

9-1-2005

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Recommended Citation

A Renewed IDEA and the Need for More Ardent Advocacy, 32 Hum. Rts. 3 (2005)

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A Renewed IDEA and the Need for More Ardent Advocacy

By Stephen A. Rosenbaum

Almost a quarter century ago the U.S. Supreme Court put its mark on the federal special education statute, the Individuals with Disabilities Education Act (IDEA). In *Board of Education v. Rowley*, 458 U.S. 176 (1982), it held that states accepting federal dollars must provide personalized instruction with sufficient support services to permit children with a disability to benefit educationally from that instruction. But the Court also said that Congress's "intent was more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside." *Id.* at 192. Allowing extensive participation by parents at every juncture of the administrative process is just as important as measuring the resulting Individualized Education Program (IEP) against substantive standards. *Id.* at 205–6. The Court also assumed that parents "will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Id.* at 209.

That ardor may not be enough. After hearing its first IDEA case in many years, the Court recently upheld a Court of Appeals decision placing the burden on parents, rather than the school district, when they challenge the appropriateness of their child's educational program. *Schaffer v. Weast*, ___ U.S. ___, 126 S. Ct. 528 (2005).

Students and parents are also apprehensive in the wake of the IDEA



A teacher's aide and student work together as part of a Champaign, Illinois, elementary school's Individual Education Plan, created in response to NCLB.

reauthorization last December, which went into effect during the summer of 2005, a few months before the thirtieth anniversary of the original act. Many special education supporters think the extensively recast Individuals with Disabilities Education Improvement Act of 2004 spells trouble. The reauthorization contains provisions that appear to dilute important values rooted in federal statutory and case law, such as procedural safeguards to ensure that parents are involved in the educational planning process and that students are not easily expelled—the very protections touted in *Rowley* and other Supreme Court jurisprudence. This will likely have its heaviest impact on parents at the margins—those with minimal education, limited English language proficiency, and little income.

The national trend toward standards-based testing of students as a means for making teachers and administrators more accountable and closing the achievement gap—as

embodied in the controversial No Child Left Behind Act (NCLB)—was also a contributing factor in the IDEA reauthorization. Lastly, Congress has failed once more to appropriate adequate school-based funding at the same time it revisited the special education statute.

Advocates must now engage in new tactics to mitigate what they see as damaging changes and yet be open to honest and critical reflection on changes that may be harmless or even beneficial. I recommend a four-step approach: (1) embrace some of IDEA's new provisions and make the best of others, (2) ensure that parental zeal is not lacking when challenging school district practices, no matter how the law is read by the Court, (3) aggressively monitor the NCLB, and (4) effectively use interest group organizational strategies to effect change.

When George W. Bush established the President's Commission on Excellence in Special Education, he

Associated Press, AP

proclaimed his support for “creating and maintaining a system of public education where no child is left behind. Unfortunately, among those at greatest risk of being left behind are children with disabilities.” 66 Fed. Reg. 51,287 (Oct. 2, 2001). The commission found that while IDEA generally provided basic legal safeguards and access for disabled children, it “place[d] process above results, and bureaucratic compliance above student achievement, excellence and outcomes.” *Id.*

Commissioners also called for early and simplified identification of eligible children, increased and more flexible financing, better preparation, recruitment and retention programs for teachers and administrators, and reduced paperwork. These themes were foreshadowed in a 2001 private think tank report, “Rethinking Special Education for a New Century.” Many of the core principles for reform articulated in the report seem sensible: make IDEA standards based and performance based; use Section 504 of the Rehabilitation Act of 1973, as amended as the civil rights underpinning of special education; streamline the number of eligibility categories based on the need for prevention or intervention, remediation, and/or accommodation; focus on prevention and early intervention, using research-based practices; encourage flexibility, innovation, and choices in placement and services; and provide adequate funding.

Curiously, almost none of the recommendations made by the presidentially appointed National Council on Disability found their way into the reauthorization, even though the council issued two reports on IDEA in the last decade, with suggestions on how to better enforce IDEA through such means as federal funds withholding and increased legal aid to parents.

Inside the New IDEA

The resulting legislation—while affording some good news about improved monitoring of districts, early intervention, and liberalized eligibility definitions—is not consumer friendly. The renewed IDEA reduces the parental rights to notice, informed consent, and the immediacy and availability of review concerning eligibility, placement, or services. Some protections against premature discipline of disabled students have been eliminated. It permits federal funds to be spent on students without disabilities, reduces the so-called paperwork burden, imposes more hurdles to filing for due process hearings, and further limits the awarding of attorneys’ fees.

Some of the provisions weaken present mandates on frequency and notice—of meetings, assessments, documentation, and procedural safeguards. Perhaps most controversial is the elimination of benchmarks or short-term objectives, except for students with the most significant disabilities. A reevaluation needs be

conducted no more than once a year. The former statute required testing and other evaluation in the child’s native language unless “clearly not feasible.” This requirement too has been diluted.

In an effort to elevate function over form, the amendments provide that a due process hearing decision be based on a determination of whether a child receives a free, appropriate public education—and not on purely procedural grounds. There is also a new mandatory thirty-day cooling-off period after filing for due process, and the hearing is limited to adequately pled issues raised in the hearing notice. There is now a statute of limitations of two years prior to the date of filing.

The reauthorized IDEA also contains provisions for mutually acceptable waivers of procedure by parents and school authorities. These include jointly excusing any member of the IEP team from attending a given meeting and revising the education plan, in whole or in part, through written addenda rather than reconvening everyone in person. In addition, the school district is to encourage consolidation of IEP meetings.

The act also provides for a ten-state pilot program granting waivers of paperwork requirements. In a recent national study, 53 percent of special education teachers reported that routine duties and paperwork greatly interfered with their teaching. The accuracy of this is less important than the perception of time spent on tasks considered marginal or irrelevant to the primary role of instruction.

Two defenses are no longer available to disabled students facing suspension or expulsion under the 2004 amendments. To suspend a student for more than ten days is considered a “change of placement,” and the former statute first required an inquiry into whether the violation of school code was a manifestation of the student’s disability. Under the new law, the IEP team may find that manifestation exists only if the behavior was “caused by” the disability or the “direct result” of

Useful Resources

R. Turnbull, N. Huerta & M. Stowe, “The Individuals with Disabilities Act as Amended in 2004” (Beach Center on Disability, The University of Kansas, 2006).

Consortium for Appropriate Dispute Resolution in Special Education (CADRE) (www.directionservice.org/cadre)

Technical Assistance Alliance for Parent Centers (www.taalliance.org)

National Information Center for Children and Youth with Disabilities (www.nichcy.org)

National Center for Cultural Competence at Georgetown University Center for Child & Human Development (cchdc.georgetown.edu/nccc)

the district's failure to implement an IEP—and not simply a “relationship” between behavior and disability.

The amendments also expand the exceptions to the general rule that a student remains in his present placement while awaiting a decision from a hearing officer. Previously, the only exception to the rule covered weapons, drugs, and serious injury.

These changes are in one sense alarming, as they contradict all of the conventional wisdom about the process due in educational planning and dispute resolution. On the other hand, a properly informed client can waive procedures that are of marginal use to testing or educational program design. The family's focus must be on outcomes as well as process. The challenge is to encourage best practices by policy makers and administrators at the local or state level so that many of the IEP requirements regarding notice, short-term objectives, waiver, and reevaluation could be retained or reinstated.

Advocates must also encourage teachers in classrooms and the academy to promote best practices concerning the conduct of meetings, the role of team members, the recording of goals and objectives, and measuring student progress.

Other changes should be accepted and implemented sensibly. Nothing is particularly redeeming about group wordsmithing. Goals and objectives reviewed before a meeting or derived from standardized lists or prior IEPs do not necessarily convert the planning process from collaborative and individualized to authoritarian and off-the-shelf.

An IEP document that is brief and comprehensible and filled with school year *goals* may be more valuable as a lesson plan and report card than a thicker packet replete with painstakingly crafted short-term *objectives*.

As for attendance at IEP meetings and their number, the conventional advice about quality over quantity is solid. Meetings are routinely postponed because the district's cast of thousands cannot possibly align their

calendars. Is it better to postpone a high school meeting for the resistant regular education teacher or the clueless counselor—or to proceed with the productive participation of a knowledgeable therapist and a caring resource teacher? A California IEP task force recently endorsed the concepts of advance preparation, clarification of team roles, and appointment of case managers and, in a nod to the twenty-first century, it recommended that laptop computers be used at meetings to streamline the process. These are the kinds of innovations and desirable practices that a pilot project could stimulate.

Dismissing the criticism of procedural safeguards as rhetoric from hostile school administrators or as rehashed dogma of antigovernment conservatives is easy. Nonetheless, we must acknowledge that the procedures have at times been adhered to in a pro forma or even burdensome manner, with no corresponding positive effect on school program or learning outcomes. Moreover, much can be said for reducing the rancor in school conference rooms and courthouses.

Yet acquiescing or rationalizing change must not be the order of the day. Zealous advocacy must be the byword for parents and students who will be more vulnerable to bureaucratic maneuvers under the guise of fiscal or pedagogical reform.

Growing the Grassroots

The reauthorization requires the redoubling of efforts toward public education and direct representation and assistance. At a recent meeting of lawyers and self-help providers, it was suggested, only half in jest, that parents be furnished “advo-kits” as part of a massive grassroots educational campaign. Clearly, advocates must be prepared to undertake nontraditional, intensive, and multicultural outreach approaches, going beyond workshops where a facilitator writes with markers on flipcharts in front of a polite audience that is fortified by weak coffee and *pan dulce*.

Federally funded parent training

and information and resource centers are untouched by the new legislation. They should be easily reprogrammed to meet IDEA's changes. A more ambitious technical assistance and advocacy scheme recommended by the National Council on Disability to engage private bar associations and legal services was shelved, however.

Despite all attempts at promoting self-advocacy, the reality is that many people will require more intensive support, especially clients who have limited English proficiency, uncertain immigration status, and/or little formal education, or may live in a remote area. Even the much-vaunted technical assistance dispensed to parents can prove ineffectual if the client is unable to translate the legal advice and coaching into effective advocacy. The importance of assistance to *proper* hearing petitioners was underscored in an amicus brief filed on behalf of fourteen disability and education advocacy groups in the just decided *Schaffer v. Weast* case.

In the Winter 2000 issue of *Human Rights*, education activist Lilliam Rangel-Diaz urged that a greater number of publicly funded lay advocates be trained—by law schools and others—for the benefit of youths with disabilities and their parents. These paraprofessionals would be knowledgeable, skilled, and less costly than attorneys. While that vision has yet to reach fruition, a national parental advocacy organization and university-affiliated technical assistance center are in the process of designing a training curriculum, courses, and internships—the Special Education Advocate Training (SEAT) Project—for expanding the ranks of legal advocates, with a grant from the U.S. Department of Education.

Getting Behind No Child Left Behind

The NCLB is a product of the standards-based reform movement and has a lot of currency among policy makers and politicians otherwise opposed to federal intervention in matters of local control. Whether this