

## Special Education Law: Challenges Old and New

From the first campaigns to win educational rights for children with disabilities to the current legal struggles, legal reforms have improved conditions for children with disabilities. But many legal controversies over special education issues remain.

BY MARK C. WEBER

**L**aw has always affected the education of children with disabilities. At one time, the law excluded from school children deemed either unable to learn or merely considered disturbing to others. Special education programs existed in many areas, but as late as the 1970s, Congress found that 1.75 million children were excluded from school entirely and 2.5 million were in programs that did not meet their needs. Legal reform has im-

proved conditions immensely. But many legal controversies remain, and there are practical lessons to be learned from legal developments.

### SIX MILESTONES

1. *PARC and Mills*. Parents of children with disabilities witnessed the movement for educational

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quality for African Americans, and they began campaigns to establish a right to education for their children. Two influential cases — *PARC v. Pennsylvania* and *Mills v. Board of Education*<sup>1</sup> — resulted in decrees ending educational exclusion, mandating adequate services, and establishing rights for parents to challenge decisions about their children's education.

**2. EAHCA, IDEA, IDEIA.** In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), which established that every state accepting federal special education funding must provide an enforceable right to a free, appropriate public education to all children with disabilities. Renamed the Individuals with Disabilities Education Act (IDEA), this law continues to be the backbone of special education law.<sup>2</sup> Recent changes, embodied in the Individuals with Disabilities Education Improvement Act (IDEIA) of 2004, coordinate special education law with the No Child Left Behind initiative and make adjustments to procedures.<sup>3</sup>

IDEA embodies some basic concepts. First among these is zero exclusion, the idea that all children, however severe their conditions, are entitled to an appropriate education. A second concept is a free, appropriate public education itself, sometimes referred to as FAPE.<sup>4</sup> This term conveys the obligation to adapt education to the needs of children with disabilities. A third idea is related services, the entitlement to services other than ordinary classroom instruction. A fourth basic concept is least restrictive environment, the mandate that children with disabilities must be educated to the maximum extent appropriate with children who do not have disabilities, and that related services must be provided to prevent removal from general education. Fifth, the education must be free, and the charges imposed on parents of children with disabilities must be eliminated. A sixth idea is parental participation rights, which include notice and involvement in decisions about their child's education. Seventh is the Individualized Education Program (IEP), a written document for each child that sets out the child's current level of performance, the goals the child will meet, and the specific educational and related services to be provided.

The law also establishes basic procedures for special education identification, evaluation, meetings of school personnel with parents for developing an IEP, placement of the child, and resolution of disputes. Dispute resolution procedures include mediation, as well as the right to a hearing. At the hearing, the parent and the school system can submit documents and

call and cross-examine witnesses. Both sides may appeal the final administrative decision to a court.

**3. Rowley.** Many appeals of hearing decisions have raised the issue of whether the services offered by the school district meet the standard of appropriate education for the child. In the one case that has reached the Supreme Court, *Board of Education v. Rowley*, the Court overturned a decision that required a school district to provide a sign-language interpreter to a child who, through lip reading and use of a hearing

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aid, was performing satisfactorily in class and passing from grade to grade.<sup>4</sup> The Court said the EAHCA was intended to provide a floor of educational opportunity and give children some educational benefit, rather than maximize the potential of children with disabilities to the same degree that the potential of other children was developed. The Court thought that the maximization approach was unworkable and was more than what Congress intended. Although the decision limited its analysis to the situation of a child able to perform adequately in the mainstream, the Court's reasoning has been applied in many other contexts.

**4. Tatro and Garret F.** In *Irving Independent School District v. Tatro* and *Cedar Rapids Community School District v. Garret F.*, the Supreme Court affirmed decisions requiring school districts to provide clean, intermittent catheterization for a child who could not urinate normally and to furnish a variety of specialized nursing services, including ventilator maintenance, for a child who could not breathe without mechanical assistance.<sup>5</sup> The Court rejected arguments that these services were medical ones not covered by the law. The Court's approach reinforced the mandate to place students in the least restrictive environment, for it required school districts to provide elaborate, expensive assistance to enable children to be educated in an ordinary classroom setting.

**5. Burlington and Remedial Matters.** Several other Supreme Court decisions have addressed such topics as tuition reimbursement, damages, and attor-

fees. *Burlington School Committee v. Department of Education* held that tuition reimbursement could be denied through due process hearings and appeals if the school district fails to offer appropriate education and the parents enroll the child in a private school.<sup>6</sup> In *Florence County School District Four v. Carter*, the Court extended the rule to cover programs not approved by the state, as long as the programs provide appropriate education.<sup>7</sup> Courts have further extended these ideas to require payment for related services and mandate compensatory education. Although the Supreme Court initially decided that the law did not entitle prevailing parents to receive attorneys' fees from the school district, Congress amended the law to provide fees. More recently, the Supreme Court ruled that the law does not permit prevailing parents an award of charges for expert witnesses, though there is movement in Congress to overturn that decision.

**i. Honig and Discipline Issues.** As early as the *Ms* case in 1972, courts recognized that suspensions and expulsions kept many children with disabilities out of school. IDEA says that when a school district refuses to change the placement of a child with a disability and the parent invokes due process hearings, the child is to stay put pending resolution of the dispute. In *Honig v. Doe*, the Supreme Court ruled that this provision applies to disciplinary suspensions and expulsions that would cause a change in placement.<sup>8</sup> Therefore, children with disabilities could be kept in school despite a long-term suspension or expulsion, as long as the parents requested a due process hearing, though the Court left open the possibility that a judge could modify the placement if the student was dangerous. Congress later altered this arrangement. The law currently provides that children with disabilities may be removed to interim al-

ternative educational settings if their misconduct is unrelated to their disability or if the misconduct involves weapons, illegal drugs, or infliction of serious bodily injury.<sup>9</sup>

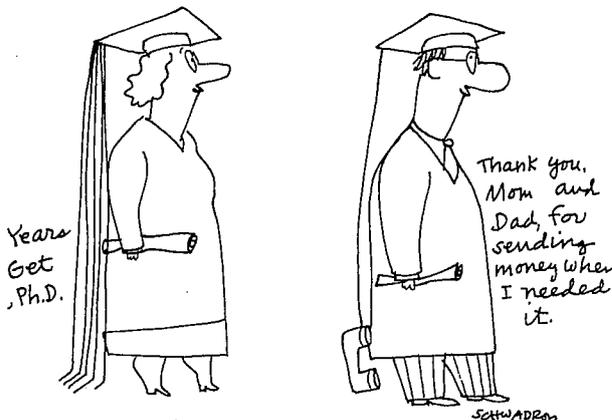
## CURRENT LEGAL ISSUES

**1. Special Education Eligibility.** A great deal of activity in the schools, before hearing officers, and in the courts has to do with eligibility under IDEA. Concerns exist over the possibility that some children are receiving a learning-disabled label when they have simply been deprived of good classroom instruction. There is skepticism about some traditional evaluation methods, such as IQ testing. In addition, many observers have noted that African Americans are disproportionately identified as having mental retardation and emotional disturbance. A recent innovation is response-to-intervention (RTI) methodology, which exposes students who are not performing as well as others to progressively more intense, scientifically validated instruction and concludes only at the end of the intervention that the student who does not respond has a learning disability.

In the IDEA, Congress provided that schools could use up to 15% of their federal special education funding to furnish services to children who have not been identified as eligible under IDEA; these services may include RTI. If there is a racial disproportion in the numbers of children identified, the school district must allocate the money to early intervening services. There is also activity in the courts. A number of decisions have upheld determinations that children who display serious difficulties with learning are nevertheless ineligible for services under IDEA. This trend has received both guarded scholarly support and strenuous criticism.<sup>10</sup>

**2. Related Services and Least Restrictive Settings.** Developments are also on the horizon with regard to related services and least restrictive environment. Advocates are looking to the expansive view of mandatory related services in *Tatro* and *Garret F.* and arguing for more supports to enable children with severely disabling conditions to thrive in ordinary classrooms. In *L.B. v. Nebo School District*,<sup>11</sup> for example, a court of appeals required a school district to provide extensive, at-home, applied behavior analysis services for a child with autism in order to support her success in a mainstream grade school classroom during the school day. Decisions of this type interpret the IDEA language to require that children not be removed from the general education classroom unless they can-

### THE NEW MORTAR BOARD STYLES:



not be educated there with the use of supplementary aids and services.

**3. Preventing Harassment and Bullying.** Parents sometimes object to mainstream placements because their children are harassed because of their disabilities. This harassment may occur in separate settings as well, of course. Courts are increasingly permitting legal remedies — in the form of either tuition reimbursement or damages awards — against school districts that fail to prevent harassment by teachers and students. These developments match the growing recognition that bullying and abuse frequently interfere with children's learning.

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**4. Appropriate Education Standards.** More than a quarter-century after *Rowley*, controversy continues over the level of services to which children are entitled. Outcomes for children in special education, even children who do not have significant cognitive impairments, lag far behind those for other children. Changes to IDEA since *Rowley* to emphasize self-sufficiency and harmonize the statute with standards-based educational approaches have led commentators and at least one federal court in *J.L. v. Mercer Island School District* to conclude that *Rowley* is now obsolete.<sup>12</sup> The *Mercer Island* decision is now on appeal, and further proceedings may shed light on this issue. Regardless of what happens in the courts, it is hard to imagine that the movement toward standards-based education will not raise the bar for special education services and stimulate the demand for better outcomes.

**5. Remedies Developments.** After the *Carter* decision, Congress codified the right to tuition reimbursement, but used awkward wording that might be taken to mean that the remedy applies only when the child has previously received special education from the public school. If that interpretation is adopted, it would rule out reimbursement when the school district, without justification, refuses to offer special education to a child who needs it and the parent enrolls the child in a private special education placement. It would also prevent reimbursement when the public school offers a blatantly inappropriate special educa-

tion placement and the parent places the child in a private program without ever enrolling the child in the school district's program. Courts disagree on whether the law compels these results, and the issue is now before the Supreme Court in *Forest Grove School District v. T.A.*<sup>13</sup>

Issues also exist over when parents may invoke such remedies as the Americans with Disabilities Act and Section 504 of the Rehabilitation Act to obtain damages for conduct by school officials that leads to educational, emotional, or physical harm to children with disabilities, as well as whether damage claims might be asserted for violations of IDEA, the Constitution, and other federal laws through the Civil Rights Act.

In addition, there are continuing developments concerning attorneys' fees. IDEA provides that parents and their lawyers must pay attorneys' fees in some situations when due process hearings are invoked frivolously or for an improper purpose. In addition, courts have generally applied to special education cases a Supreme Court decision from a different context, holding that attorneys' fees for prevailing claimants are not available for a settlement unless that settlement has some form of endorsement from a court, as with a consent decree.<sup>14</sup>

**6. Behavior Intervention.** Student discipline is a longstanding issue in special education, as indicated by *Honig* and the IDEA amendments. More recently, parents and their advocates have focused on behavior



"We made it."

ervention services to keep their children from ending in the kind of conduct that will trigger discipline. Accordingly, due process challenges are coming that educational programs offered by school districts fail to meet standards of appropriate education because they lack adequate behavior intervention plans. A prominent decision is *Neosho R-V School District v. Clark*.<sup>15</sup> Increasingly, parents are also arguing that programs offered by schools lead to excessive removal from the regular classroom because the programs lack behavioral supports, thus violating the least restrictive environment obligation.

## THE PRACTICAL CONSIDERATIONS

**1. Maximizing Resources.** Creative educators know how important it is to maximize the resources available to serve children who need extra support. Under the current law, services may be available through early intervening services, RTI programs, and Title I assistance, all without necessarily designating a child as a "special education" student. The challenge to teachers and administrators is to use all of those sources to raise the educational attainment of children, while also making sure that children eligible under IDEA are properly identified and are afforded their procedural rights. RTI must not be used to delay intensive services for children who need them.

**2. Minimizing Isolation.** The President's Commission on Excellence in Special Education declared that educators should realize that children in special education are the responsibility of general education first, and that thinking about special education and general education as two separate systems leads to perverse incentives and neglect of children's needs.<sup>16</sup> Too often, special education continues to be viewed as a place to hold a child, rather than as a bundle of services to support a child and help him or her succeed. Teachers and administrators can support the efforts of parents and advocates to improve services delivered to children with disabilities in the mainstream, so that the children can learn with and from others and achieve at grade level or above, except perhaps in the rarest cases of serious cognitive impairment.

**3. Promoting Not-So-Special Education.** Does special education have to be special? All children deserve education that will enable them to thrive. Children identified as children with disabilities have procedural rights and educational entitlements that must be observed. But the education they receive need not be so different from that received by other children,

and the education received by all children should be of high quality and tailored to their needs. If extensive support services, behavior intervention, and necessary out-of-classroom help can be given to the students with disabilities, the children will be able to fit seamlessly into the mainstream of public education. That should be the goal of special education and special education law. K

## NOTES

1. *PARC v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972).
2. 20 U.S.C.A. §§ 1400-1482 (West 2009).
3. Mark C. Weber, "Reflections on the New Individuals with Disabilities Education Improvement Act," *Florida Law Review* 58, 2006, pp. 7-51.
4. 458 U.S. 176 (1982).
5. *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984); *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999).
6. 471 U.S. 359 (1985).
7. 510 U.S. 7 (1993).
8. 484 U.S. 305 (1988).
9. Perry A. Zirkel, "Discipline of Students with Disabilities: A Judicial Update." *West's Education Law Reporter* 235, 2008, pp. 1-10.
10. See, for example, Robert A. Garda Jr., "Who Is Eligible Under the Individuals with Disabilities Education Improvement Act?" *Journal of Law and Education* 35, 2006, pp. 291-334 (giving qualified support); and Mark C. Weber, "The IDEA Eligibility Mess," *Buffalo Law Review* 57, 2009, pp. 83-160 (criticizing).
11. 379 F.3d 966 (10th Cir. 2004).
12. *J.L. v. Mercer Island School District*, No. C06-494P, 2007 WL 505450 (W.D. Wash. Feb. 10, 2007).
13. 523 F.3d 1078 (9th Cir. 2008), cert. granted, 129 S. Ct. 987 (Jan. 16, 2009) (No. 08-305).
14. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001).
15. 315 F.3d 1022 (8th Cir. 2003).
16. President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* (Washington, D.C.: U.S. Government Printing Office, 2002).