

Chapter

Six

The Special Education Process: Eligibility and Entitlement

An advocate representing children in the delinquency system should anticipate that a large percentage of those children are eligible for special education, related services, and transition services.

Written by

Mary G. Hynes

A child who is between the ages of three and twenty-one (until the end of the semester in which the child turns twenty-two) and has a disability that adversely affects the child's educational performance likely is entitled to a Free, Appropriate Public Education (FAPE). Common disabilities include mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities. A FAPE must be in accordance with state educational agency standards, must include an appropriate elementary or secondary education in the state involved, and also must be based upon an Individualized Education Program (IEP) design-ed for the child. A FAPE must be provided by the state at no cost to the child or, of course, to the child's parent(s).

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A FAPE consists of special education, related services, and, if the child is fourteen years old or older, transition services. Related services are, in essence, any services necessary to help the child benefit from the special education services. Transition services are services that prepare the child to make the transition from secondary school to post-secondary school, from school to work, and from living dependently to living independently. Both categories of services, related services and transition services, are broad categories. The Individuals with Disabilities Education Act (IDEA) and its implementing regulations list a number of these services which state that the lists are not exhaustive or

exclusive.

The Supreme Court has defined FAPE to require that the school system rigidly follow the procedural requirements of the IDEA. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Procedural violations by the school system likely indicate that the school system has denied the child a free, appropriate public education. On the other hand, appropriateness of an educational program does not require maximizing the child's educational opportunities; rather, appropriateness means that the child is receiving some educational benefit that allows the child to learn the general curriculum adopted for all students, to make meaningful progress in other areas of educational need related to his or her disability, and to make progress towards graduation from year to year.

An advocate representing children in the delinquency system should anticipate that a large percentage of those children are eligible for special education, related services, and transition services. These services can help to stabilize a child and justify, among other things, a court's decision not to detain the child.

I. Eligibility

The first step in determining whether a student may be entitled to special education and related services is to ascertain whether the student has a disability. If the student has a disability covered by the IDEA, the second step is to establish that the child's disability adversely affects the child's educational performance to the extent that special education and related services are necessary. If the student has a disability that is not covered by the IDEA, or the disability does not adversely affect the student's educational performance, the student may still be entitled to protection under section 504 of the Rehabilitation Act. Depending upon the child's needs, section 504 protection would entitle the student to receive special education and related services, regular education and related services, or

accommodations within regular education.

A. The IDEA: The basic federal law for children with disabilities affecting education

The (IDEA) covers children with certain specific disabilities from the ages of three through twenty-one.¹ 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*. These disabilities are: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. 20 U.S.C. § 1401(3)(A)(I); 34 C.F.R. § 300.7 (1997). The regulations include “multiply handicapped” as a separate disability. 34 C.F.R. § 300.7(a)(5) (1997). A student who has one of these enumerated disabilities is eligible for special education and related services if the disability adversely affects the student’s educational performance to the extent that special education and related services are necessary. 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R.

¹Individuals with Disabilities Education act (IDEA) eligibility continues through the semester in which the child turns twenty-two. With the exception of certain older students who are incarcerated in adult facilities and were not previously identified as needing special education, federal law requires that states provide a free appropriate public education (FAPE) to all students from the ages of three through twenty-one unless the provision of educational services to children of ages three, four, five, eighteen, nineteen, twenty, or twenty-one would be contrary to State law or practice. 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.122 (1997). In other words, if State law does not provide for educational services to any children in this age range, the State need not provide special education and related services to children with disabilities in this age range. See *Stewart v. Salem Sch. Dist.*, 670 P.2d 1048 (Or. App. 1983)(Oregon not required to provide special education services to children under regular school age where Oregon did not provide any education services to non-disabled students in the same age range).

§300.7(a)(1) (1997).²

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Advocates must thoroughly familiarize themselves with the criteria for each of the disabling conditions since the nature of the disabling condition will be a primary consideration in developing the child’s educational programming. An accurate understanding of the child’s disabling condition is fundamental to creating an educational program which will meet the student’s unique needs. For example, an educational program designed to meet the needs of a student with learning disabilities would not be appropriate to meet the needs of a student with mental retardation. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (9th Cir. 1987)(distinguishing mental retardation from learning disabilities). To secure an appropriate educational program, therefore, an advocate must become familiar with, and conversant in, the defining criteria for each disability. The federal regulations define the various disabilities at 34 C.F.R. §300.7.³

²At the States’ discretion, children ages three through nine who are experiencing developmental delays may also be eligible for services under the IDEA. 20 U.S.C. §1401(3)(B). This category of eligibility – developmental delays – for children ages three to five is in addition to the other enumerated disabilities. Prior to the 1997 amendments to IDEA, the upper limit for eligibility in the developmental delay category was age five. See 34 C.F.R. §300.7(a)(2)(1997).

³For an extensive discussion of educational evaluations and diagnosing disabilities, see Chapter 8, *infra*.

B. The Rehabilitation Act

If a student is not eligible for special education and services under the IDEA, the student may still be eligible to receive services under section 504 of the Rehabilitation Act. 29 U.S.C. §794; C.F.R. §194 *et seq.* The Rehabilitation Act provides that: “no otherwise qualified individual with a disability . . . shall, solely be reason of his or her disability, be excluded from participation in any program or activity receiving Federal financial assistance. . .” 29 U.S.C. §794(a). A “person with a disability” means a person who (1) has a physical or mental impairment which substantially limits one or more major life activities (including learning); or (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 34 C.F.R. §104.4 (j). A student is considered “otherwise qualified” for educational services if the student is of compulsory school age or if the state provides educational services to non-disabled students of the same age. 34 C.F.R. § 104.4(k). A student is also “qualified” if the student is of an age during which it is mandatory under state law to provide educational services to people with disabilities, or is someone to whom the state is required to provide FAPE under IDEA. *See* 34 C.F.R. §104.3(k)(2) (ii), (iii).

As a general rule, most students with disabilities will be covered by the IDEA, without reliance on the Rehabilitation Act. However, in some instances, a student may have a disability that is not covered by the IDEA. For example, Attention Deficit Disorder (ADD),⁴ an increasingly prevalent disability of elementary age children, is sometimes, but not always, covered by the IDEA under the category of “other health impairment.”⁵

⁴In this context, the term “Attention Deficit Disorder (ADD)” includes the variant “Attention Deficit Hyperactivity Disorder (ADHD).”

⁵In order to qualify as an “other health impairment” under IDEA, a particular child’s Attention Deficit Disorder must be a chronic or acute

However, courts have held that a student with ADD may be “otherwise qualified” to receive special education and related services under the Rehabilitation Act, even if the student is not eligible under the IDEA. *See Lyons v. Smith*, 829 F.Supp. 414 (D.D.C. 1993). Another example of where § 504 might be important is where a child has a disability under IDEA, but does not need “special education” -- and so is not IDEA-eligible. Section 504 would nonetheless require the provision of related services and accommodations.

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In other cases, a student with a disability may not require special education services but may be subject to discrimination, thus entitling the student to protection under the Rehabilitation Act. For example, a student who is HIV positive or who has been diagnosed as having AIDS may not need any special services, but may require protection from discriminatory exclusion from

health problem that results in limited alertness and adversely affects educational performance. U.S. Department of Education Joint Policy Memorandum, September 16, 1991, reprinted at 18 IDELR (Individuals with Disabilities Law Report) 116. *See also* 34 C.F.R. § 300.7 (defining “other health impairment”). Where a child, because of ADD, has heightened alertness to environmental stimuli and, as a result, limited alertness in regard to academic tasks and educational performance, the “limited alertness” criterion is met, and he or she may be eligible for IDEA services. *See Response to Inquiry of Cohen*, 20 IDELR23 (U.S. Department of Education/Office of Special Education Programs 5/13/93). *See also Morgan v. Chris L.*, 927F. Supp. 267 (E.D. Tenn. 1994), *aff’d.*, 106 F.3d 401 (6th Cir. 1997) (child with ADD protected by IDEA).

school on the basis of the nature of the disabling condition. *See, e.g., District 27 Community Sch. Bd. v. Board of Educ.*, 502 N.Y.S. 2d 325 (Sup. Queens 1986) (illegal segregation of HIV positive student); *Robertson v. Granite City Com. Unit Sch. Dist.*, 684 F. Supp. 1002 (S.D. Ill. 1988) (illegal segregation of student with AIDS).

II. Entitlement

The nature of the entitlement to a FAPE is defined by statutory and regulatory law and by case law. Advocates must be familiar with both the statutory and regulatory definitions of FAPE, as well as the substantive standard for FAPE articulated by the Supreme Court in *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

A. The statutory and regulatory entitlement

Definitions of the three terms “free, appropriate public education (FAPE)”, “special education”, and “related services”, construed together, describe the core of the statutory entitlement under the IDEA. A fourth term, “transition services”, added to the statute by amendment in 1990, rounds out the services to which an adolescent with a qualifying disability is entitled.

The IDEA provides that a “free, appropriate public education (FAPE)” means “special education and related services that (A) have been provided at public expense. . .; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program. . .” 20 U.S.C. § 1401(8); 34 C.F.R. § 300.8 (1997). The regulations implementing § 504 also entitled covered students to a “free appropriate public education.” *See* 34 C.F.R. § 104.33(a). For purposes of § 504, “free appropriate public education” means the provision of regular or special education and related aids and services

that are designed to meet the needs of the individual student as well as the needs of students without disabilities are met. 34 C.F.R. § 104.33(b).

The IDEA statute and regulations further define the terms “special education” and “related services”. “Special education” means “specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability. . .” 20 U.S.C. § 1401(25); 34 C.F.R. § 300.17 (1997). The term “related services” means “transportation, and such developmental, corrective, and other supported services. . . as may be required to assist a child with a disability to benefit from special education. . .” *See Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 833 (1984).⁶

Further, the term “related services” is broadly defined to include, but is not limited to: speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility training, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training. 20 U.S.C. § 1401 (22); 34 C.F.R. § 300.16 (1997).

Section 300.16(b) of the Code of Federal Regulations as codified in 1997, provides definitions of specific related services listed in § 300.16(a)’s general definition of “related services”. Of particular note to the advocate for

⁶For an explanation of the distinction between a prohibited “medical service,” for purposes other than diagnosis and evaluation, and a permissible “school health services,” *see Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (clean intermittent catheterization of a child appropriately characterized as a school health service, rather than as a medical service).

children with disabilities who are enmeshed in the delinquency system are “counseling services”, defined in § 300.16(b)(2); “medical services”, defined in § 300.16(b)(4); “occupational therapy”, defined in § 300.16(b)(5); “parent counseling and training”, defined in § 300.16(b)(6); “physical therapy”, defined in § 300.16(b)(7); “psychological services”, defined in § 300.16(b)(8); “recreation”, defined in § 300.16(b)(9); “rehabilitation counseling services”, defined in § 300.16(b)(10); “social work services in schools”, defined in § 300.16(b)(12); “speech pathology”, defined in § 300.16(b)(13); and “transportation”, defined in § 300.16(b)(14).

A requirement added to IDEA in 1990 and amended in 1997, designed to assist adolescents in moving into the “post-school” world, provides that IEPs must include “transition services.” Transition services focusing on the student’s course of study must be included in the IEP beginning at age fourteen. 20 U.S.C. § 1414(d)(1)(A)(v)(ii). The full array of transition services must be in place by no later than age sixteen, and younger if appropriate. *Id.*

The term “transition services” means a coordinated set of activities for a student, designed within an outcome-oriented process, which pro-motes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. 20 U.S.C. § 1401(30); see 34 C.F.R. § 300.18(a), (b) (1997).

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An advocate can obtain a broad array of meaningful services for a child based upon the statutory and regulatory definitions of “related services” and “transition services”. Moreover, in listing categorical examples of related services, transition services, and other entitlements (as well as for various other requirements), the IDEA's implementing regulations' listings are explicitly not exclusive.⁷

The use of the word “include” means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.” 34 C.F.R. § 300.9 (1997). Hence, by applying the definitions of “related services” and “transition services”, an advocate can argue that the provision of a particular service is appropriate and must appear in the child's IEP even if the service sought is not listed explicitly in the IDEA's implementing regulations.⁸

⁷See, e.g., Note to 34 C.F.R. § 300.16 (1997) that states, in relevant part, that “[t]he list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a child with a disability to benefit from special education.” Similarly, the note to 34 C.F.R. § 300.18 (defining “transition services”) states that [t]he list of activities in [the regulation] is not intended to be exhaustive.”

⁸In other words, the fact that the service sought does not appear as a related service or a transition services in a listing in the regulations does not preclude that service from being defined as either a related service or as a transition service. Section

B. The Supreme Court's definition of (FAPE)

In *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court provided its interpretation of what constitutes a free, appropriate public education (FAPE) for purposes of IDEA. In *Rowley*, the parents argued that their child Amy, who was deaf, required instruction by a qualified sign-language interpreter in all of her academic classes in order to maximize her academic potential. The school argued that Amy did not require a full-time sign language interpreter because she was achieving passing marks with the assistance of a hearing aid, one hour of tutorial assistance, and speech therapy. The District Court found that while Amy was “advancing easily from grade to grade” in her regular education classes without an interpreter, she “understands considerably less of what goes on in class than she could if she were not deaf,” and, consequently, was not performing up to her fullest capability. *Id.* at 185. This disparity between her achievement and her potential led the District Court, and the Circuit Court, to agree with the parents that the school had denied Amy a FAPE. *Id.* at 186.

The U.S. Supreme Court reversed, holding that the IDEA does not impose an obligation on school systems to develop educational programs designed to maximize the potential of students with disabilities. *Id.* at 200. Instead of creating a federal substantive standard for special education program- ming, the Court held that the IDEA is largely a procedural statute and that compliance with the Act’s procedures will generally yield an appropriate substantive result. In the words of the Court:

When the elaborate and highly specific procedural safeguards . . . are contrasted with the general and somewhat imprecise substantive admonitions

300.9 of the C.F.R. defines “include” in a manner that negates a school district representative from arguing “expresio unius est exclusio alterius.”

contained in the Act, we think that the importance Congress attached to these procedural safeguards can not be gain-said. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard. We think that . . . adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Id. at 205-206. Consequently, the Court articulated a two-pronged test for determining if whether a school has provided FAPE: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonable calculated to enable the child to receive educational benefits?” *Id.* at 206-207.⁹

Courts have not been uniform in their

⁹In assessing whether the IEP is “reasonably calculated to enable the child to receive educational benefits” the Court noted that when a child with a dis-ability is “being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational bene-fit.” *Id.* at 207 n.28. Advocates seeking to apply this standard should attend not only to whether a student is passing from grade to grade, but also, obviously, to whether the student is achieving curricular goals. A shorthand system for monitoring academic progress is to check the student’s scores on standardized achieve-ment tests. All too often, children receive “social pro-motions” that, in effect, heighten the child’s feeling of being lost academically and hasten the day when the child stops attending regularly or simply drops out of school.

application of either prong of the *Rowley* standard. With regard to the test for procedural sufficiency, courts have vacillated between ruling that procedural failings alone render the resulting program invalid, to holding that some degree of prejudice flowing from the procedural violation must also be established. One Ninth Circuit case holds that the obligation to provide formal written notice of a proposed placement “should be enforced rigorously” under the first prong of the *Rowley* test, and that a school’s failure to provide such formal notice is “not merely technical” but renders the school’s proposed program invalid. *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994) *cert. denied*, 115 S.Ct. 428. *But see, Max M. v Illinois State Bd. of Educ.*, 629 F. Supp. 1504, 1517-18 (N.D. Ill. 1986)(failure to provide written notice of rights was not fatal where parents participated in developing educational program).

Yet another Ninth Circuit case holds that “procedural flaws do not automatically require a finding of a denial of a FAPE,” but that such a denial occurs only when those flaws result in “loss of educational opportunity” or “seriously infringe the parents’ opportunity to participate in the IEP formulation process.” *W.G. v. Target Range*, 960 F.2d 1479, 1484 (9th Cir. 1992)(failure to include child’s parents and teacher in development of IEP rendered IEP invalid). *See also, Hiller v. Bd. of Educ. of Brunswick Cent. Sch. Dist.*, 743 F. Supp. 958,970 (N.D.N.Y. 1990)(procedural failings did not result in denial of FAPE where parents were “thoroughly involved” in educational planning for child).

With regard to the second prong of the *Rowley* test, the substantive appropriateness of the program, courts have generally given school districts considerable latitude. In *Lachman v. Board of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988)(*cert. denied*, 488 U.S. 925), the Court refused to order the school district to adopt a teaching method desired by the child’s parents, holding: “*Rowley* and its progeny leave no doubt that parent, no matter how well-motivated, do not have a right under the EAHCA to compel

a school district to provide a specific program or employ a specific methodology . . .”¹⁰ *Accord, Straube v. Florida Union Free Sch. Dist.*, 801 F. Supp. 1164,1176 (S.D.N.Y. 1992) (IDEA does not impose obligation to “employ a specific methodology” or “provide the ‘best’ available education but rather ‘appropriate’ education”).

In cases, however, in which the evidence establishes that a student has made little progress over time in meeting the objectives contained in an individualized educational program, courts have not hesitated to rule that student has been denied FAPE. *See Ojai Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1992) (*cert. denied*, 115 S.Ct. 90 (failure to make any progress on IEP goals for seven years was sufficient evidence that the educational placement was inappropriate.) In addition, if the school’s proposed placement, whatever its intrinsic value, is unable to meet the unique educational needs of a student with a disability, a court will conclude that the program is inappropriate. *See, e.g., Smith*, 15 F.3d at 1525 (placement in a group setting was inappropriate for autistic child where child required full-time, one-to-one instruction in order to learn). Courts have also found a violation of the right to FAPE where, for example, the school’s proposed IEP and placement provided for only four months’ worth of progress in reading skills over an academic year, *Carter v. Florence County Sch. Dist. No.4*, 950 F. 2d 156 (4th Cir.1991), *affirmed*, 114 S.Ct. 361 (1993), and the school’s proposal failed to provide for meaningful educational strategies to address the behavioral manifestations of a child’s emotional disturbance. *Chris D. v. Montgomery Rd. Of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990). Throughout, courts have stressed that “benefit” must be meaningful in order to meet the *Rowley* standard. *See, e.g., Cordrey v. Euckert*, 917 F.2d 1460,1473 (6th Cir.1990), *cert. denied*, 111 S.Ct. 1391 (1991) (child must benefit meaningfully within his or

¹⁰“EAHCA” stands for the Education of All Handicapped Children Act, an earlier name of the IDEA.

her potential); *Polk v. Susquehanna Intermediate Sch. Dist.*, 853 F.2d 171,184 (3rd Cir. cert. denied, 109 S.Ct. 838 (1988) (de minimis or trivial benefit insufficient; whether benefit is de minimis must be gauged in relation to child's potential); *Hall v. Vance*, 774 F.2d 629, 636 (4th Cir. 1985) (“Congress did not intend that a school system could discharge its duty. . . by providing a program that produces some minimal academic advancement, no matter how trivial”).

In addition, *Rowley* and the lower court decisions applying it must now be read in light of 1997 amendments to the IDEA stressing that the right to a FAPE includes the right to meaningful opportunities to learn the content of the general curriculum adopted for all students, and to make meaningful progress in that curriculum. The IDEA now explicitly requires that IEPs describe how the child's disability affects participation and progress in the general curriculum, and contain goals and objectives geared towards enabling the child to do so; include special education, related services and supports for school personnel that will allow the student to progress in the general education curriculum; and be reviewed periodically and revised to address any lack of expected progress in the general curriculum. 20 U.S.C. § 1414(d)(1)(A), (d)(4).¹¹

Also relevant in this context might be two cases holding that parental or student hostility towards a school's proposed placement might preclude the child's attaining sufficient educational benefit/FAPE from the placement. *See Board of Educ. of Community Consolidated Sch. Dist. No.*

21 v. Illinois Rd. of Educ., 938 F. 2d 712 (7th Cir. 1991); *Greenbush Sch. Comm. v. Mr: and Mrs. K.*, 25 IDELR 200 (D. Me. 1996) (holding as well that the child's fear of the school in which it was proposed he be placed would prevent him from receiving educational benefit if the IEP were to be implemented there).

¹¹The statement of Congressional findings included in the IDEA Amendments of 1997 notes that twenty-seven years after the special education statute was first passed, low expectations still plague the education of children with disabilities, and that high expectations, maximum possible access to the general curriculum, and teaching that allows children to meet the challenging expectations that have been set for all students are critical. 20 U.S.C. § 1400(c)(4), (5).