The Individuals with Disabilities Education Act (IDEA): Statutory Provisions and Recent Legal Issues

Cynthia Brougher, Coordinator
Legislative Attorney

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Summary

The Individuals with Disabilities Education Act (IDEA) is the major federal statute for the education of children with disabilities. IDEA both authorizes federal funding for special education and related services and, for states that accept these funds, sets out principles under which special education and related services are to be provided. The requirements are detailed, especially when the regulatory interpretations are considered, and have been the subject of numerous judicial decisions. The key concept in IDEA is the requirement for the provision of a free appropriate public education (FAPE) for children with disabilities. In order to implement FAPE, IDEA requires that each child with a disability have an individualized education program. Children with disabilities may also receive related services and must receive their education in the least restrictive environment.

IDEA was originally enacted to respond to situations where children with disabilities were being excluded from school without any statutory recourse. Section 615 of IDEA provides detailed procedural safeguards for children with disabilities and their parents. Procedural safeguards are provisions protecting the rights of parents and children with disabilities regarding a free appropriate public education (FAPE) and include notice of rights, mediation, resolution sessions, and due process procedures. Section 615 has been a continual source of controversy, especially the provisions relating to the discipline of children with disabilities. IDEA also provides for attorneys' fees in some situations, but the Supreme Court has found that parents are not entitled to expert witness fees.

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Introduction

The Individuals with Disabilities Education Act (IDEA)[1] is the major federal statute for the education of children with disabilities.[2] IDEA both authorizes federal funding for special education[3] and related services[4] and, for states that accept these funds,[5] sets out principles under which special education and related services are to be provided. The requirements are detailed, especially when the regulatory interpretations are considered. The major principles include requirements that

- states and school districts make available a free appropriate public education (FAPE)[6] to all children with disabilities, generally between the ages of 3 and 21. States and school districts identify, locate, and evaluate all children with disabilities, regardless of the severity of their disability, to determine which children are eligible for special education and related services.
- each child receiving services has an individual education program (IEP) spelling out the specific special education and related services to be provided to meet his or her needs. The parent must be a partner in planning and overseeing the child's special education and related services as a member of the IEP team.
- "To the maximum extent appropriate," children with disabilities must be educated with children who are not disabled; and states and school districts provide procedural safeguards to children with disabilities and their parents, including a right to a due process hearing, the right to appeal to federal district court and, in some cases, the right to receive attorneys' fees.

[1] 20 U.S.C. §1400 et seq.

[2] Other federal statutes that affect the education of children with disabilities are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq. For a discussion of these statutes and the education of children with disabilities see CRS Report R40123, *Education of Individuals with Disabilities: The Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA)*, by (name redacted). Several other statutes may also be significant to IDEA. See e.g., The No Child Left Behind Act, P.L. 107-110, discussed in CRS Report RL33749, *The No Child Left Behind Act: An Overview of Reauthorization Issues for the 111th Congress*, by (name redacted); CRS Report RL32913, *The Individuals with Disabilities Education Act (IDEA): Interactions with Selected Provisions of the No Child Left Behind Act (NCLB)*, by (name redacted) and (name redacted). In addition, IDEA and Medicaid issues have surfaced. See e.g., CRS Report RS22397, *Medicaid and Schools*, by (name redacted). A discussion of the intersection of these law with IDEA is beyond the scope of this report.

[3] IDEA provides grants to the states and includes set-asides and state and substate formulas. Funding has been a controversial issue and legislation has been introduced regularly to provide "full funding" for IDEA. See S. 88, 111th Cong. For a discussion of these issues see CRS Report RL32085, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, by (name redacted), and CRS Report RL32716, *Individuals with Disabilities Education Act (IDEA): Analysis of Changes Made by P.L. 108-446*, by (name redacted) and (name redacted).

[4] Related services (for example, physical therapy) assist children with disabilities to help them benefit from special education (20 U.S.C. §1401(26), P.L. 108-446 §602(26)).

[5] Currently, all states receive IDEA funding.

[6] It should be emphasized that what is required under IDEA is the provision of a free appropriate public education. The Supreme Court, in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 177 (1982), held that this requirement is satisfied when the state provides personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction, and that this instruction should be reasonably calculated to enable the child to advance from grade to grade. IDEA does not require that a state maximize the potential of children with disabilities.

IDEA was originally enacted in 1975 in response to judicial decisions holding that when states provide an education for children without disabilities, they must also provide an education for children with disabilities.[7] IDEA has been the subject of numerous reauthorizations; the most recent reauthorization was P.L. 108-446 in 2004. P.L. 108-446 included specific authorizations for appropriations through 2011.[8] The American Recovery and Reinvestment Act of 2009, P.L. 111-5, includes supplemental appropriations for IDEA.[9] Congress is currently beginning the process of identifying potential issues for the next reauthorization.[10] This report examines the major provisions of IDEA and the legal issues that have arisen.

Definitions

Overview

IDEA contains a number of definitions which are of critical importance in interpreting the requirements of the act. These include, among others, definitions of assistive technology devices and services,[11] child with a disability,[12] core academic subjects,[13] educational service agency,[14] excess costs,[15] free appropriate public education,[16] highly qualified,[17] individualized education program,[18] local educational agency,[19] related services,[20] special education,[21] specific learning disability,[22] supplementary aids and services,[23] and transition services.[24] Two definitions, the definition of a child with a disability and the definition of a highly qualified teacher, will be examined further.

[7] PARC v. State of Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972); Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972). For a discussion of these cases see CRS Report 95-669, *The Individuals with Disabilities Education Act: Congressional Intent*, by (name redacted).

[8] 20 U.S.C. §1411(i). For years after 2011, P.L. 108-446 authorized "such sums as may be necessary for fiscal year 2012 and each succeeding fiscal year."

[9] See CRS Report R40151, *Funding for Education in the American Recovery and Reinvestment Act of 2009 (P.L. 111-5)*, by (name redacted), (name redacted), and (name redacted).

[10] For a discussion of issues raise in recent case law which may be considered see CRS Report R40521, *The Individuals with Disabilities Education Act (IDEA): Selected Judicial Developments Following the 2004 Reauthorization*, by (name redacted).

[11] 20 U.S.C. §1401(1)-(2).

[12] 20 U.S.C. §1401(3).

[13] 20 U.S.C. §1401(4).

[14] 20 U.S.C. §1401(5).

[15] 20 U.S.C. §1401(8).

[16] 20 U.S.C. §1401(9).

[17] 20 U.S.C. §1401(10).

[18] 20 U.S.C. §1401(14).

[19] 20 U.S.C. §1401(19).

[20] 20 U.S.C. §1401(26).

[21] 20 U.S.C. §1401(29).

[22] 20 U.S.C. §1401(30).

[23] 20 U.S.C. §1401(33).

[24] 20 U.S.C. §1401(34).

Child with a Disability

The definition of a child with a disability is a key component of IDEA. Unlike the definitions of disability in the Americans with Disabilities Act (ADA)[25] and Section 504 of the Rehabilitation Act,[26] the IDEA definition is categorical, not functional, and contains a requirement that the child need special education and related services. The IDEA definition states the following:

> CHILD WITH A DISABILITY.—(A) IN GENERAL.—The term 'child with a disability' means a child—(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as '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.[27]

The regulations elaborate on the "other health impairments" category and include examples of chronic or acute health impairments, such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, and Tourette syndrome.[28]

Judicial decisions involving IDEA's definition of a child with a disability have most often involved the requirement that the child must be in need of special education. For example, in *L.I. v. Maine School Administrative District No. 55,*[29] the First Circuit Court of Appeals found that a child with Asperger's Syndrome and an adjustment disorder with depressed mood was a child with a disability under IDEA even though she had high grades, generally non-disruptive behavior, and "undisputed intellectual ability." The court rejected the argument that IDEA is limited to children whose disabilities "significantly impact educational performance," noting that neither the statute nor its regulations contain this limiting language.[30]

Highly Qualified Teacher

The 2004 reauthorization of IDEA, P.L. 108-446, included a new definition of highly qualified teacher.[31] The definition is linked to the definition of "highly qualified" in Section 9101(23) of the Elementary and Secondary Education Act (ESEA)[32] but modifies that definition as it applies to special education teachers. IDEA requires that every special education teacher, regardless of whether he or she is teaching a "core academic subject," be highly qualified.[33] The statutory

[25] 42 U.S.C. §12102. For a discussion of the interaction of IDEA, the ADA, and Section 504 in the education context see CRS Report R40123, *Education of Individuals with Disabilities: The Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA)*, by (name redacted).

[26] 29 U.S.C. §705(20).

[27] 20 U.S.C. §1401(3).

[28] 34 C.F.R. §300.8(c)(9).

[29] 480 F.3d 1 (1st Cir. 2007). See also, Board of Education of Montgomery County v. S.G., 230 Fed Appx. 330 (4th Cir. 2007). But see R.B. v. Napa Valley Unified School District, 496 F.3d 932 (9th Cir. 2007).

[30] 480 F.3d 1. at 38.

[31] 20 U.S.C. §1401(10). For a more detailed discussion of this provision see CRS Report RL33649, *The Individuals with Disabilities Education Act (IDEA): Final Regulations for P.L. 108-446*, by (name redacted) and (name redacted).

[32] For information on ESEA requirements, see CRS Report RL33333, *A Highly Qualified Teacher in Every Classroom: Implementation of the No Child Left Behind Act and Reauthorization Issues for the 112th Congress*, by (name redac ted).

[33] 20 U.S.C. §1412(a)(14)(C).

definition of highly qualified specifically provides that there is no private right of action for students if a teacher is not highly qualified.[34] However, the regulations note that a complaint may be filed under state complaint procedures.[35]

Child Find

IDEA requires that in order to receive funds under the statute, a state must submit a plan to the Secretary of Education indicating that a state has certain policies and procedures in effect. Among these is the requirement that all children with disabilities and who are in need of special education, are identified, located, and evaluated.[36] This requirement is referred to as child find. Although this requirement has not been heavily litigated, the Ninth Circuit held in *Compton Unified School District v. Addison*[37] that a school district who failed to evaluate a ninth grader who failed all her classes, colored with crayons and played with dolls in class failed to meet IDEA's child find requirement and that such a failure could be the subject of a due process complaint. Although the Supreme Court has not yet made a determination regarding whether the case will be heard, the Court did ask the Department of Justice for its views on the issue.[38] The issue as presented to the Court is whether the parent of a child with a disability has a right to a due process hearing alleging negligence because of school officials' failure to arrange an educational program for the child, or if due process suits are only allowed when the school district makes an intentional decision.

Free Appropriate Public Education (FAPE)

Statutory Language

The core requirement of IDEA is that a state must provide children with disabilities a free appropriate public education in order to receive federal funding under the act.[39] FAPE is defined in the statute as meaning "special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 614(d)."[40]

[34] 20 U.S.C. §1401(10)(E).

[35] 34 C.F.R. §300.18(f).

[36] 20 U.S.C. §1412(a)(3); 34 C.F.R. §300.111 (2010).

[37] 598 F.3d 1181 (9th Cir. 2010), Petition for certiorari filed (Jan. 6, 2011) (No.10-886).

[38] 2011 U.S. LEXIS 2986; 79 U.S.L.W. 3591 (April 18, 2011),

[39] 20 U.S.C. §1412(a)(1).

[40] 20 U.S.C. §1401(9).

Judicial Interpretations

Board of Education of the Hendrick Hudson Central School District v. Rowley,[41] decided in 1982, was the first IDEA case to reach the Supreme Court and remains a seminal decision on the requirements of FAPE. The Supreme Court noted that there was no substantive language in IDEA regarding the level of education to be accorded to children with disabilities and observed that "(i)mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child."[42] The Court concluded that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[43] The Court held that the requirement of FAPE is met when a child is provided with personalized instruction with sufficient support services to benefit educationally from that instruction. This instruction must be provided at public expense, meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. The Court found that when a child with a disability is mainstreamed, "the system itself monitors the educational progress of the child.... The grading and advancement system thus constitutes an important factor in determining educational benefit."[44] Therefore, the IEP "should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[45] However, the states are not required to "maximize" each child's potential.[46] If the child is progressing from grade to grade and making measurable and adequate gains, the FAPE requirement is met.

The Supreme Court also stated that in ensuring that the requirements of the statute have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the states. The primary responsibility for formulating the education provided was left by IDEA to state and local educational agencies. As the Court noted, determining when children with disabilities are "receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem"[47] than complying with requirements for access to education. Because of the wide spectrum of disabilities, the Court did not attempt to establish any one test for determining the adequacy of educational benefits and confined its analysis to the facts of the case.

Rowley remains a key decision under IDEA and is often cited by courts attempting to determine the parameters of a free appropriate public education.[48] However, the lower courts have varied in how expansively they have interpreted *Rowley*, with some courts interpreting *Rowley* to support schools' IEPs if the procedural requirements have been met, even if the educational progress is

[41] 458 U.S. 176 (1982).

[42] 458 U.S. 178 at 200.

[43] *Id*. at 201.

[44] *Id* at 203.

[45] *Id.* at 203-204.

[46] *Id*. at 198.

[47] *Id*. at 202.

[48] The 2004 reauthorization of IDEA has been found not to affect the Rowley standard. See Mr. and Mrs. C. v. Maine School Administrative District No. 6, 538 F. Supp. 2d 298 (D. Me.2008).

minimal.[49] Other courts have read *Rowley* more expansively. For example, in *Polk v. Cent. Susquehanna Intermediate Unit 16*,[50] the Third Circuit Court of Appeals examined the "some educational benefit" language in *Rowley* and held that it required an IEP to provide more than de minimis educational benefit.[51]

The Individualized Education Program (IEP)

After a child has been identified as a child with a disability under IDEA, an individualized education team is formed to write an individualized education program for the child.[52] IDEA contains detailed requirements for the IEP. The IEP must include a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals, a description of how these goals are to be met, a statement of the special education and related services to be provided, and an explanation of the extent to which the child is to be educated with children without disabilities.[53]

Since the IEP is the way FAPE is implemented, it is a key component of IDEA and has been the subject of numerous judicial decisions. Generally, these cases have adopted a two-part inquiry: first, the court determines whether IDEA's procedures have been complied with; second, the court ascertains whether the IEP is reasonably calculated to provide the child with educational benefits.[54]

Related Services

IDEA's requirement of a free appropriate public education is the cornerstone of the act, and one of the components of FAPE is the requirement for related services. FAPE is defined in part as requiring "special education and related services."[55] Related services are defined as meaning

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education

[49] See e.g., Fort Zumwalt School District v. Clynes, 119 F.3d. 607 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998), where the Eighth Circuit emphasized Rowley's "access to education" requirement and held that the IEP was adequate since the child was making progress, earning passing marks and advancing to the next grade, despite reading proficiency scores in the second to ninth percentile.

[50] 853 F.2d 171 (3d Cir. 1988), *cert.* denied, 488 U.S. 1030 (1989).

[51] *Id.* at 180-185. Similarly, the Fifth Circuit, in Cypress-Fairbanks Indep. School District v. Michael F., 118 F.3d 245 (5th Cir. 1997), cert. denied, 522 U.S. 1047 (1998), quoted from *Rowley* and concluded that "the educational benefit that an IEP is designed to achieve must be meaningful.'" *Id.* at 248. In order to determine whether an IEP meets this standard, the Cypress-Fairbanks court identified four factors: (1) the program is individualized, (2) the program is administered in the least restrictive environment, (3) the services are provided in a coordinated and collaborative manner, and (4) positive academic and nonacademic benefits are demonstrated. *Id*. at 253.

[52] 20 U.S.C. §1414(d).

[53] *Id.*

[54] See Board of Hendrick Hudson School District v. Rowley, 458 U.S. 176, 206-207 (1982).

[55] 20 U.S.C. §1401(9).

> program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposed only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.[56]

Two Supreme Court decisions under IDEA have involved the concept of related services, and both have involved the issue of what is a medical service. In *Irving Independent School District v. Tatro*,[57] the Court examined the case of an eight-year-old girl with spina bifida who required clean intermittent catheterization (CIC), and held that the school must provide the service. The Court ruled that services affecting both the medical and educational needs of a child must be provided under IDEA if (1) the child has a disability so as to require special education, (2) the service is necessary to help a child with a disability benefit from special education, and (3) a nurse or other qualified person who is not a physician can provide the service. Services that could be provided outside the school day would not need to be provided. *Tatro* drew a bright line between services that had to be provided by a doctor and those that could be provided by a person who was not a physician. However, after *Tatro*, some courts of appeals did not apply this bright line but used other factors, such as the nature and extent of services. This set the stage for another Supreme Court decision in 1999, *Cedar Rapids Community School District v. Garret F*.[58]

Garret F. involved a child who was paralyzed from the neck down as a result of a motorcycle accident when he was four years old. Since the child was ventilator dependent, he required substantial services including providing suction on his tracheotomy tube and manually pumping air through an air bag when suction is being provided. The school denied the parents' request for services and proposed a test for related services in which the outcome would depend on a series of factors, such as whether the care was continuous and the cost of the services. The Court rejected this proposed test and used the same reasoning it had used in *Tatro,* finding that the medical services exclusion from the definition was limited to the services of a physician or a hospital. This holding, the Court stated, was in keeping with the overarching purpose of IDEA "to open the door of public education to all qualified children."[59]

The 2004 reauthorization dealt with this issue by establishing risk pools for high-need children with disabilities.[60] States are permitted to reserve 10% of the funds reserved for other state activities (or 1% to 1.05% of the overall state grant) to establish and maintain a risk pool to assist local educational agencies (LEAs) serving high-need children with disabilities.

[56] 20 U.S.C. §1401(26).

[57] 468 U.S. 883 (1984).

[58] 526 U.S. 66 (1999).

[59] Id. at 78.

[60] 20 U.S.C. §1411(e)(3).

Educational Placement

Least Restrictive Environment

IDEA requires that children with disabilities, to the maximum extent appropriate, be educated with children who are not disabled and that separate schooling or special classes occur only when the nature or severity of the disability is such that "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[61]

Several recent courts of appeals decisions have followed a two-pronged approach, first enunciated in *Daniel R.R. v. State Board of Education,*[62] to determine whether an IEP places a student in the least restrictive environment. First, a court must consider whether education in the regular classroom with the use of supplementary services can be achieved satisfactorily. Second, if such placement cannot be achieved satisfactorily, the court must consider whether the school has mainstreamed the child to the maximum extent appropriate. The first prong includes several factors: whether the school district has made reasonable efforts to accommodate the child in the regular classroom, the educational benefits available to the child in the regular classroom as compared to those in a special education classroom, and the possible negative effects of the inclusion of the child on other students in the regular classroom.[63]

The possible negative effects of a child with a disability on other students were examined by the Third Circuit in *A.G. v. Durtan.*[64] The court noted the student's frequent, loud vocalizations, combined with removal of shoes and socks, inappropriately clapping and grinding her teeth, having difficulty toileting, and inappropriately touching other students. Although these disruptions were not considered dispositive, the court considered them and upheld the district court decision that the student could not be satisfactorily educated full time in a regular classroom.

Private Schools

Issues concerning what services are required for children with disabilities placed in private schools, and who is to pay for these services, have been a continuing source of controversy under IDEA.[65] Under current law, a child with a disability may be placed in a private school by the local educational agency (LEA) or state educational agency (SEA) as a means of fulfilling the FAPE requirement for the child. In this situation, the full cost is paid for by the LEA or the SEA. A child with a disability may also be unilaterally placed in a private school by his or her parents. In this

[61] 20 U.S.C. §1412(a)(5).

[62] 874 F.2d 1036 (5th Cir. 1989).

[63] P. v. Newington Board of Education, 546 F.3d 111 (2d Cir. 2008); T.W. v. Unified School District No. 259, Wichita, Kansas, 136 Fed. Appx. 122 (10th Cir. 2005). Although Daniel R.R. was not cited, a similar standard was used in L.E. v. Ramsey Board of Education, 435 F.3d 384 (3d Cir. 2006).

[64] 374 Fed. Appx. 330 (3d Cir. 2010).

[65] For a discussion of these issues under current law, see CRS Report RS22044, *Individuals with Disabilities Education Act (IDEA): Services in Private Schools under P.L. 108-446*, by (name redacted), and CRS Report RL33368, *The Individuals with Disabilities Education Act (IDEA): Parentally Placed Children in Private Schools*, by (name redac ted) and (name redacted).

situation, the cost of the private school placement is not paid by the LEA unless a hearing officer or a court makes certain findings. IDEA, as amended, states in part,

> (ii) REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT.—If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of the enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.[66]

However, IDEA does require some services for children in private schools, even if they are unilaterally placed there by their parents, and there is no finding that FAPE was not made available to the child. In this situation, IDEA requires that a proportionate amount of the federal funds shall be made available.[67]

The current statutory provisions regarding private schools are the result of several major amendments, and most of the Supreme Court decisions on private schools are prior to the statutory changes.[68] However, two recent Supreme Court cases, *Board of Education of the City School District of the City of New York v. Tom F.*[69] and *Forest Grove School District v. T.A.*,[70] have addressed the question of whether IDEA allows for tuition reimbursement for parents who placed their child in a private school without ever having received special education from the public school under the current statutory provisions.

In *Board of Education of the City School District of the City of New York v. Tom F.*, the Court, dividing 4-4, upheld an appeals court ruling that parents of a child with a disability are entitled to private school reimbursement even though the student had never received special education services from the school district. The Court's *per curiam* decision did not set a precedent for lower courts; therefore, the issue about whether reimbursement for private school tuition may be made when the child has not received public special education services was not settled until the Court's most recent decision in *Forest Grove.*

In *Forest Grove School District v. T.A.*,[71] the Supreme Court held that IDEA authorizes reimbursement for private special education services when a public school fails to provide FAPE and the private school placement is appropriate, regardless of whether the child previously received special education services through the public school. The Court emphasized that "[i]t would be particularly strange for the Act to provide a remedy ... when a school district offers a child inadequate ... [special education] services but to leave parents without relief in the more

[66] 20 U.S.C. § 1412(a)(10)(C)(ii).

[67] 20 U.S.C. §1412(a)(10). For a detailed discussion of these requirements see U.S. Department of Education, "Provisions Related to Children with Disabilities Enrolled by Their Parents in Private Schools," (Feb. 2008) http://www.rrfcnetwork.org/images/stories/FRC/IDEA/idea.pdf.

[68] For a discussion of all the Supreme Court decisions on IDEA and private schools see CRS Report RL33444, *The Individuals with Disabilities Education Act (IDEA): Supreme Court Decisions*, by (name redacted) and (name red acted).

[69] 552 U.S.1 (2007).

[70] 557 U.S. __ (2009), *aff'd* 523 F.3d 1078 (9th Cir. 2008).

[71] 557 U.S. __ (2009), *aff'd* 523 F.3d 1078 (9th Cir. 2008).

egregious situation in which the school district unreasonably denies a child access to such services altogether."

Procedural Safeguards and Discipline

Statutory Overview

IDEA was originally enacted to respond to situations where children with disabilities were being excluded from school without any statutory recourse. Section 615 of IDEA provides detailed procedural safeguards for children with disabilities and their parents.[72] Generally, IDEA requires that if there is a dispute between the school and the parents of a child with a disability, the child "stays put" in his or her current educational placement until the dispute is resolved using the due process procedures set forth in the statute.[73] Procedural safeguards are provisions protecting the rights of parents and children with disabilities regarding a free appropriate public education (FAPE) and include notice of rights, mediation, resolution sessions, and due process procedures. Section 615 has been a continual source of controversy, especially the provisions relating to the discipline of children with disabilities. Amendments to the section have been made during recent reauthorizations[74] in an attempt to balance the rights of children with disabilities with the need to provide for the safety of all children and to attempt to make the process less adversarial. In addition, judicial decisions have addressed controversial issues such as which party has the burden of proof in a due process hearing[75] and whether expert witness fees are recoverable for prevailing parents.[76]

Due Process Complaint

Parents of a child with a disability or a school may file a due process complaint. This complaint may only be presented concerning violations that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action. There are several exceptions to this statute of limitations. First, if state law has an explicit time limitation for presenting a complaint, that provision shall control. In addition, the time requirement does not apply to a parent if the parent was prevented from presenting the complaint due to specific misrepresentations by the LEA that it had resolved the problem or the local educational agency withheld information from the parent that was required to be provided under Part B.[77]

[72] 20 U.S.C. §1415. It should be noted that complaints may also be filed with the state education agency (SEA). 34 C.F.R. §300.151 et seq. These complaints may address the problems of a group of children. See U.S. Department of Education, "Q and A: Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities," (January 2007) http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary_key/6.

[73] 20 U.S.C. §1415(j).

[74] See e.g., P.L. 108-446.

[75] *Shaffer v. Weast,* 546 U.S. 49 (2005).

[76] *Arlington Central School District v. Murphy,* 548 U.S. 291 (2006).

[77] 20 U.S.C. §1415(b)(6).

Resolution Sessions and Mediation

In an attempt to resolve issues before the more confrontational due process proceedings, the 2004 reauthorization of IDEA added a requirement for a resolution session prior to a due process hearing. The resolution session is a preliminary meeting between the parents, the relevant members of the IEP team, and a representative of the local educational agency who has decision-making authority. [78] The House report for P.L. 108-446 noted that the resolution session "is intended to improve the communication between parents and school officials, and to help foster greater efforts to resolve disputes in a timely manner so that the child's interests are best served."[79] The LEA may not include its attorney unless the parent is accompanied by an attorney, and if an agreement is reached during the resolution session, the parties must execute a legally binding agreement signed by both parties and which is enforceable in court.[80]

Provisions allowing for the voluntary mediation of disputes under IDEA were added in the 1997 reauthorization[81] and are retained in the current law. Mediation cannot be used to delay a parent's right to a due process hearing, and mediation discussions are confidential and cannot be used as evidence in any subsequent due process hearing. [82] When challenged, courts have generally upheld mediation agreements.[83]

Due Process Hearings

If the resolution session and/or the mediation session do not resolve the complaint, an impartial due process hearing may be conducted.[84] Any party to the due process hearing has the right to be accompanied and advised by counsel and by individuals with special knowledge or training regarding children with disabilities, the right to present evidence and confront and cross examine witnesses, the right to a written or electronic verbatim record, and the right to a written or electronic verbatim findings of fact and decisions.[85] If a party is not satisfied with the result of this hearing, an appeal may be made.[86]

Disciplinary Procedures

Generally, under IDEA, a child with a disability is not immune from disciplinary procedures; however, these procedures are not identical to those for children without disabilities.[87] First, IDEA requires that all children, including children with disabilities who have been suspended or

[78] 20 U.S.C. §1415(f)(1)(B).

[79] H.Rept. 108-77, 108th Cong., 1st Sess., at 114 (2003).

[80] 20 U.S.C. §1415(f)(1)(B).

[81] P.L. 105-17, §615(e).

[82] 20 U.S.C. §1415(e).

[83] Amy S. v. Danbury, 174 F.Appx. 896 (6th Cir. 2006); Ballard v. Philadelphia School District, 273 Fed. Appx. 184 (3d Cir. 2008), cert. den. 129 S.Ct. 1317 (Feb. 23, 2009).

[84] 20 U.S.C. §1415(f).

[85] 20 U.S.C. §1415(h).

[86] 20 U.S.C. §1415(g).

[87] 20 U.S.C. §1415(k).

expelled from school, must receive a free appropriate public education.[88] In addition, with certain exceptions, during the pendency of due process proceedings, the child with a disability is to stay-put in his or her current educational placement.[89] However, school personnel may suspend a child with a disability for up to 10 school days.[90]

There are a number of safeguards for children with disabilities if school personnel seek to change the placement of a child with a disability without the consent of the parents. Within 10 school days of a decision to change the placement of a child with a disability, school personnel must conduct a manifestation determination. Essentially, if the LEA, a parent, and relevant members of the IEP team determine that the conduct in question was caused by or had a direct and substantial relationship to the child's disability, or if the conduct in question was the direct result of the LEA's failure to implement the IEP, the conduct is determined to be a manifestation of the child's disability. If the conduct is determined not to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner, and for the same duration, as they would be applied to children without disabilities, except that educational services may not cease. If the behavior is found to be a manifestation of the child's disability, a functional behavioral assessment shall be implemented or reviewed.[91]

School personnel also may place the child in an interim alternative education setting for up to 45 school days for situations involving weapons or drugs, or where a child has inflicted serious bodily injury[92] upon another person while at school. School personnel may also request a hearing officer to change the placement of a child with a disability to an appropriate interim alternative educational setting for 45 school days. There are specific appeals provisions for this situation in the statute.[93]

Burden of Proof

Although IDEA contains detailed due process requirements to ensure the provision of FAPE, including the opportunity for an impartial due process hearing, the statute contains no specific provision relating to which party has the burden of proof in a due process hearing. The courts of appeal, prior to the Supreme Court's decision in *Schaffer v. Weast,*[94] were split in their interpretations of who bore the burden of proof.

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[88] 20 U.S.C. §1412(a)(1).

[89] 20 U.S.C. §1415(j). The stay-put provision was at issue in *Honig v. Doe*, 484 U.S. 305 (1988), where the Supreme Court held that there was no implied exception to the stay-put rule.

[90] 20 U.S.C. §1415(k)(1)(B).

[91] 20 U.S.C. §1415(k).

[92] Serious bodily injury is defined in the same manner as in 18 U.S.C. §1365(h)(3), which states, "the term 'serious bodily injury' means bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental facility."

[93] For a more detailed discussion of the discipline provision in IDEA, see CRS Report RL32753, *Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 108-446*, by (name redacted).

[94] 546 U.S. 49 (2005). Chief Justice Roberts took no part in the decision. For a more detailed discussion of Weast, see CRS Report RS22353, *The Individuals with Disabilities Education Act (IDEA): Schaffer v. Weast Determines Party Seeking Relief Bears the Burden of Proof*, by (name redacted).

In *Schaffer v. Weast*,[95] the Supreme Court held that the burden of proof regarding an allegedly inadequate IEP in an IDEA due process hearing rests with the party seeking the relief. The Supreme Court, in an opinion by Justice O'Connor, first observed that "absent some reason to believe that Congress intended otherwise, ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief."[96] Justice O'Connor then examined, and rejected, various reasons advanced to support the argument that the burden of proof should be on the school system. The Supreme Court noted that the most plausible argument advanced by the parents was that, in the interest of fairness, the burden of proof should not be placed on a party when the facts are "peculiarly within the knowledge of his adversary."[97] School districts were seen as having a "natural advantage" regarding the information, but Justice O'Connor did not find this to be determinative because "Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them."[98] The Court noted that IDEA provides parents with the right to review records, to have an independent educational evaluation, to have details about options considered by the school district as well as disclosure of evaluations and recommendations, and to receive attorneys' fees in the discretion of a court if they prevail. Justice O'Connor concluded that "[t]hese protections ensure that the school bears no unique informational advantage."[99]

Parental Rights

IDEA states that one of its purposes is to "ensure that the rights of children with disabilities and parents of such children are protected."[100] In *Winkelman v. Parma City School District*,[101] the Supreme Court examined the issue of whether IDEA permits parents who are not attorneys to bring suit in court, either on their own behalf or as representatives of their child. The Court held that such *pro se* suits were permitted for parents suing with regard to their own rights. In an opinion written by Justice Kennedy, the Court concluded that IDEA grants parents independent, enforceable rights that encompass a child's entitlement to a free appropriate public education, and that these rights are not limited to procedural or reimbursement issues.

In arriving at this holding, Justice Kennedy observed that "a proper interpretation of the Act requires a consideration of the entire statutory scheme." The Court examined IDEA's statutory language, noting that one of the purposes of IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected."[102] This language was found to refer to rights for both parents and children with disabilities. Similarly, the Court found that the establishment of procedural rights was required "to ensure that the rights of children with disabilities and parents of such children are protected."[103] These provisions were found to support the finding that the parents of a child with a disability have "a particular and personal interest" in

[95] *Id.*

[96] *Id*. at 57-58.

[97] *Id*. at 60, citing United States v. New York, N.H. & H.R. Co., 355 U.S. 253, 256, n.5 (1957).

[98] *Id*.

[99] *Id*. at 61.

[100] 20 U.S.C. §1400(d)(1)(B).

[101] 550 U.S. 516 (2007).

[102] 20 U.S.C. §1400(d)(1)(B).

[103] 20 U.S.C. §1415(a).

the goals of IDEA and that "IDEA includes provisions conveying rights to parents as well as to children."

Seclusion and Restraint[104]

IDEA provides that when the behavior of a child with a disability impedes the child's learning or the learning of others, the IEP team must consider "the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[105] Nothing in IDEA specifically addresses the use of seclusion and restraints, and the Department of Education has stated that "[w]hile IDEA emphasizes the use of positive behavioral interventions and supports to address behavior that impedes learning, IDEA does not flatly prohibit the use of mechanical restraints or other aversive behavioral techniques for children with disabilities."[106] The department also noted that state law may address whether restraints may be used and, if restraints are allowed, the "critical inquiry is whether the use of such restraints or techniques can be implemented consistent with the child's IEP and the requirement that IEP Teams consider the use of positive behavioral interventions and supports when the child's behavior impedes the child's learning or that of others."[107]

The Supreme Court has not specifically addressed the use of seclusion or restraints under IDEA; however, in *Honig v. Doe*,[108] the Court examined IDEA's requirements for children who exhibited violent or inappropriate behavior, and held that a suspension longer than 10 days violated IDEA's "stay-put" provision.[109] In *Honig,* the Court observed that this decision "does not leave educators hamstrung" and that educators may utilize "normal procedures" which "may include the use of study carrels, timeouts, detention, or the restriction of privileges" as well as a 10-day suspension.[110] Several lower courts have dealt more specifically with this issue.[111]

Representative Miller introduced legislation, H.R. 1381, 112th Congress, on April 6, 2011, to establish minimum safety standards in schools to prevent and reduce the inappropriate use of restraint and seclusion. Similar legislation passed the House in the 111th Congress[112] and a bill was also introduced in the Senate.[113]

[104] For a more detailed discussion of this issue see CRS Report R40522, *The Use of Seclusion and Restraint in Public Schools: The Legal Issues*, by (name redacted) and (name redacted).

[105] 20 U.S.C. §1414(d)(3)(B).

[106] Letter to Anonymous, 50 IDELR 228 (OSEP March 17, 2008).

[107] *Id.*

[108] 484 U.S. 305 (1988).

[109] 20 U.S.C. §1415(j). For a more detailed discussion of *Honig* and the "stay put" provision see CRS Report RL32753, *Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 108-446*, by (name redacted).

[110] 484 U.S. 305, 325 (1988).

[111] See e.g., Melissa S. v. School District of Pittsburgh, 183 Fed. Appx. 184 (3d Cir. 2006). For a discussion of lower court decisions see CRS Report R40522, *The Use of Seclusion and Restraint in Public Schools: The Legal Issues*, by (name redacted) and (name redacted).

[112] H.R. 4247, 111th Cong.

[113] S. 2860, S. 3895, 111th Cong. For a more detailed discussion of this legislation see CRS Report R40522, *The Use of Seclusion and Restraint in Public Schools: The Legal Issues*, by (name redacted) and (name redacted).

Attorneys' Fees

Although the original version of IDEA, P.L. 94-142, contained no specific provision for attorneys' fees, prevailing parties used Section 505 of the Rehabilitation Act of 1973,[114] or Section 1988 of the Civil Rights Attorneys' Fees Award Act,[115] to seek fees. However, the Supreme Court in *Smith v. Robinson*[116] held that the only remedies for prevailing parties under IDEA were those contained in that statute. The statute was described as "a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children."[117] The Court further noted that allowing the use of other statutes to provide for attorneys' fees would "be inconsistent with Congress' carefully tailored scheme."[118]

The Court's decision in *Smith v. Robinson* was controversial. In response, Congress in 1986 enacted the Handicapped Children's Protection Act, which provided for attorneys' fees under IDEA.[119] These provisions were amended in 1997. The P.L. 105-17 amendments allowed the reduction of attorneys' fees if the attorney representing the parents did not provide the LEA with timely and specific information about the child and the basis of the dispute, and specifically excluded the payment of attorneys' fees for most individualized education plan (IEP) meetings. The 2004 IDEA reauthorization, P.L. 108-446, kept many of the previous provisions on attorneys' fees but also made several additions. These include allowing attorneys' fees for the state educational agency (SEA) or the local educational agency (LEA) against the parent or the parent's attorney in certain situations.[120] The Fifth Circuit found that the award of attorneys' fees for the LEA was permissible against a lawyer who refused to accept all offered relief and who used stonewalling tactics;[121] however, the mere fact that the parents do not prevail in court does not make the parents' action frivolous.[122]

Expert Witness Fees

Although there is no specific provision allowing a court to award prevailing parents expert witness fees, the language regarding attorneys' fees had been interpreted by some lower courts to allow such an award. IDEA's statutory language states in relevant part, "in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—(I) to a prevailing party who is the parent of a child with a disability."[123]

[114] 29 U.S.C. §794a.

[115] 42 U.S.C. §1988.

[116] 468 U.S. 992 (1984).

[117] *Id.* at 1009.

[118] *Id.* at 1012.

[119] P.L. 99-372.

[120] 20 U.S.C. §1415(i)(3). For a discussion of P.L. 108-446 and attorneys' fees, see CRS Report RS22055, *The Individuals with Disabilities Education Act (IDEA): Attorneys' Fees Provisions in P.L. 108-446*, by (name redacted).

[121] El Paso Independent School District v. Berry, 400 Fed. App. 947 (5th Cir. 2010).

[122] R.P. v. Prescott Unified School District, 631 F.3d 1117 (9th Cir. 2011).

[123] 20 U.S.C. §1415(i)(3)(B).

The parents in *Arlington Central School District v. Murphy*[124] argued that the language on costs encompassed the payment of expert witness fees. To support this argument, they pointed to the legislative history of the Handicapped Children's Protection Act,[125] which stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses."[126] The Supreme Court, in a decision written by Justice Alito, held that IDEA does not authorize prevailing parents to recover fees they have paid to experts. The majority opinion first observed that the holding was "guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause." This was seen as significant because if Congress attaches conditions to a state's acceptance of funds, the conditions must be unambiguous and provide clear notice. The majority concluded that IDEA's statutory language did not provide this clear notice and that the legislative history was unconvincing and "simply not enough" under these circumstances.[127]

H.R. 1208 and S. 613 were introduced in the 112th Congress to amend IDEA to include the fees of expert witnesses. They specifically provided that "the term 'attorneys' fees' shall include the fees of expert witnesses, including the reasonable costs of any test or evaluation necessary for the preparation of the parent or guardian's case in the action or proceeding."

Commonly Used Acronyms

ED	Department of Education
FAPE	Free Appropriate Public Education
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program
LEA	Local Education Agency
LRE	Least Restrictive Environment
SEA	State Education Agency

[124] 548 U.S. 291 (2006).

[125] P.L. 99-372.

[126] H.Rept. 99-687, at 5.

[127] For a more detailed discussion see CRS Report RS22465, *The Individuals with Disabilities Education Act (IDEA): The Supreme Court Denies Expert Fees in Arlington Central School District v. Murphy*, by (name redacted).

Author Contact Information

Cynthia Brougher, Coordinator
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

Acknowledgments

Previous authors of this report include (name redacted) and (name redacted).