, collaboration and support between general and special education? What if we expected students with disabilities to succeed in life after school, to the same degree that other students succeed? Although the list of “what ifs” could go on, it is important that such an inquiry occur.

Nationwide, from Elk Grove, California to New York City, communities are beginning to talk about “inclusive education.”⁶⁷ These discussions recognize that a school district must become:

[A] diverse problem-solving organization with a common mission that emphasizes learning for all students. . . . [that] employs and supports teachers and staff who are committed to working together to create and maintain a climate conducive to learning . . . [where] the responsibility for all students is shared.⁶⁸

School districts must recognize that achieving the goals of IDEA '97 will require, at a minimum:

[A] sense of community; leadership; high standards; collaboration and cooperation; changing roles and responsibilities; an array of services; partnership with families; flexible learning environments; strategies based upon research; new forms of accountability;

⁶⁷ Inclusion requires more than placing a special education student in a classroom with a “velcroed” aide. This issue was raised in the *Rachel H.* case, 14 F.3d 1398 (9th Cir. 1994). See *infra* Kathryn Dobel, *Representing Rachel*, 5 UC DAVIS J. JUV. L. & POL'Y 219 (2001).

⁶⁸ Council for Exceptional Children, *Creating Schools for All Our Students: What Twelve Schools Have to Say*, in INCLUSION AND SCHOOL REFORM (Lipsky & Gartner eds., 1998).

access to the full range of school experiences; and continuing professional development.⁶⁹

The cryptic and intangible *Rowley* standard of benefit is rightfully dying, if not already dead. By focusing on standards for all students, and participation and progress in the general curriculum, IDEA '97 illuminates a more objective and quantifiable approach to the subjective *Rowley* benefit analysis developed through subsequent case law. By enacting IDEA '97, Congress has renewed the belief that *all* students can learn. It is important that we meet the challenge as a community.

⁶⁹ *Id.*

Representing Rachel

KATHRYN DOBEL*

In 1975, Congress enacted the Education for All Handicapped Children Act, largely because disabled individuals were being excluded from free and appropriate educational opportunities.¹ The passage of the Act, which was later renamed the Individuals with Disabilities Education Act (IDEA), did not by itself expand the opportunities for the inclusion of disabled persons into meaningful educational programs. As school districts across the nation attempted to comply with the Act, they often created segregated educational opportunities.

Pursuant to the IDEA, the Individualized Education Program (IEP) drives the placement and services appropriate for each student with disabilities on an individual basis. In *Board of Education v. Rowley*, a seminal special education case, the U.S. Supreme Court referred to the IEP as the cornerstone of the educational process.² While all placement decisions must be made on an individual basis, the starting point on the full continuum of program and placement options is full inclusion with accommodations and modifications, along with supports and services.³ The appropriateness of full inclusion must be discussed at the IEP level.

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¹ 20 U.S.C. §§ 1400-1491 (2000). The Act was renamed the Individuals with Disabilities Education Act (IDEA) in 1990 to conform with the terminology contained in the Americans with Disabilities Act of 1990.

² 458 U.S. 176 (1982).

³ 34 C.F.R. §§ 300.550-.551 (2001). “Full inclusion” refers to placement in regular education classes with supplementary supports and services. The terms “mainstreaming” and “integration” refer to scheduled time spent in

The *Rowley* Court defined “appropriate education” under the IDEA as “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”⁴ “Related services” are statutorily defined as “supportive services as may be required to assist a disabled child to benefit from special education.”⁵

The IDEA charges states with the responsibility to assure that:

to the maximum extent appropriate, children with disabilities . . . are educated with the children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or the severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁶

With this section Congress created a strong preference for mainstreaming.⁷

Despite the clear Congressional mandate for inclusion, most school district administrators have had difficulty determining how to individualize instruction in group-based general education classrooms. In these classrooms, instruction is based on district and/or statewide curriculum standards for the general education population. As a result, districts have created “special day classes,” or special education classrooms and centers. Districts have referred qualified students to

regular education classes and/or activities for students who have traditionally been placed in special education classes for at least fifty-one percent of their school day. However, the words “full inclusion,” “integration” and “mainstreaming” are often used by courts, when referencing inclusive education, in the same way.

⁴ *Rowley*, 458 U.S. at 201.

⁵ 20 U.S.C. § 1401(22) (2000)

⁶ § 1412(a)(5)(A) (2000).

⁷ Sacramento City Unified Sch. Dist., 16 EHRLR 1236 (SEA CA 1990) (citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)).

special day classes when their level of disability or behavior was more significant than a teacher believed they could handle by themselves.

Unfortunately, once these special education classrooms and centers were created, they became the standard rather than an exception to tailoring individual educational programs within the mainstream as Congress intended. Important opportunities to learn language and social skills from interaction with general education peers did not often exist for disabled students who were placed in special education classrooms. Too often, special education classes became the dumping ground for students with perceived behavioral problems when teachers believed they lacked adequate support to deal with them in their classrooms.⁸

The meaning of “special” in Webster’s Dictionary is:

of a different form from others; distinctive, peculiar, or unique; exceptional; extraordinary; highly regarded or valued...not general or regular....⁹

In comparison, the meaning of “special education” under IDEA is “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”¹⁰ In reality, unfortunately, “special education” is not always very special.

⁸ In 1997 when the IDEA was reauthorized, Congress stated its concern about this problem:

[T]he education of children with disabilities can be made more effective by (A) having high expectations for such children and assuring their access in the general curriculum to the maximum extent possible, . . . (C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts in order *to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent*, and (D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate.

20 U.S.C. § 1400(c)(5)(A)-(D) (2000) (emphasis added).

⁹ WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1376 (4th ed. 2000).

¹⁰ 20 U.S.C. § 1401(25) (2000).

A lack of adequate teacher training programs in colleges and universities, and a deficiency of intensive post-credential training in instructional methodologies, coupled with nationwide failures to adequately fund salaries for teachers, further diminishes the efficacy of the special education classrooms.¹¹ Segregating students with the most needs from the advantages of mainstream education frustrates their potential ability to successfully matriculate in their communities as adults.¹² Accordingly, in 1997 when the IDEA was reauthorized, Congress declared

the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.¹³

The importance of diversity should no longer be a topic of debate. We do not live in a homogeneous society. The lessons we can all learn from the disabled are not measured merely by numbers. Congress has made such a finding:

Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation,

¹¹ In 1997 Congress determined that the education of disabled children can be made more effective by “supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them (i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children.” 20 U.S.C. § 1400(c)(5)(E)(i) (2000).

¹² In 1997, Congress set the goal of enabling disabled children “to be prepared to lead productive, independent, adult lives, to the maximum extent possible.” § 1400(c)(5)(E)(ii) (2000).

¹³ 20 U.S.C. § 1400(c)(4) (2000).

independent living, and economic self-sufficiency for individuals with disabilities.¹⁴

A critical requirement underlying the consideration of an appropriate educational placement for a disabled student is that despite the category under which a student has qualified, the student is entitled to all supplementary aids, services, programs and placements that are appropriate to meet his or her individual needs.¹⁵

In a 1989 case, *Daniel R.R. v. State Board Of Education*, the Fifth Circuit applied a two-part inquiry to determine the extent to which a handicapped child must be mainstreamed.¹⁶ The *Daniel R.R.* court held that

The initial inquiry is whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child; if it cannot... the second inquiry is whether the school has mainstreamed the child to the maximum extent appropriate.¹⁷

In this regard, the court stated, “the Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.”¹⁸

To determine what is required to satisfy the mainstreaming requirement, the *Daniel R.R.* court considered a number of factors regarding the individual child. Factors included the nature and severity of the disability, the curriculum and goals of the general education class, and the sufficiency of a school district’s efforts to accommodate the

¹⁴ § 1400(c)(1).

¹⁵ The services and placement needed by each child with a disability to receive a free and appropriate public education (FAPE) must be based on the child’s unique needs and not on the child’s disability. 34 C.F.R. § 300.300(a)(3)(ii) (2001).

¹⁶ 874 F.2d 1036 (5th Cir. 1989).

¹⁷ *Id.* at 1048.

¹⁸ *Id.*

disabled child in regular education. Additional considerations were whether the child would receive educational benefit from regular education and the effect the handicapped child's presence had on the general classroom environment and on the education of other students.¹⁹ The *Daniel R.R.* court made it clear that "educational benefits" are not the only virtue of mainstreaming. The court stated:

[M]ainstreaming may have benefits in and of itself... although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment.²⁰

From 1989 through 1994 I, along with co-counsel Diane Lipton,²¹ had the distinct honor of representing Rachel H. and her parents in their heroic battle for inclusive education for Rachel. In 1990, Rachel was an eight-year-old girl with mild to moderate developmental delays.²² Rachel, a wonderful, enthusiastic, happy, loving and socially engaging young girl, has taught us all how important it is never to determine educational placement on the basis of a label.

For Rachel, the most appropriate placement also happened to be the least restrictive environment, that is, her neighborhood school.²³ However, to enroll her there, her

¹⁹ *Id.* *Daniel R.R.* was also cited in *Sacramento City Unified Sch. Dist.*, 16 EHLR 1236 (SEA CA 1990).

²⁰ *Daniel R.R.*, 874 F.2d at 1047-48.

²¹ Diane Lipton is an attorney with the Disability Rights Education Defense Fund.

²² Both the district court decision and the Ninth Circuit decision stated that Rachel had an I.Q. of 44. *Bd. of Educ. v. Holland*, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd sub nom.*, *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994). However, there was contradictory evidence that the test used to elicit the score was not appropriate for Rachel. In describing Rachel, the California Special Education Hearing Officer more appropriately referred to her as having mild to moderate developmental delays. *Sacramento City Unified Sch. Dist.*, 16 EHLR 1237 (SEA CA 1990).

²³ Pursuant to title 34 C.F.R. §§ 300.550 subdivisions (b)(1) and (b)(2), Least Restrictive Environment (LRE) refers to the requirement that "to the maximum extent appropriate, children with disabilities are educated with

parents endured five years of expensive litigation by the Sacramento City Unified School District (SCUSD), in its attempt to keep Rachel out of her neighborhood school. Rachel's case immediately attracted interest from the local Sacramento press and television news stations. By the time the U.S. Supreme Court had denied certiorari in 1994, the special education community across the nation was watching carefully.

In Rachel's case, prior to the fall of 1989, her parents acted on their own to change her educational placement to a mainstream placement. The SCUSD had insisted on placing Rachel in a full-time special education class with other significantly disabled children. These children could not impart educational opportunities to Rachel through modeling social or language skills. Rachel's parents had to fight for her to even attend lunch, recess, assemblies, and field trips with her mainstream peers. Initially, her parents just wanted Rachel to attend recess and lunch with her general education peers. When the SCUSD told Rachel's parents that she was not ready and would have to practice first in her special education classroom, the parents began to investigate the efficacy of inclusion for Rachel.

As a result of parental efforts, the SCUSD assigned staff to follow Rachel during recess to record negative data, in order to justify keeping her from the mainstream activities. Subsequently, during the summer of 1989, Rachel's parents enrolled her in a summer program at Shalom School.²⁴ Once there, Rachel began to blossom. Her parents saw such significant improvement in social and language skills, and the

children who are nondisabled;" and that "special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only if 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."

²⁴ Following less than successful efforts to obtain more inclusive education in the Sacramento City Unified School District for several years, Rachel's case to secure her right to inclusive education, was litigated from the fall of 1989 through the fall of 1994, when the U.S. Supreme Court denied certiorari. During this time, her parents enrolled Rachel at Shalom School, a private school in Sacramento.

beginnings of eager exploration of academic endeavors, that they embarked on the long and arduous journey for inclusive education for Rachel.

Ironically, to place Rachel in her neighborhood school without SCUSD support, her parents would have had to withdraw her from special education. That would mean that the supports, accommodations, and modifications necessary to make the program successful for Rachel would not necessarily be available, nor could she access her procedural and substantive rights pursuant to the IDEA. When Rachel's parents arrived at the neighborhood school on the first day of the new school term in the fall of 1989, they were not permitted to enroll Rachel.²⁵ There were poignant clips of these efforts on the local news stations in the Sacramento area at the time. During the due process proceedings that followed, the SCUSD actually threatened to refer the parents to Child Protective Services if the parents attempted to disenroll Rachel from special education.²⁶

At that point, Rachel's parents had no choice but to litigate in order to open the doors to her neighborhood school and assert Rachel's right to be fully included in general education with supports and services. California students now take for granted their access to inclusive programs with supplemental support and services thanks to the Hollands' heroic efforts on Rachel's behalf. Their efforts have benefited all disabled children.

Two questions asked in the proceedings were why Rachel needed to be placed in a special day class, and what was so "special" about the special education placement proposed by the SCUSD. When the case was mediated, and

²⁵ Since SCUSD had only offered a full day special education placement to Rachel, Rachel's parents were not allowed to enroll her in a mainstream educational program, such as any child without a disability could attend without question beyond the establishment of routine residency requirements.

²⁶ Rachel's parents sought an impartial due process hearing in order to exhaust their administrative remedies as required pursuant to 20 U.S.C. § 1415(f) (2001) to obtain an order allowing Rachel to enroll in a mainstream educational program in the SCUSD.

the administrative hearing began in April of 1990, Rachel attended a regular education kindergarten class at Shalom School (Shalom). Rachel's parents placed her at Shalom in order to receive an appropriate inclusive education while her administrative case was pending. In that setting, Rachel demonstrated her ability to learn through imitation and modeling.²⁷ At Shalom, during the kindergarten year, Rachel was fully included with non-disabled peers without any special education or services, and without significant modifications to the curriculum or program. As a result, she made her first real progress in social and language skill development. She also gained a willingness to try things that never previously offered to her in her years in SCUSD special education classes.

The administrative hearing was held over the course of four months in 1990. The hearing primarily considered the appropriateness of an inclusive placement for Rachel's first grade term during 1990-91. The SCUSD witnesses testified at the administrative hearing that Rachel lacked the requisite ability to grasp concepts taught in the first grade and that the curriculum would have to be modified to such an extent that it would become unrecognizable. The hearing officer summarized the SCUSD's viewpoint:

The District also asserts that the instructional methodologies employed in the first grade (i.e. unstructured, quickly building on new concepts, lack of repetition) would not provide Rachel an opportunity to learn.²⁸ They further assert that Rachel's self esteem would falter and she would become an 'isolate' in the class.²⁹

²⁷ Rachel's parents placed her in a kindergarten class at Shalom School in the fall of 1989, because she had never had the opportunity to participate in a mainstream educational program with nondisabled peers. Rachel's parents determined that she should begin her immersion into inclusive education at the appropriate level of instruction. Modeling is an educational term referring to imitating or copying behaviors and actions.

²⁸ Rachel requires repetition and a slower pace.

²⁹ Sacramento City Unified Sch. Dist., 16 EHLR 1239 (SEA CA 1990).

At some points during the hearing, the SCUSD appeared to assert that it wanted to protect Rachel from herself. Or it worried that she might learn she was not as capable as other children. SCUSD also claimed it was concerned Rachel would not learn from the general education curriculum. Therefore, the SCUSD attempted to create a schedule requiring Rachel to go in and out of general education every time an academic activity was introduced to the class. The proposed schedule was not presented to the parents at an IEP meeting, nor was it the result of IEP discussions with the parent, as the IDEA required. As a result, the SCUSD's schedule was doomed to failure on its face.³⁰ The SCUSD's proposed schedule was singularly inappropriate for Rachel and probably any other student. Apparently, the schedule was created by the SCUSD and its counsel in the course of due process preparation. It was first provided to the parents in the documentary submission presented to their counsel five days before the commencement of the hearing. Under the schedule, Rachel would be required to transition in and out of her special day class and two different general education classes six times daily.³¹

Rachel's special education teacher during the 1988-89 term in the SCUSD, testified on behalf of the SCUSD at the administrative hearing. The hearing officer said of her testimony,

[The teacher] did not believe the integration experiences benefited Rachel. She stated that after increasing the integration time, Rachel made very little progress on her goals and objectives and regressed in the classroom....[The teacher] expressed concern regarding Rachel's safety in the regular kindergarten class and asserted that Rachel

³⁰ The schedule failed both procedurally and substantively because it was not created with IEP team input to address Rachel's specific educational needs. 20 U.S.C. § 1414(d) and 34 C.F.R. § 300.340 (2001). Pursuant to 20 U.S.C. § 1414(d)(B) and title 34 Code of Federal Regulations sections 300.344(a)(1) and 300.345 (2001), the IEP team necessarily must include Rachel's parents as equal participants.

³¹ See *Holland*, 786 F. Supp. at 876.

started to drool, was disoriented and unable to concentrate. She believed that Rachel was overwhelmed by the experience.³²

The hearing officer pointed out that although this special education teacher expressed these concerns, “she did not request an aide to assist Rachel in the kindergarten class because she was of the opinion that it would then not be ‘true mainstreaming.’”³³ The SCUSD’s mainstream kindergarten teacher, on the other hand, despite the lack of any consultation from the SCUSD regarding Rachel’s limited inclusion that term, characterized the inclusion experience as successful. The inclusion expert for Rachel testified to the contrary. The expert said that it was the special day class curriculum that would need to be modified for Rachel, and the special education class lacked appropriate language models. During the expert’s observations, the only conversations she noticed were between the teacher and the students, rather than between the students. She was also concerned about the possibility that Rachel would mimic “any inappropriate behavior exhibited by the students in the classroom.”³⁴

The hearing officer set forth the important factors by which she decided the case based on Rachel’s individual needs. The officer stated:

Rachel’s parents believe that a Special Day Class [sic] is an inappropriate placement for Rachel. Of particular concern to them [are] the lack of appropriate language models and the poor behavior models the other students would provide for Rachel...[and] the limited interactions that occur between the students. They further assert that the daily activities, as shown on the classroom schedule, included watching television and table setting, which are inappropriate for Rachel.³⁵

³² Sacramento City Unified Sch. Dist., 16 EHLR 1239-40 (SEA CA 1990).

³³ *Id.* at 1240.

³⁴ *Id.* at 1241.

³⁵ Sacramento City Unified Sch. Dist., 16 EHLR 1240 (SEA CA 1990).

Perhaps the only real reason behind Rachel's need to fight for inclusion was the SCUSD's misconception that it was too expensive for the district.³⁶ The SCUSD misunderstood the application of available special education funding for inclusive educational programs and inflated the true costs of inclusion for Rachel.³⁷

Cross-examination of District witnesses revealed that under SCUSD's viewpoint, Rachel would herself have to bear the financial burden of inclusion. The SCUSD believed she had to pay the entire salary for the special education consultant which was allegedly required to fully include Rachel, a full-time one-to-one aide, and the entire cost of a disability awareness program for the entire SCUSD. However, Rachel did not require an aide in her kindergarten class at Shalom. Her teacher at Shalom testified during the district court trial that Rachel only needed a part-time aide for the second grade at Shalom. No student should bear the burden that the SCUSD imputed to Rachel; and the hearing officer, the district court judge, and Ninth Circuit panel agreed. The courts saw through the SCUSD's ploy as purely a litigation strategy.³⁸

The reality in California was that, in 1989, full inclusion for the severely handicapped student was the exception rather than the practice, and depended largely on geography.³⁹ For example, if Rachel had lived fifteen miles to

³⁶ At the Administrative Hearing, the SCUSD claimed that to fully include Rachel, it would cost \$108,993, in comparison with the cost of \$70,000 for other severely handicapped students in the District. Sacramento City Unified Sch. Dist., 16 EHLR 1242 (SEA CA 1990). In the Ninth Circuit appeal, the District claimed that it would lose up to \$190,764 in state special education funds if Rachel was not enrolled in a special education classroom 51 % of the day. *Holland*, 4 F.3d at 1398.

³⁷ Sacramento City Unified Sch. Dist., 16 EHLR 1242.

³⁸ Sacramento City Unified Sch. Dist., 18 IDELR 762.

³⁹ It was Rachel's administrative due process case in 1990 which first captured statewide interest about inclusion and forced administrators in California to focus on the requirements set forth by Congress for inclusion in title 34 Code of Federal Regulations section 300.550 (2001). State Department of Education Inclusion Specialist testified about the availability of State resources available to the SCUSD to assist with inclusive education.

the west of Sacramento, in Davis, California, she would have been offered inclusive placement in a general education first grade class, with a teacher who appreciated the fact that both general and special education students benefit from the inclusion experience. If the school districts in Davis or Sacramento had requested assistance, the State of California could have provided training and technical assistance to Rachel's district in developing a full inclusion program free of cost. The SCUSD chose instead to spend its money litigating, trying to keep Rachel out of general education. The SCUSD's efforts forced her parents to educate her at Shalom at their own expense, until the litigation concluded.

After Rachel prevailed at the administrative level, the SCUSD appealed the administrative hearing decision to the U.S. District Court.⁴⁰ In *Board of Education v. Holland*,⁴¹ the court found for Rachel. The court adopted a four-part test, borrowing from several circuit court decisions.⁴² The court held that the following factors are relevant in determining the appropriate level of integration for a disabled child:

- 1) the educational benefits of regular education placement, as compared to special education placement;
- 2) the nonacademic benefits of interaction with non-disabled peers;
- 3) the effect of the child's presence in the regular education classroom on the teacher and other students; and
- 4) the costs of supplementary services required to maintain the child in the regular education environment.⁴³

⁴⁰ Rachel was the prevailing party in the impartial due process hearing brought under 20 U.S.C. § 1415(f) (2001).

⁴¹ 786 F. Supp. 874 (E.D. Cal 1992).

⁴² See *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 153-54 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991); *Daniel R.R.*, 874 F.2d 1036; *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983).

⁴³ *Holland*, 786 F. Supp. 874 (citations omitted).

Upholding the hearing decision on appeal, District Court Judge Levi analyzed these four factors by a review of the hearing testimony. Judge Levi stated,

Children change, the educational demands on them change, and Rachel may change. If Rachel does not flourish under this placement in the future, then adjustments should be made. The IDEA foresees such adjustments at the annual IEP review. But the weight of the evidence suggests that this is the appropriate placement now for Rachel Holland.⁴⁴

The SCUSD appealed the court's decision. On appeal to the Ninth Circuit, Rachel prevailed. The Ninth Circuit affirmed the district court's four-part inquiry, and adopted it as the standard.⁴⁵

The SCUSD then petitioned the U.S. Supreme Court. The Court denied certiorari, and the Ninth Circuit holding is now the law. In California, inclusion is the legal standard rather than the exception. School districts throughout California and the Ninth Circuit are required to embrace inclusion pursuant to the carefully delineated standards set forth in *Holland*.⁴⁶

Unfortunately, the legal victory in Rachel's case only solved part of the problem. The next level of inquiry must address the issues raised when school districts include disabled students, but do not appropriately educate them. The failure to appropriately educate is part of the challenge to individualize instruction and methodologies, including specific supports and services required for appropriate educational progress. With very few exceptions, educational

⁴⁴ *Id.*

⁴⁵ *Bd. of Educ. v. Holland*, 4 F.3d 1398 (9th Cir. 1994). 20 U.S.C. § 1412(a)(5)(A) (2001) is formerly codified at 20 U.S.C. § 1412(5)(B).

⁴⁶ The Third, Fifth and Eleventh Circuits use what is known as the *Daniel R.R.* test. The Fourth, Sixth and Eighth Circuits apply the *Roncker* test. In *Holland*, the district court employed factors used in both lines of cases in its analysis. *Holland*, 786 F. Supp at 878-84.

opportunities are not better individualized in special education classes.⁴⁷

California's failure in special education is inextricably linked to the general downfall of the educational system. Since the reduction of tax dollars devoted to education from the passage of Proposition 13, the quality of public education is at an all-time low, save for the few schools in which test scores are competitive with the rest of the nation. Unfortunately, that does not mean that special education is adequate even in those districts with better general education programs.

Students assigned to special day classes are often relegated to educating themselves at their seats, via independent work, with a teacher who has an emergency credential. More often, students receive instruction merely from a well-intentioned instructional assistant, rotating through the classroom for individual questions. Given that the population in a special education classroom is so diverse, very little group-based instruction can take place. Until special education teacher training programs focus on specific and intensive training in the methodologies and technologies available and necessary to provide research based educational programs, districts will continue to spend money on private services.⁴⁸

Until California provides more money for the education of all students, the State will not improve the education for its disabled students. Meanwhile, unfortunate and inaccurate rumors circulate, claiming that expensive special education programs have taken money away from general education. Special education has been blamed for everything from low teacher salaries to the lack of art and music programs in the public school system. There is insufficient evidence to justify these conclusions.

⁴⁷ 20 U.S.C. § 1400(c)(4)-(5) (2000).

⁴⁸ If the school districts do not have available appropriate educational services, programs and placements, they must provide appropriate private services, programs and placements. *See* 34 C.F.R. § 300.349 (2001).

There is a distinct possibility that California has not adequately tapped into all of the federal dollars allowed under the IDEA. Instead, the reality under the new State special education funding model promulgated in 1998, is that school districts are using special education funds for attorneys' fees to litigate cases. This money would more appropriately serve students who desperately need services.

Opinions vary about inclusion and services. Initially, most school district administrators throughout the California watched Rachel's case with apprehension. After the district court decision was issued, there were no school district administrators in California willing to publicly state that they would have litigated the case.⁴⁹

In the fall of 1994, shortly after the U.S. Department of Education filed an amicus brief to the U.S. Supreme Court in support of Rachel H., the California Department of Education held an annual educational conference in Sacramento. Judith Heumann, Assistant Secretary, U.S. Department of Education, appeared as the keynote speaker. It was apparent by audience questions to Ms. Heumann that there was general misinformation about the costs of inclusion and an unfortunate lack of understanding about the real costs to society if exclusion is the educational policy of preference.⁵⁰

When litigating Rachel's case from 1989-1994, given the negative reaction by SCUSD district administrators to her inclusion, Rachel's parents and counsel did not think it wise to seek individually tailored instruction for Rachel. However, now that inclusion is the legal standard, it is appropriate to push the envelope and to require the development of individually tailored educational programs for all disabled students in the least restrictive environment.

⁴⁹ While administrators were nervous about their abilities to fully include children with disabilities in mainstream programs, and were afraid of the alleged expense necessary for creating inclusive educational programs in their own districts, the actions taken by SCUSC were not publicly endorsed.

⁵⁰ Congress addressed these issues in 1997 when reauthorizing the IDEA. 20 U.S.C. § 1400(c) (2000).

In a case that was a sharp contrast to *Rachel H.*, I also served as counsel for an autistic boy. His parents had to live near UCLA to participate in an intensive full-time, one-to-one behavioral integration program. The program aimed to teach the boy sufficient skills to successfully integrate him with support and services in general education, beginning at the preschool level.⁵¹ While this case and Rachel's case appear to be at opposite ends of the spectrum, they actually stand for the same principle. To appropriately include children with disabilities in general education, necessary individual supports, services and educational programs must be tailored to the unique needs of each child.

In fact, the IDEA, as amended in 1997, draws on the language from, and supports the holdings, of *Union School District* and *Holland*.⁵² The IDEA strengthens inclusive programs, focusing on the educational needs of each student.

Cases after 1997 have begun to focus on the specific educational needs of children with disabilities who are fully included in mainstream educational programs, and the specific services and supports necessary to provide a meaningful educational benefit. For example, in 1998, a hearing was held concerning an autistic boy who was fully included in his neighborhood school by consent of the parties, but whose parents sought a more appropriate individualized curriculum, support and services to enhance his educational opportunity in his mainstream placement. The chief hearing officer for the California Special Education Hearing Office, Edwin Villmoare, wrote an eloquent opinion, following a ten-day

⁵¹ *Union Elem. Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994), *cert. denied*, 513 U.S. 965 (1994). In *Union*, an intensive forty-hour weekly one-on-one, home-based behavioral intervention program provided in conjunction with a mainstream preschool placement with shadow aide support was ordered for a preschool age autistic child. The State Education Agency decision is cited as well as the Ninth Circuit decision because the California Special Education Hearing Officer's decision clearly defines the standard used in California to define an appropriate educational opportunity for preschool disabled children. *Union Elementary Sch. Dist.*, 16 EHLR 978 (SEA CA 1990).

⁵² 20 U.S.C. § 1400(c) (2000).

administrative hearing, about the requirements for an appropriate education for this young autistic boy.⁵³

The Mill Valley District had filed for a hearing when the parents declined consent to an IEP that did not contain base level data or goals relevant to the student's needs, and among other things, contained no objectives. The District asserted that the IEP provided a free and appropriate public education to the student. The parents raised issues related to the individualized education program, support and services needs within the inclusive setting, including the failures to provide appropriate individualized instruction designed to meet the student's needs.

In deciding the case, Mr. Villmoare considered the four factors enunciated in *Rowley* for analyzing whether a District has offered or provided an appropriate placement.⁵⁴ The student's instructional assistants testified that the student was not meaningfully involved with the academic portions of the general education class, and could not participate in many of the classroom activities, because the instructional assistant did not have the necessary knowledge or resources to adapt the curriculum for the student by herself. The case manager for the student's program, appointed by the District, instead developed a series of "programs" for the student that were activities entirely separate from those the other students worked on, and were unrelated to the classroom curriculum. Thus, the student was continually pulled in and out of class. Accordingly, the instructional assistant and observers in the classroom were concerned about whether the student was benefiting from the placement. There was no attempt by the case manager to adapt the curriculum of the second grade class for the student.

⁵³ [Ed.: For more information on mediation and the California Special Education Hearing Office, see *infra* Elaine Talley, *Mediation of Special Education Disputes*, 5 UC DAVIS J. JUV. L. & POL'Y 239 (2001).]

⁵⁴ The four factors are whether the district's placement is designed to meet the student's unique needs; whether the District's placement is designed to provide educational benefit; whether the District's placement provides an education in the least restrictive environment; and whether the District's placement conforms with the IEP. See *Rowley*, 458 U.S. at 188-89.

In deciding in favor of the student, the hearing officer stated:

Patience, open-mindedness, and good faith will be necessary now and in the future. Educating a student like 'A' will continue to present enormous challenges and uncertainties... By agreeing to full inclusion, the parties have chosen an option for autistic students that, while increasingly selected, has been little studied. In effect the parties are attempting to fuse mainstreaming...with massive intervention....⁵⁵

The hearing officer recognized that providing an appropriate education to 'A' required a specially-tailored, and perhaps nontraditional, program.

As Congress reiterated in 1997, in the reauthorization of the IDEA, disability in no way diminishes the right of individuals to participate in or contribute to society. In California, since Rachel's administrative hearing decision was first published in 1990, educational opportunities in inclusive settings have increased for children with disabilities. However, implementation of the Act, including the provision of inclusive education, has been impeded by low expectations and a failure to ensure access to general curriculum to the maximum extent possible. It is clear that inclusive education by itself is no longer sufficient. School districts in California and throughout the nation must also provide specific educational programs, supports and services in order to meet the unique educational needs of all students who are included.⁵⁶

⁵⁵ Mill Valley Elementary School District, SEA CA 1998. The decision can be accessed through the California Department of Education website at <http://www.cde.ca.gov>.

⁵⁶ See 20 U.S.C. 1400(c) (2000).

Mediation of Special Education Disputes

ELAINE TALLEY*

Special Education in California

Both federal law and state law govern special education in California. Under this body of law, each child with a qualifying disability is entitled to a free and appropriate public education (FAPE). FAPE is defined as special education and related services that are provided at public expense. This education must be provided in the least restrictive environment, meaning that, to the maximum extent possible, students eligible for special education are to be educated with students without disabilities.¹

Dynamics of Special Education Disputes

Special education law requires the educational program of each child with a disability to be “individualized” through the Individualized Education Program (IEP) team process. The IEP team, which includes parents, teachers, administrators, and service providers, meets and develops an individualized program for each child. Most of the time, this process happens smoothly. However, people may disagree as to what is appropriate for a given child. In fact, “[b]ecause parents and educators may not share identical perceptions of the child or goals for the student and because their roles in the

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¹ 34 C.F.R. § 300.550 (2000).

child's life as parent and professional are dissimilar, disputes are inevitable and normal."²

Emotions can run high when there are disputes regarding the education of a child with a disability. Parents want the best for their children, regardless of whether their children have a disability. School districts and service providers try to do the best they can within the constraints of legal obligations and limited budgets. Parents and districts have the right to have a hearing officer decide the issues for them at a due process hearing when they disagree about the child's eligibility, placement, or program needs. The option of mediation, however, is often a better dispute resolution choice.

Definition of Special Education Mediation

Special education mediation, which generally takes place face-to-face, is a process whereby the parties in dispute work towards a resolution with the help of a neutral third party, the mediator. Under the Individuals with Disabilities Education Act (IDEA), each state must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. The Institute for Administrative Justice at the McGeorge School of Law operates a special education due process and mediation system under a contract with the California Department of Education. The Institute has approximately twenty special education mediators located statewide.

Mediation allows parties to resolve special education disputes in an informal, non-adversarial, and often, creative, setting. The process usually produces wiser, more equitable, and more stable results than adjudication. The financial cost of resolving a dispute through mediation is substantially less than that of a due process hearing. More importantly, in mediation, the parents and educators retain control to make the best decisions collaboratively for the child. The mediator's

² Gail Imobersteg, *Evaluation Study of Special Education Dispute Resolution Issues in California, Final Report*, Feb. 29, 2000 (on file with author).

role is that of a facilitator, with no decision-making authority. Because the parties work together to reach resolution, the mediation process itself can strengthen the relationship between the parties. The relationship between the parent and school personnel is a long-term relationship at risk of being damaged by a formal, protracted, and adversarial due process hearing. Mediators work with parties to identify not only the parties' presenting issue, but also the underlying interests. Identifying the underlying interests facilitates the generation of several options for resolution of the dispute, and promotes the parties' understanding of each other's perspective.

Advantages of Special Education Mediation

Resolving special education disputes through mediation has many advantages over a due process hearing without attempting mediation. First, in mediation, the parties control the outcome. Because the parents and school personnel are the most familiar with the child and because they will have to work together to make the child's education a success, it makes sense to encourage them to make decisions through the mediation process. At a due process hearing, the parties give up this power and ask the hearing officer to make the decision for them. The hearing officer is required to apply the law to the evidence presented at hearing. Mediation allows for more creative solutions to be developed.

A second advantage of mediation is that mediated agreements can often be reached and implemented much more rapidly than a hearing decision can even be written. Parties may meet in mediation, reach an agreement, and implement that agreement as early as the following day.

Another advantage of mediation is that, since the parties work together to come up with a mutually satisfying agreement, there is a high likelihood that the agreement will be followed. In contrast, if a hearing officer imposes a solution upon the parties, the solution may not reflect either party's desires, so there may be problems implementing the decision.

In addition, in mediation, the parent and school personnel are building a long-term relationship. A positive relationship between the parents and school personnel is critical to every student's success. Mediation can help to repair a relationship that has broken down. On the contrary, adjudication rarely has such an effect.

Finally, mediation's cost to the parties, in time and resources, is a fraction of the cost of a due process hearing. In California, special education due process hearings average several days in length. Attorneys represent both school districts and students in most cases, creating substantial costs for both sides. In contrast, the average length of mediation is less than four hours, and is therefore much less costly, even if attorneys participate.

The Special Education Mediation Session

Mediations are voluntary, confidential, non-adversarial, informal meetings of the parties to the special education dispute. These meetings occur at a time and place convenient to the parties. Special education law entitles parties to a dispute to receive a written hearing decision within forty-five days of the request for hearing. Under both state and federal law, mediation may not be used to delay the rights of either party to go forward to hearing. However, parties often agree to postpone their hearing in order to try to resolve the dispute through mediation.

Sessions generally begin with the mediator explaining the process and the ground rules for mediation and helping the parties identify the issues. The ground rules are usually quite simple: the parties agree not to interrupt each other and to treat each other with respect. The mediator will also reiterate that he or she is not a decision-maker; the parties themselves retain control over all decisions made at mediation. Prior to convening the session, the mediator will confirm that an informed decision-maker from each side of the conflict will be present throughout the mediation.

The mediator will keep the parties together as long as doing so is fruitful. Depending on the nature of the case and

the parties, the mediator may keep the parties at the same table, or place them in different rooms to discuss their individual differences or concerns in depth. The latter approach is known as caucusing or shuttle mediation.

Regardless of whether the parties remain in the same room, the mediator will work with both parties to try to identify the underlying interests behind their positions. For example, a parent may ask for a specific reading program. The mediator will work to discover the parent's underlying interest, which may be an improvement in his or her child's reading ability. Identifying the underlying interest opens up more possible creative solutions.

Cases are often resolved in mediation through a final agreement of the parties. The terms of the agreement are memorialized in writing; the parties sign the agreement, and the case is closed. Sometimes the parties reach an interim agreement in mediation. For example, the parties may make an interim agreement to have the student assessed and then have an IEP team meeting to discuss the results of that assessment. If a resolution is achieved at the IEP team meeting, then the case may be closed. Perhaps a key reason that mediation is used so widely and so successfully in special education disputes is the fact that the parties have the flexibility in mediation to try alternative solutions.

California's Program

Special education law provides the parents of the approximately 660,000 eligible students with disabilities in California, and the school districts serving them, the right to mediation and due process hearings to resolve disputes involving the issues of identification, assessment, placement, or the provision of a free appropriate public education.³ Under a contract with the California Department of Education, the Institute of Administrative Justice at McGeorge School of Law operates the California Special Education Hearing Office (SEHO). SEHO has provided mediation and due process hearings throughout California for over a decade. Last year,

³ CAL. EDUC. CODE § 56501(a) (Deering 2001).

SEHO received over two thousand requests for due process hearings. Approximately ninety-seven percent of the cases went through mediation. Most of those cases settled through mediation, so that less than one hundred hearing decisions were needed for the two thousand requests filed.⁴

While federal law has mandated that states provide mediation as an option to resolve special education disputes since the reauthorization of the IDEA in 1997, state law has made mediation available to Californians since 1980. The availability of mediation for over twenty years in California has helped to create a cultural paradigm, so that parties to special education disputes now use mediation as the primary method for resolving these disputes.

⁴ See Imobersteg, *supra* note 2.

The Legal Yin and Yang of Attention Deficit/Hyperactive Disorder

DORIS DERELIAN*

Introduction

Joey Doe fidgets at his desk playing with his pencil and papers. Then he gets up out of his seat and fans the backs of the desks in front of him as he walks to the window. His frustrated teacher tells him once again to remain seated and not disrupt the other students. Joey stays at his desk until he notices a boy he knows pass by the classroom door. He then rises and proceeds as if to enter the hall to see his friend. The teacher responds by sending Joey to the counselor's office where he is asked if he has taken his medication this morning. He can't remember. Joey is thinking about lots of things but not necessarily about his class work or the medication he usually takes in the morning.

Joey is like approximately six percent of America's elementary school children: those who find it difficult to sit still and pursue educational tasks for a socially appropriate length of time. Their problem is Attention Deficit/Hyperactive Disorders (ADHD), characterized by inattention, impulsivity, and hyperactivity that can cause children to be unmanageable in the classroom, in social situations, and in the home.¹

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¹ PETER S. LATHAM & PATRICIA H. LATHAM, DOCUMENTATION AND THE LAW: FOR PROFESSIONALS CONCERNED WITH ADD/LD AND THOSE THEY SERVE 17 (1996).

Children with ADHD have always been with us, but in recent years the special needs of these children have received increased recognition by mental health professionals and the general public.² More recently, the legal profession has grappled with associated issues in tort law, civil rights and disability law, employment, and education law.³ Although the bulk of legal interaction in this area addresses the interests of children, now college-aged youth and adults also present problems associated with these disorders. Symptoms persist into adulthood in forty to sixty percent of persons with the childhood disorders.⁴

Attorneys face dissatisfied and disgruntled parents with confused and disappointed children who want a remedy. Frequently, they seek accommodations through disability law, or they demand changes to individualized education plans, or they might want equal opportunity for their poorly performing student through civil rights law.

Two Disorders—General Descriptions

Authorities now commonly discuss both ADD (without hyperactivity) and ADDH (with hyperactivity) under the general ADHD rubric. More often professionals making diagnostic decisions about affected children discover only a small percentage to be ADD with the much larger majority being ADDH.⁵

² Stewart R. Hokola, *Legal Rights of Students with Attention Deficit Disorder*, 7 SCH. PSYCHOL. Q. 285 (1992).

³ Eileen M. Ouillette, *Legal Issue in Treatment of Children with Attention Deficit/Hyperactive Disorders* 6 (Supp) J. CHILD NEUROLOGY, S68 (1991).

⁴ G. Weiss, et al., *Psychiatric Status of Hyperactives as Adults: A Controlled Prospective 15 Year Follow Up of 63 Hyperactive Children*, 23 J. AM. ACAD. CHILD & ADOL. PSYCHIATRY 212 (1985).

⁵ Craig R. Feidler & David P. Prasse, *Legal and Ethical Issues in the Educational Assessment and Programming for Youth with Emotional and Behavioral Disorders* in BEHAVIORAL APPROACH TO ASSESSMENT OF YOUTH WITH EMOTIONAL/BEHAVIORAL DISORDERS: A HANDBOOK FOR THE SCHOOL-BASED PRACTITIONER 34 (1996).

Boys are six to ten times more likely to be affected than girls and are almost entirely ADDH symptomatic.⁶ Statistics of actual incidence of ADHD are in question among experts, often with a variance more than can be reasonably expected in psychological or educational data.⁷

The presence of hyperactivity drives the treatment choice; that is, most often prescribing control of the disorder by administration of stimulant drugs. Ritalin, the current drug of choice, is medically indicated only when hyperactivity accompanies attention deficit. Before physicians decide to treat with drugs, they must be careful not to rely solely on parental or informal reports of a child's dysfunctional status. Not all schools perform appropriate evaluation by teachers or school administrators and not all parents successfully report errant behaviors.⁸ It is recommended that physicians observe potential ADHD patients over time before immediately prescribing drug intervention.

To date no cause of ADHD has been found. Arguments rage over a trend toward a medical model to explain abnormal brain activity underlying behavior in these children. Some recent researchers believe abnormal glucose metabolism in the brain could be the long-sought answer.⁹ However, fewer than five percent of children with ADHD have neurological damage; CT scans, MRIs and EEGs show no abnormalities.¹⁰

Others feel strongly that psychological misdeeds and illnesses, such as poor parenting, interfamily conflict and divorce, underlying neuroses or psychoses, or personality disorders cause ADHD.¹¹ The disorder is probably inherited in

⁶ M. McGee, *A Comparison of Girls and Boys with Teacher Identified Problems of Attention*, J. AM. ACAD. CHILD & ADOL. PSYCHIATRY 711 (1987).

⁷ *See id.*

⁸ I.W. Horowitz, *Legally Mandated Options Available to Children with ADHD within Public Education*, 32 CLINICAL PEDIATRICS 703 (1993).

⁹ A. Zametkin, et al., *Cerebral Glucose Metabolism in Adults with Hyperactivity of Childhood Onset*, 323 NEW ENG. J. MED. 1361 (1990).

¹⁰ MERCK MANUAL OF MEDICAL INFORMATION (1999).

¹¹ LATHAM & LATHAM, *supra* note 1, at 71.

certain families. Reports suggest that at least twenty-eight percent of biological parents of hyperactive children also had a history of hyperactivity.¹² For the legal professional, causation simply may be moot when representing a child's interests with regard to education or privacy rights, control and treatment problems, and other disputes needing resolution.

Diagnostic Criteria¹³

Important to any deliberation of this subject is clear definition of the diagnosis. Unfortunately, while the diagnostic criteria are as complete as they have ever been, there is still confusion over validity of medical and school-based diagnostic efficacy.¹⁴ The challenge for the mental health community and the legal community rests in finding consistent indices to describe the disorder.

One significant reason for inconsistency in diagnoses is changes in agreed-upon signs and symptoms. Since no biological or "hard" signs exist (such as fever or infection) confirming the presence or absence of ADHD, only "soft" symptomatic criteria can be used.¹⁵ Given the lack of specific medical data, practitioners use the Diagnostic and Statistical Manual of Mental Disorders (DSM) to diagnose ADHD. A problem arises, however, as diagnostic criteria have changed across time. The DSM III identified in narrative form the following:

The child displays, for his or her mental and chronological age, signs of developmentally inappropriate inattention, impulsivity and hyperactivity. The signs must be reported by adults

¹² John Biederman, et al., *Family-genetic and Psychosocial Risk Factors in DSM-III Attention Deficit Disorder*, 29 J. AM. ACAD. CHILD & ADOL. PSYCHIATRY 527 (1990).

¹³ For the best discussion of diagnosis and treatment of ADHD, see ASSESSMENT OF CHILDHOOD DISORDERS 71-129 (Eric J. Mash & Leif G. Terdal eds., 3d ed. 1997).

¹⁴ Russell A. Barkley, *Attention-Deficit/Hyperactivity Disorder*, in ASSESSMENT OF CHILDHOOD DISORDERS 71 (3d ed. 1997).

¹⁵ Richard Welke, *Litigation Involving Ritalin and the Hyperactive Child*, 1990 DETROIT C. OF L. REV. 125 (1990).

such as parents and teachers in the child's environment. Because the symptoms are typically variable, they may not be observed directly by the clinician. When the reports of teachers and parents conflict, primary consideration should be given to the teacher reports because of greater familiarity with age-appropriate norms....¹⁶

In 1987, the DSM III-R was published with a modified overall style and specifically, a changed description of ADHD: "Consider the criterion met only if the behavior is considerably more frequent than that of most people of the same developmental age. A disturbance of at least six months during which at least eight of the following are present:

1. often fidgets with hands or feet or squirms in seat
2. has difficulty remaining seated when required to do so
3. is easily distracted by extraneous stimuli
4. has difficulty awaiting turn in games or group situations
5. often blurts out answers to questions before they have been completed
6. has difficulty following through on instructions from others
7. has difficulty sustaining attention in tasks or play activities
8. often shifts from one uncompleted activity to another
9. has difficulty playing quietly
10. often talks excessively
11. often interrupts or intrudes on others
12. often does not seem to listen to what is being said to him or her
13. often loses things necessary for tasks or activities at school or at home
14. often engages in physically dangerous activities without considering possible consequences (not for thrill seeking)...."¹⁷

DSM III Notes require separation of above criteria from ADHD if other mental disease such as schizophrenia, affective disorder, retardation, or pervasive developmental disorder presents in these children.¹⁸

¹⁶ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 43 (1980).

¹⁷ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 52 (1994).

¹⁸ *See id.*

The dilemma for the legal profession stems from recognizing that any normal, active and growing child may display one or all of the criteria above and not have ADHD. Differentiation requires observation of the frequency of behavior as compared to “that of most people of the same mental age.”¹⁹ Hyperactivity can be distinguished from over-activity because it tends to be undirected, haphazard, and unorganized as compared to that of a normal child’s pattern of behavior.

The current manual (DSM-IV) states that hyperactivity no longer need be associated with ADD, that is, hyperactivity alone may be an independent diagnosis in some children. Symptoms need be found in only *two* environments such as the home and school instead of in all surrounding environments.²⁰ This liberalization of criteria means greater numbers of children (and adults) carry this diagnosis in today’s schools and workplaces.

Recently, the American Academy of Pediatrics provided its members and the public with guidelines for diagnosis of ADHD.²¹ Their basis for issuing such information is the recognition that “[ADHD is] the most common childhood neurobehavioral disorder.”²² These problems plague both the medical professional and an interested public.

In a first-ever attempt to communicate with both clinician and lay audiences about a pediatric disorder, the Academy made five recommendations with levels of strength based on certainty in the literature:

Recommendation 1: In a child 6-12 years old who presents with inattention, hyperactivity, impulsivity, academic underachievement, or behavior problems, primary care clinicians should initiate an evaluation for

¹⁹ *See id.*

²⁰ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL 84 (4th ed., 1996).

²¹ American Academy of Pediatrics, *Diagnosis and Evaluation of the Child with Attention-Deficit/hyperactivity Disorder*, 105 PEDIATRICS 5 (2000).

²² *Id.* at 6.

ADHD. (Strength of evidence: good; strength of recommendation: strong).

Recommendation 2: The diagnosis of ADHD requires that a child meet DSM-IV criteria (strength of evidence: good; strength of recommendation: strong).

Recommendation 3: The assessment of ADHD requires evidence directly obtained from parents or caregivers regarding the core symptoms of ADHD in various settings, the age of onset, duration of symptoms, and degree of functional impairment (strength of evidence: good; strength of recommendation: strong).

Recommendation 4: The assessment of ADHD requires evidence directly obtained from the classroom teacher (or other school professional) regarding the core symptoms of ADHD, the duration of symptoms, the degree of impairment and coexisting conditions. A physician should review any reports from a school-based multidisciplinary evaluation where they exist, which will include assessments from the teacher or other school-based professional (strength of evidence: good; strength of recommendation: strong).

Recommendation 5: Evaluation of the child with ADHD should include assessment for coexisting conditions (strength of evidence: strong; strength of recommendation: strong).²³

With the Academy's release of new recommendations, medical practitioners who normally interact in this area welcomed the attention the information received. "Involving pediatricians in diagnosing ADHD is really exciting because they are seeing these kids more than child psychiatrists. It will add a new dimension and actually be able to help a lot more kids."²⁴

²³ *See id.*

²⁴ Karen Pierce, *Pediatric Group Issues Guidelines to Hyperactivity*, N.Y. TIMES, May 2, 2000, at A4.

The insurgence of these recommendations may assist medical diagnosticians, but the controversy swirling around diagnostic efficacy will not be quieted. In a meta-analysis of empiric studies of ADHD diagnoses made from observational data given by parents, teachers, administrators, physicians and others, broad differences were found in interpretation of behaviors leading to a differential diagnosis of ADHD as against non-disorder behavioral problems.²⁵ In some studies, no specific criteria guided evaluators of ADHD, not even DSM-identified behaviors.²⁶

The attorney practicing in this area deals with troubling documentation that is, at best hearsay garnered by estimate and by limited investigation available at most schools. Even physicians who automatically prescribe drug therapy have little more than a brief consultation from which to make decisions.²⁷

Arguably, diagnostic errors can serve as a basis for challenge by parents, schools, and members of the community. Cases early in the evolution of this body of law involved both misdiagnosis and mistreatment of children labeled ADHD. Today, parents often need court intervention to obtain necessary accommodation for their ADHD children. Today, as well, many parents seek legal assistance for inappropriate handling of their children by those medical and educational professionals who willy-nilly classify any assortment of classroom behaviors as ADHD with concomitant stereotypical responses.²⁸ Most legal wrangling however can be found in the application of legislation created by Congress to solve the dilemma of disability discrimination.

Federal Law Protecting Children in Educational Settings

The federal government's involvement in education is minimal compared to that of the states. Historically, education

²⁵ K. Platzman, et al., *Review of Organizational Methods in Attention Deficit Hyperactivity Disorder (AD/HD): Implications for Diagnosis*, 7 SCH. PSYCHOL. Q. 161 (1992).

²⁶ *Id.* at 163.

²⁷ Welke, *supra* note 15, at 135.

²⁸ LATHAM & LATHAM, *supra* note 1, at 65.

of America's children has been a state and local responsibility. However, in response to a significant lack of educational opportunity for handicapped children, Congress has enacted a mesh of laws addressing the needs of these children. In some way, the Rehabilitation Act of 1973, Section 504²⁹, the Education of the Handicapped Act of 1975³⁰ amended in 1990 to the Individuals with Disabilities Act (IDEA),³¹ and the Americans with Disabilities Act (ADA)³² have overlapping impact on the rights of children and parents with regard to educational opportunity. Stepping through this minefield of provisions carving out rights for ADHD children frequently stymies both legal scholars and practitioners.³³

In general, the education statutes principally provide federal funds for states to carry out their own plans for accommodating handicapped students. The language of the IDEA purpose is "...to assure that all children with disabilities have available to them ...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure the rights of children with disabilities and their parents or guardians, to assist states and localities to provide for the education of all children with disabilities...."³⁴

In seminal IDEA judicial interpretation, Justice Rehnquist delivered the Supreme Court opinion in *Board of Education v. Rowley*,³⁵ interpreting the issue of what is a free appropriate public education. With remarkable breadth, the court supported the "ambitious federal effort to promote

²⁹ 29 U.S.C. § 794 (1973).

³⁰ 20 U.S.C. § 602 (1975).

³¹ 20 U.S.C. § 1400 et seq. The statute has undergone several name changes: Title VI of the Elementary and Secondary Educational Act (1966-1975), the Education for All Handicapped Children Act (1975-1976), the Education of the Handicapped Act (1979-1990), and the Individuals with Disabilities Education Act (1990-Present).

³² 42 U.S.C. § 12101 et seq. (1994).

³³ Perry A. Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 ED. LAW REP. 369 (1997).

³⁴ 20 U.S.C. § 1400 (2000).

³⁵ 458 U.S. 176 (1982). The opinion details a complete legislative history of the education statutes.

education of handicapped children [based on a] perception that a majority of handicapped children...were totally excluded from schools....”³⁶ The majority felt the Act sufficiently defined “free appropriate public education.”³⁷ The court distinguished between an education to maximize an individual handicapped child’s potential versus an educational standard to create an educational opportunity equivalent with that of a non-handicapped child. The court agreed the latter reflected the intent of Congress in enacting the legislation, and found parents and students who wish individual maximization must bear the burden of achieving that themselves. In writing for the majority, Justice Rehnquist spelled out that the court in no way wished to determine for the states which education methods or accommodations Congress demanded. In fact, the court went so far as to write that while the Act requirement for an “individualized educational program” must be prepared for each handicapped student, with parental participation, they would not attempt to dictate how or in what fashion schools must meet this provision of the legislation.³⁸

In other words, the federal government could agree to fund states’ efforts at assisting schools accommodate handicapped students and their concerned parents, but could not dictate the form those accommodations must take.

For the ADHD student this means a smorgasbord of possible school actions. Behavioral disabilities, in contrast to physical ones, receive greater or lesser attention depending on the jurisdiction and the outcomes of lower court decisions across the country. Though Congress did not specify ADHD as a separate IDEA eligibility category, it did include language defining children with specific learning disabilities as “those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.”³⁹ This definition

³⁶ *Id.* at 179.

³⁷ *Id.* at 186

³⁸ *Id.* at 206-07.

³⁹ 20 U.S.C. § 1401(a)(15) (1994).

serves to fill the gaps in several statutes as will be described later.

The Department of Education (DOE) posited that children were already eligible under Section 504 of the Rehabilitation Act. In a subsequent DOE memorandum, two separate rights were articulated for these children: 1) recognition of a disability and 2) free equal education. Effectively from 1990 onward, individual due process proceedings reflected a new sensitivity to eligibility under the IDEA as well as Section 504. From this regulatory interpretation, courts have, at least in IDEA cases, relied on the inclusion of ADHD as a disability with legal standing.⁴⁰ This classification faces a more severe scrutiny under an ADA framework that will be discussed later.

Frequently school authorities handled children with behavior problems by expelling or suspending them with or without appropriate due process proceedings. Parents had not yet realized the impact of the IDEA on their rights to full participation in all decisions affecting their handicapped child. In *Honig v. Doe*, the Supreme Court undertook to establish how states could act with respect to obligations of providing education for handicapped children.⁴¹ California schools frequently unilaterally expelled or suspended students whose disruptive behavior they wished to control. These suspensions often had indefinite terms and little, if any, formal evaluation proceedings to determine cause. The court granted certiorari in order to deliberate the specific requirements of the IDEA: rights of parents to be full participants in school decisions about their children, to seek review of decisions they think inappropriate, and to request appropriate evaluation to determine the cause of behavioral misconduct.⁴²

One of the most important outcomes of the *Honig* opinion is that it keeps students in school while evaluation proceeds. This “stay put” provision of the IDEA proved invaluable to parents. It provides that during the pendency of

⁴⁰ 34 C.F.R. § 300.7(b)(10) (1997).

⁴¹ 484 U.S. 305 (1988).

⁴² *Id.*

any proceedings initiated under the Act, the child remains in the current educational placement unless the student poses an “immediate threat to the safety of others” and even then the suspension may only last ten days.⁴³

For the families of children with ADHD this decision finally brought them power. The lower courts began to enjoin school districts from carrying out policies against the interests of behaviorally disabled students.

Sharp criticism of the “stay put” provision came in late 1990s as commentators examined abuse by students wishing to avoid discipline in the form of expulsion or suspension from school.⁴⁴ The holding and progeny of *Honig* established a potential for abuse because special education students could not be expelled until after due process proceedings had been completed and could not be expelled at all for conduct related to their disability.⁴⁵ The problem with “stay put” requirements lies in the non-differentiation between all behavioral disruption and that of correctly identified ADHD students. For example, can a student carry a firearm to school or flagrantly disobey disciplinary rules and remain at school beyond the reasonable expectation of suspension or expulsion? The critics argue the answer is yes.⁴⁶ While parents demand and wait for an evaluation hearing to determine if their child has an identifiable disability, school officials cannot remove the student from the school or place them in any type of isolated environment.⁴⁷

⁴³ *Id.*

⁴⁴ Aaron D. Rachelson, *Expelling Students Who Claim to be Disabled: Escaping the IDEA’s “Stay Put” Provision*, 2 MICH. L. & POL’Y REV. 127 (1997).

⁴⁵ Teresa J. Bryant, *The Death Knoll for School Expulsion: The 1997 Amendments to the IDEA*, 47 AMER. U. L. REV. 487 (1998). For a complete analysis of the issue of abuse of avoiding discipline in schools, see both Bryant and Rachelson, as well as Christopher Kraus, *Application of the “Stay put” Provision of the IDEA to Students with Undetected Disabilities*, 5 KY. CHILDREN’S RTS. J. 1 (1997).

⁴⁶ Rachelson, *supra* note 42, at 128.

⁴⁷ *See id.*

In spite of these concerns, most commentators believe the opinions in *Honig* and in lower courts upholding IDEA support children with ADHD and their families by creating the necessary procedures to ensure equal treatment for these disabled students.⁴⁸

Court Rulings on Accommodations for ADHD Students

Just how far must a school go to ensure an accommodation to a student with ADHD? This is a question lower courts have struggled with since the IDEA became law. Variance among jurisdictions can be demonstrated by examining two opposing cases. The Ninth Circuit in *Capistrano Unified School District v. Wartenberg*⁴⁹ found that the student's bad behavior resulted directly from his ADHD, therefore qualifying him for IDEA benefits; that his individualized education program developed by the school district did not meet his needs; and that private school provided the appropriate educational setting for him. Thus, the district must reimburse with attorney's fees the cost of private school for Jeremy Wartenberg.⁵⁰

By contrast, in *Sylvie M. v. Board of Education*⁵¹, the U.S. District Court for the Western District of Texas rejected a similar transfer from public to private school as necessary to achieve "free appropriate education" for an ADHD student. The court, in interpreting the IDEA requirement for an Individualized Education Program (IEP) "reasonably calculated to provide a meaningful educational benefit," held

⁴⁸ Donald J. Hermann, MENTAL HEALTH AND DISABILITY LAW IN A NUTSHELL 331 (1997). This very brief synopsis includes a description of the Family Educational Rights and Privacy Act (1974) not covered in this discussion but enacted to guarantee access of students and parents to all school records including test/evaluation reports collected in assessing ADHD and other behavioral records.

⁴⁹ 59 F.3d 884 (1995).

⁵⁰ *Id.* at 894. In following cases, attorney's fees have been recovered under IDEA. Using catalyst theory, the plaintiff may be reimbursed as the prevailing party if she can show her lawsuit was the causal link to prompting some remedial action. See *W.T. Tatum v. Andalusia City Schs.*, 977 F. Supp 1437 (M.D. Ala. 1997).

⁵¹ 48 F. Supp. 2d 681 (W.D. Tex. 1999).

that it does not have to provide the *best possible* one, nor one that will maximize the child's educational potential, rather it need only be one that will permit [the student] to benefit from the instruction.⁵²

These two cases might be distinguished by the decisions of the respective parents. In *Wartenberg*, the transfer to private school had been an outcome of agreed-upon discussions with school authorities while in *Sylvie M.*, the parents unilaterally removed the student to a private school then sued for reimbursement under the IDEA. In neither case, however, did the districts believe an obligation to reimburse existed.

The choice of legal theory a parent or guardian pursues in seeking recourse for alleged violations against their ADHD child can make a difference. It should be noted that parents enjoy a fifty percent favorable outcome when using Section 504 of the Rehabilitation Act and a 45.7% favorable outcome when pursuing remedies under the IDEA, at least at the administrative level through the DOE.⁵³ It is acknowledged that few empiric results-oriented studies of alleged ADHD violations have been conducted especially at the regulatory level.

Legal Arguments for ADHD under the ADA

When the Rehabilitation Act transformed into the ADA in 1992, many questions arose concerning ADHD because the language of the ADA reflected a different approach to classifying impairments as disabilities. Under the Act, the program (school, business, public establishment) must bear the cost of reasonable accommodation for both youngsters and adults. Congress enacted the legislation over the initial objections of President George Bush who felt any new legislation in the disabilities arena would be over broad and costly to American business. Very specific language limited the covered categories of disabilities to those that

⁵² *Id.* at 693 (emphasis added).

⁵³ Zirkel, *supra* note 33, at 374.

“substantially limit a major life activity”⁵⁴ In fact, many impairments cannot qualify as disabilities under the ADA. While it is relatively easy to describe a plaintiff’s physical or mental impairment, it becomes increasingly difficult to satisfy the limitation element of the prima facie case. Life activities listed such as seeing, hearing, and walking, though not an inclusive delineation, prove to be troublesome especially when applied to mental impairments. So it has been left to the Equal Employment Opportunities Commission (EEOC) and Department of Justice (DOJ) to promulgate regulations which help answer the questions of qualifying disabilities.⁵⁵

ADHD is not provided for in the regulations. The EEOC and DOJ provide that a “mental impairment” is any mental or psychological disorder, including mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁵⁶ Courts tend to place ADHD with learning disabilities for purposes of qualifying it for disability status, but commentators of many persuasions argue against this association.⁵⁷ Some courts rely on the IDEA definition to overcome the ambiguity of the ADA and regulatory language.⁵⁸

The most advantageous use of the ADA might be for the adult plaintiff. Significant numbers of children have now reached maturity after being diagnosed with ADHD. Their employers, higher education administrators and others covered by the ADA now face challenges.

As examples, law and medical students, using the ADA, have sued their respective colleges and universities for

⁵⁴ 42 U.S.C. § 12101 (1994).

⁵⁵ See 16 C.F.R. § 1630 et seq. and 28 C.F.R. § 35.100 et seq. For a thorough and detailed discussion of the issues surrounding the classification of ADHD within the ADA framework, see Robert Herzog, *ADD: Or An Arbitrator’s Disciplinary Dilemma*, 53-NOV DISP. RESOL. J. 20 (1998).

⁵⁶ 16 C.F.R. § 1630.2(h)(2) (1998); 28 C.F.R. § 35.104 (1998).

⁵⁷ David W. Lannetti, *Extending Coverage of the ADA to Individuals with Attention Deficit-Hyperactive Disorder: A Demonstration of Inadequate Legislative Guidance*. 35 TORT & INS. L. J. 155 (1999).

⁵⁸ *Id.* at 167.

accommodations including private tutors and extended exam times relying on their childhood diagnoses of ADHD and other learning disabilities. Generally, courts held that students admitted to professional schools may expect reasonable accommodations but not when creating “undue hardship” for defendants.⁵⁹ Often if the professional student achieves at least to the level of his or her average peer, courts will find for the defendant university.⁶⁰

Few children take advantage of yet another federal law under which ADHD is an eligible condition. The Social Security Act⁶¹ in Titles II and XVI provides for children so afflicted to receive social security benefits. However, the language of the Act regards *severity* of the condition significant for granting eligibility: “Manifested by developmentally inappropriate degree of inattention, impulsiveness and hyperactivity. This disorder meets statutory appropriateness when medical documentation satisfies its severity.”⁶²

ADHD and Treatment

In today’s climate, profound concerns center on treatment with psychotropic drugs to modify behavior and create socially acceptable children. The ubiquitous presence in schools, care institutions, and homes leads some commentators to decry all forms of drug therapy as inappropriate and dangerous.⁶³ The most common

⁵⁹ For discussion of law students’ efforts to obtain accommodations, see Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1 (1999).

⁶⁰ *Id.*

⁶¹ 42 U.S.C. § 402 et seq. (2000).

⁶² Social Security Act, 20 C.F.R. § 404, Subpart P, App. 1, § 112.11. The first criterion of “marked” inattention, impulsivity, and hyperactivity is narrower standard than DSM IV criteria. Few children receive benefits solely on ADHD qualification. However, under utilization may result from lack of sufficient notice to parents of ADHD children. Attorneys in this area should be aware of potential benefits available to clients for assisting in the education or other costs of ADHD children.

⁶³ PETER R. BRIGGIN, TALKING BACK TO RITALIN 9 (1998).

commercial product overwhelmingly prescribed is Ritalin.⁶⁴ In 2000, physicians wrote eleven million prescriptions.⁶⁵

No one knows with certainty why a stimulant in the form of amphetamine effectively calms and stills hyperactive children, but it is effective in eighty percent of children receiving medication after diagnosis.⁶⁶ While Ritalin acts in the hyperactive child like a sedative, that is, keeping the student in his or her seat and reducing or eliminating extraneous movements, no one has proven increased educational success.⁶⁷ In fact, many parents now believe that while drug therapy can modify behavior, it cannot produce the “ideal” classroom pupil.⁶⁸

An outspoken opponent of drug therapy, Peter Breggin, M.D., brings his arguments to television and printed media because he believes that approach reaches parents who otherwise could not be adequately informed about the negative side of Ritalin.⁶⁹ Media coverage of this ADHD issue continues to escalate. Health and science editors of major daily papers claim that readers demand information about psychotropic drugs for mental illness in general and specifically for ADHD.⁷⁰

The professional journal *Science* ran a series of articles on research pros and cons with regard to Ritalin efficacy and side effects.⁷¹ Major questions to be answered about Ritalin include what are the long-term effects of Ritalin therapy, what

⁶⁴ James C. O’Leary, *An Analysis of the Legal Issues Surrounding the Forced Use of Ritalin*, 27 NEW ENG. L. REV. 1173, 1993.

⁶⁵ Eliot Marshall, *Epidemiology News Focus*, SCIENCE, August 4, 2000.

⁶⁶ *See id.*

⁶⁷ *Id.* at 1178.

⁶⁸ LATHAM & LATHAM, *supra* note 1, at 65.

⁶⁹ BREGGIN, *supra* note 58, at 247.

⁷⁰ Michael Janofsky, *Colorado Jumps into Fray on Drugs for Problem Kids*, N.Y. TIMES, 25 Nov. 1999 at A6. The New York Times runs an average of 10-12 stories about Ritalin and psychotropic drugs for children per year. *See Hooked on Ritalin, a Prescription for Compulsive Behavior, Study Confirms Ritalin’s Effectiveness, Pooh Gets Psychiatric Diagnosis, and others.*

⁷¹ Eliot Marshall, *Planned Ritalin Trial for Tots Heads into Uncharted Waters*, 290 SCIENCE 1280 (17 Nov. 2000).

bio-systems are affected by Ritalin in this population of users, what is the validity of claims of opponents such as growth retardation, depression, dependency/abuse propensity, and what are the neurotoxicity outcomes of use by ADHD patients?⁷²

Perhaps the most pervasive problem with Ritalin and other drugs results from school officials' dependence on the control these drugs exert over student classroom behavior. Once teachers and administrators see the calming effect such drugs produce in a disruptive child, the more likely they are to pressure parents into using drugs even when they would otherwise choose not to.⁷³ The school's authority to demand and the constitutional right to refuse under a right of privacy identified in *Griswold v. Connecticut*⁷⁴ come into conflict frequently and without a good resolution. Reliance on prisoners' liberty rights (resisting enforced anti-psychotics) and mental patients' rights (free from administration of unwanted drug therapies) is the basis for court opinions in favor of parents against schools and other care institutions.⁷⁵ The state cannot exert its *parens patriae* power over ADHD children as it might over incompetent patients.⁷⁶

However, schools succeed at requiring drug intervention for ADHD students when they prove students' safety and control improve.⁷⁷ Most often district policies and procedures allow schools to implement control mechanisms for handling difficult students. Courts hold for schools when they comply with their regulations; however, they must maintain educational standards for the ADHD students at the same time.⁷⁸

Alternative treatments often include a foundation with or without pharmacological intervention and counseling,

⁷² BREGGIN *supra* note 58, at 44.

⁷³ O'Leary, *supra* note 59, at 1180.

⁷⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁵ Welke, *supra* note 15, at 126. A complete early 90s examination of the subject is included here discussing theories and corresponding defenses.

⁷⁶ O'Leary, *supra* note 59, at 1202.

⁷⁷ LATHAM & LATHAM, *supra* note 1, at 41.

⁷⁸ *Id.* at 43.

parental guidance and reinforcement behaviors, behavior modification, and family awareness/attention.⁷⁹ Though these approaches lack the corrective immediacy achieved with drugs, they tend, over time, to modify behaviors sufficiently that parents and caregivers report satisfaction with the results, however labor intensive.⁸⁰

Other Issues in ADHD

Much has been made of defenses involving mentally-challenged offenders in criminal cases. Is an ADHD child liable for his or her actions against person or property? Is ADHD an excuse to behave irrationally without accountability? The answer is unclear.⁸¹ ADHD serves as an explanation for certain impulsive acts, but does not constitute a sufficient mental disturbance to be an extenuating factor in determination of guilt or sentencing.⁸² Studies attempting to predict criminal behavior within samples of ADHD children followed into adulthood have no predictive value about such behaviors per se without concomitant parental and family dysfunction a more likely cause.⁸³

Research into the causes of ADHD may prove successful. If altered neuro-pathways turn out to be causal, then possibly bio-specific drugs could control ADHD behavior.⁸⁴ Nicotine holds promise for treating diseases such as ADHD. From current research, it appears that the simplicity of the nicotine molecule makes it especially effective in controlling release of neurotransmitters that run the brain on a moment-by-moment basis.⁸⁵ However, that solution is not immediately on the horizon.

⁷⁹ Russell A. Barkley, *Attention-Deficit/Hyperactivity Disorder*, in *ASSESSMENT OF CHILDHOOD DISORDERS* 71 (3d ed. 1997).

⁸⁰ *Id.* at 116.

⁸¹ *Id.* at 111.

⁸² *Wainwright v. Arkansas*, 790 S.W.2d 420 (Ark. 1990), *cert. denied*, 111 U.S. 1123 (1991).

⁸³ Barkley, *supra* note 74, at 115.

⁸⁴ BREGGIN, *supra* note 58, at 48.

⁸⁵ Harvey Black, *A Good Side to Nicotine?*, *THE SCIENTIST*, June 26, 2000 at 17.

Conclusion

With an issue of this magnitude, only cursory attention may be given to a myriad of subtopics. Examination of mental disorders of children leads most often to ADHD, more prevalent than all other behavioral illnesses of children combined. Perhaps nowhere else can “normal” life continue as in the family and school of a hyperactive child. Compared to the complexities of more severely handicapped individuals, we often label ADHD as a minor blip in the issues that confront our society.

On the other hand, issues of diagnostic error, treatment inappropriateness, professional ignorance and other problem conditions ought to keep us attuned to ADHD in the normal course of our lives.

Joey slouches at the library table where he spreads out blank sheets of paper. His fingers drum on the wood, his foot pumps up and down under the chair. Staring at the books on the shelves ahead of him, he creates a game to level the books to the floor. His mind wanders overhead to the reading lamp and he draws large figures with his hand as he imagines their angles to the light. Now in high school, Joey still thinks about many things at once but not his schoolwork. His urges to get out of his chair have calmed but his future as an adult with ADHD looms ahead.

Disabled Youth, Incarceration, and Educational Challenges

DOMINGA SOLIZ* AND NOAH CUTTLER**

Introduction

In 1975, Congress enacted the Education for All Handicapped Children Act (EHA), which required that all public schools provide a free appropriate public education (FAPE) for students with disabilities.¹ In 1997, Congress amended the EHA to include several substantial special education provisions.² The amended statute, the Individuals with Disabilities Education Act (IDEA), requires local education agencies to provide an Individualized Education Program (IEP) for each disabled student.³ Congress created the IEP to allow parents more involvement in their child's education.⁴

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¹ The range of disabilities that qualify a child for special education services under IDEA is broad. Some of the qualifying disabilities are mental retardation, deaf-blindness, deafness, hearing impairment, speech or language impairment, visual impairment, emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, and multiple disabilities. 20 U.S.C. §1401(3)(a) (1997); 34 C.F.R. §300.7(a)(1) (1999), *see* Sue Burrell & Loren Warboys, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM (2000), available at <http://ojjdp.ncjrs.org/pubs/court.html#179359>.

² Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (1997).

³ 20 U.S.C. § 1414(d)(2)(A) (1997); 34 C.F.R. § 300.342(a) (1999).

⁴ 20 U.S.C. § 1415; 34 C.F.R. § 300.501-300.512.

The committee creating the IEP must provide education for disabled students in the least restrictive manner possible. In *Board of Education v. Rowley*, the U.S. Supreme Court interpreted the IDEA to mean that disabled students should be placed in mainstream classes to the “maximum extent allowable.”⁵ The primary function of schools is to educate students. When considering the placement of disabled students, however, the schools must also weigh several other factors. In *Sacramento City Unified School District v. Rachel H.*, the Ninth Circuit refined the *Rowley* analysis by adopting a four-factor test to determine a FAPE.⁶

Inclusion can be beneficial for a disabled student; however, schools must administer the procedure with caution. Compared to non-disabled students, disabled students traditionally have a harder time coping with normal social functions. This is evidenced by disabled students’ higher rate of adversarial police interactions and juvenile convictions.⁷ This problem is made worse when schools neglect the due process rights afforded to disabled students by the IDEA. Moreover, in 1997 schools were given greater authority to enforce disciplinary measures for disabled students.⁸ These measures appear to have frustrated the purpose of the IDEA, as evidenced by even larger incarceration rates of students with disabilities.⁹ Once specialized students are incarcerated it is less likely that their educational needs will be met because correctional facilities are less equipped and less concerned with these needs.

⁵ 458 U.S. 176 (1982).

⁶ These four factors are: the educational benefits of a regular classroom, supplemented with appropriate materials, weighed against a special education classroom; the non-interaction benefits of interaction with children who are not disabled; the effect of a student with disabilities presence on the teacher and other children in the classroom; and, the cost of mainstreaming a student with disabilities into a regular classroom. *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). See also *infra* Joyce Eckrem & Eliza McArthur, *Is the Rowley Standard Dead? From Access to Results*, 5 UC DAVIS J. JUV. L. & POL’Y 199 (2001).

⁷ See *id.*

⁸ 20 U.S.C. § 1415(k)

⁹ See Burrell & Warboys, *supra* note 1.

Part I of this article addresses the risks of inclusion of disabled students under the IDEA. Part II discusses the 1997 amendments to the IDEA and their effect on disabled youth. Part III concludes with a look at the disproportionate incarceration of disabled students in juvenile facilities.

The Risks of Inclusion

Disabled students have a higher rate of adversarial police interactions and juvenile convictions.¹⁰ A study by the Juvenile Journal for Special Disabilities found that nearly twenty percent of students with emotional disabilities are arrested at least once before they finish school.¹¹ This compares to an arrest rate of six percent for all students.¹² In addition, a national survey found that individual schools, on average, file police reports for thirty-four percent of their students with disabilities during a school year, compared to only twenty-eight percent of non-disabled students.¹³ The same study reported that disabled students were three times more likely than non-disabled students to face serious disciplinary actions.¹⁴

Fifty-eight percent of students with emotional disturbance and thirty-one percent of students with learning disabilities will be arrested within three to five years after leaving school.¹⁵ Another study reported similar figures, with nineteen percent of all disabled juveniles arrested within two years after leaving school.¹⁶ This is nearly four times the

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ Compiled by a survey of 272 public middle school and high school principals. *Student Discipline and IDEA*, U.S. GEN. ACCOUNTING OFFICE, GAO-01-210, at 17 (2001).

¹⁴ *See id.* at 6.

¹⁵ Students can leave school either by graduating or dropping out. *The National Longitudinal Transition Study: A Summary of Findings*. (SRI International, 1997).

¹⁶ *What Happens Next? Trends in Postschool: Outcomes of Youth With Disabilities* (Wagner, M., et al. eds., Menlo Park, CA: SRI International, 1992).

number of arrests for all juveniles aged ten to seventeen.¹⁷ A 1997 report by the University of Utah School of Medicine found that children and teens with attention deficit disorder are more likely to have encounters with the police and juvenile system.¹⁸ Students with attention deficit hyperactive disorder are seven times more likely to be suspended from school and eight times more likely to have adversarial encounters with the law than non-affected peers.¹⁹

Statistics such as these should act as a red flag for school districts to closely follow the *Rachel H.* guidelines.²⁰ Failure to do so can compromise the education of disabled students. In *Millersburg v. Lynda T.*, the disabled student began experiencing emotional and behavioral problems in fourth grade.²¹ The student's initial IEP did not include individualized behavior management programs. Despite several due process hearings over the next four years, none of the student's IEPs contained individualized behavior programs.²² In *Millersburg*, the court found that the school district failed to satisfy three of the four *Rachel H.* factors. Most importantly, the school district failed to develop an individualized behavior management program despite a Pennsylvania statute that expressly requires such programs in the IEPs.²³

Inclusion can help disabled students adapt to mainstream society. The need for greater involvement by the schools to find suitable means of educating and developing students for life beyond school is an essential part of the IDEA. Schools that undervalue or disregard the needs of a disabled student can make matters worse.

¹⁷ Snyder, H. & Sickmund, M., *Juvenile Offenders and Victims: A National Report*, (Dep't of Justice, 1995).

¹⁸ David Holden, *Attention Disorders Put Kids at Risk of Facing Juvenile Justice System*, HUNTSVILLE TIMES, Oct. 8, 2000, available at <http://www.al.com/news/huntsville/Oct2000/8-e339757.html>.

¹⁹ See *id.*

²⁰ See *Rachel H.*, 14 F.3d 1398 *supra* note 6.

²¹ 725 A.2d 1223 (Pa. 1998).

²² See *id.*

²³ See *id.*; 22 PA. CODE § 14.36(b).

1997 IDEA Amendments

Initially, the IDEA guidelines protected due process for disabled students with disciplinary problems. The most favorable provision, called the “stay-put” provision, required that the disabled youth remain in his or her educational placement pending completion of any disciplinary or juvenile review proceedings unless the parents and state or local education agencies disagreed.²⁴ In *Honig v. Doe*, the U.S. Supreme Court interpreted the IDEA to mean that during any due process proceedings, court proceedings or appeals, the school district could not unilaterally exclude youths with disabilities when determining educational placement.²⁵

Amendments to the IDEA in 1997 gave schools greater authority to discipline disabled students. The amendments provided that nothing prevents an agency from “reporting a crime committed by a child with a disability to appropriate authorities,” and nothing prohibits law enforcement and judicial authorities from “exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.”²⁶ Schools have the authority to discipline disabled students with lengthy suspensions and juvenile detention.

Pre-amendment decisions reflected the juvenile courts’ willingness to protect disabled students.²⁷ Pre-amendment cases were consistent with the purpose of the IDEA, while cases after 1997 used the gaps in the statute to make prosecution of disabled children a stronger priority.²⁸ The 1997 amendments made it easier for juvenile courts to gain jurisdiction over disabled school children that commit school-related crimes. This led to a lessening of the courts’ protection

²⁴ 20 U.S.C. § 1415(e)(3) (the “stay – put” provision).

²⁵ 484 U.S. 323 (1988).

²⁶ 20 U.S.C. § 1415 (k)(9); 34 C.F.R. § 300.529 (a).

²⁷ See e.g. *Flint v. Williams*, 276 N.W. 2d 499 (Mich. Ct. App. 1979). Allowing the school district to initiate probate proceedings unilaterally to bypass legislative review of special education children frustrates the intent of IDEA.

²⁸ See *Burrell & Warboys*, *supra* note 1.

of disabled students. A recent Justice Department study reported that,

Long before the 1997 IDEA amendments, a number of courts found that the best course was to dismiss the juvenile court case or defer it until special education proceedings stemming from the misbehavior could be completed.”²⁹

This trend reported by the Justice Department appears to have ended. In *Trent v. Wisconsin*, the Wisconsin Court of Appeals held that a juvenile court proceeding could occur concurrently with IEP due process hearings.³⁰ In separating disability and delinquency, the court held that the purpose of the IDEA was to address special education, while juvenile proceedings were intended to address delinquency.

Educational Failures and Incarceration

Children with disabilities are disproportionately represented in our juvenile justice system.³¹ The 1997 amendments to the IDEA have made it easier for schools to place disabled students in juvenile detention. Once incarcerated, the educational needs of children with disabilities are difficult to meet.³²

Emotional disturbance and specific learning disability are the most commonly found disabilities in the juvenile justice system.³³ Between the 1992/93 and 1996/97 school years the number of disabled students ages six to twenty-one in schools increased by thirteen percent.³⁴ During the same period the number of disabled youths in correctional facilities increased by twenty-eight percent.³⁵ Of all the incarcerated

²⁹ See *id.*

³⁰ *Wisconsin v. Trent* N., 569 N.W.2d 719 (Wis. 1979).

³¹ Leone, P.E., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389-401 (1995).

³² See Burrell & Warboys, *supra* note 1.

³³ See Burrell & Warboys, *supra* note 1.

³⁴ Doren, B. et al., *Predicting Arrest Status of Adolescents with Disabilities in Transition*, 29 J. SPECIAL EDUC. 363-380 (1996).

³⁵ See *id.*

youths, forty-two percent were identified as having emotional disturbance and forty-five percent were identified as having learning disabilities.³⁶ In total, seventy percent of incarcerated youths have a disabling condition,³⁷ but only 8.6 percent of disabled students qualify for special education services.³⁸ Two out of three youths entering juvenile correctional facilities have already been identified as disabled and have received special education services prior to their incarceration.³⁹ The 1997 IDEA amendments also affect juveniles housed in adult prisons. The amendments allow states to elect not to provide special education services to a youth if they were not identified under the IDEA as being a student with a disability, or did not have an individualized education program under the IDEA.⁴⁰

Implementing IDEA requirements in juvenile correctional facilities is a challenge because of systemic barriers. Correctional officers have trouble gaining access to school records for juveniles in custody, and it is not uncommon for records to arrive well after the juveniles are released.⁴¹ In addition, disabled juveniles tend to transfer more frequently compared to non-disabled juveniles: the average length of confinement in juvenile detention centers is fifteen days.⁴² Short stays increase the likelihood that records will be lost. The facilities' hesitation to evaluate juveniles for special education needs or disabilities makes it more likely that the evaluation process will take longer than the juvenile's detention.

³⁶ *See id.*

³⁷ *See Leone, P., supra note 31.*

³⁸ Twentieth Annual Report to Congress: *To Assure the Free Appropriate Public Education of All Children with Disabilities* (Dep't of Educ., 1998).

³⁹ Leone, P., *Education Services for Youth with Disabilities in a State-operated Juvenile Correctional System: Case Study and Analysis*, 28 THE J. SPECIAL EDUC. 43-58 (1994).

⁴⁰ Twenty-first Annual Report to Congress: *Special Education in Correctional Facilities* (Dep't of Educ., 1999).

⁴¹ Moran, P., *Special Education and Transition Services in a Detention Center School*, 42 J. CORRECTIONAL EDUC. 152-158 (1991).

⁴² Abt Associates, Inc., *Conditions of Confinement: Juvenile Detention and Corrections Facilities* (Dep't of Justice, 1994).

Identifying disabled youths in prison is another problem. A 1994 study of one juvenile correctional facility found that special education services were provided only to juveniles who were identified as having special needs before entering the juvenile justice system.⁴³ Furthermore, some of these juveniles have had to wait more than four months to receive special education services.⁴⁴ Inconsistent intake procedures, unqualified staff, and inadequate interim monitoring contribute to the failure to identify disabled youths in correctional facilities. Under the IDEA, all juveniles must be identified, located, and evaluated and a practical method must be implemented to determine whether they are receiving required special education services. Without an efficient system for identifying incarcerated disabled youths, including training of staff, routine screenings during admittance to a facility, and a better method of obtaining school records, the IDEA's requirements will not be met.

While many disabled students have short stays at juvenile facilities, those that remain longer do so because of a failure to understand the system. It is difficult to meet young offenders' special needs because disabled juveniles who initially enter the system for relatively minor offenses wind up staying for longer periods of time due to their inability to follow general educational programs.⁴⁵ Disabled children often have a hard time understanding what is required of them for their specific education program, or their attitude is misinterpreted by staff as being hostile or inappropriate rather than as deriving from the disability.⁴⁶

The inability of juvenile correctional facilities to enact proper educational measures for disabled students in prison has motivated over twenty class action lawsuits since 1975.⁴⁷ These cases demanded the establishment of special education services in correctional facilities which would be overseen by

⁴³ See Leone, P., *supra* note 31.

⁴⁴ See *id.*

⁴⁵ See Burrell & Warboys, *supra* note 1.

⁴⁶ See *id.*

⁴⁷ Puritz, P., & Scali, M.A., *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody* (Dep't of Justice, 1998).

the states' department of education, and which would focus on the rehabilitation of juvenile corrections. Since 1990, over a dozen cases have addressed identification and assessment problems in correctional facilities.⁴⁸ These cases have had significant effects on laws affecting disabled youth by defining the IDEA statute.

The Supreme Court has clarified the meaning of "free appropriate public education" under the IDEA⁴⁹ and has classified certain services as educational or medical.⁵⁰ In addition, the cases have helped determine who can be considered disabled under the IDEA.⁵¹ These cases have resulted in the requirement that school districts allow correctional facilities to access juvenile records more quickly. Also, they have required correctional facilities to provide a variety of educational and rehabilitative services to disabled kids in custody.⁵²

In a recent case, *Williams v. McKeithen*,⁵³ the court held the State of Louisiana fully responsible for running its adult and juvenile correctional facilities.⁵⁴ In doing so, the court effectively put an end to the for-profit juvenile prison industry in that state.⁵⁵ The State and Wackenhut were alleged to have failed to provide adequate services to inmates, including education, health care, and rehabilitative services in Louisiana's secure juvenile facilities.⁵⁶

The *Williams* case resulted in the settlement of four lawsuits against the State of Louisiana and the Wackenhut Corrections Corporation, a for-profit corporation that manages prisons. Terms of the settlement included increasing the

⁴⁸ See *id.*

⁴⁹ Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

⁵⁰ Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).

⁵¹ See Sch. Bd. of Nassau County v. Arline, 107 U.S. 1123 (1987); Honig v. Doe, 108 U.S. 592 (1988).

⁵² See *id.*

⁵³ 121 F. Supp. 2d 943 (M.D. La. 2000).

⁵⁴ See *id.*

⁵⁵ Fox Butterfield, *Settling Suit, Louisiana Abandons Private Youth Prisons*, N.Y. TIMES, Sept. 8, 2000.

⁵⁶ See *Williams*, 121 F. Supp 2d at 945.

capacity and training of staff in order to better recognize signs of disabilities, learn appropriate methods of interaction with disabled juveniles, and measure and monitor behavior changes of incarcerated children.⁵⁷ The settlement also required individual educational assessment and individualized intervention plans to provide special education placement for disabled youth.⁵⁸

One of the four cases, *United States v. Louisiana*, was litigated by the U.S. Department of Justice.⁵⁹ The involvement of the Justice Department shows a trend toward rethinking the structure of juvenile prison systems in order to better enforce the IDEA. In *Williams*, strict adherence to the IDEA helped put an end to for-profit juvenile prisons that failed to meet the needs of youth in custody.

Conclusion

Disabled youth often have a hard time receiving an appropriate education. They also pass through our juvenile justice system at disproportionately high rates. When they are in the juvenile justice system, their education is put even more at-risk. In turn, they may suffer even greater setbacks. Litigation can be used to force states to meet IDEA standards by withholding money to those states until they establish new special education services. In addition, other avenues may be necessary to address these problems. It may be necessary to enact statutes and constitutional amendments that guarantee adequate education so that special education will be supported more strongly. Rethinking and re-budgeting our correctional education system so that it is not considered separate from public education would be an important step in the development of appropriate special education programs in our juvenile justice system.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ The four cases are *Williams v. McKeithen*, Civ. No. 71-98; *Brian B. v. Stalder*, Civ. No. 98-0886-B-1; *A.A. v. Wackenhut Corrections Corp.*, Civ. No. 00-246-CMI; *United States v. Louisiana*, Civ. No. 98-0947-B-1. The cases are together referred to as *Williams*. More information is available at http://www.doj.gov/crt/split/documents/la_pi_me.htm.

Falling Into Full Inclusion: Placing Socialization Over Individualized Education

TAMERA WONG*

Introduction

The Individuals with Disabilities Education Act (IDEA) was intended to provide an opportunity for students with disabilities to receive a public education alongside children who are not disabled.¹ This article focuses on the issue of whether all children with disabilities should be educated in the regular classroom.² Advocates for the disabled argue that the IDEA mandates full inclusion as the means of providing a “free appropriate public education” to disabled students.³ They argue that the social benefits that will follow from integrating disabled students with non-disabled students are of equal importance to the child’s educational achievement.

Recent Circuit Court decisions have attempted to set standards by which school districts should mainstream children with disabilities. In *Sacramento City Unified School District v. Rachel H.*⁴ the Ninth Circuit enunciated the modern test for inclusion. While the social goals of full inclusion may

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¹ 20 U.S.C. §§ 1400-87 (2000).

² Daniel H. Melvin II, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 601 (1995).

³ Advocates include parents, educators, attorneys, and other advocates for obtaining the right to a free education for disabled students. See Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against “Inclusion,”* 72 WASH. L. REV. 775, 807 (1997) (interpreting “free appropriate public education” under the IDEA).

⁴ 14 F.3d 1398 (9th Cir. 1994).

have benefits to all students in the regular classroom, a decision to mandate full inclusion across the board may not serve the academic needs of some groups of disabled children. The unique educational and physical needs that a child's disability creates are not always best addressed in a regular classroom.

This article begins by describing the history of the implementation of the IDEA in the courts. It will attempt to show that the current standards do not prioritize actual individual academic progress over the social benefits of full inclusion. It should not be construed as an argument for segregated education, but as a cautionary note to advocates of full inclusion. The article concludes that full inclusion ignores the fact that some disabled students have physical and mental needs that cannot be addressed adequately in a regular classroom. Research by the U.S. Department of Education shows that a growing number of children with concurring disabilities and orthopedic impairments require environmental adjustments, additional teaching certification, and health assistance that the regular classroom is not prepared to provide.⁵ By prioritizing socialization equal to or above the student's individual academic needs, the practice of full inclusion may not provide a satisfactory education for many disabled students.

⁵ U.S. DEP'T. OF EDUC., TO ASSURE THE FREE APPROPRIATE EDUCATION OF ALL CHILDREN WITH DISABILITIES: 22ND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2000).

Setting the Standard for Inclusion

Powerful antibiotics became available in the 1950s for public use, allowing more children with severe disabilities to survive beyond early childhood.⁶ Consequently, the population of disabled persons that required greater social services grew. At the time, the only service available was institutionalization. Children with disabilities were excluded from benefiting from public education for fear that they would disrupt the learning process of nondisabled children.

Following the decision of the U.S. Supreme Court in *Brown v. Board of Education*⁷, parents of disabled children began a legal battle for the inclusion of disabled persons in public education. In *Brown*, the Court stated that education is the most important function of state and local governments.⁸ Further, the Court stated that the right to the opportunity of an education “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”⁹ After *Brown*, advocates filed suit against the public school system, arguing that disabled persons were a minority group facing discrimination. Their claim was that equal educational opportunity for disabled children was guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.¹⁰

In response to public pressure to enhance the educational services available to disabled children, Congress enacted the Rehabilitation Act of 1973¹¹ and the Education for All Handicapped Children Act (EAHCA) of 1975.¹² Section 504 of the Rehabilitation Act prohibits discrimination against persons with disabilities for all programs receiving federal funding. The IDEA, which now incorporates EAHCA, sets

⁶ See Dupre, *supra* note 3, at 783.

⁷ 347 U.S. 483 (1954).

⁸ See *id.* at 493.

⁹ *Id.*

¹⁰ See Melvin, *supra* note 2, at 606.

¹¹ 29 U.S.C. § 794 (1994).

¹² 20 U.S.C. § 1401-1420 (1988 & Supp. V 1993).

out the affirmative substantive and procedural rights of disabled children.¹³

For a state to receive federal funding for public education, the IDEA requires that “a free and appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”¹⁴ As the disabled child moves through the public education system, the child shall have an individualized education program (IEP) developed and revised according to the child’s educational need for services.¹⁵ Furthermore, children with disabilities should be educated “to the maximum extent appropriate” with children who are not disabled.¹⁶ Disabled children should only be removed from a regular educational setting when the “nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”¹⁷ The IDEA also requires that the child is educated in the least restrictive environment.¹⁸

Mainstreaming and inclusion go hand in hand with “free and appropriate education” and the least restrictive environment requirement. Advocates describe mainstreaming as a way to lead disabled children from special education programs into the regular classroom. Their argument is that children who are placed in special classrooms are socially stigmatized and are educated in overly restrictive environments.¹⁹ When a child is mainstreamed, the child is primarily placed in a special education class but is included in the regular classroom for part of the day. “Integration” is the

¹³ 20 U.S.C. §1412(5)(b) (2000). See Dupre, *supra* note 3, at 786 (1997).

¹⁴ 20 U.S.C. §1412 (2000).

¹⁵ § 1412(4).

¹⁶ § 1412(5)(b).

¹⁷ § 1412.

¹⁸ § 1412(5)(a).

¹⁹ See Melvin, *supra* note 2, at 615-18.

legal term incorporating the actual assimilation of students by physical proximity, and social and academic integration.²⁰

This theory has evolved into the current argument for full inclusion for all students with disabilities.²¹ Full inclusionists advocate for the removal of special education programs, arguing that the elimination of social stigmatization outweighed the questionable benefits of segregated classrooms.²² The IDEA does not contain the word “inclusion” in its text, nor has the Supreme Court defined the term. Full inclusionists contend that by requiring that students with disabilities be placed in the least restrictive appropriate environment, the IDEA mandates the elimination of special education placements.²³

In the face of statutory silence about the meaning of inclusion, appellate courts have issued opinions in cases outlining various standards for mainstreaming a disabled student favoring the inclusion of disabled students in regular classrooms wherever possible.²⁴ While the courts have not yet adopted the doctrine of full inclusion, recent appellate court cases have applied standards that place the social benefits of a non-segregated education equal to or above the individual academic needs of the disabled child.²⁵

²⁰ Richard Tompkins & Pat Deloney, *Inclusion: The Pros and Cons*, ISSUES...ABOUT CHANGE (Southwest Educational Development Laboratory) 1995, available at <http://www.sedl.org/change/issues/issues43.html>.

²¹ Cynthia L. Byrd, Book Note, *The Courts Still Do Not Buy One-Size-Fits-All Education*, 22 W. ST. U.L. REV. 425, 441 (1995).

²² See Tompkins & Deloney, *supra* note 20.

²³ See Dupre, *supra* note 3, at 807.

²⁴ See *id.* at 806.

²⁵ See, e.g., *Sacramento City Unified Sch. Dist. V. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1046 (5th Cir. 1989); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991); *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993).

The Modern Test

In *Sacramento City Unified School District, Board of Education v. Rachel H.*,²⁶ the Ninth Circuit defined the current standard for assessing an “appropriate” education in the least restrictive environment. Rachel H. was assessed as being moderately mentally retarded. After Rachel attended various special education programs, Rachel’s parents requested that Rachel be placed in a regular classroom full time. The District rejected their request and proposed a program that would place Rachel in special education classes for academic subjects and in a regular classroom for non-academic activities such as art and music. Rachel’s parents appealed the District’s placement decision. They argued that Rachel learned best both socially and academically in a regular classroom.²⁷ The hearing officer held that the District had not made an adequate effort to educate Rachel in a regular class as required by the IDEA.²⁸

The district court held that full-time placement in a regular classroom was appropriate for Rachel.²⁹ On appeal by the District, the Ninth Circuit combined the tests applied by other circuits³⁰ to create a four-factor test for determining if a disabled child should be mainstreamed into a regular classroom.

The first factor is to assess the educational benefits of placing the child full time in a regular classroom.³¹ Under the IDEA, mainstreaming is automatic unless the child’s disabilities are so severe that the child cannot receive a satisfactory education in a regular classroom, even with supplemental aids and services.³² Under the second factor, the court must look at the non-academic benefits of the

²⁶ 14 F.3d 1398 (9th Cir. 1994).

²⁷ *See id.* at 1403.

²⁸ *See id.* at 1400.

²⁹ Bd. of Educ. v. Holland, 786 F. Supp. 874, 875 (E.D. Cal. 1992), *aff’d sub nom.*, Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

³⁰ *See Roncker*, 700 F.2d at 1058; *Daniel R.R.*, 874 F.2d at 1046.

³¹ *See Rachel H.*, 14 F.3d at 1400.

³² *See id.* at 1403.

placement.³³ Academic achievement of the individual child is not the only purpose of mainstreaming. The Fifth Circuit court in *Daniel R.R.* stated that integration is a benefit in and of itself.³⁴ The Ninth Circuit in *Rachel H.* found that Rachel's social and communication skills as well as her self-confidence increased after being placed in a regular classroom.³⁵ The third factor requires the court to look at the effect the disabled student has on the teacher and children in the regular classroom.³⁶ If the child does not place an extraordinary burden on the teacher's time and does not significantly impede the learning of the other children, the disabled child should remain in a regular classroom. Finally, the fourth factor considers the costs of mainstreaming the disabled student. If the cost of supplemental aides and services is so great that it impacts the education of the other children in the district, the disabled child should not be placed in a regular classroom.³⁷

The Ninth Circuit in *Rachel H.* outlined a standard favoring full inclusion without giving priority to the child's individual progress. Of the four factors that must be balanced in determining if the child should be included, only one focuses on the academic progress of the student. The other three factors assess social or economic effects the child has by participating full time in the regular classroom. The balancing test shifts the focus from a primary assessment of the educational benefit being conferred upon the child to a four-part inquiry into whether the social goals of the IDEA are achieved.

The *Rachel H.* test demonstrates the point of conflict between mandating full inclusion and the need for an individualized education plan for disabled children. The Ninth Circuit in *Rachel H.* held that Congress' preference was for educating children with disabilities in regular classrooms.³⁸ A premise of inclusion is that disabled children share enough

³³ See *id.* at 1400.

³⁴ See Byrd, *supra* note 21, at 436-437.

³⁵ See *Rachel H.*, 14 F.3d at 1401.

³⁶ See *id.* at 1400.

³⁷ See *id.*

³⁸ See *id.* at 1403.

characteristics and abilities with non-disabled children to be adequately educated in the same environment.³⁹ However, the IDEA requires that each child have an IEP that is continually revised and reviewed according to the child's progress.⁴⁰ This provision seems to indicate that each child has a unique set of educational needs that requires regular attention. By mandating full inclusion for all disabled children, the unique needs of children with disabilities are overlooked.

Pitfalls of Full Inclusion

The argument for full inclusion and mainstreaming is largely a social one. It is based on the American notion of freedom and equal opportunity that should be afforded to persons with disabilities.⁴¹ Separate special education programs have been criticized because they have a labeling effect of designating a student as "special" or "disabled."⁴² By placing a label on the student as being different, the individual's sense of self worth decreases. The label also has the effect of setting the student apart from the individual's non-disabled peers, inhibiting one's sense of freedom and opportunity.

On the other hand, by participating in a regular classroom setting, a sense of community is built and the disabled child is placed in an environment that maximizes individual growth.⁴³ The student has the opportunity to observe peer models and to be educated with students of the same age. All students in the classroom derive educational benefits because inclusion provides an opportunity to experience diversity. This experience heightens the students' appreciation of differences and will lead to a greater respect for the unique characteristics of others.⁴⁴ Finally, all of

³⁹ See Melvin, *supra* note 2, at 643.

⁴⁰ 20 U.S.C. § 1412(5) (2001).

⁴¹ See Tompkins & Deloney, *supra* note 20.

⁴² See *id.*

⁴³ CREATIVE EDUCATORS AT WORK: ALL CHILDREN INCLUDING THOSE WITH DISABILITIES CAN PLAY TRADITIONAL CLASSROOM GAMES (Donna Raschke, Ph.D. & Jodi Bronson, eds., 1999), at <http://www.uni.edu/coe/inclusion/philosophy/benefits.html>.

⁴⁴ See *id.*

society benefits from inclusion because it promotes the civil rights of all individuals by upholding the social value of equality. Although these benefits are persuasive and attractive, achieving them is difficult in reality. For example, Joanne Huston, attorney and educator, has argued that the full inclusion argument masks the “substantive legal, financial and pedagogical problems inherent in implementing an overarching inclusion policy.”⁴⁵

Advocates for full inclusion argue that the IDEA’s least restrictive environment requirement is a mandate for full inclusion.⁴⁶ However, the IDEA provides a limitation on this requirement by saying that “to the maximum extent appropriate, students with disabilities should be educated with students who are not disabled.”⁴⁷ The limitation implies that there may be instances when it is not appropriate to completely integrate a disabled child into a regular classroom. Additionally, in the 1997 Amendments to the IDEA, the governing principle stated by Congress is that a free and appropriate education should emphasize the “unique needs” of children with disabilities.⁴⁸

The IDEA does not define an appropriate education. The courts, however, have interpreted the IDEA to be a placement standard for full inclusion.⁴⁹ Since *Rachel H.*, a school district now has a heavy burden of proof to show why a student should be placed in a special education program.⁵⁰ Before such a program is recommended, the school district must first consider the needs of each child and develop an IEP. The district must mainstream the disabled child to the maximum extent appropriate and, in doing so, must account for academic and non-academic benefits. Any supplemental aids or services that the child might need in a regular

⁴⁵ Joanne L. Huston, *Counterpoint: Inclusion: A Proposed Remedial Approach Ignores Legal and Educational Issues*, 27 J.L. & EDUC. 249, 250 (1998).

⁴⁶ See Dupre, *supra* note 3, at 807.

⁴⁷ 20 U.S.C. § 1400 (2000), See Huston, *supra* note 53, at 251.

⁴⁸ § 1400 (d)(1)(A) (2000).

⁴⁹ See Dupre, *supra* note 3, at 797.

⁵⁰ See Byrd, *supra* note 21, at 440.

classroom should also be provided. Furthermore, the district is responsible for monitoring the effect the disabled child has on the teacher and the non-disabled students. According to *Rachel H.*, only a significant negative impact to the class as a whole will be considered. Modifications to the curriculum and additional assistance to the disabled child are not considered significant. In short, the school district must make every effort available to accommodate the regular classroom environment to the disabled student. Only when it is virtually impossible for the child to obtain some education from the regular classroom will the court sustain a special education placement.

The Council for Exceptional Children (CEC) believes that the least restrictive environment requirement is not a provision for mainstreaming.⁵¹ It is also not a mandate that all disabled children be included in the regular classroom. The CEC stresses the significance of the IEP in managing the student's achievement in the least restrictive environment. The objective is to include students with disabilities in the regular classroom to the maximum extent appropriate within the framework of the unique needs of the child.⁵² There may be instances where, because of the nature or severity of the handicap, a satisfactory education cannot be achieved in the regular classroom even with supplementary aids and services.⁵³

A U.S. Department of Education study conducted in 2000 found that 46.4 percent of students with disabilities ages six to twenty-one with disabilities were served outside of the regular classroom for less than 21 percent of the school day.⁵⁴ Of this same group of students, 29 percent spent 21 to 60 percent of the school day outside of the regular classroom. About 20 percent spent more than 60 percent of the school day

⁵¹ DEP'T OF HEALTH, EDUC. & WELFARE, OFFICE OF EDUC., & BUREAU OF EDUC. FOR THE HANDICAPPED, LRE: DEVELOPING CRITERIA FOR THE EVALUATION OF THE LEAST RESTRICTIVE ENVIRONMENT PROVISION 24 (Research for Better Schools, Inc. 1979).

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See* U.S. Dep't of Educ., *supra* note 5, at III-4.

outside of the regular classroom and about five percent of the students spent all of their time either in separate facilities, residential facilities or in the home and hospital.⁵⁵ These statistics show that over 50 percent of disabled students ages six to twenty-one have been assigned to special education or facilities outside of the regular classroom in furtherance of their academic progress.

The environment in which students receive special education and services depends on the disability. For instance, 51 percent of students with mental retardation spend over 60 percent of the school day outside of the regular classroom, as do 45 percent of students with multiple disabilities.⁵⁶ The increasing amount of students with co-occurring disabilities and orthopedic impairments, along with the statistics on students with disabilities as a whole, demonstrate the special needs of these students are not being met in a regular classroom.

The IDEA defines a child with a disability as a child

“(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”⁵⁷

The statutory definition provides categories of disabilities in which a student is placed for the IDEA’s purposes. However, the definition does not include students with co-occurring disabilities. Research shows that a significant portion of children with disabilities has more than one disability. A 1997 study found that about 48 percent of the four million children ages five through seventeen who had at least one serious functional limitation in mobility, self-care, communication, or learning also had one or more additional minor limitations in

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ 20 U.S.C. §1401(3)(a) (2000).

other areas of functioning.⁵⁸ Full inclusion may not adequately address the unique needs of disabled students within this category.

As a group, these students will have greater difficulties learning and will have larger needs than a student with one disability.⁵⁹ Because of the hardship in assessing and identifying students with co-occurring disabilities, it is also very difficult to design an appropriate educational program for the child.⁶⁰ Disabilities often are assessed before the child reaches school age.⁶¹ Subsequent manifestation of learning disabilities may then be attributed to the initial diagnosis. As a result, the child's learning disabilities may never be recognized. The challenging nature of identifying co-occurring disabilities complicates assignment of the child to appropriate services.

According to the U.S. Department of Education, students with both learning and behavior problems may not even be served well through special education delivery systems because teachers do not feel comfortable with their ability to instruct their students.⁶² Special education teachers require specialized pre-service and in-service training materials in order to address the students educational needs, and many feel inadequately prepared to serve students with co-occurring disabilities.⁶³ Research by the Department of Education demonstrates that if special education teachers do not feel prepared to serve this group of students, a regular classroom teacher will be even less prepared to educate students with co-occurring disabilities.

⁵⁸ Hogan, D.P., Msall M.E., Rogers, M.L., & Avery, R.C., *Improved Disability Population Estimates of Functional Limitation among American Children aged 5-17*, MATERNAL CHILD HEALTH J., at 203-213 (1997).

⁵⁹ See U.S. Dep't of Educ., *supra* note 5, at II-30.

⁶⁰ See *id.* at II-32.

⁶¹ See *id.* at II-33.

⁶² See *id.* at II-34.

⁶³ Ford, J., & Fredericks, B., *Welcoming Students who are Deaf-blind into Typical Classrooms*, in PERCEPTIONS OF INCLUSION BY PARENTS OF CHILDREN WHO ARE DEAF-BLIND 37-54 (L.T. Romer et al. eds., 1995).

Another growing group of students with disabilities are those with orthopedic impairments. While an orthopedic impairment might not limit the academic achievement of the child, it may have a significant impact on the student's ability to adjust to learning in a regular classroom environment.⁶⁴ The child might have frequent absences, miss out on social development during playtime with other students, and ongoing health concerns might affect educational performance. Physical disabilities also require adaptations of the classroom to address building accessibility, equipment needs, and mobility and positioning assistance. A workforce certified to instruct this group of students is crucial to meeting their physical and academic needs.

A survey of teachers serving the needs of students with physical and health impairments found that almost 50 percent did not feel adequately trained to use the assistive and adaptive equipment required by their students.⁶⁵ Another survey of teachers found that unmet needs increased relative to the severity of the disability of the student.⁶⁶ Adequately addressing the academic and physical needs of students with orthopedic impairments in a regular classroom presents similar challenges to the ones presented by children with co-occurring disabilities. The school district would need to be prepared to provide the physical environment, health care, aides and supplements necessary to create the least restrictive learning environment to the student.

The general education teacher plays a crucial role in the inclusion process. The teacher's attitude affects both the teaching strategy and the students in the class. It influences the teacher's expectations of the students and treatment of them, which in turn influences the student's self-image and

⁶⁴ See U.S. Dep't. of Educ., *supra* note 5, at II-49.

⁶⁵ Heller, K.W., et al., *A National Perspective of Competencies for Teachers of Individuals with Physical and Health Disabilities*, in *EXCEPTIONAL CHILDREN* 219-234 (1999).

⁶⁶ GAIL MCGREGOR, ED.D. & R. TIMM VOGELSBURG, PH.D., *INCLUSIVE SCHOOLING PRACTICES: PEDAGOGICAL AND RESEARCH FOUNDATIONS* 40 (1998).

academic performance.⁶⁷ Studies have shown that many teachers have a negative view of students with disabilities and mainstreaming.⁶⁸ Teachers responded that their lack of knowledge about disabilities, lack of experience with disabled students, and their lack of training in teaching disabled students influenced their attitudes. Advocates of inclusion respond to these concerns by arguing that increased pre-service and in-service training will promote positive attitudes and skill acquisition. Support services, including psychologists and special education teachers, will provide information, assistance, behavior management and teaching techniques to assist general education teachers in instructing students with disabilities.⁶⁹

The benefits of integrating a student with severe disabilities into a regular classroom accrue when the experience is well planned and organized.⁷⁰ It provides an opportunity to learn firsthand about the differences and similarities of human beings. Inclusion is also an opportunity to learn how to interact with members of society who have severe disabilities. Interaction leads to more positive and accepting attitudes and reduces non-disabled students' fear of students with severe disabilities.⁷¹ The key to successful integration is careful planning by the teacher to include interaction during all parts of the school day.⁷² This includes sensitization and information sessions built into the curricula and allowing non-disabled students to participate in the inclusion efforts as tutors or activity partners.

The current perspectives on curricular adaptation assume that students with disabilities have different goals in

⁶⁷ ERIC Clearinghouse on Tests, Measurement & Evaluation, *Measuring Teacher's Attitudes Toward Mainstreaming*, ERIC DIGEST (1985), at http://ed.gov/databases/ERIC_Digests/ed289885.html.

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ ERIC Clearinghouse on Handicapped & Gifted Children, *Integrating Students with Severe Disabilities*, ERIC DIGEST (1990), at http://www.ed.gov/databases/ERIC_Digests/ed321501.html

⁷¹ *See id.*

⁷² *See id.*

the same curricular areas as their peers.⁷³ This places an additional workload on the general education teacher to modify the curriculum. A large amount of the literature dedicated to the modification of general education curriculum for mainstreamed children with disabilities focuses on the ability of the general education teacher to make adjustments based upon recommendations made by the special education instructor.⁷⁴ In the regular classroom, the teacher must make adjustments to the way instruction is delivered, the amount of content covered and the level of assistance provided to the students.⁷⁵ A disabled child might need an individualized lesson plan, materials, modified teaching style and different testing procedure.⁷⁶

The full inclusion of students with severe disabilities presents many issues and research questions.⁷⁷ Few large-scale studies have been conducted on the educational achievement of inclusion programs for students in this group.⁷⁸ While the results thus far have shown positive benefits to students with severe disabilities, they must be viewed with caution because each represents only a small sample size of the general population of students in this category.⁷⁹

One study compared the quality and curricular content of the IEP objectives written for students with severe disabilities who were in special education classes with those who were members of the general education classes. The results found a significant increase in the overall quality of IEP objectives written for students when they were placed full time into regular classrooms.⁸⁰ Additionally, there was an increase in the number of objectives written for the full

⁷³ See *id.*

⁷⁴ See McGregor, *supra* note 66, at 20.

⁷⁵ See *id.*

⁷⁶ See Dupre, *supra* note 3, at 852.

⁷⁷ Pam Hunt & Lori Goetz, *Research on Inclusive Educational Programs, Practices and Outcomes for Students with Severe Disabilities*, 31 J. SPECIAL EDUC. 3-29 (1997).

⁷⁸ See *id.* at 16.

⁷⁹ See *id.* at 25-26.

⁸⁰ See *id.* at 13.

inclusion students that required the mutual participation of both the students and their non-disabled peers.⁸¹ While this study showed that teachers had higher expectations for their students and included objectives that provide for interaction of all students in the class, it does not correspond with the activities of the school day and the child's actual engagement and learning. The limited sample size of the studies demonstrates that in-depth research is still wanting before understanding and validating the efficacy of full inclusion.⁸²

Law Professor Anne Proffitt Dupre has argued that full inclusion does not provide a satisfactory education for disabled students and that the statutory language of the IDEA does not mandate full inclusion.⁸³ The IDEA was written to address the *education* of the disabled student, not the *placement* of the student into a regular classroom.⁸⁴ The integration of disabled students into a regular classroom should be assessed according to each student's individual academic needs.⁸⁵ When it is appropriate for the student's academic progress, the student should be integrated.

The regulations set forth in the IDEA require the school district to provide various program options which include regular classes, special classes, special school, home instruction and instruction in hospitals and institutions.⁸⁶ Professor Dupre infers from these regulations that full inclusion is not required in every case.⁸⁷ Congress explicitly recognized the need for segregated placement when it described that special education can be provided in the home, hospitals and institutions.⁸⁸ Dupre concludes from these express provisions that the IDEA recognizes that unique needs of disabled children might be better met in other settings. The

⁸¹ *See id.*

⁸² Russell Gersten, *Responses to Hunt and Goetz*, 31 J. SPECIAL EDUC. 30-31 (1997).

⁸³ *See Dupre, supra* note 3.

⁸⁴ *See id.*

⁸⁵ *See id.* at 807-8.

⁸⁶ 20 U.S.C. § 1401(25)(A) (2000).

⁸⁷ *See Dupre, supra* note 3, at 809.

⁸⁸ *See id.* at 807.

current public school system does not appear to be prepared to make the adjustments necessary to ensure the academic progress of students with disabilities. Dupre argues the courts need to take a more critical approach to the premises underlying full inclusion and elevate academic achievement over academic setting.⁸⁹

Conclusion

The academic needs of each individual disabled child are unique. The IDEA recognizes these unique needs by requiring an individual educational program for each child. On the other hand, full inclusion attempts to equalize all disabilities across the board. Whether a student has co-occurring disabilities, an orthopedic impairment, or an emotional disability, inclusion advocates believe that the student can achieve a satisfactory education in a regular classroom. The inclusion argument assumes that schools are prepared to accommodate such students so that they can learn as non-disabled students can. Furthermore the argument assumes that school facilities are adequate, the teachers are trained to address the children's needs and the curriculum is or can be adapted to the children's learning process. However, the Department of Education report has proven otherwise. A large percentage of disabled students do not even receive adequate education in special education programs, let alone inclusive general education programs.

We need to be cautious in mandating full inclusion because the goal of the IDEA is to provide disabled children with the best setting for each child's individual needs. Full inclusion does not serve the needs of all disabled students. In the instances of students with co-occurring disabilities or orthopedic impairments, school facilities, teaching staff and financial resources might not be available to provide a satisfactory learning environment for the entire class.

The focus of determining whether a disabled child should be integrated should not be primarily on other students or the teacher, but on the individual child. The IDEA requires

⁸⁹ See *id.* at 857-58.

that a spectrum of academic settings be available to the disabled child. With the assistance of specialists, teachers and parents, the IEP should be carefully tailored so that the student receives the most appropriate educational services available, whether he or she is enrolled in a regular classroom or a special education program. Studies have demonstrated that the public education system currently is not capable of providing a satisfactory education to students with disabilities.

A full inclusion mandate requires a reassessment and restructuring of the public education system.⁹⁰ Inclusion presently exists as a philosophy and many barriers exist before putting it to practice.⁹¹ The first obstacle to overcome is that the rationale for full inclusion needs to be clearly demonstrated. The research in this area is limited, and the benefits and significance of the changes need to be more elaborately spelled out.⁹² The regulations in the IDEA make available alternative academic settings for disabled children, thus providing the courts with the option to find that the IDEA does not mandate full inclusion. The implementation of full inclusion of all disabled students should be approached cautiously and should primarily focus on the actual academic benefit the disabled child will receive in the classroom.

⁹⁰ See McGregor, *supra* note 66, at 6.

⁹¹ See *id.*

⁹² See *id.* at 8.

Viewpoints on Special Education

Special education involves a wide range of people. An incomplete list would include students, parents, educators, administrators, agency staff, advocates, lawyers, and elected officials. Journal staff interviewed a variety of these people. We asked them to tell us what they perceived as strengths, weaknesses, and opportunities for improvement in special education. Our intent was to identify important current issues. Also, we wanted to provide a sense of what these people do, in their own words.

To gain political perspectives on the current special education system, we asked California legislators to share their thoughts. All twenty-nine members of the California Assembly and Senate Education Committees were invited to participate. Two legislators responded: Assemblywoman Lynne C. Leach, Vice-Chair of the Assembly Education Committee and Senator Dede Alpert, member of the Senate Education Committee.

The reflections of all of these individuals follow.



Jane Reid
Private Attorney
Marin County

KATE STEINHEIMER

“In the State of California, public school [special education] programs are for the most part lousy and ineffective,” says Jane Reid, a private attorney in Marin County, who has specialized in special education law since 1995. Ms. Reid generally represents parents or other adults who fights for children’s educational rights to get school districts to provide appropriate services for children. “Many programs are a sham; they don’t do, or even try to do, what they say. They just don’t work,” she says. She believes poor teachers, misidentification of students, and failure to use appropriate strategies all contribute to the problem. Moreover, she sees serious problems with the system, which would take a lot of resources to address. On the other hand, she acknowledges the difficulty the districts face in providing services. “There is too much to do. By law instruction must be individualized, but they can’t individualize. Services are not provided intensely enough, and the way they are provided is repugnant.”

Ms. Reid cites Resource Room instruction as an example of the services problem. Because children are pulled out of their regular classrooms for special instruction, they are singled out and often made to feel stigmatized. In addition to the stigma, this is a difficult form of instruction for these children because they miss instruction in their regular classes and teachers often tell them it is their responsibility to catch up. This is particularly burdensome because these children are already having trouble. Other conflicts frequently arise from this type of pull-out instruction. For example, when a field trip for the class is scheduled on a day when a student is to receive speech services, the student either misses the field trip

or the speech session. Ms. Reid finds this situation unacceptable; she believes the child should go on the field trip and be able to reschedule the speech session at another time. In an ideal world, there would be enough funding for salaries, transportation, and other resources that tutors could provide after school.

Another very negative aspect of special education which Ms. Reid often encounters is hostility between families and schools, as school districts try to avoid their responsibilities. She has seen schools show parents programs that would be inappropriate for their children, “in hopes that they’ll run screaming” from special education services. Ms. Reid recalls one instance when a family requested placement in a non-public school for the child, the parents were sent to observe at a non-public school for emotionally disturbed children. She believes they were sent to that school so they would decide they did not want that type of placement. Although funding for non-public placements appears to be part of the reason districts try to avoid them, Ms. Reid thinks districts are afraid of parents realizing what they are not getting in public schools.

Abysmal communication between parents and the schools also contributes to the problems, according to Ms. Reid. The difficulties originate from both sides. She notes that the parent is often upset about his or her child’s situation, while the school claims nothing is wrong or that it does not deal with problems like that. This develops into a fight. She believes parents need to be heard, and schools should try to understand the situation and see what can be done to solve it, instead of getting defensive.

According to Ms. Reid, the first step toward a remedy for these problems would be for school personnel to acknowledge that their programs are lousy and to think about how to fix them. She has heard resource teachers say off the record that they know the instruction they are providing is inappropriate for the students, but they do not come forward and say so publicly. She suggests that it might help to give teachers immunity or job protection when they speak up about

their needs. Furthermore, formal education regarding special education law for administrators would be another beneficial step. Ms. Reid finds that often principals misunderstand the law and tell parents, “We don’t do that here” or “If we do it for you, we have to do it for everyone.” The principals need to either be trained in the law or at least recognize when they need to turn a situation over to someone else.

When asked about the strengths of the current special education system, Ms. Reid says bluntly, “It exists. Having it is better than not.” She notes that prior to the special education laws, children with special needs were either warehoused or not educated at all. Despite its many flaws, the current system is an improvement over the previous situation. She also thinks it is a positive factor that education in general and special education specifically have become hot political topics. As there is more publicity, “parents are becoming more educated about their rights, and that will help. They’ll force an increase in services and funding. They see that the system is not working and that it is not ok.”

Ms. Reid believes that the overall scheme of the federal law, the Individuals with Disabilities Education Act (IDEA), is very good. She explains that the federal law sets out broad guidelines, defining what disability is, and mandating a free appropriate education for all students. The California law implements the federal guidelines, providing the program specifics, such as time lines, guidelines as to who should attend Individual Education Plan meetings, and procedural safeguards like providing for due process hearings. Ms. Reid said that the state law is reasonably effective in implementing the federal objectives. She points out, however, that there are some vague areas that have resulted in a large amount of litigation, for example, the type of education “appropriate” for a particular student. The language in the statutes does not provide much guidance in particular cases.

If she could wave her magic wand to fix the system, Ms. Reid would focus on creating effective programs for the students and eliminating the contentiousness between schools and homes. “I hate the fighting,” she said. “Childhood is so

precious and important. It is easy to lose sight of the idea that we all want kids to go to school, learn, and have a pleasant day in school. Raising children appropriately is the most important thing society can do—period!” She also comments that special education is particularly important to our society because it enhances individuality. “You can’t just pigeon-hole and institutionalize people.”



Deborah DeLauro
Special Education Attorney
Marin County

MICHELLE RUSKOFSKY

Deborah DeLauro has fifteen years of experience providing expert and compassionate legal representation to families and children with special educational needs.

Now in private practice in Marin County, California, Ms. DeLauro received her undergraduate degrees in history and social studies education at Syracuse University. She holds a Secondary Teaching Credential and has taught high school social studies. She has a Master's Degree in Education and a J.D. from Temple University.

As a solo practitioner since 1994, Ms. DeLauro provides legal assistance to families and children with special educational needs at individual education planning meetings, mediations, fair hearings and in court to obtain a free, appropriate public education for the students she represents. Her practice also includes the representation of special needs students at Suspension/Expulsion Appeal Hearings and Adoption Assistance Appeal Hearings. She is currently active in the Learning Disabilities Association of California and in the Council of Parents, Attorneys and Advocates.

After moving to California, Ms. DeLauro saw a keen need for attorneys to bridge the gap between special education services that children are entitled to, and those that school districts were providing. She began interviewing and meeting with anyone associated with the special education field: attorneys, service providers, psychiatrists, psychologists, and many others. It was apparent to her that the need for an attorney specializing in special education services for children was both "great and urgent." Before she established a practice

of her own, Ms. DeLauro mentored with as many attorneys who specialized in disability and special education law and participated as an observer at many Individual Education Plan meetings and mediation conferences. She also tried to get to know as many public school special education directors and teachers as possible in order to better understand the challenges of providing a free appropriate public education for all students eligible under the Individuals with Disabilities Education Act (IDEA).

When Ms. DeLauro began practicing special education law, there were few other attorneys in the field. The network continues to remain small, but today, a national organization called the Council of Parents, Attorneys and Advocates (COPAA) is available to those people who are trying to effect change in the identification and delivery of needed services and resources to qualified students throughout the United States.

Other major information resources are the *Individuals with Disabilities Education Law Report*, LRP Publications and the individual State Departments of Education which usually have information online as well as in print. Here in California, the Department of Education annually publishes *A Composite of Laws*. Additionally, the Community Alliance for Special Education (CASE) and Protection and Advocacy, Inc. (PAI) publish a manual called *Special Education Rights and Responsibilities*.

Ms. DeLauro views special education law as a “practice of people helping kids.” She has found that the attorneys who practice in this area not only care about kids and the educational system but also have a realistic appreciation of just how complicated and ever changing the laws affecting special education are. Her current practice consists mostly of working with families and school districts through the Individualized Education Planning process, and, if necessary, representing students and their parents in administrative due process. Most of her cases settle before they reach the hearing stage, with about ninety-eight percent resolved through mediation.

According to Ms. DeLauro, a primary purpose of the IDEA is to provide all eligible students with a free appropriate public education. She believes that this is a significant challenge in this age of consolidating educational programs on huge campuses, and providing “one size fits all” educational programs.

Furthermore, Ms. DeLauro notes that, the IDEA provides educators and parents with a process to address their children’s unique educational needs early, but only if “the system works correctly.” Unfortunately, most parents of children with special education needs “do not understand how the system works.” Ms. DeLauro indicates that there seems to be a lot of misinformation and misinterpretation of the law, which also prevents the system from being implemented according to law.

Ms. DeLauro believes that the current special education system is set up as a “negative paradigm.” She notes that for a student to access special education support, he or she must first fit under a specific category or label in order for the child to access the programs. She thinks that this aspect of special education sometimes makes “the problem worse before it can ever get better.”

Ms. DeLauro feels that one of her jobs when she agrees to represent a student is to educate the student’s parents about special education rights and responsibilities. She tries to help one child at a time and hopes that she is also contributing to positive systemic change. She feels strongly that an educational community is only as strong as its weakest member. Therefore, school districts must work hard to meet the educational needs of all their students, not just their bright and talented students.

Ms. DeLauro acknowledges that a lack of funding and on-the-job teacher training for special education programs makes providing such programs for children difficult. Without the latest skills and resources, schools have a hard time providing access to the specialized education that school districts are required to provide. Overall, Ms. DeLauro sees that the ultimate goal of special education is to create a system

for all children to be educated whether it requires a specialized setting or program or whether the services can be integrated into the mainstream.

Ms. DeLauro views that the political arena provides an important opportunity for improving the special education system. She believes that there has been an absence of effective legislation for special education in California. She thinks that although it would be best in an ideal world if politics is not involved, “the political climate definitely sets the stage for special education funding, legislation and policy.” Interestingly, she sees the teachers’ unions as a potentially promising vehicle for advancing special education concerns. She believes that there is a natural alliance between teachers who are expected to teach in overcrowded classrooms with insufficient resources and parents who want their children to receive an appropriate education. Ms. DeLauro thinks, however, that currently teachers’ unions do not recognize the potential of this alliance.

Writing letters and attending open legislative meetings are two ways that Ms. DeLauro voices special education needs to politicians. She attends open legislative meetings, and also encourages her clients to attend. Unfortunately, it is often inconvenient and difficult to travel to and attend such meetings.

Ms. DeLauro believes that education must be equally accessible for all people, not just for children and parents of children in regular educational settings. She says, “it is important to understand that today, special education is really customized instruction for particular children who qualify for the specialized programs designed for them.” Special education does not just refer to education for the most severely handicapped children in our communities. There is a growing population of our children who require some kind of customization just to make it through our school. Ms. DeLauro emphasizes that establishing good teacher training programs as well as on the job training in new teaching methods and resources are key aspects for providing a meaningful classroom experience to all of our students.



Carole Brill
Special Education Attorney
San Francisco

MICHELLE RUSKOFSKY

Carole Brill went to UC Hastings law school in San Francisco, California. At that time, she did not necessarily intend to become a lawyer. However, she graduated and began doing some prison work. While working with the prisoners, she was constantly asked to help their children. This was the beginning of Ms. Brill's career in children's law.

In 1975, Ms. Brill started Legal Services for Children, the nation's first free law firm for children. At that time, children did not make up a large part of the law. There were few provisions, statutes, entitlements, or procedures that dealt with children. Children's law was not an accepted area of the law and children's lawyers were not considered "real lawyers." Children were also not considered "real clients" because in the law at that time, children were likened to either the insane, the indigent, or simply as chattels. However, Ms. Brill considers that part of her career as a very exciting time, where she was a part of the creation of children's law standards, procedures, and practice. At Legal Services for Children, she hired many legal caseworkers with advanced degrees to assist her. The caseworkers were vital in the development of the practice since they were able to establish attorney-client relationships with the children they helped.

It was not until 1990 when Ms. Brill started a similar law office in San Francisco, the Children's Law Office, where she currently practices. She wanted to refocus on lawyering and to strike a better balance between the fundraising she did for Legal Services for Children and clinical work. At the Children's Law Office, children are provided with free, comprehensive legal services for any needs that they may

have, including special education. Times have changed regarding special education because when Ms. Brill began practicing children's law in 1975, there weren't any laws like the Individuals with Disabilities Education Act (IDEA) to work with. Instead, she dealt with children's issues such as discipline, abuse, health, runaway children, and children caught in custody battles, all on a case-by-case basis. Now with such laws as the IDEA, children are placed into certain categories of "disabled" in the eyes of the law. Ms. Brill knows that education is inevitably a big part of all children's lives, and therefore special education and disabled children's issues are major areas of practice at the Children's Law Office.

Ms. Brill has encountered many weaknesses of the special education system during her practice in children's law. First is that much of her involvement in education disputes "would be unnecessary if people in school districts would simply do their jobs." She gets children's cases only when a problem arises, and such problems arise when "school districts either do not know what they are supposed to do, or do not do their job at all." She believes that seventy-five to ninety percent of the work that she does in special education "would be unnecessary if agencies in charge of serving special education children would work together and serve the children correctly and effectively."

A second weakness in the special education system that Ms. Brill has encountered is that school districts frequently blame parents of special education children for their children's special needs. School districts tend to focus on those parents who are not involved or do not do enough for their children's education, and those parents who are too aggressive or pushy. Because of this misdirected focus on the parents, school districts do not help the ones who are in need the most: the children. Ms. Brill sees her job as "very special" in regard to this problem, because she represents all children regardless of whether the child has parents. She will advocate for children with entitlements and rights under special education law regardless of their familial situation.

Ms. Brill views her work in children's law as an "absolute joy." She is able to work for children who otherwise would have no access to the legal system and who are not considered legitimate clients with rights. She is able to see firsthand the accomplishments children can achieve in their educational career when they are given the opportunity to do so early in their lives. Furthermore, she sees "absolute opportunities" and success in children's law on a child-by-child basis. At this level, she sees the positive changes in children's lives that can result through access to the legal system that centers like her Children's Law Office provide.



Perry Pederson & Virginia Sawyer
Collaborative Classroom Educators
Arroyo Grande, California

GIGI SAWYER RADDING

I first knew Perry Pederson as my English teacher at Arroyo Grande High School on the central coast of California. As a student teacher, he was enthusiastic, demanding, patient and fair; students admired him almost immediately. A quarter of a century later, his dedication to and talent for teaching are still obvious. Virginia Sawyer, the special education instructional aide in Mr. Pederson's classroom, frequently speaks of his focused efforts and distinctive teaching style. Having her own gift for teaching, Mrs. Sawyer also demonstrates a similar dedication to her students. Mrs. Sawyer and Mr. Pederson combine their efforts and, with the help of others, are able to reap successes despite some difficulties.

Currently, Mr. Pederson teaches expository compositions to ninth-grade students. He explains, "that is a euphemistic way of saying that I try to get students to pass information or explanation, in writing, to an audience." Though a regular education teacher, Mr. Pederson incorporates "resource" or special education students into his program in what is known as a "collaborative class." He considers collaborative teaching to be one of the strengths of the educational system because "resource students get their ninth-grade composition instruction in the same classroom with their ninth-grade peers. Several social and academic benefits result when students with identified disabilities are able to sit in the same English classroom with students who do not have identified disabilities."

However, Mr. Pederson recognizes that these benefits are not without tremendous costs. He points out that "it is very expensive to offer this kind of education." As an

example, “the deaf student who has a signer in class with him every day is taking a large share of limited funds.” Mr. Pederson’s concern is not only for an overburdened education budget, but also for the demand on other scarce resources needed by students in collaborative classrooms. Much of Mr. Pederson’s time and energy is directed away from regular education students in tailoring his instruction to each of the ten to twelve resource students and in communicating with their teachers. Another weakness Mr. Pederson recognizes in the collaborative structure “is that resource teachers need to know my subject matter as well as I do, and, quite naturally, as they are not composition and literature teachers, they do not.”

Mrs. Sawyer appreciates his sensitivity to the difficulties that resource students and their teachers face in the collaborative classroom. She relates that he is willing to restructure and individualize his program and to invest time where some other teachers do not. According to Mrs. Sawyer, some teachers adhere to their standard class assignments, resistant to the collaborative plan. In such cases, she explains, both the resource students and their special education instructors bear additional and significant burdens; together they must work extremely hard to meet the teacher’s regular education demands and graduation requirements.

Nevertheless, Mrs. Sawyer rises to the challenge and regularly puts forth the extra effort. In her over 29 years at Arroyo Grande High School, she has directly helped many striving students obtain their diplomas and has made a point of attending their graduation ceremonies. She has performed in various instructional capacities, including as a tutor to resource students in English, history and math and sometimes even in basic life skills. She receives her greatest reward for her dedication when students return to share with her, as they often do, their successes in life as productive citizens.

She currently works as an instructional aide to the high school’s special education teacher, Debbie Davis-Smith. In observing Mrs. Davis-Smith, Mrs. Sawyer identified what, in her opinion, is another area with room for improvement in the high school’s special education system. Mrs. Sawyer explains

that the innumerable reports which Mrs. Davis-Smith must complete in her role as special education teacher must all be hand-written. The computerized program for doing such work, which Mrs. Sawyer understands has been utilized successfully by many other districts for several years, has yet to come to Arroyo Grande High School. Mrs. Sawyer recommends a modernization of the current system. In her view, computer-assisted processing of the many required forms would allow for more specific reporting and for more instructional time directed towards students.

Mr. Pederson is no longer so optimistic about improving the system. Yet, he still believes in and demonstrates the resilience of the human spirit. His formula for perseverance and success, he says, is similar to that of many teachers: "I get some rest; I go to work; I trust and depend upon talented teachers such as Mrs. Virginia Sawyer, Mrs. Debbie Davis-Smith, and many others like them; I try hard; I always try to demand more than a student wants to give; I go home; I weed the garden; I get some rest and do it all again."



Joe Billingslea & Rolf Athearn
Program Specialists for Special Education
Stockton Unified School District

KATE STEINHEIMER

Joe Billingslea and Rolf Athearn, Special Education Program Specialists for the Stockton United School District, sum up the most critical issue in special education today in one word: funding. As they work to provide special education services to 5,000 students in an urban school district with 38,000 students who speak over 130 languages, they face funding issues on a daily basis and in a variety of forms.

The problem begins, Mr. Billingslea believes, with the U.S. Department of Education: “The federal government mandates special education and tells us what to do, but they don’t give us any money to do it.” He explains that federal statutes define special education. They tell school districts what language the schools need to use to describe their disabled students. The statutes even define what a parent is for special education purposes. “Everything we do is driven by these laws, but they’ve been fighting for twenty-five years over whether the federal government will help fund the programs.” Mr. Billingslea notes that this year some federal money was actually released to the school districts, but he questions whether it is a victory or “just a drop in the bucket.”

One area where the lack of funding is critical to Stockton Unified is facilities. Stockton is a district with aging facilities, and frequently there is no money to perform necessary repairs and improvements. Mr. Athearn showed pictures of the restroom for disabled students at one of Stockton’s three high schools. The door was too narrow for a wheel chair to pass through easily and it would be impossible for a disabled student to open the door independently. Inside, the plumbing was old. There was no heat or air conditioning,

and the atmosphere was depressing and unsanitary. Mr. Athearn was scheduled to attend a meeting the day after this interview which he expected would result in some funding to repair these and other facilities for disabled students, but he commented that he had been lobbying for money for repairs for four or five years.

Besides clean, safe facilities, special education students have other expensive needs. Mr. Billingslea points out that transportation for 5,000 special education students is very expensive, while Mr. Athearn notes that many special education students are vision-impaired, have orthopedic difficulties or are deaf, and need assistive technology. A new type of communicator that will be purchased this year to assist deaf students will cost \$6,000. This far exceeds the \$330 per student per year special education budget. Although there are currently two students who could benefit from the communicator in the district, only one device will be purchased. Other students need the one-to-one assistance of an instructional aide in order to receive an education in the least restrictive environment, which is required by law. Mr. Athearn also says that it is often the “squeaky wheel that gets the grease. Autism is the biggest deal right now.” There are currently groups of parents and advocates promoting the causes of autistic children, so the districts scramble to meet those needs, sometimes at the expense of others.

School districts are also required to spend money on programs like Protection and Advocacy, which Mr. Billingslea describes as a program subsidized by the state to be sure the school district is doing its job in meeting the needs of special education students. Additionally, the paperwork required to document special education is time-consuming and expensive. After an Individual Education Program (IEP) meeting, the average report is eighteen pages long if the student qualifies for special education. “It takes seven pages just to say no,” says Mr. Billingslea. There is also a great deal of reporting that must be done to the state. Much of this work has been done by hand, although Stockton Unified is slowly moving toward computerization.

The expensive needs of special education students often breed bitterness between general and special education, according to Mr. Billingslea. Teachers in general education might look at special education and see more money being spent to educate one child than a whole general education class. In Stockton Unified this year, special education is encroaching on the general fund by over three million dollars due to under-funding. However, Mr. Billingslea comments that the expenses are unlikely to change and should not change, because they are based on upholding the civil rights of the disabled students.

Mr. Billingslea and Mr. Athearn agree that this civil rights protection is one of the great strengths of the current system. "The law really protects special education kids," says Mr. Billingslea. He remembers a student in a wheelchair at the school where he taught special education for several years before becoming a program specialist. The school quickly became aware of and fixed problems like cracks in sidewalks and a lack of ramps that made navigation difficult. Mr. Billingslea says that the student was in a special education class, but was a popular member of the school who did spend a lot of time with the general education students. He was liked by everyone and even elected student body secretary. Without the special education laws, this student probably would not have received a public education at all.

Committed special education staff make up the other strength Mr. Athearn and Mr. Billingslea see in the current system. "There are many dedicated people who work very hard to serve kids," says Mr. Billingslea. He points to Mr. Athearn's diligent four or five year quest to improve the restroom facilities for disabled students at Stockton's high schools, and says that there are many ways people search out to help children.

Both specialists see many opportunities for improvement in the system, beginning of course with increased funding for resources and facilities. Investing in teachers was another area where both agreed more funding should go. More money for salaries to motivate teachers

would be effective. Mr. Athearn believes teacher training is crucial, both before teachers enter the classroom and on a continuing basis through in-service days. Teachers also need time when they are compensated for meeting with each other and program specialists. Currently there are few in-service days and little money is available to pay for substitutes so that teachers can work together.

Mr. Athearn also believes that finding ways to get school sites to work together as teams is important to improving special education. Mr. Billingslea comments that many tasks designated to special education would be more appropriate for general education to take on. "General ed needs to take responsibility for low-achieving students and students with behavior problems [who are often unnecessarily placed in special ed], so they stop taking money away from kids who are in special ed legitimately."

Mr. Billingslea gives an example of an emotionally disturbed student who had been in special education, but for whom the least restrictive appropriate environment had been determined to be a general education classroom, although he would still qualify for some special education services. After a few weeks, the school called the special education department to complain about the placement, because the child was not succeeding in the general classroom. It turned out that he had been placed with a brand new, untrained teacher. Neither his clinician nor his previous teacher had been contacted for advice, and no one had looked at his Individual Education Plan or held a student study team meeting to determine how to meet his needs. A school site with more resources to work as a team could avoid problems like this which can be devastating for a child.



Greg G. Yardley
Complaint Investigator,
Arizona Department of Education

GIGI SAWYER RADDING

Greg G. Yardley has been associated with education and, in particular, special education, since he graduated from Washburn University in 1970. Having earned his teaching credential, Mr. Yardley subsequently became certified as a special education teacher and school administrator in Kansas, Arizona, and several other states.

In addition, Mr. Yardley earned a Master of Science degree in Secondary School Administration from Kansas State University in 1984. He then continued his specialized studies in Educational Administration at Kansas State University and at the University of Kansas. From the mid 1970s to the late 1990s, Mr. Yardley taught and coordinated various special education programs in self-contained programs, special purpose schools and secure settings.

Mr. Yardley currently serves as Complaint Investigator for the Arizona Department of Education. He is employed at the State Education Agency level in the Department's Exceptional Student Services Section. There, he investigates possible violations of state and federal law and regulations regarding the rights of special education students. Specifically, Mr. Yardley examines, monitors, and enforces complaint corrective action compliance under the Individuals with Disabilities Education Act (IDEA) of 1997. To do so, he relies heavily on information made available to him, and he makes regular use of the rapid-access resources of the Internet and other modern media.

More significantly, Mr. Yardley considers the codification of special education by IDEA to be a strong contribution to his work, especially in the area of his present

focus: dispute resolution. He also values the “basis of precedent in circuit court and hearing officer decisions that gives complaint investigators a large body of thought and decision from which to reach investigative findings relative to complaint allegations or issues.” Mr. Yardley states that this guidance is essential to the complaint investigator in writing a report. He explains that the investigator not only must examine the issues, make a compliance decision regarding those issues, and then impose any necessary corrective action, but must base simultaneously all of these conclusions soundly in the laws and regulations.

Mr. Yardley offers the United States Supreme Court decision in *Cedar Rapids Community School District v. Garret F.*¹ as an example of legal precedent important to a competent complaint investigator. The issue identified by Justice Stevens in *Garret* was whether a school district must provide, as a required “related service,” nursing assistance during school hours to a ventilator-dependent student to assure meaningful public school access.² Ultimately, the *Garret* Court held that “the District must fund such ‘related services’ in order to help guarantee that students like Garret are integrated into the public schools.”³ Mr. Yardley points to *Garret* as the basis for the test commonly used to determine whether health care services are required “related services.” As he explains the test, if the service is necessary for the special education student’s school attendance, is neither for diagnostic nor evaluative reasons, and does not need to be administered by a physician, it is a “related service.”

While he appreciates the strengths of the system in which he works, Mr. Yardley also warns of some potential but avoidable dangers. He indicates that “if information is not available, if investigative work is not carefully and thoroughly done, if conclusions are hastily reached without adequate research, then students’ rights may not be adequately protected.” He suggests, though, that at least some of these

¹ 526 U.S. 66 (1999).

² *Id.* at 68.

³ *Id.* at 79.

risks can be reduced through even more frequent and higher quality educational opportunities for dispute resolution staff.

Finally, Mr. Yardley states that in addition to the good instructional programs already available, national teleconferences could supplement traditional conferences. He advocates for the use of modern communication technology, adapted to protect confidentiality, to facilitate an exchange of ideas and methods to improve dispute resolutions. He adds that scheduling should be arranged to increase training accessibility, and arrangements should be made for staff to “cross-train” agency members who are unable to attend particular sessions. After all, as Mr. Yardley recognizes, the system’s “greatest strength is found in the persons who do the work; the investigative support staff must be dedicated to a demanding task, requiring no small amount of skill in communication, analysis and synthesis, among other abilities.”



Gary Bieringer
Director, Community Assessment
and Referral Center for the
Huckleberry Youth Program

KATE STEINHEIMER

For Gary Bieringer, Director of the Community Assessment and Referral Center (CARC) for the Huckleberry Youth Program, the most critical issue in special education today is providing children with appropriate services. The related problem of misdiagnosis of students' needs is also a serious problem. CARC provides multi-faceted crisis intervention for youth who have been arrested. Many of the students Mr. Bieringer sees "are in special education and it's doing nothing for them—their needs are not being met." Others have not yet been identified as qualifying for special education, but should be. Mr. Bieringer worked for five years as a special education teacher in a public middle school before joining the non-profit sector where he has worked for over twenty years.

When asked about the strengths of the current special education system, Mr. Bieringer frankly acknowledges that he does not have a lot of positive things to say about the San Francisco system, with which he is most familiar. "They tend to warehouse kids, they're slow with paperwork, and they're not consumer-friendly," he says. "Of course there are individual schools and teachers which are exceptions." As an example, he points to the different ways teachers handle explaining parents' rights. He says that in Individual Education Program (IEP) meetings some teachers will explain the rights in a way parents can understand, but more often they do not. "It is very intimidating. Your child is being discussed, all these terms are being thrown around, most parents end up just nodding agreement."

Mr. Bieringer finds the system's biggest weakness to be the negative labels that are applied to children. He thinks it

is important that students be helped to understand what their particular problem is, so they can know that they are not stupid. Misunderstanding and lack of self-esteem due to the labels that are used for children constitute a big part of the problem. "With a lot of kids, no one has explained what it means to have a learning disability. Once they have an understanding, and they realize it doesn't mean they are dumb or stupid, they can begin to deal with it." Helping kids gain this understanding is one goal of the Huckleberry Youth Program. The program also focuses on getting appropriate services for students and helping them understand what their educational needs are.

Speeding up the assessment process, sticking to time lines, and providing more support for teachers are the main areas where Mr. Bieringer sees opportunity for improvement. He sees the basic legal framework of PL94-142, which first mandated IEPs, time lines, assessments, and providing special education services as adequate, with the problems lying more in the implementation than in the laws themselves. He believes the problems arise from how the individual districts tend to interpret the law. "They can either follow the letter of the law or the spirit of the law," he says. "With special ed kids it is not enough to just follow the letter of the law. And some districts don't even do that."

The main area where he sees a problem with districts' compliance with the law is in following the prescribed time lines. Despite these time lines, Mr. Bieringer finds the time that passes without any action on students' cases to be far too long. If the law could be changed to impose some type of penalty on school districts which do not meet the mandatory time lines, that would be a beneficial change. He points out that currently the only recourse parents have when districts do not follow the legal mandates is to file suit, which is a difficult and lengthy process. The penalty imposed should be "stiff" and go all the way up to the school board and superintendent, according to Mr. Bieringer. "The violations of the law should not be allowed to be hidden in the special education department," he said. Although he acknowledges the difficulty of fashioning a meaningful sanction that would not

indirectly penalize students, he firmly believes there must be some type of legal mechanism to hold districts accountable for violating the law. “When our kids break the law, there are sanctions against them,” he notes. However, the same is not true when the districts break the law. He concludes, “There has to be responsibility. It is a big thing that we always talk about with the kids. It should apply to the districts as well.”



The Honorable Lynne C. Leach
Vice-Chair
California Assembly Education
Committee

California Assembly Member Lynne C. Leach shared the following thoughts with Rebecca Gardner of the Journal:

Every child deserves the chance to have a quality education, including those children requiring special education. In order to deliver on that, we have a big hurdle to overcome: inadequate funding. For the last twenty-five years, the federal government has shortchanged California by committing to fund special education at forty percent of per K-12 pupil expenditures, but only coming up with approximately fifteen percent. With full federal funding, school districts could provide more services and not end up tapping their general funds, impacting other academic programs and driving wedges between special education and non special education students.

Teachers who accept the added responsibilities of special education need the same recruitment, retention and professional development opportunities as other teachers. Wherever we are able, every effort should be made to place our special education students in general education classrooms so that both groups of children can experience the richness of learning and relating to one another. California has 5.7 million students. Each is a unique, special person with a potential for contributing to society. Our goal should be to create a premier education system which helps each child to realize his or her potential.



The Honorable Dede Alpert
Member
California Senate Education
Committee

California State Senator Dede Alpert shared the following thoughts with Rebecca Gardner of the Journal:

One of the most critical issues for special education is adequate funding. Federal funds supplement rather than supplant special education funding. However, California has an ongoing dispute with the federal government on compliance. The federal government is threatening to withdraw its funding if students are not placed in appropriate classes.

Another critical issue is how special education students are accommodated in taking the standardized tests. For example, the State Board of Education ruled that special education students will not be allowed to use calculators during the math portion of the test. Additionally, many special education students may be denied a diploma, as they will not be able to pass the exit exam. The implications for special education students were not completely thought through when the exit exam was adopted.

One of my highest priorities in special education is ensuring equal educational access for all students with disabilities. As such, I am authoring SB 511, to fund local Family Empowerment Centers on Disability and a State Level Technical Assistance Center to ensure coordination, quality and accountability, and statewide service within the special education system. The investment of less than forty dollars per child per year will reduce the systems' reliance on costly legal remedies to solve problems; improve parent satisfaction and involvement; ensure parent voices in public policy development and school reform efforts; and improve the educational outcomes and life skills of students with disabilities.

Children's Section on Special Education

The Children's Section supplements the academic and practitioners' perspectives proffered in this symposium edition on special education, completing the voices involved in the intricate and challenging nexus of federal law and its implementation at the state and local levels. Originally, the Children's Section intended to showcase solely children's experiences from full inclusion programs. But the interview process revealed a very significant and underestimated element: the role of the parent.

We found that the parents of special needs children assume several demanding roles, vastly exceeding that of parents of regular education children. They must constantly educate themselves on medical and scientific advances in treating or better understanding the causal aspects of their child's disability and its effects on their child's ability to learn. In turn, they must educate the schools. They must monitor the progress of their child. They are on-call in case there is a problem at school. They need to verify that their child is receiving the services outlined in the Individual Education Plan. They must navigate the minefield of teachers' egos and district resistance to spending additional money on one child. They must become their child's strongest legal and emotional advocate, believing in their child's potential. They must assume the pain of the subtle (or blatant) peer exclusion that they hope their child does not recognize. Some parents dread the coming years of maturity, as their child's peer development may slow, further distancing the child from societal assimilation and acceptance. Most of all, if the disability is sufficiently severe, they must become their child's voice, as they best understand their child's words.

We spoke with a very gregarious set of parents. They are involved in many ways, such as forming parental support groups or coaching Special Olympics. Some of them are

embroiled in the legal system, advocating for their children's education. These parents' experiences may be exceptional.

Special education is an issue that is often ignored by society. Although the legal system has moved these children toward equality, it has moved in baby steps. These parents live their child's life, a second childhood laced with the wisdom of an adult's perspective and memories of peer cruelty, magnified by a disability. They cringe with anticipated hurt, yet harbor immense hope in their child's unrealized possibility.

When the Children's Section staff sought to interview full-inclusion children in different Northern California districts, their parents often directly answered or augmented the answers of the children. Some children were too young or disabled to answer the questions, so their parents spoke for them. None of the children were aware of the legal system's import or relationship to their education process; their parents were content with that ignorance. We began with the following set of questions, but we found that the interviews progressed beyond them.

Please tell me about where you have gone to school and the different kinds of programs you have been involved in. How do they compare to each other?

Tell me about the kinds of therapies you have had?

Do you like school? What is the hardest part, and of what are you most proud?

Do you have friends in your school? Is it hard to find friends? What kinds of things do you do together?

Do you ever feel like your teachers or your classmates treat you differently? How? Why?

What do you think you teach your classmates?

Have you had to deal with the legal system in getting help with your education? How was it? Do you want to talk about it?

ALEX T.'S STORY, as told by his mom, Christine T.
(Alex T. is a five-year-old boy with autism and cerebral palsy)

Alex started in a County-funded infant program after his diagnosis at ten months old. The teacher was excellent – a good person who created an opportunity for parents to talk and become involved in a parental support group. Some of Alex's infant classmates are now in full-inclusion classes as well. Alex's County-funded, full-inclusion nursery school program was not as successful. In that program, the teachers did not know how to deal with his severe emotional outbursts. The problem continued when he began full-inclusion kindergarten.

Alex has had several kinds of therapy, including speech, physical, and music therapy. In addition to regular kindergarten, he is also in an applied behavior analysis program with a nonpublic agency for twenty hours a week. His mother, Christine, continues to keep him involved because she sees progress.

Christine could not identify the hardest part of full inclusion for Alex, because Alex absolutely loves it. He is very happy; he loves his aide and the kids in his class. In fact, when the teacher recently taught a unit about autism and disclosed that Alex is autistic, the regular education students helped to make patches for a quilt benefit on autism. Through the quilt project, the classmates rallied around to help Alex. From Christine's perspective, the only bad quality about full-inclusion is that although Alex is currently unaware of his difference, she already sees him being treated differently. He is not a true peer in the classroom; he has only been invited to two birthday parties for his regular education classmates, and very few will come over to play.

Alex's peers play with him as they would with a three-year-old, even though they are five or six years old. Alex cannot join his classmates in board games or computer games because he hasn't mastered them yet. He spent the school year learning the alphabet. He can't join his classmates in soccer

because he doesn't know the rules. But one little boy seeks him out and protects him.

By Christine's choice, Alex will be retained next year. He has made significant academic progress, so she wants to keep him in the class another year. If he had been moderately developmentally delayed and wasn't getting any benefit out of the year, she would have kept him with his age group. But he is successfully learning, and she would like to give him an opportunity to continue to get what he is supposed to learn from kindergarten.

There is one full-inclusion teacher for the entire school, and Christine had to threaten to go to court to get an aide trained. Alex is at the mercy of the aide. The school's caseload is very heavy and it has trouble keeping up with the IEPs. But Christine and her husband have tried to avoid the legal system because of the expense in precious time they need to spend with Alex and the high monetary cost. Parents must pay a large retainer, paying as they go, and then, if they win their case, they will eventually be reimbursed after the attorney's fees are recovered. According to Christine, because all of the special education services are deficient, parents must pick their battles carefully, making issue only of the most important problems.

Christine is particularly concerned about how Alex will feel in full-inclusion when he is twelve or thirteen years old, because he is a developmentally handicapped child. She introduced a troubling question with which most special education parents must struggle: at what point is it more important to have friends or to be fully-included simply because it is a right? She fears that the subtle exclusion from the older kids will only escalate, especially as Alex has "accidents" at school, and cannot get to the restroom in time. Although that is still accepted in kindergarten, it could cause him to be ostracized in junior high school.

The possibility of ostracization is real because the school does nothing to sensitize the regular education children to the realities of being a special education child. In Christine's experience, the school district was willing to fight

in court, incurring attorneys fees of \$20,000 to \$40,000, over the fact that they had no budget for upper grade assemblies on special education sensitivity that cost \$2,000 per assembly. The idea behind the federal law is a wonderful utopia, but the implementation reality is that the schools don't train the aides and the other kids to deal with the special needs students. As a result, the special needs kids are set up for failure.

Christine receives education on autism from Families for Early Autism Treatment. Alex's IEP requires that she be consulted monthly to target what he will learn. But the full-inclusion teacher with a master's degree in special education does not know how to plan for Alex's needs. The district contracted with the county, who had a behavior analyst from a nonpublic agency. Alex's program is now data-driven, but Christine had to take the district to mediation to get them to take data on his progress, and had to train the aide in taking the data (the full inclusion teacher still does not know how to do it). In closing, Christine said that she believes that the investment in a special education child may be costly now, but that it saves society money in the long run to help these kids become as autonomous as possible.

DANIELLE F.'S STORY, as told by Danielle and her mother,
Julie L. (Danielle F. is an eight-year-old girl with cerebral palsy)

Danielle has been fully-included in regular school throughout her education. But her mother, Julie, augmented her education by starting an after-school program that would meet Danielle's needs. Danielle is very fortunate in that she is well-accepted in class, and she doesn't believe herself to be handicapped. She is in the first grade and loves school. She finds that being the best writer in her class is her proudest accomplishment, and she has lots of friends. When asked what they do together, Danielle said that they mostly talk and play truth-or-dare. She added that they like Britney Spears.

Danielle feels that she is treated like "just another one of the students" and when asked what she teaches her classmates, she was silent for a little while. She agreed that she probably taught them about strength and courage.

Through fundraising, Julie founded a conductive education after-school program. She then went to mediation for an IEP to continue the funding. Julie has had three mediations in the course of Danielle's education so far, and two were successful. In the third and most recent hearing, she had a horrible IEP experience, in which the school district wanted to take Danielle out of classes for her services, putting her in services between 9 a.m. and 3 p.m. each day. To cut the aid, the school schedules the services during the school day itself, knowing that the parent won't want to take their child away from class. Julie's solution is to stop the school district from assessing Danielle tri-annually. As the parent, she has a right to refuse the assessments. The assessment lowers Danielle's self-esteem, as she is in special education because of her physical disability, not her cognitive functioning. Rather than subjecting Danielle to additional assessment, Julie will pay for computer training from her own pocket.

The other advantage of the after-school program is that it gives special education students an opportunity to interact with their disabled peers. The conductive education bolsters

Danielle's confidence, so she feels that she can do anything, and has no sense of being different from anyone else.

Finally, Julie wanted to close by saying that parents usually know what is best for their children. Because of proximity, parents can see potential in their children that others might not detect, and the parents truly want the children to reach that full potential. She said that the parents need more respect in this process; they are not trying to take or receive benefits that they do not truly need for their child.

SARAH B.'S STORY, as told by Sarah and her mother,
Melinda B. (Sarah B. is an eleven-year-old girl with subcortical
band heterotopia)

Sarah has attended three different school districts in California. In the first district, the pre-school program lacked structure. The second district had a special day class, which was decent according to Melinda. But that changed in first grade, when the full-inclusion teacher denied that Sarah was learning, and told Melinda that Sarah couldn't fully participate in the regular education classes (for reading, lunch, art, etc.). Although Melinda had a good relationship with the special education department, the family moved. In the third district, Sarah was put into full-inclusion.

In third grade, Sarah had two different full-inclusion teachers, but both were very successful in working with her. She had a good in-school relationship with other girls, and had a group of "lunch buddies." In fourth grade, the teacher did not know how to work with a special education child, and would call Melinda to tell her that Sarah was wearing the wrong shoes that day, instead of discussing the underlying teaching method and learning issues. Sarah had behavioral problems that year, and the teacher excluded Sarah from the end-of-the-year class party, saying that she was not physically able to join the class in ice-skating.

In fifth grade, Sarah had another good year. She communicated well with the teacher. Her peer situation, however, was limited further. During the time that she has been in full inclusion, she has only been invited to one regular education child's party. She has little socialization with regular education children outside of school. The girls in her Girl Scout troop don't take the time to involve her.

This year, in sixth grade, she has an aide, and it is her strongest academic year ever. Past aides have been inexperienced and unsympathetic to her needs, so she has not kept one consistently. This makes it difficult to keep track for her IEP, and the teachers haven't been able to answer

questions about her progress. Sarah has only had speech therapy. Melinda feels that in retrospect, with more familiarity with Sarah's rights now, Melinda would have found other therapies as well.

Sarah says that she likes school, and that the teacher and the classroom with the desks "you put stuff in" are the best parts. She says she has friends at recess and lunch who play "power puff girls" with her. Melinda later augmented this response, saying that Sarah's IEP includes having regular education students sit with Sarah at lunch. When asked if she feels like her teachers or classmates treat her differently, Sarah said that she was treated just like everyone else. She teaches her classmates how to play games, like basketball, baseball, and soccer. She won Special Olympic medals in basketball, and she is looking forward to junior high school. She, like almost every other pre-teen, loves Britney Spears.

Sarah's parents have not been involved with the legal system on her behalf, but they said that if they knew then what they know now, they would have been involved by the time Sarah was three or four years old. Getting the lunch group in the IEP was a huge battle; other parents complained about their children having to spend time with Sarah. The teacher agreed to set up a phone list to have students call Sarah to help her practice her phone skills. This wasn't written in the IEP. When the teacher gave Sarah the phone list with the times to expect calls twice a week over a two-month period, she only received one call. Melinda wrote notes explaining the effect in her household when the students did not call. The teacher explained that she was expecting too much from the students. Still, a reward system might have encouraged their calls.

Although Sarah claimed to have friends, Melinda says that Sarah gets very upset on weekends when she sees her brothers and their friends, yet she doesn't have any friends come over. Melinda must get "geared up" to have Sarah's special education kids over, because both Melinda and her husband already coach Special Olympics several hours a week. Sarah and Melinda can't wait for junior high, especially since Melinda knows several kids in that inclusion program.

Recent Court Decisions Impacting Juveniles

Introduction

The purpose of the case law section is to provide an overview of selected court decisions involving the interests of juveniles decided between October 15, 2000 and February 15, 2001. The cases summarized here include decisions of the Federal Circuit Court of Appeals, individual state Supreme Courts, and the California Courts of Appeal. Following these case summaries is an article highlighting a recent New York Supreme Court case.

Federal Circuit Courts of Appeals Decisions



Blondin v. Dubois

238 F.3d 153 (2d Cir. 2001).

The mother abducted her two children living in France and brought them to the United States to live with their uncle. She fled France to protect her children from further emotional damage caused by the domestic violence in their home. The children's father filed a petition, as required under the Hague Convention, seeking the children's return to France. The district court denied the request under Article 13(b) of the Hague Convention. Article 13(b) provides an exception to repatriation if there is a grave risk that the child's repatriation would expose the child to physical or psychological harm or place the child in an intolerable situation. On appeal, the Second Circuit affirmed the denial of the repatriation request. The mother's expert witness testified that repatriation would have severe negative effects on the children who already suffered from "severe traumatic stress disorder." The

Second Circuit stated that the Hague Convention generally requires repatriation of abducted children to their country of habitual residence. Nonetheless, the district court had not erred in denying repatriation in this case because credible evidence existed that repatriation could be harmful to the children.

📖 *Diorinou v. Mezitis*

237 F.3d 133 (2d Cir. 2001).

In 1995, under a temporary protective order, a mother left the United States for Greece with her two children. Simultaneously, the children's father left Greece for the United States where he petitioned the United States District Court in New York for the return of his children under the Hague Convention. A similar petition for the children's return was filed on behalf of the children's father in Greece. Both petitions were denied in Greece in 1996. The Greek Court awarded permanent custody to the children's mother in Greece in January 1998. The decision was affirmed on appeal in 1999. The Greek appellate court was unaware that a New York court had awarded the father temporary custody of the children in July 1997. In October 2000, the father removed the children from Greece during a scheduled visit. The children's mother immediately filed and the district court granted a Hague petition for the return of the children to their mother. On appeal, the father claimed that the district court erred in considering dispositive the January 1998 custody grant. The Circuit court affirmed the district court's decision. The Second Circuit stated that the Hague Convention requires the court to give full faith and credit to the decisions of foreign courts. Even if no specific requirement for comity existed in the statute, the court is to read it in to the Convention's full faith and credit requirement. However, the Second Circuit noted that the existence of a foreign judgment is not automatically dispositive, and a review of the record like that accomplished here is important to assure an appropriate decision.

📖 *Dale M. v. Bd. of Educ. Bradley-Bourbonnais High Sch. Dist.*
237 F.3d 1813 (7th Cir. 2001).

A minor began middle school in 1993. He exhibited serious behavior problems and eventually was placed in a “therapeutic day school.” In 1995, the minor was hospitalized for substance abuse and depression and arrested for delinquent behavior. Subsequently, the minor was diagnosed with “conduct disorder,” but no learning disability. After his release from juvenile hall, the school district wanted to place him back in the day school, but his mother enrolled him in a residential boarding school. The boarding school provided services similar to the day school in truancy prevention, but did not provide treatment for the minor’s problems with substance abuse or depression. When the minor’s mother presented a claim for reimbursement for the cost of the boarding school, the school district denied her claim because the school district would have provided similar services. The minor’s mother filed a claim under the Individuals with Disabilities Education Act (IDEA) in the district court. The district court held that the school district had violated its duty under the IDEA and ordered the school district to reimburse the minor’s mother. On appeal, the Seventh Circuit reversed. The Seventh Circuit held that the school district did not violate its duty under the IDEA by refusing to pay tuition reimbursement for a student who was an “incorrigible truant and lawbreaker.” The Seventh Circuit stated that the services offered by the boarding school were not educational services. Rather, the services amounted to little more than confinement.

📖 *Fales v. Garst*
235 F.3d 1122 (8th Cir. 2001).

Three public school teachers were instructed by a school principal not to discuss incidents that had occurred with some special education students at their school. The teachers received disfavorable employment evaluations when they disobeyed the principal’s instructions. The teachers filed suit against the principal alleging violations of their constitutional rights to free speech and equal

protection. The principal moved for summary judgment on the grounds of qualified immunity which the district court denied. The principal appealed and the Eighth Circuit reversed. Teachers' equal protection claim was denied because they did not offer evidence that they received different treatment than other similarly situated teachers. The Eighth Circuit also found that the teacher's interest in speaking out on the treatment of special education students was outweighed by the school administration's interest in efficient administration. The Eighth Circuit held that the teacher's speech on these matters consisted of complaining to the administration and the media. This caused disharmony in the school and among co-workers which polarized the school. Also, the Eighth Circuit reversed the denial of the principal's motion for summary judgment because the teachers had failed to meet the burden of proof on their constitutional claims.

 *United States v. M.C.E.*

232 F.3d 1252 (9th Cir. 2000).

A juvenile, with a prior conviction for a 1997 residential burglary, was arrested for shooting and killing a cab driver. After the juvenile was charged, the prosecutor applied for mandatory and discretionary transfers from juvenile to adult status under title 18 United States Code section 5032. The prosecutor claimed that transfer was mandatory under section 5032 because the juvenile had been previously found guilty of an offense that would have been a felony involving the use of violence committed after the juvenile's sixteenth birthday. The district court denied the mandatory transfer application, but granted the discretionary transfer. The juvenile and the prosecutor appealed. On appeal, the Ninth Circuit reversed the district court's denial of the mandatory transfer. The court stated that section 5032 defined violent crime as any act that "substantially risks the use of physical force against another person." The Ninth Circuit held that residential burglary is such a crime because the unlawful entrance into a dwelling creates a substantial risk of physical force being used against another person. Because the court

decided that residential burglary is a crime that triggers the mandatory transfer requirement under section 5032, it did not reach the discretionary transfer issue under section 5032.

 *Padilla v. City and County of Denver*
233 F.3d 1268 (10th Cir. 2000).

A disabled minor claimed that between 1992 and 1997, the school district had failed to provide behavioral programming, augmentive communication and tube feeding services. Further, she alleged that the school district repeatedly restrained her in a stroller without supervision in a windowless closet which precipitated a fall that worsened an existing seizure condition. The minor claimed that the school district's actions violated her federal civil rights under title 42 United States Code section 1983 and her rights to adequate education services under title 20 United States Code sections 1400 to 1487. The district court denied the school district's motions to dismiss both claims. The school district appealed. The Tenth Circuit reversed the denial of the motion to dismiss the section 1983 claim and affirmed the denial of the motion to dismiss IDEA violations. The Tenth Circuit stated that the administrative remedies available under the IDEA preclude civil rights actions under section 1983 based on alleged violations of the IDEA.

State Supreme Court Decisions

 *Raymond v. Red Clay Consolidated*
765 A.2d 952 (Del. 2000).

A child had been placed in a tailored special education program in a school district under an Individualized Education Program (IEP) since 1995. In 1997, the placement was reassessed. After the reassessment, the child's parents disagreed with the school district's recommendation to place the child in a self-contained program at the public school. The child's parents enrolled the child in a private school recommended by their child's psychologist. The school district refused to reimburse

them for their child's private education. The child's parents sought and were awarded reimbursement at a due process hearing. The family court reversed and the parents appealed. On appeal, the parents argued that tuition reimbursement was required when a school district violated procedural requirements. The child's parents claimed that the school district failed to prepare a new IEP before placement considerations were made and there had been no timely due process hearing. The Delaware Supreme Court affirmed the family court decision. Even though there were procedural inadequacies, no actionable wrong existed. The inadequacies did not compromise the child's right to an appropriate education, seriously hamper the parent's opportunity to participate in the process, or deprive the student of educational benefits. In this case, the 1996 IEP was reasonably calculated to provide educational benefits, and the child's parents were not forced to remove the child from the public school where the child had been successful.

California Courts of Appeal Decisions

 *In re Dakota S.*

102 Cal. Rptr. 2d 196 (Ct. App. 2000).

The parent claimed that the juvenile court erred in placing her child in a permanent plan of guardianship with the child's foster parent. The parent asserted that the county's Department of Health and Human Services failed to prepare, and the juvenile court had failed to consider, a statutorily required assessment of the foster parent as a prospective guardian. Despite the lack of the report, the Third District Court of Appeal affirmed the juvenile court's order. The appellate court noted that the statutorily required assessment is important and the department's failure to provide it is a potentially grievous error. In this case, however, the lack of an assessment did not result in an injustice. The appellate court stated that the juvenile court did consider information equivalent to the information the assessment would have provided. Furthermore, the appellant's failure to raise an objection to

the department's failure to provide an assessment at the hearing precluded the appellant from raising the issue on appeal.

 *Kyle O. v. Donald R.*

102 Cal. Rptr. 2d 476 (Ct. App. 2000).

The grandparents petitioned the family court for visitation with their grandchild after their daughter died during the pendency of the dissolution from the child's father. The father opposed the petition, not because he opposed visitation, but because he opposed the loss of some control over the visitation schedule. The father favored a spontaneous visitation schedule. Despite the father's proposal, the family court awarded the grandparents' request for a set schedule. The father appealed. During the pendency of this appeal, the U.S. Supreme Court decided *Troxel v. Granville*, 120 S. Ct. 2054 (2000). In *Troxel*, the Court held unconstitutional a Washington state non-parental visitation statute. In *Troxel*, the non-parental visitation was ordered without deference for a fit parent's objection to the order. The Court stated that an award of visitation to a non-parent without evidence the parent was unfit interfered with a fit parent's liberty interest in the care, custody, and control of his or her children. Following the Supreme Court's decision in *Troxel*, the Third District Court of Appeals reversed the family court's visitation order. The appellate court stated that the death of the child's mother pending the dissolution of her marriage to the child's father did not imbue the grandparents with their daughter's parental rights, or diminish the father's parental rights. The appellate court held that absent a showing of parental unfitness, parents are entitled to a presumption that they will act in their child's best interests in arranging visitation with interested non-parents. The grandparents failed to present evidence to rebut the presumption of parental fitness. The father had a right to prefer an unstructured visitation schedule.

 *In re Joseph F.*

102 Cal. Rptr. 2d 641 (Ct. App. 2000).

A police officer attempted to detain a minor on public school grounds while investigating whether the minor was trespassing. When the minor used offensive language and refused to obey the officer's order to stop, a scuffle ensued. The officer employed a wristlock before placing handcuffs on the subdued minor. The juvenile court sustained a wardship petition filed against the minor for battery and resisting arrest. On appeal, the minor claimed that the officer had no reasonable cause to arrest the minor; therefore, the officer's use of force was unjustified. The First District Court of Appeals affirmed the juvenile court's order. The appellate court noted that schools are special places with regard to public access and school safety is an important social goal. The police officer was aware that the minor was not a student at the school where the incident occurred. The minor's own behavior resulted in the escalation of force employed in the course of the arrest. Since the officer had lawful authority to detain the minor, the charges of battery and resisting arrest sustained in the wardship petition were justified.

 *In re Francisco S.*

102 Cal. Rptr. 2d 514 (Ct. App. 2000).

A minor admitted possession of less than one ounce of marijuana. The penalty imposed was the maximum \$250.00 fine. The juvenile court stayed the fine payment and sent the minor home on probation. However, the minor failed to comply with the terms of his probation and was brought back before the juvenile court. The juvenile court sustained the petition for violation of probation and ordered the minor's commitment in juvenile hall for sixty days under the court's contempt power. On appeal, the minor claimed that the juvenile court had erred in ordering confinement for a violation of probation when the deferred maximum penalty was a \$250.00 fine. The Second District Court of Appeal reversed the juvenile court's contempt order. The appellate court noted that the purpose of the juvenile court system is to rehabilitate, not to

punish, minors. Confining minors in juvenile hall under the court's contempt power for probation violations fundamentally undermines the purpose of the system. When the legislature enacts a maximum penalty of a \$250.00 fine for a particular crime and the imposition of the penalty is stayed while a minor is on probation, the juvenile court cannot confine the minor for a probation violation.

 *Manduley v. Superior Court*

104 Cal. Rptr. 2d 140 (Ct. App. 2001).

On March 7, 2000, voters approved Proposition 21, the Gang Violence and Juvenile Crime Prevention Act, which amended California Welfare & Institutions Code section 707(d). The new code provisions gave prosecutors the power to decide whether teenagers aged fourteen and older should face adult penalties for the commission of many serious crimes and certain combinations of crimes. Before the amendment of the code by the passage of Proposition 21, prosecutors had to file a juvenile wardship petition in the juvenile court and obtain the approval of a judge following a fitness hearing before most attempts to try a juvenile as an adult. In this case, the prosecuting attorney directly filed criminal charges against juveniles in adult court. After the juveniles' demurrers to the prosecutor's direct filing of criminal charges in adult court were overruled, they filed a Petition for Writ of Mandamus contesting the constitutionality of Proposition 21. The Fourth District Court of Appeals issued a preemptory writ of mandate concluding that the section of the statute amended pursuant to section 26 of Proposition 21, violated the state's separation-of-powers doctrine. The court found that the code section as amended gave prosecutors virtually unchecked authority to curtail the judiciary's power to control the sentencing structure applicable in a particular case. This judicial power, traditionally exercised only subject to parameters created by the legislature, cannot be subject to prosecutorial control. The court determined that beyond the unconstitutional

amendment of the code section involved, much of Proposition 21 was separable and remained intact.

In dissent, Justice Nares argued that Proposition 21's amendment of section 707(d) did not fundamentally alter or exceed prosecutors traditional power to charge criminals even if the choice of where to file criminal charges, either in juvenile or adult court, ultimately does affect the sentencing structure available for a judge to employ. Justice Nares wrote there was no violation of the separation-of-powers doctrine. Further, the statute, if given a traditional presumption of constitutionality, should have been upheld because it did not give prosecutors power traditionally reserved exclusively to the judiciary.

Case Spotlight:***Campaign for Fiscal Equity v. New York***

719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001)

ROBERT COSTELLO*

Sociologists maintain that public education is the great equalizer in American society. The following case analysis highlights the latest battle being waged on the education front by those who would equalize the opportunities for students in America's public education system. On January 10, 2001, in *Campaign for Fiscal Equity v. New York*, a New York State trial court held that New York City's public school children are not receiving a "sound basic education" in violation of the New York State Constitution.¹ In addition, the court found that the state's school financing system disproportionately harmed minority students in violation of Title VI of the Civil Rights Act of 1964.² The result in *Campaign for Fiscal Equity* places New York in the company of more than ten other states that have been forced by the courts to assure that public school students receive a public education that passes constitutional scrutiny.³ The trial court noted that three theories have evolved in the education reform cases that have been filed

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¹ 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001). State Supreme Court Judge Leland DeGrasse presided over the trial. In New York, the Supreme Court is a trial court.

² *See id.* at 2. More than seventy percent of New York State's Asian, African-American, and Hispanic students live in New York City.

³ *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), *Abbeville County Sch. Dist. v. South Carolina*, 515 S.E.2d 535 (S.C. 1999), *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

since the late 1960s.⁴ For example, education reform advocates claimed that public school funding systems based on local property taxes violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.⁵ This argument was rebutted in 1973 when the U.S. Supreme Court held that rationally-based property taxation systems used to fund public school systems do not violate the Equal Protection Clause.⁶

In 1982, education reform advocates in New York argued before a New York court that the state's public school system funding structure violated the Equal Protection Clause of the New York State Constitution.⁷ The court found that there was no violation because the State Constitution did not require that all school districts be funded equally.⁸ However, the court noted that the Education Article of New York's Constitution required that the "State Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."⁹

Campaign for Fiscal Equity was filed in May 1993.¹⁰ The plaintiffs adopted a theory that relies on the lack of adequate education in the public school system rather than the equality of public school system funding.¹¹ The trial court agreed with the plaintiffs' argument that New York City receives \$1.5 billion less than it deserves.¹² New York City public schools enroll about thirty-eight percent of the state's students, but they only receive thirty-six percent of the state's

⁴ See *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 478.

⁵ See *id.* at 480.

⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁷ *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27 (N.Y. 1982).

⁸ See *id.* at 35.

⁹ *Id.* at 47 (citing N.Y. CONST. art. XI, § I).

¹⁰ A prominent New York law firm, Simpson Thacher & Bartlett, assigned eight lawyers to the case and ended up donating fourteen million dollars in legal work and expenses. The legal battle stretched over six years and culminated in a seven-month trial.

¹¹ See *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 479.

¹² See *id.* at 502.

aid, which is intended to provide public school children in the district a “sound basic education.”¹³ In 1999, the statewide average for spending was nearly \$11,000 per pupil.¹⁴ In that same year, New York City spent approximately \$9,000 per pupil, forty-three percent of which was funded by the State.¹⁵

The State asserted that despite the disparities, it was providing a “sound basic education” to public school students since New York State spends more per student on education than in most other states with large school districts.¹⁶ The trial court rejected the State’s argument.¹⁷ The trial court held that a “sound basic education” was not what an earlier court had described as the “basic education” that leaves a citizen competent to vote and to serve on a jury.¹⁸ The plaintiffs urged the court to utilize the rigorous new graduation objectives adopted by the New York State Board of Regents.¹⁹ The State countered that a “sound basic education” was achieved if the public school student could pass an eighth grade literacy exam. The court decided that a “sound basic education” could not be measured by the highest aspirations of state educators or achieved by the requirement that a student pass an eighth grade literacy exam.²⁰ The court stated that a “sound basic education” should consist of the provision of

¹³ See *id.* at 478.

¹⁴ See Jodi Lee Reifer, *Island Could See Big Boost in School Aid*, STATEN ISLAND ADVANCE, Jan. 11, 2001, at 2.

¹⁵ See *id.*

¹⁶ See *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 478.

¹⁷ See *id.*

¹⁸ See *id.* at 484. The plaintiffs called witnesses to explain how a sound basic education must encompass more than voting and jury duty. For example, one expert witness, Dr. Thomas Sobol, Professor at Columbia University and former New York State Education Commissioner, testified that serving as a juror today requires complex abilities and skills. See *Plaintiffs’ Evidence in CFE v. State of New York*, at www.cfequity.org (April 9, 2001) (plaintiffs posted information to website). For example, the use of DNA is one area that experts pointed to requiring higher skills for juries. See *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 484.

¹⁹ See *id.* at 483-84. New York State has adopted state exams for high school students in math, science, history and languages.

²⁰ See *id.* at 485.

foundational skills that students need to become productive citizens with competitive employment.²¹

Extensive local media coverage of the case generated excitement in New York City.²² Mayor Rudolph Giuliani and School Chancellor Harold Levy immediately praised the decision.²³ When the decision was issued, two options existed to satisfy the necessary increase from \$1 billion to \$2 billion in the budget for New York City's public schools. First, the State could decrease spending in the relatively wealthy suburban areas. Second, the State could budget additional funds or force the city to raise the funds. Either method could result in negative political consequences for Governor George Pataki and State legislators. Based on the experiences in other states where courts have reached similar results, this is a potentially explosive issue. For example, in 1990, a similar New Jersey decision led to a hike in property tax rates.²⁴ As a result, then-Governor Jim Florio and half of the Democrats in the State Legislature lost their seats. Former Texas Governor Mark White suffered the same fate in the early 1980s when legislation that funneled property taxes from rich districts into poor districts passed after a similar court decision.²⁵

The negative political consequences of raising taxes to fund education could explain why Governor Pataki announced that the State would appeal the court's decision in *Campaign for Fiscal Equity*. Governor Pataki did not directly comment on the decision, but it is possible that an appeal could delay a resolution until after the 2002 gubernatorial election.²⁶ The immediate result of an appeal is to allow the governor to sidestep this politically unattractive issue.

On January 16, 2001, Governor Pataki announced that he would appeal the decision. On April 5, 2001, the Appellate

²¹ See *id.*

²² See Editorial Page, *Ruling May Force the State to Spend More on Schools*, N.Y. TIMES, Jan. 12, 2001.

²³ See Reifer, *supra* note 14.

²⁴ See *id.*

²⁵ See *id.*

²⁶ Updates on the *Campaign for Fiscal Equity* case can be found at www.cfequity.org.

Division of the New York State Supreme Court ruled in favor of the plaintiffs (Campaign for Fiscal Equity) in granting its motion for an expedited appeal. As a result, the State must go forward with an appeal no later than October 2001. If the State is unable to meet this expedited appeal schedule, then the appellate court may dismiss the case. Thus, while it appears that the proponents of equality in education have won a battle for New York City's public school students, it will be some time before the war will be over.

Websites on Juvenile Issues

In keeping with the symposium topic, the Journal staff reviewed websites related to special education. We hope that our Internet exploration will aid our readers in their own research. The featured websites provide detailed information on a variety of special education issues. They are followed by a list of some of our other favorite websites pertaining to juvenile law and policy.

 **Bazon Center for Mental Health Law**

<http://www.bazon.org>

Dedicated to “legal advocacy for the civil rights and human dignity of people with mental disabilities,” the Bazon Center sponsors this website. Among the topics presented are healthcare and mental care for children with mental disabilities; federal disability benefits for children; and special education. The site provides legislative updates, advocacy resources, press releases, and an on-line bookstore. Additionally, the site includes information on the Americans with Disabilities Act (ADA), aging, fair housing, and managed care.

 **EDLAW, Inc. & The EDLAW Center**

<http://www.edlaw.net>

The EDLAW Center’s website provides a wealth of resource materials for parents of children with disabilities. The site contains informative briefings, educational records, an electronic library, and a listing of attorneys in the U.S. who represent parents of children with disabilities. Additionally, the site links to the Council of Parent Attorneys and Advocates and an on-line parent advocacy consulting service.

 **FindLaw: Special Education Advocate**

<http://Firms.findlaw.com/Melanie/index.htm>

Sponsored by a children's rights advocate, this website relays information to parents of children with special needs. The site's creator, Melanie Burrows, offers help to parents as a paralegal and children's rights advocate. The site features information on how to get in touch with an advocate, general information about children with disabilities, and links to publications and other online resources.

 **IDEA '97**

<http://www.dssc.org/frc/idea.htm>

This website provides a basic database regarding the Individuals with Disabilities Education Act (IDEA). It is a good starting place for looking at the IDEA from a legal perspective. The site contains links to online resources including: the language of the IDEA; IDEA regulations; training information; memos regarding the IDEA, and monitoring resources. It also gives information about state responsibilities and how to locally monitor IDEA activities.

 **IDEA Practices Home Page**

<http://www.ideapractices.org>

This website answers questions about the IDEA and expresses its goal to support efforts to "help all children learn, progress, and realize their dreams." The comprehensive website features legal resources, IDEA regulations, case studies from schools implementing promising IDEA programs, and updates from the Department of Education. The site also features stories on advocacy efforts and recent special education study findings, and provides links to other IDEA websites.

 **Looseleaf Case Law Reporters: Special Education**

<http://www.lrp.com/Education/special.htm>

This Looseleaf Case Law Reporters website features a variety of resources and materials about children with disabilities and special education. The site allows Internet

users to purchase a variety of special education resources, including CD-ROMs, books on litigation, encyclopedias, and training videos. It should be a good source for anyone looking for materials and information regarding children and disabilities.

 **NICHCY: FAQ About Special Education Services**

http://www.kidsource.com/NICHCY/special_ed.html

A database of frequently asked questions about special education services, this site includes information about the IDEA and the Individualized Education Program (IEP). Both legal and practical information are included in this FAQ list, including details about special education programs, processes for getting a child evaluated under the IDEA, and the role of schools in this process.

 **Nolo's Legal Encyclopedia – Overview of Special Education Law**

http://www.nolo.com/encyclopedia/articles/kid/se_law.html

This website, part of the Nolo Legal Encyclopedia, provides information on the IDEA and the rights to education that children with special needs have. The site discusses the IEP which is made available under the IDEA. It also provides links to other resources and books about the IEP for on-line purchase. This Nolo website offers a good starting point for parents looking for the basic rights of their children's education.

 **Reed Martin: Special Education Legal Rights Strategies & Resources**

<http://www.reedmartin.com>

Sponsored by attorney Reed Martin, this website provides a diverse array of information for parents, attorneys, school personnel, and other special education advocates. Features include: a special education newsletter available via e-mail, advocacy tips and answers, links to recent news stories, a sponsored chat room, and a message board for children and teenagers. Additionally, the site provides the

textual language of the ADA, federal regulations regarding the Education Rights and Privacy Act, and the IDEA.

 **Wrightslaw: Special Education Law & Advocacy**

<http://www.wrightslaw.com>

This website is tailored for parents, advocates, educators, and attorneys concerned with special education. The site features a variety of information about special education law and advocacy, including articles, cases, newsletter archives, and a form to sign up for Wrightslaw's free on-line newsletter, "Special Education Advocate." The site also provides information on IEPs, and detailed IEP goals and objectives. In addition, the website also links Internet users to the Wrightslaw Law Libraries and Advocacy Libraries, as well as an on-line advocates bookstore featuring a wealth of comprehensive resources.

OTHER FAVORITE BOOKMARKS

The Journal has reviewed websites for over two years. The websites listed below involve a wide array of juvenile justice issues and warrant a second look.

 **ABA Juvenile Justice Center**

www.abanet.org/crimjust/juvjus/home.html

Dedicated to examining the changes in juvenile justice systems across the nation with specialized information for parents, attorneys, and judges.

 **Action Alliance for Children**

www.4children.org

Examines trends and policies affecting children and their families and offers information on conferences and videotapes.

 **AdoptioNetwork**

www.adoption.org

Provides detailed information regarding all aspects of the adoption process.

-  **The Center on Juvenile and Criminal Justice**
www.cjcj.org
Presents a wealth of information for people interested in working within and improving the current juvenile justice system.
-  **Child Trends, Inc.**
www.childtrends.org
Shares findings from studies of children, youth, and families on topics ranging from welfare to school readiness.
-  **Children's Defense Fund**
www.childrensdefense.org
Offers guidance for understanding children's passage into adulthood, including successful community crusades for children to violence prevention and health insurance.
-  **Information on Children and the Court System**
www.rollanet.org/~bennett/bbchild.htm
Provides information on court appointed special advocates and the cases which affect children.
-  **The Justice Information Center**
www.ncjrs.org
Shares information on a variety of legal fields, including juvenile justice.
-  **Juvenile Justice Trainer's Association**
www.jjta.org
Provides a national network of information, technical services, and support for juvenile justice professionals.
-  **The Juvenile Law Center**
www.jlc.org
Shares information on children's rights and works to advance the rights of juveniles, particularly in dealing with public agencies.
-  **Kids Count**
www.aecf.org/kidscount
Tracks the status of children in the United States and reports on specialized topics affecting children.

-  **KidsPeace National Centers for Kids in Crisis**
www.kidspeace.org
Provides information to help children in crisis situations, including parenting tips, hotline numbers, and studies on the effectiveness of various treatment programs.

-  **National Center on Education, Disability, and Juvenile Justice**
www.edjj.org
Shares information on programs to help youths who are marginalized by the juvenile justice system.

-  **National Center for Missing and Exploited Children**
www.missingkids.com
Posts safety tips and pictures of missing children and related news updates.

-  **The Office of Juvenile Justice and Delinquency Prevention**
www.ojjdp.ncjrs.org
Provides a comprehensive array of information and resources on general areas of juvenile justice.

-  **Resolving Conflict Creatively Between Victims and Youth Offenders**
www.triune.ca/rcc4.htm
Presents the basic premise behind the community justice model of resolving conflict creatively, including the use of healing circles and mediation.

-  **SupportGuidelines.com**
www.supportguidelines.com
Provides an extensive resource for researching child support issues, including on-line access to child support guidelines.

To share your thoughts on this section or have your website reviewed in a future issue of the Journal, please contact Rebecca Gardner at ragardner@ucdavis.edu.