The Individuals with Disabilities Education Act (IDEA): Selected Judicial Developments Following the 2004 Reauthorization

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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 cornerstone of IDEA is the principle that states and school districts make available a free appropriate public education (FAPE) to all children with disabilities. IDEA has been the subject of numerous reauthorizations; the most recent reauthorization was P.L. 108-446 in 2004. Congress is currently beginning the process of identifying potential issues for the next reauthorization. Some of the issues raised by judicial decisions include the following:

- What amount of educational progress is required to meet FAPE standards?
- What educational benefits are required to be put in an individualized education program (IEP)?
- What use of seclusion and restraints is allowed (if any) under IDEA?
- Are all settlement agreements enforceable in federal court or only those reached through dispute resolution or mediation?
- Is information disclosed in a resolution session confidential?
- What are the rights of a noncustodial parent of a child with a disability?
- Does the Supreme Court's decision in *Schaffer v. Weast* correctly allocate the burden of proof in IDEA cases?
- Are compensatory educational services required for the same amount of time that the appropriate services were withheld?
- Does the Supreme Court's decision in *Arlington Central School District v. Murphy* correctly deny reimbursement for expert witness fees?
- Does there need to be more detailed guidance on systemic compliance complaints?

This report examines the Supreme Court decisions, and selected lower court decisions since July 1, 2005, the effective date of P.L. 108-446.

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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. IDEA both authorizes federal funding[2] for special education and related services[3] and, for states that accept these funds,[4] 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 the following requirements:

- States and school districts make available a free appropriate public education (FAPE)[5] 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.

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.[6] IDEA has been the subject of numerous reauthorizations; the most

[1] 20 U.S.C. §1400 et seq. For a more detailed discussion of IDEA see CRS Report RS22590, *The Individuals with Disabilities Education Act (IDEA): Overview and Selected Issues*, by Richard N. Apling and Nancy Lee Jones.

[2] Although funding issues are beyond the scope of this report, it should be noted that the Ninth Circuit, in Arizona State Board for Charter Schools v. U.S. Department of Education, 464 F.3d 1003 (9th Cir. 2006), examined whether a for-profit charter school was eligible for federal funds under IDEA and held that a "a natural reading of the [statutory] text conveys clear congressional intent that all schools, including charter schools, must be non profit to receive IDEA and ESEA funds." For a discussion of this case and the use of IDEA funds for charter schools see Mark D. Evans, "An End to Funding of For-Profit Charter Schools?" 70 U. Colorado L. Rev. 617 (2008). For a discussion of IDEA funding generally see CRS Report RL32085, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, by Ann Lordeman.

[3] 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)).

[4] Currently, all states receive IDEA funding.

[5] 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. 176 (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.

[6] 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).

recent reauthorization was P.L. 108-446 in 2004. P.L. 108-446 included specific authorizations for appropriations through 2011.[7] Congress is currently beginning the process of identifying potential issues for the next reauthorization. This report examines the Supreme Court decisions, and selected lower court decisions since July 1, 2005, the effective date of P.L. 108-446.[8]

Definition of Disability

A key component of IDEA is the definition of a child with a disability. Unlike the definitions of disability in the Americans with Disabilities Act (ADA)[9] and Section 504 of the Rehabilitation Act,[10] the IDEA definition is categorical, not functional, and contains a requirement that the child needs 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.[11]

Several courts of appeal decisions have examined whether a child who falls within one of the categories of disabilities but whose disability may have a minimal effect on education is a child with a disability and thus covered by IDEA. In *L.I. v. Maine School Administrative District No. 55*,[12] 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.[13] Similarly, in *Board of Education of Montgomery County v. S.G.*[14] the school argued that a child with schizophrenia was not a child with a disability because the disability did not adversely affect her school performance. The Fourth Circuit Court of Appeals rejected this argument after finding that the child had missed a substantial amount of school due to

[7] 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."

[8] The lower court cases were identified by a LEXIS search using the term "individuals with disabilities education act and date aft 2004" and a LEXIS search for "P.L. 108-446." It should be emphasized that although P.L. 108-446 was enacted in December 2004 and had a July 1, 2005, effective date, many of the cases located by the LEXIS search dealt with events that occurred prior to the effective date of P.L. 108-446, and were therefore subject to the previous statutory language. Generally, these cases are not discussed except where they raise a significant issue that was not resolved by the 2004 reauthorization. It should also be noted that a number of the cases examined concerned whether P.L. 108-446 applied retroactively, and held that the 2004 reauthorization was not retroactive. See e.g., Anna Hood v. Encinitas Union School District, 486 F.3d 1099 (9th Cir. 2007); Anthony v. District of Columbia, 463 F. Supp. 2d 37 (D.D.C. 2006); Tereance D. v. School District of Philadelphia, 570 F. Supp. 2d 739 (2008).

[9] 42 U.S.C. §12102, as amended by P.L. 110-325.

[10] 29 U.S.C. §705(20), as amended by P.L. 110-325.

[11] 20 U.S.C. §1401(3).

[12] 480 F.3d 1 (1st Cir. 2007).

[13] *Id.* at 38.

[14] 230 Fed Appx. 330 (4th Cir. 2007).

hospitalizations, failed to complete many of her assignments, and, if returned to the public school environment, would most likely be hearing voices again.

On the other hand, the Ninth Circuit in *R.B. v. Napa Valley Unified School District*[15] held that a child with ADHD, depression, reactive attachment disorder, and post traumatic stress disorder who exhibited violent tendencies was not eligible for IDEA services since her inappropriate behavior did not adversely affect her educational performance. The fact that the child received a Section 504 plan and behavioral supports did not make her eligible under IDEA. In *Alvin Independent School District v. AD*,[16] the Fifth Circuit also found no adverse educational effect from the child's ADHD. *Mr. and Mrs. N.C. v. Bedford Central School District*[17] examined whether a child with dysthymic disorder met the requirements of the IDEA regulations for seriously emotionally disturbed and found that the child's behavior fell short of the requirements for seriously emotionally disturbed. The Second Circuit also noted that even if the child qualified as seriously emotionally disturbed, there was insufficient evidence that his educational performance was adversely affected.

Free Appropriate Public Education (FAPE)

Statutory Provision

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.[18] 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)."[19]

Supreme Court Decision in *Rowley*

A seminal decision on the requirements of FAPE, *Board of Education of the Hendrick Hudson Central School District v. Rowley*,[20] decided in 1982, was the first IDEA case to reach the Supreme Court. 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."[21] The Court concluded that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related

[15] 496 F.3d 932 (9th Cir. 2007).

[16] 503 F.3d 378 (5th Cir. 2007).

[17] 300 Fed. Appx. 11 (2d Cir. 2008).

[18] 20 U.S.C. §1412(a)(1).

[19] 20 U.S.C. §1401(9).

[20] 458 U.S. 176 (1982).

[21] *Id.* at 200.

services which are individually designed to provide educational benefit to the handicapped child."[22] 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."[23] 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."[24] However, the states are not required to "maximize" each child's potential.[25] 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"[26] 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.

Lower Court Decisions

Rowley remains a key decision under IDEA and is often cited by courts attempting to determine the parameters of a free appropriate public education.[27] 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 minimal. For example, in *Fort Zumwalt School District v. Clynes*,[28] the Eighth Circuit emphasized *Rowley's* "access to education" requirement and held that the IEP was adequate. The court noted that the child was making progress, earning passing marks and advancing to the next grade, despite reading proficiency scores in the second to ninth percentile. However, the dissenting opinion described the child's achievement as "trivial" and argued that "(t)his cannot be the sort of education Congress had in mind when it enacted IDEA."[29]

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[22] *Id.* at 201.

[23] *Id* at 203.

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

[25] *Id.* at 198.

[26] *Id.* at 202.

[27] 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).

[28] 119 F.3d. 607 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998).

[29] *Id.* at 617 (dissenting opinion by Judge Gibson). For a more detailed discussion of Fort Zumwalt see Charlene K. Quade, "A Crystal Clear Idea: The Court Confounds the Clarity of Rowley and Contorts Congressional Intent," 23 (continued...)

Other courts have read *Rowley* more expansively. For example, in *Polk v. Cent. Susquehanna Intermediate Unit 16*,[30] the Third Circuit examined the "some educational benefit" language in *Rowley* and held that it required an IEP to provide more than de minimis educational benefit.[31] Similarly, the Fifth Circuit, in *Cypress-Fairbanks Indep. School District v. Michael F.*,[32] quoted from *Rowley* and concluded that "the educational benefit that an IEP is designed to achieve must be meaningful."[33] 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.[34] Other courts have looked at academic achievement testing, as well as grades, to measure educational benefit. For example, in *Falzett v. Pocono Mountain School District*,[35] the court found that, despite allegations of missed days and limited curriculum, a student whose SAT scores improved and who received excellent grades, qualifying him for the Junior National Honor Society, had received FAPE under IDEA. However, in *Ringwood Board of Education v. K.H.J.*,[36] the Third Circuit found that when a child has above average intellectual ability IDEA requires more than a negligible benefit, and noted that "expecting a child with 'above average' intelligence to perform in the 'average' range hardly qualifies as 'maximizing' that child's potential."[37]

Procedural or other violations do not always give rise to a violation of FAPE.[38] Generally, procedural violations must affect the child's substantive rights.[39] For example, FAPE has been found to require that services mandated by an IEP be implemented as soon as possible after the IEP development, not immediately or within 30 days.[40] Similarly, inaccessible facilities do not necessarily violate FAPE if there is general program accessibility.[41] In addition, FAPE has been found not to be violated when a resolution session is improperly convened if there was not substantial effect on the child's educational opportunities.[42] However, certain procedural

(...continued)

Hamline J. Pub. L. and Policy 37 (2001).

[30] 853 F.2d 171 (3d Cir. 1988), cert. denied, 488 U.S. 1030 (1989).

[31] *Id.* at 180-185.

[32] 118 F.3d 245 (5th Cir. 1997), cert. denied, 522 U.S. 1047 (1998).

[33] *Id.* at 248.

[34] *Id.* at 253.

[35] 152 Fed. Appx. 117 (3d Cir. 2005). See also Thompson R2-J School District v. Luke P., 540 F.3d 1143 (10th Cir. 2008), cert. den. 129 S. Ct. 1356 (Feb. 23, 2009), where the progress made by a student with autism was found to be sufficient.

[36] 258 Fed. Appx. 399 (3d Cir. 2007).

[37] *Id.* at 410.

[38] Fitzgerald v. Fairfax County School Board, 556 F.Supp.2d 543 (E.D. Va. 2008); School Board of Independent School District No. 11, Anoka-Hennepin, Minnesota v. Renollett, 440 F.3d 1007 (8th Cir. 2006); Sytsema v. Academy School District No. 20, 538 F.3d 1306 (10th Cir. 2008); J.L.; M.L.; K.L. v. Mercer Island School District, 2009 U.S. App. LEXIS 17513 (9th Cir. 2009).

[39] T.T. v. District of Columbia, 2007 U.S. Dist. LEXIS 52547 (July 23, 2007); Hunter v. District of Columbia, 2008 U.S. Dist. LEXIS 70009 (September 17, 2008); Kingsmore v. District of Columbia, 466 F.3d 118 (D.C. Cir. 2006).

[40] DD v. New York City Board of Education, 465 F.3d 503 (2d Cir. 2006).

[41] Logwood v. Louisiana Department of Education, 197 Fed. Appx. 302 (5th Cir. 2006). The fact that certain parts of the school facilities were inaccessible to a student in a wheelchair did not deny the student a meaningful educational benefit and thus violate FAPE since he had an alternative route to his classrooms and activities on the stage of the auditorium would have been moved to the accessible gymnasium if necessary.

[42] O.O. v. District of Columbia, 573 F.Supp.2d 41 (2008).

violations may be significant enough to be a denial of FAPE. In *N.B. and C.B. v. Hellgate Elementary School District*,[43] the Ninth Circuit held that the school's failure to evaluate a child in all areas of suspected disability was a procedural error that denied FAPE.

Educational Standards and the No Child Left Behind Act (NCLBA)

The application of the Supreme Court's analysis in *Rowley* to current controversies is somewhat confused by the change in the usage of the term "educational standards." Although the Supreme Court in *Rowley* required that the instruction given to a child with a disability meet the state's educational standards, the term "educational standards" has taken on a different meaning in recent years. Currently, the term "educational standards" is likely to refer to specific content-based standards that delineate what a child should know and be able to perform at various points in his or her educational career.

The 1997 Amendments to IDEA[44] reflected the standards-based education movement. P.L. 105-17 significantly changed the IEP requirements and required that the IEP include, among others, a statement of the child's present levels of educational performance, including the effect of the child's disability on the child's involvement and progress in the general curriculum, and a statement of measurable annual goals designed to enable the child to progress in the general curriculum.[45] In addition, in the statement of findings for the 2004 reauthorization, P.L. 108-446 states that "[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general curriculum in the regular classroom to the maximum extent possible.... "[46]

Given the fact that the standards-based education movement, as reflected in IDEA and the No Child Left Behind Act (NCLBA),[47] has changed the standards from what was required in the version of the law the Supreme Court interpreted in *Rowley*, questions have been raised concerning the current application of *Rowley*. Parents of students with disabilities have argued that FAPE requirements have been changed by NCLBA in several cases but have not yet been successful.[48] Similarly, an unsuccessful argument has been made that there is an inherent conflict between IDEA and NCLBA.[49]

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[43] 541 F.3d 1202 (9th Cir. 2008).

[44] P.L. 105-17.

[45] P.L. 105-17 §614(d)(1)(A), 20 U.S.C. §1414(d)(1)(A). The 2004 IDEA reauthorization, P.L. 108-446, continued the standards-based requirements of P.L. 105-17.

[46] 20 U.S.C. §1400(c)(5)(A).

[47] 20 U.S.C. §§6301-6777. For a discussion of the requirements of the NCLBA, see CRS Report RL31284, *K-12 Education: Highlights of the No Child Left Behind Act of 2001 (P.L. 107-110)*, coordinated by Wayne C. Riddle. For a discussion of the relationship between the NCLBA and the IDEA, see CRS Report RL32913, *The Individuals with Disabilities Education Act (IDEA): Interactions with Selected Provisions of the No Child Left Behind Act (NCLB)*, by Richard N. Apling and Nancy Lee Jones.

[48] See e.g., Leighty v. Laurel School District, 457 F.Supp.2d 546 (W.D. Pa. 2006). "Although the IDEA clearly conditions the States' receipt of IDEA funds on the inclusion of disabled children in the assessments mandated by the NCLBA, it does not require that FAPE determinations be based on the results of those assessments, nor does it require that the IEP's prepared for disabled children be designed specifically to enhance their scores on standardized tests. While it is clear that both the IDEA and the NCLBA require recipient States to include disabled children in the assessments, with the modifications necessitated by their disabilities, neither statute indicates that FAPE determinations under the IDEA are controlled by the performance of disabled children on assessments required under the NCLBA." At (continued...)

The Individualized Education Program (IEP)

Statutory Provisions

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.[50] 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.[51] 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 the *Rowley* two-part inquiry: first, the court determines whether IDEA's procedures have been complied with; second, the court determines whether the IEP is reasonably calculated to provide the child with educational benefits.[52]

Lower Court Decisions

The exact parameters of an IEP have been the subject of several decisions. Generally, an IEP does not have to be "perfect" to be in compliance with IDEA, but must be "reasonably calculated to enable the child to receive educational benefits."[53] In *School Board of Independent School District No. 11 v. Joshua Renollett*,[54] the Eighth Circuit court of appeals found that although there were some flaws in the child's IEP, since these flaws did not compromise his right to an appropriate education or deprive him of educational benefits, there was no violation of IDEA.[55]

(...continued)

40-41. Fisher v. Stafford County Township Board of Education, 2007 U.S. Dist. LEXIS 14003 (February 27, 2007), aff'd 289 Fed. Appx. 520 (3d Cir. 2008). "There is absolutely no support in the statutes or case law for Fisher's attempt to engraft the achievement standards references in the NCLB Act onto the IDEA." At 42. Kirby v. Cabell County Board of Education, 2006 U.S. Dist LEXIS 67254 (S.D. W.Va. September 19, 2006). "While the statutory language of 20 U.S.C. §6311 requires that state plans are coordinated with the IDEA along with other programs under Title 20 ... , there is no language in the Act that places additional obligations on the development or assessment of a child's IEP.... The obligations contained in the section referenced by the plaintiffs are placed on the state in regards to all students. It does not contain specific obligations to children with disabilities nor does it alter the Court's standard of review in regards to the IEP in question." At 20. For a discussion of this issue see Robin Bucaria, "Expanding the Definition of FAPE under NCLB: Why Courts Give FAPE the Slip and Leave it Swimming in a Sea of Alphabet Soup," 10 J. L. Fam. Studies 237 (2007).

[49] Board of Education of Ottawa Township High School District 140 v. Spellings, 517 F.3d 922 (7th Cir. 2008).

[50] 20 U.S.C. §1414(d).

[51] *Id.*

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

[53] Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).

[54] 440 F.3d 1007 (8th Cir. 2006).

[55] Similarly, in Bradley v. Arkansas Department of Education,443 F.3d 965 (8th Cir. 2006), the court found that although the child's IEP and its implementation may not have been perfect, the IEP was reasonably calculated to provide educational benefits and thus did not violate IDEA. See also Mr. and Mrs. B v. East Granby Board of Education, 201 Fed. Appx. 834 (2d Cir. 2006), rejecting the argument that the child's IEPs violated IDEA since they did not include the recommendations of experts retained by the parents. The IEPs were found to be reasonably calculated to provide educational benefit. In G.N. and S.N. v. Board of Education of the Township of Livingston, 309 (continued...)

Similarly, the Second Circuit in *Cabouli v. Chappaqua Central School District*[56] found that the evidence supporting the adequacy of the IEP, including the child's recent social progress, indicated that the child would likely make educational progress under the IEP and, therefore, there was no violation of IDEA. The lack of a functional behavioral assessment in an IEP does not necessarily mean that the IEP is invalid.[57] The Sixth Circuit in *Nack v. Orange City School District*[58] found that procedural violations that did not cause the student any substantive harm were not a violation of IDEA. In addition, the court in *Nack* also held that a lack of progress during one school year does not necessarily indicate an IDEA violation since IDEA does not guarantee success, but requires that a student receive sufficient specialized services to benefit from his or her education.[59]

On the other hand, courts have found that an IEP which does not provide the child with educational benefits violates IDEA. In *A.K. v. Alexandria City School Board*,[60] the Fourth Circuit held that an IEP which stated that the child should be placed at an unidentified private day school was not reasonably calculated to provide educational benefits and, therefore, was a violation of IDEA. And in *M.L. v. Federal Way School District*,[61] the Ninth Circuit found that not including a regular education teacher on the IEP team resulted in a "loss of educational opportunity" that amounted to a denial of FAPE. However, in *R.B. v. Napa Valley Unified School District*,[62] the Ninth Circuit held that IDEA did not require the participation of the child's current special education teacher as long as a special education teacher who has actually taught the child was present.

The input of parents in an IEP has been the subject of several recent decisions. Generally, courts have held that "the right of parents to control the content of the IEP is limited."[63] For example, in *Shelby S. v. Conroe Independent School District*,[64] the Fifth Circuit found that in order to develop an appropriate IEP, the school could perform an independent medical evaluation despite a lack of parental consent. And in *Lessard and Lessard v. Wilton-Lyndeborough Cooperative School District and New Hampshire Department of Education*,[65] the First Circuit held that an IEP was

(...continued)

Fed. Appx. 542 (3d Cir. 2009), the absence of a requested modification to the IEP did not mean that the IEP was not reasonably designed to confer a meaningful educational benefit.

[56] 202 Fed. Appx. 519 (2d Cir. 2006).

[57] A.C. and M.C. v. Board of Education of the Chappaqua Central School District, 553 F.3d. 165 (2d Cir. 2009); Lessard v. Wilton-Lyndeborough Cooperative School District, 518 F.3d 18 (1st Cir. 2008).

[58] 454 F.3d 604 (6th Cir. 2006).

[59] *Id.* at 22.

[60] 484 F.3d 672 (4th Cir. 2007).

[61] 394 F.3d 634 (9th Cir. 2004).

[62] 496 F.3d 932 (9th Cir. 2007). See also, A.G. v. Placentia-Yorba Linda Unified School District, 320 Fed. Appx. 519 (9th Cir. March 20, 2009).

[63] J.R. v. Sylvan Union School District, 2008 U.S. Dist. LEXIS 18168 (March 10, 2008). See also, *A.E. v. Westport Board of Education*,454 F.3d 450 (5th Cir. 2006),where the court held that an IEP may be valid even if there is not consensus on all its aspects and, since the IEP was reasonably calculated to enable the child to receive educational benefits, there was no violation of IDEA. Similarly, the rights of parents when an LEA is imposing disciplinary proceedings on a child do not require parental consent to the LEA's determination. Fitzgerald v. Fairfax County School Board, 556 F.Supp.2d 543 (E.D.Va. 2008). See also Systema v. Academy School District No. 20, 538 F.3d 1306 (10th Cir. 2008), where the court found that the fact that the parents had not signed a draft IEP did not affect its status.

[64] 454 F.3d 450 (5th Cir. 2006).

[65] 518 F.3d 18 (1st Cir. 2008).

not procedurally deficient due to incompleteness and noted, "[l]ine-drawing is often difficult, and in the IEP context it is impossible to draw a precise line separating healthy requests for parental input from impermissible demands that parents do the school system's work."[66] Despite the limited control of parents over the IEP, courts have found for the parents in IEP cases. For example, in *County School Board of York County v. A.L.*,[67] the Fourth Circuit found that a lack of prior notice to a proposed IEP change and a failure to inform the parents of their due process rights violated IDEA.

Related Services

As noted above, IDEA's requirement of a free appropriate public education is the cornerstone of the act. FAPE is defined in part as requiring "special education and related services."[68] 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 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.[69]

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*,[70] 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 held 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 appeal 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.*[71]

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

[66] *Id.* at 20.

[67] 194 Fed. Appx. 173 (4th Cir. 2006).

[68] 20 U.S.C. §1401(9).

[69] 20 U.S.C. §1401(26) (emphasis added).

[70] 468 U.S. 883 (1984).

[71] 526 U.S. 66 (1999).

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 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."[72]

The 2004 reauthorization dealt with this issue by establishing risk pools for high-need children with disabilities.[73] 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 LEAs serving high-need children with disabilities. Related services have not given rise to a large number of recent IDEA cases. Generally, the cases have emphasized the broad discretion of a federal court to define what services are required to enable a child with a disability to benefit from special education, and have applied the *Tatro* analysis.[74]

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."[75]

Several recent courts of appeal decisions have followed a two-pronged approach, first enunciated in *Daniel R.R. v. State Board of Education*,[76] 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.[77]

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[72] Id. at 78.

[73] 20 U.S.C. §1411(e)(3).

[74] See Richardson Independent School District v. Michel Z. and Carolyn Z., 561 F.Supp.2d 610 (N.D. Texas 2008), where the court held that, since they were critical to enable the child to benefit from special education, occupational, recreational, and speech therapy and individual group and family therapy that were not included in the child's IEP were reimbursable as related services. However, blood tests to evaluate potential side effects from medication were not reimbursable. Similarly, in M.K. v. Sergi, 554 F.Supp.2d 201 (D.Conn. 2008), the court held that medical services are only covered if they are intended for diagnostic and evaluative purposes, not on-going monitoring of a medication regimen.

[75] 20 U.S.C. §1412(a)(5).

[76] 874 F.2d 1036 (5th Cir. 1989).

[77] 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) and B.S. v. Placentia-Yorba Linda Unified School District, (continued...)

Stay Put

In enacting P.L. 94-142, the original version of IDEA, Congress provided grants to the states to help pay for education for children with disabilities, and also delineated specific requirements the states must follow to receive these federal funds. This public law contained a requirement 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. The concept of "stay put" was placed in the statute to help eliminate the then common discriminatory practice of expelling children with disabilities from school. A revised "stay put" provision remains as law in the current version of IDEA.[78]

In 1988, the question of whether there was an implied exception to the "stay put" rule was presented to the Supreme Court in *Honig v. Doe*.[79] *Honig* involved emotionally disturbed children, one of whom had choked another student with sufficient force to leave abrasions on the child's neck and who had kicked out a window while he was being escorted to the principal's office. The other child in the *Honig* case had been involved in stealing, extorting money, and making lewd comments. The school had sought expulsion, but the Supreme Court disagreed finding that "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[80] However, the Court observed that this holding did "not leave educators hamstrung.... Where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days.... And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under section 1415(e)(2), which empowers courts to grant any appropriate relief."[81] This statement about the school's right to seek judicial relief has come to be know as a *Honig* injunction.

The Supreme Court's interpretation of IDEA in *Honig* did not quell all concerns about discipline and children with disabilities. In 1994, Congress amended IDEA's "stay put" provision to give schools the unilateral authority to remove a child with a disability to an interim alternative educational setting if the child was determined to have brought a firearm to school. This provision was expanded in the IDEA Amendments of 1997 to include weapons (not just firearms) and drugs, and was further expanded in the 2004 reauthorization to include situations where a student has inflicted serious bodily injury upon another person while at school.

Not all issues regarding the stay put provisions have involved disciplinary actions. Several courts have addressed the issue of whether the stay put requirement applies when a child is transitioning from Part C of IDEA to Part B. Part B of IDEA applies to school-aged children and requires the provision of FAPE as delineated in an IEP; Part C of IDEA applies to infants and toddlers and requires the provision of appropriate early intervention services as set forth in an individualized

(...continued)

306 Fed. Appx. 397 (9th Cir. 2009).

[78] 20 U.S.C. §1415(j). For a detailed discussion of "stay put," see CRS Report RL32753, *Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 108-446*, by Nancy Lee Jones.

[79] 484 U.S. 305 (1988).

[80] 484 U.S. 305, 323 (1988) (emphasis in the original).

[81] *Id.* at 325-326.

family service plan (IFSP). Rejecting an opinion by the Office of Special Education Programs (OSEP) of the Department of Education,[82] the Third Circuit in *Pardini v. Allegheny Intermediate Unit*[83] held that the stay put provision requires the child "to continue to receive conductive education until the dispute over its appropriateness for inclusion in her IEP was resolved."[84] However, the Eleventh Circuit in *D.P. v. School Board of Broward County*[85] disagreed, finding that the children in that case were applying for initial admission to a public school program and that they were not entitled to continue to receive services pursuant to their IFSPs.

Other issues regarding the stay put provision have involved mediation, private school placement, a move from a resource room to a classroom, and the appeals process in the courts. *Sammons v. Polk County School Board*[86] raised the issue of whether a request for mediation invokes the stay put provision. The Eleventh Circuit held that the IDEA regulations[87] limited the application of the stay put provision to the pendency of administrative or judicial proceedings and, therefore, it was not applicable to a request for mediation. In *L.M. v. Capistrano Unified School District*,[88] the Ninth Circuit held that a child who had not had an implemented IEP, and had never been placed in a public school, but was unilaterally placed in a private school by his parents, could not use the stay put provision to continue private school placement. A child's relocation from a resource room to an inclusion classroom was not found to constitute a change in placement within the meaning of the stay put provision.[89] In *Joshua A. v. Rocklin Unified School District*,[90] the Ninth Circuit held that the stay put provision applied throughout the appeals process in the courts.

Seclusion and Restraints

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."[91] 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."[92] 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

[82] Letter to Klebanoff, 28 IDELR 478 (July 1, 1997). "Since the dispute in this case involved the child's initial public school placement, the district was not obligated to maintain the child's private nursery school program pending resolution of the dispute about his placement."

[83] 420 F.3d 181 (3d Cir. 2005).

[84] 420 F.3d 181, 192 (3d Cir. 2005).

[85] 483 F.3d 725 (11th Cir. 2007).

[86] 165 Fed. Appx. 750 (11th Cir. 2006).

[87] 34 C.F.R. §300.518.

[88] 556 F.3d 900 (9th Cir. 2009).

[89] In re: Educational Assignment of Joseph R. v. Mars Area School District, 318 Fed. Appx. 113 (3d Cir. March 24, 2009).

[90] 559 F.3d 1036 (9th Cir. 2009).

[91] 20 U.S.C. §1414(d)(3)(B).

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

interventions and supports when the child's behavior impedes the child's learning or that of others."[93]

The Supreme Court has not specifically addressed the use of seclusion or restraints under IDEA; however, in *Honig v. Doe*,[94] the Court examined IDEA's requirements for children who exhibited violent or inappropriate behavior, and held that a suspension longer than ten days violated IDEA's "stay-put" provision.[95] 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 ten-day suspension.[96]

Despite the lack of specific language in IDEA regarding the use of restraints and seclusion, cases have been brought alleging that their use violates a child's right to a free appropriate public education.[97] Generally, courts have not found violations of IDEA where the seclusion or restraint was deemed necessary to keep the child from hurting himself or others,[98] or where the child was progressing academically and the school had tailored the child's IEP to address behavioral issues.[99] Courts have examined whether the administrative exhaustion requirements of IDEA apply in situations involving the use of seclusion and restraint. In *C.N. v. Willmar Public Schools*[100] the child's IEP and behavior intervention plan allowed for the use of seclusion and restraint procedures when the child was a danger to herself or others. The court required administrative exhaustion, finding that if the parent was dissatisfied with the child's education, she must follow the IDEA due process procedures and file for a due process hearing. Since the parent had not done so, the court dismissed the parent's complaint.[101]

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[93] *Id.*

[94] 484 U.S. 305 (1988).

[95] 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. 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 Nancy Lee Jones.

[96] 484 U.S. 305, 325 (1988).

[97] For a report on restraint and seclusion in schools see National Disability Rights Network, "School is not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools," (January 2009) http://www.napas.org/sr/SR-Report.pdf. Rep. George Miller has asked the Government Accountability Office to investigate the use of restraint and seclusion in schools. "House Education Committee Chairman asks GAO to Investigate Restraint, Seclusion," 42 Education Daily 3 (January 28, 2009).

[98] Melissa S. v. School District of Pittsburgh, 183 Fed. Appx. 184 (3d Cir. 2006).

[99] CJN v. Minneapolis Public Schools, 323 F.3d 630 (8th Cir. 2003, cert. den. 540 U.S. 984 (2003).

[100] 2008 U.S .Dist. LEXIS 63673 (August 19, 2008).

[101] See also Doe v. S&S Consolidated I.S.D., 149 F.Supp.2d 274 (E.D. Texas 2001), (The court, in a case that also presented constitutional issues, dismissed the IDEA claims relating to restraints since IDEA's administrative procedures had not been exhausted); Vicky M. and Darin M. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71406 (M.D. Pa. September 26, 2007); Kimberly F. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71394 (M.D. Pa. September 26, 2007); Eva L. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71425 (M.D. Pa. September 26, 2007); John G. and Gloria G. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71365 (M.D. Pa. September 26, 2007); Sanford D. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71413 (M.D. Pa. (September 26, 2007); Joseph M. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71410 (M.D. Pa. September 26, 2007); Thomas R. v. Northeastern Educational Intermediate Unit 19, 2007 U.S. Dist. LEXIS 71416 (M.D. Pa. September 26, 2007) (A series of cases involving a special education teacher who allegedly hit, pinched, dragged, and retrained autistic students in Rifton chairs with bungee cords and/or duct tape which were dismissed for failure to exhaust (continued...)

In contrast, IDEA has been used by parents in an attempt to enjoin enforcement of a New York State regulation that banned the use of "aversive interventions."[102] Parents argued in part that "some students' IEP's were being revised without parental consent or simply not revised for the new school year, the effect of which was to deprive those students of aversive therapies."[103] The Second Circuit vacated the district court's injunction against the regulation and remanded for further findings, noting, "We are confident that, especially given the harms that could result if the student plaintiffs' behavioral treatments are interrupted, the deficiencies in the district court's order may be expeditiously remedied."[104]

Retaliation and Harassment

Although harassment is not explicitly prohibited in IDEA, the Department of Education has stated that disability harassment may result in a denial of FAPE.[105] Several courts have held that harassment may be so severe that the child with a disability is denied access to educational benefits and that, therefore, IDEA is violated.[106] However, at least one court has found that the claim of harassment must be tied to IDEA and should clearly state that the harassment has denied the child FAPE.[107] In addition, another court held that claims regarding retaliation are subject to IDEA's requirements for exhaustion of administrative remedies.[108]

Due Process Procedures

Overview

Section 615 of IDEA provides detailed procedural safeguards for children with disabilities and their parents.[109] 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. 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

(...continued)

administrative remedies.)

[102] Alleyne v. New York State Education Department, 516 F.3d 96 (2d Cir. 2008). Aversive interventions were defined as including "skin shocks, 'contingent' food programs, and physical restraints." *Id.* at 98.

[103] *Id.* at 99.

[104] *Id.* at 102.

[105] http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html

[106] M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005); Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004).

[107] Geoffrey Stringer v. St. James R-1 School District, 446 F.3d 799 (8th Cir. 2006).

[108] M.T.V. v. DeLalb County School District, 446 F.3d 1153 (11th Cir. 2006). For a discussion of harassment and IDEA see David Ellis Ferster, "Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education under the Individuals with Disabilities Education Act," 43 Ga. L. Rev. 191 (Fall 2008); Brandy L. Wagstaff, "Disabling Incentives: How *A.W. v. Jersey City Public Schools* has the Wrong 'Idea' for Deterring Disability Harassment in the Public Schools," 19 Geo. Mason U. Civil Rights L. J. 169 (Fall 2008).

[109] 20 U.S.C. §1415.

agency knew or should have known about the alleged action.[110] The 2004 reauthorization added the provision allowing schools to also file complaints and there has been at least one instance where a school district has used this authority.[111]

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. This preliminary meeting involves the parents, the relevant members of the IEP team, and a representative of the local educational agency who has decision making authority. The LEA may not include its attorney unless the parent is accompanied by an attorney.[112] Provisions allowing for mediation of disputes under IDEA were added in the 1997 reauthorization[113] and retained in the current law.[114] In addition, the 2004 IDEA reauthorization provided for judicial enforcement of agreements reached through a resolution session[115] or mediation.[116]

Several judicial decisions have addressed issues regarding the resolution session. One court held that the information disclosed during the resolution session is not confidential since the statute does not specifically confer confidentiality and the resolution session discussions are not settlement discussions.[117] Another decision examined the inclusion of a school board attorney when a parent did not have an attorney present, and found that the limitation on the presence of an attorney is only for the preliminary meeting, not for the writing of a settlement decision.[118] As noted previously, procedural violations in a resolution session do not violate FAPE if there was not a substantial effect on the child's educational opportunities.[119]

Several courts have examined the question of whether all settlement agreements are enforceable in federal court or whether judicial enforcement is limited to agreements reached through dispute resolution or mediation. Generally, the courts have held that the statutory language limits judicial enforcement to those agreements reached through dispute resolution or mediation.[120]

In *Amy S. v. Danbury*,[121] the Sixth Circuit held that mediation agreements signed by the parents, who were represented by counsel, precluded a claim. The parents had alleged that the school had breached the mediation agreement since the agreed upon tutor could no longer transport the child

[110] 20 U.S.C. §1415(b)(6).

[111] See Steve Esack, "School District Sues 'Vexatious' Mother," http://www.chicagotribune.com/topic/all-4giftedbox.6978540aug05,0,2171782.story?track=rss-topicgallery.

[112] 20 U.S.C. §1415(f)(1)(B).

[113] P.L. 105-17, §615(e).

[114] 20 U.S.C. §1415(e).

[115] 20 U.S.C. §1415(f)(1)(B)(iii).

[116] 20 U.S.C. §1415(e)(2)(F)(iii).

[117] Friendship Edison Public Charter School Chamberlain Campus v. Ebony Smith, 561 F.Supp.2d 74 (D.D.C. 2008).

[118] Mr. and Mrs. S. v. Rochester Community Schools, 2006 U.S. Dist. LEXIS 71432 (W.D. Michigan October 2, 2006).

[119] O.O. v. District of Columbia, 573 F.Supp.2d 41 (2008).

[120] Traverse Bay Area Intermediate School District v. Michigan Department of Education, 2007 U.S. Dist. LEXIS 54660 (W.D. Mich. July 27, 2007); Bowman v. District of Columbia, 2006 U.S. Dist. LEXIS 53467 (D.D.C. Aug. 2, 2006).

[121] 174 Fed. Appx. 896 (6th Cir. 2006).

in his car. The court rejected this argument, noting that tutoring services were still available. Similarly, in *Ballard v. Philadelphia School District*,[122] the court rejected an argument by a parent that a settlement agreement was invalid.

Parental Rights

In *Winkelman v. Parma City School District*,[123] 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."[124] 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."[125] These provisions were found to support the finding that the parents of a child with a disability have "a particular and personal interest" in the goals of IDEA and that "IDEA includes provisions conveying rights to parents as well as to children."

The rights that IDEA provides for parents were found to encompass not only procedural but also substantive rights. Justice Kennedy observed, "IDEA does not differentiate, through isolated references to various procedures and remedies, between the rights accorded to children and the rights accorded to parents." It was argued that granting these rights would increase the costs to the states because parents may bring more lawsuits if they do not have the financial constraint of paying for an attorney. However, the Court found that these concerns were not sufficient to support an argument under the Constitution's Spending Clause that IDEA failed to provide clear notice before a new condition or obligation was placed on a recipient of funds. In addition, Justice Kennedy observed that IDEA specifically allows courts to award attorneys' fees to a prevailing educational agency when a parent has brought an action for an "improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."[126]

The Supreme Court's emphasis on a parent's own rights has led courts to conclude that, although a non-attorney parent cannot pursue claims on behalf of his child, he may amend the complaint to assert his own claims.[127] In addition, a parent was found to have "personal rights to enforce

[122] 273 Fed. Appx. 184 (3d Cir. 2008), cert. den. 129 S. Ct. 1317 (Feb. 23, 2009).

[123] 550 U.S. 516 (2007).

[124] 20 U.S.C. §1400(d)(1)(B).

[125] 20 U.S.C. §1415(a).

[126] 20 U.S.C. §1415(i)(3)(B)(i)(III).

[127] French v. New York State Department of Education, 2008 U.S. Dist. LEXIS 74220 (September 24, 2008); Alexandra R. v. Brookline School District, 2007 U.S. Dist. LEXIS 66091 (D. N.H. September 6, 2007).

FAPE" and, thus, survived an attempt to dismiss her claim.[128] However, a parent may not use his or her rights in order to circumvent an existing consent decree involving the same issues.[129] In addition, the mere assertion that the rights are those of the parents may not be sufficient. In *Woodruff v. Hamilton Township Public Schools,*[130] the Third Circuit found that although the parents had filed an amended compliant purporting to assert their claims only, the claims asserted were not personal to the parents and, therefore, the parents' complaint was properly dismissed.

Parental rights, as determined by *Winkelman*, have been extended by some courts to cases brought under Section 504 and the ADA as well as IDEA.[131] However, not all courts have agreed with this interpretation. In *D.A. and M.A. v. Pleasantville School District,*[132] the court found that *Winkelman* reflected the specific language and structure of IDEA with its emphasis on parental involvement and was, therefore, not applicable to Section 504 and the ADA.

Other parental rights issues are not as directly tied to the *Winkelman* decision. The issue of whether a parent could recover damages under IDEA for lost earnings and suffering incurred while successfully pursuing her child's IDEA claim was raised in *Blanchard v. Morton School District.*[133] The Ninth Circuit noted that money damages were not available for a child with a disability, and that "IDEA does not contemplate the remedy Blanchard seeks and in that regard creates no right enforceable under §1983.... "[134] The Second Circuit addressed the issue of the rights of a noncustodial parent in *Fuentes v. Board of Education of New York City*.[135] IDEA defines the term "parent,"[136] and the IDEA regulations expand upon the statutory language stating that a parent is presumed to be the parent unless he or she does not have legal authority to make educational decisions for the child.[137] The *Fuentes* court emphasized the regulatory language and found that the noncustodial biological parent did not have the legal authority to make educational decisions.

Section 504 and the Americans with Disabilities Act (ADA)

IDEA is not the only federal statute to address the education of children with disabilities, although it is the most detailed in its provisions. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA) address the rights of individuals with disabilities to education.

[128] Tereance D. v. School District of Philadelphia, 548 F.Supp.2d 162 (E.D. Pa. 2008).

[129] Muse B. v. Upper Darby School Dist., 282 Fed. Appx. 986 (3d Cir. 2008).

[130] 305 Fed. Appx. 833 (3d Cir. January 15, 2009).

[131] Blanchard v. Morton School District, 509 F.3d 934 (9th Cir. 2007); K.F. v. Frances Howell R-III School District, 2008 U.S. Dist. LEXIS 20700 (E.D. Missouri March 17, 2008).

[132] 2008 U.S. Dist. LEXIS 49941 (D.N.J. June 30, 2008).

[133] 509 F.3d 934 (9th Cir. 2007), cert. den., 128 S.Ct. 1447, 170 L.Ed.2d 276 (2007).

[134] *Id.* at 937.

[135] 540 F.3d 145 (2d Cir. 2008), cert den. 129 S. Ct. 1357 (Fe. 23, 2009). See also Cumberland Regional High School District Board of Education v. Freehold Regional High School District Board of Education, 293 Fed. Appx. 900 (3d Cir. 2008), where two school districts were required to share the costs of providing FAPE to a child of divorced parents who shared joint legal and physical custody.

[136] 20 U.S.C. §1401(23).

[137] 34 C.F.R. §300.30(b).

Although there is overlap, particularly with Section 504 and the ADA, each statute plays a significant part in the education of individuals with disabilities. IDEA, enacted in 1975, is both a grants statute and civil rights statute and requires programs for children with disabilities that are in addition to those available to children without disabilities. Section 504, enacted in 1973, and the ADA, enacted in 1990, are civil rights statutes that prohibit discrimination against individuals with disabilities. Their coverage is similar, and the ADA was modeled on Section 504 and its regulations; however, Section 504 only applies to entities that receive federal financial assistance, while the ADA has broader coverage, not tied to the receipt of federal funds. Although a detailed analysis of the educational coverage of these statutes is beyond the scope of this report,[138] it should be noted that several courts have examined issues presented by the interaction of the statutes, noting differences in coverage.[139]

Burden of Proof

IDEA contains detailed due process requirements to ensure the provision of FAPE. These include the opportunity for an impartial due process hearing.[140] However, the statute contains no specific provision relating to which party has the burden of proof in a due process hearing, and the courts of appeal, prior to the Supreme Court's decision in *Schaffer v. Weast*,[141] were split in their interpretations of who bore the burden of proof.

The Supreme Court in the 2005 case of *Schaffer v. Weast*[142] 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."[143] 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."[144] 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."[145] The

[138] For a more detailed discussion 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 Nancy Lee Jones and Carol J. Toland.

[139] See for example Andrew M. v. Delaware County Office of Mental Health and Mental Retardation, 490 F.3d 337 (3d Cir. 2007), where the court found that although a violation of IDEA Part B claim is generally also a violation of Section 504, a violation of IDEA Part C, which provides for services for infants and toddlers with disabilities, is not also a violation of Section 504. See also Mark H. ex rel. Michelle H. and Natalie H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008).

[140] 20 U.S.C. §1415(f).

[141] 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 Nancy Lee Jones.

[142] *Id.*

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

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

[145] *Id.*

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."[146]

Remedies

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.[147] 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 situation, the cost of the private school placement is not paid by the LEA unless a hearing officer or a court makes certain findings. However, IDEA does require some services for children in private schools, even if they are unilaterally placed there by their parents.[148] 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.[149]

The current statutory provisions regarding private schools are the result of several major amendments, and the majority of the Supreme Court decisions on private schools were decided prior to the statutory changes.[150] However, two recent Supreme Court cases 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. In the 2007 decision *Board of Education of the City School District of the City of New York v. Tom F.*,[151] the Court, dividing 4-4, allowed an appeals court ruling on private school reimbursement to stand.

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[146] *Id.* at 61.

[147] 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 Nancy Lee Jones, and CRS Report RL33368, *The Individuals with Disabilities Education Act (IDEA): Parentally Placed Children in Private Schools*, by Richard N. Apling and Nancy Lee Jones.

[148] 20 U.S.C. §1412(a)(10).

[149] 20 U.S.C. § 1412(a)(10)(C)(ii).

[150] 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 Nancy Lee Jones and Carol J. Toland.

[151] 552 U.S. 1(2007), 128 S.Ct. 1, 199 L.Ed.2d 1 (2007).

The court of appeals had held 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, and therefore the issue about whether reimbursement for private school tuition may be made when the child has not received public special education services remained unsettled. On October 15, 2007, the Supreme Court denied *certiorari* in another case presenting the same issue.[152] However, on June 22, 2009, the Supreme Court held in *Forest Grove School District v. T.A.*[153] that IDEA authorized reimbursement for private special-education services when a public school fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special-education services through the public school.

Recent lower court decisions have held that if the child is making some educational progress and the public school has provided an IEP calculated to provide for continued progress, the requirements of FAPE are met and the child is not entitled to a private school placement.[154] For example, in *M.H. and J.H. v. Monroe-Woodbury Central School District*,[155] the court found that the child's IEP was adequate and, therefore, the parents were not entitled to tuition reimbursement for a private school placement. These same standards have been applied when parents seek to place their child in a private school different from the private school where the school district has placed the child.[156] In addition, if a private school does not adequately address the child's educational needs, the court may not require private school tuition reimbursement.[157]

Courts have held that reimbursement for private school tuition is barred if parents arrange for private school educational services without notifying the LEA of their problems with their child's IDEA services.[158] Reimbursement is also barred if the parents act unreasonably in their relations with the school.[159] The parents are not barred from private school tuition reimbursement, however, if the child has not previously received special education services.[160]

Compensatory Education

If a school district is found to have deprived a child with a disability of FAPE, the child may be entitled to private school reimbursement, as was discussed previously, or the child may be entitled to receive compensatory education. Essentially, compensatory education is the award of prospective educational services designed to compensate for a previous inadequate program, and is derived from the 1985 Supreme Court's private school ruling in *School Committee of the Town*

[152] Board of Education of the Hyde Park Central School District v. Frank G., 459 F.3d 356 (2d Cir. 2006), cert. denied 522 U.S. __ (2007), 128 S.Ct. 436, 169 L.Ed.2d 325 (2007).

[153] 557 U.S. __ (2009), *aff'd* 523 F.3d 1078 (9th Cir. 2008).

[154] Thompson R2-J School District v. Luke P., 540 F.3d 1143 (10th Cir. 2008).

[155] 250 Fed. Appx. 428 (2d Cir. 2007).

[156] M.H. and J.H. v. Monroe-Woodbury Central School District, 296 Fed. Appx. 126 (2d Cir. 2008).

[157] Lauren P. v. Wissahickeon School District, 310 Fed. Appx. 552 (3d Cir. Feb. 12, 2009).

[158] See Frank G. v. Board of Education, 459 F.3d 356 (2d Cir. 2006); Carmel Central School District v. V.P., 192 Fed. Appx. 62 (2d Cir. 2006).

[159] 20 U.S.C. §1412(a)(10)(C)(iii)(III). See C.G. and B.S. v. Five Town Community School District, 513 F.3d 279 (1st Cir. 2008), where the court held that the parents "single-minded refusal to consider any placement other than a residential one" was unreasonable.

[160] Carmel Central School District v. V.P., 192 Fed. Appx. 62 (2d Cir. 2006); Frank G. v. Board of Education, 459 F.3d 356 (2d Cir. 2006); M.M. v. School Board of Miami-Dade County, Florida, 437 F.3d 1085 (11th Cir. 2006).

of Burlington v. Department of Education of Massachusetts.[161] In *Burlington*, the Court held that parents who place a child in a private school when the public school program violates FAPE may obtain reimbursement for the private school tuition. Lower courts have used this holding to find that if financial reimbursement is allowed, compensatory services must also be allowed.[162]

However, allowing such a remedy is not without some ambiguity. Courts have differed in how the award of compensatory education is to be made. Some courts have found that the child is entitled to compensatory education for the same amount of time that appropriate services were withheld.[163] Other courts have adopted an "equitable focus" which rejects a day for day approach and emphasizes the need of the student to be appropriately educated under IDEA.[164] In addition, the IEP applicable to children receiving compensatory education may also need to provide more services than might be required in a general IEP since the IEP for children receiving a compensatory education must be created to compensate for the denial of appropriate education.[165]

Section 1983 Actions

Section 1983 authorizes suits against state officials and others acting "under color" of state law for deprivation of rights derived from the "Constitution and laws" of the United States.[166] The application of section 1983 with its damages for pain and suffering to IDEA is unclear. Some courts have held that IDEA's statutory scheme does not allow for damages.[167] However, other courts have allowed damages.[168]

Attorneys' Fees

Background

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,[169] or section 1988 of the Civil Rights Attorneys' Fees Award Act,[170] to seek fees. However, the Supreme Court

[161] 471 U.S. 359 (1985).

[162] See e.g., Reid v. District of Columbia, 401 F.3d 516 (U.S. App. D.C. 2005); Draper v. Atlanta Independent School System, 518 F.3d 1275 (11th Cir. 2008).

[163] M.C. v. Cent. Regional School District, 81 F.3d 389 (3d Cir. 1996).

[164] Reid v. District of Columbia, 401 F.3d 516 (U.S. App. D.C. 2005); Board of Education of Fayette County, Kentucky v. L.M., 478 F.3d 307 (6th Cir. 2007); Neena S. v. School District of Philadelphia, 2008 U.S.Dist. LEXIS 102841 (Dec. 19, 2008).

[165] Reid v. District of Columbia, 401 F.3d 516 (U.S. App. D.C. 2005).

[166] 42 U.S.C. §1983.

[167] See Padilla ex rel. Padilla v. School District No. 1, 233 F.3d 1268 (10th Cir. 2000); A.W. v. Jersey City Public Schools, 486 F.3d 791 (3d Cir. 2007); J.S. v. Isle of Wight County School Board, 402 F.3d 468 (4th Cir. 2005).

[168] D.D. ex rel. V.D. v. N.Y. City Board of Education, 465 F.3d 503 (2d Cir. 2006). For a more detailed discussion of IDEA and Section 1983 see Suzanne Solomon, "The Intersection of 42 U.S.C. §1983 and the Individuals with Disabilities Education Act," 76 Fordham L. Rev. 3065 (May 2008). See also Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008), where the court found that parents could seek monetary damages under section 504 for a violation of FAPE.

[169] 29 U.S.C. §794a.

[170] 42 U.S.C. §1988.

in *Smith v. Robinson*[171] 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."[172] The Court further noted that allowing the use of other statutes to provide for attorneys' fees would "be inconsistent with Congress' carefully tailored scheme."[173]

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.[174] 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.[175] Because of the time required to litigate cases brought under IDEA, cases seeking attorneys' fees from the parent or parent's attorney under this new provision from the 2004 reauthorization have not yet been decided; however, several cases seeking these attorneys' fees have been filed with the lower courts.[176]

The ADA allows a court, in its discretion, to award attorneys' fees to a prevailing party. In *Buckhannon Board and Care Home, Inc., v. West Virginia Department of Human Resources*,[177] the Supreme Court addressed the "catalyst theory" of attorneys' fees which posits that a plaintiff is a prevailing party if the lawsuit brings about a voluntary change in the defendant's conduct. The Court rejected this theory finding that attorneys' fees are only available where there is a judicially sanctioned change in the legal relationship of the parties.[178]

Lower Court Decisions

Courts have consistently applied *Buckhannon* to the attorneys' fees provision in IDEA. In several cases, attorneys' fees have been given to the party who prevailed in administrative proceedings, provided that result was legally enforceable.[179] Additionally, attorneys' fees have been given to the prevailing party in judicial proceedings, even if the party prevails because of a dismissal on

[171] 468 U.S. 992 (1984).

[172] *Id.* at 1009.

[173] *Id.* at 1012.

[174] P.L. 99-372.

[175] 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 Nancy Lee Jones.

[176] *See* Bill Turque, *D.C. Files Suit Over Special-Ed Cases It Calls Frivolous*, The Washington Post, December 13, 2008, at B02, *available at* http://www.washingtonpost.com/wp-yn/content/article/2008/12/12/AR2008121203848.html.

[177] 532 U.S. 598 (2001).

[178] For more information about the *Buckhannon* decision, see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

[179] See P.N. and M.W. v. Clementon Board of Education, 442 F.3d 848 (3d Cir. 2006); A.R. ex. rel. R.V. et. al. v. New York City Department of Education, 407 F.3d 65 (2d Cir. 2005); Department of Education, State of Hawaii v. Leialoha J. ex. rel. Presh'es J., 2008 U.S. Dist. LEXIS 87854 (D. Hawaii Oct. 29, 2008).

the merits.[180] However, courts will only award attorneys' fees for relief obtained through a settlement agreement if that agreement received judicial approval.[181] Attorneys' fees will not be awarded for voluntary settlements[182] or purely private settlement agreements[183] that are not judicially sanctioned or do not require judicial approval to take effect. Also, in *Drennan v. Pulaski County Special School District*,[184] a party was not awarded attorneys' fees when it had not performed certain duties that were ordered by the court as a precondition of receiving relief from the school district. Attorneys' fees also will not be awarded to parties for representation by consultants[185] or by parent-attorneys.[186]

Courts have great discretion when deciding the amount of attorneys' fees to award to a prevailing party. Based on the degree of success that is achieved by a party, a court may decide to award less than the full amount of attorneys' fees requested by the party.[187] In one case, the court even reduced the party's attorneys' fees because the party rejected a settlement offer from the school district but accomplished little more in court than was offered in the proposed settlement.[188] Additionally, Congress first imposed a fee cap on IDEA cases brought in the District of Columbia in FY1999 through a provision in the annual District of Columbia Appropriations Act, and a cap has been part of every subsequent D.C. appropriations act since that time.[189]

[180] District of Columbia v. Jeppsen and M.J., 514 F.3d 1287 (D.C. Cir. 2008).

[181] Bassman v. Chicago Public Schools, District #299, 2008 U.S. Dist. LEXIS 87469 (N.D. Ill. Oct. 29, 2008).

[182] Bingham et. al. v. New Berlin School District, 550 F.3d 601 (7th Cir. 2008).

[183] See Smith v. Fitchburg Public Schools, 401 F.3d 16 (1st Cir. 2005); P.N. ex. rel. T.N. v. Seattle School District, No. 1, 474 F.3d 1165 (9th Cir. 2007); Salley v. Trenton Board of Education, 156 Fed. Appx. 470 (3d Cir. 2005); Mr. L. ex. rel. M. v. Sloan and Norwalk Board of Education, 449 F.3d 405 (2d Cir. 2006); Evans v. Grossmont Union High School District et. al., 197 Fed. Appx. 648 (9th Cir. 2006); Bassman v. Chicago Public Schools, District #299, 2008 U.S. Dist. LEXIS 87469 (N.D. Ill. Oct. 29, 2008).

[184] 458 F.3d 755 (8th Cir. 2006).

[185] A.H. v. South Orange Maplewood Board of Education, 153 Fed. Appx. 863 (3d Cir. 2005).

[186] See, for example, S.N. ex. rel. v. Pittsford Central School District, 448 F.3d 601 (2d Cir. 2006); Whitney Ford ex. rel. v. Long Beach Unified School District, 461 F.3d 1087 (9th Cir. 2006); Van Duyn v. Baker School District 5J, 502 F.3d 811 (9th Cir. 2007).

[187] See, for example, Crawford et. al. v. San Dieguito Union School District, 202 Fed. Appx. 185 (9th Cir. 2006); A.S. ex. rel. V.S. and G.S. v. Colts Neck Board of Education, 190 Fed. Appx. 140 (3d Cir. 2006); Aguirre v. Los Angeles Unified School District, 461 F.3d 1114 (9th Cir. 2006); Starkey ex rel. Starkey v. Somers Cent. Sch. Dist., 2008 U.S. Dist. LEXIS 104064 (S.D.N.Y. Dec. 23, 2008).

[188] See V.G. by J.G. v. Auburn Enlarged Cent. Sch. Dist., 51 IDELR 215 (N.D.N.Y. 2008). However, a school district does not shield itself from attorneys' fess simply by making a settlement offer, and a party may still receive attorneys' fees if it is "substantially justified" in rejecting the settlement offer. See Hawkins v. Berkeley Unified Sch. Dist., 51 IDELR 185 (N.D. Cal. 2008). Additionally, evidence of a settlement agreement that was offered following confidential mediation but referenced the mediation session cannot be used to show that the party rejected a school district's settlement offer. See J.D. v. Kanawha County Board of Education, 571 F.3d 381 (4th Cir. 2009).

[189] See, for example, Kaseman v. District of Columbia, 444 F.3d 637 (D.C. Cir. 2006); Pullins v. Community Services for Autistic Adults and Children, 171 Fed. Appx. 867 (D.C. Cir. 2005); Whatley v. District of Columbia, 447 F.3d 814 (D.C. Cir. 2006); Jester v. Government of the District of Columbia, 474 F.3d 820 (D.C. Cir. 2007); Blackman et. al. v. District of Columbia et. al., 456 F.3d 167 (D.C. Cir. 2006). For an example of the appropriation provision that caps IDEA fees in the District of Columbia, see Consolidated Appropriations Act, 2008, P.L. 110-161, § 819.

Expert Witness Fees

Although there is no specific provision allowing a court to award to expert witness fees to prevailing parents, the language regarding attorneys' fees has 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.... "[190]

The parents in *Arlington Central School District v. Murphy*[191] 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,[192] 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."[193] 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."[194] 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.[195]

One bill, H.R. 4188, was introduced in the 110th Congress to amend IDEA to include the fees of expert witnesses. H.R. 4188 specifically provided that "the term 'attorneys' fees' shall include the fees of expert witness, including reasonable costs of any test or evaluation necessary for the preparation of the parent or guardian's case in the action or proceeding."

Systemic Compliance Complaints

IDEA has two separate means of resolving disputes: (1) the impartial due process procedures[196] and (2) the state complaint resolution system,[197] and the state complaint regulations specifically allow complaints by "any organization or individual."[198] In addition, the Department of Education is responsible for monitoring implementation of IDEA.[199]

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[190] 20 U.S.C. §1415(i)(3)(B).

[191] 548 U.S. 291 (2006).

[192] P.L. 99-372.

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

[194] 548 U.S. 291, 295 (2006).

[195] 548 U.S. 291, 303 (2006). 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 Nancy Lee Jones.

[196] 20 U.S.C. §1415.

[197] 34 C.F.R. §§ 300.151-300.153.

[198] 34 C.F.R. §300.153(a).

[199] 20 U.S.C. §1416.

In 1975, Congress established a protection and advocacy system (P & A's) to advocate and protect the rights of individuals with developmental disabilities.[200] Many of the court cases filed by P & A's are class action lawsuits aimed at systemic violations of the rights of an individual and a number of these cases have involved special education students.[201] These cases have often involved issues concerning the P & A's access to student records.[202]

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[200] The Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §15001 et seq.

[201] For a discussion of IDEA and the enforcement of systemic, not individual, complaints see Monica Costello, "Systemic Compliance Complaints: Making IDEA's Enforcement Provisions a Reality," 41 U. Mich. J. L. Reform 507 (Winter 2008).

[202] Unified School District No. 259 v. Disability Rights Center of Kansas, 491 F.3d 1143 (10th Cir. 2007); Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Hartford Board of Education, 464 F.3d 229 (2d Cir. 2006).