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ABSTRACT

This collection of issue papers addresses the inclusion of students with disabilities who are labeled disruptive in general education classrooms. The publication begins by summarizing new provisions in the Individuals with Disabilities Education Act (IDEA) Amendments of 1997. The provisions make it clearer that students with disabilities must be given meaningful opportunities to learn the bodies of knowledge and skills which all students are expected to master and must receive services designed to address unique disability-related needs which enable them to succeed in the general curriculum. The papers that follow include: (1) "History and Overview," which describes the history of discrimination against and neglect of students with disabilities; (2) "The Legal Underpinnings of Inclusion," which discusses the legal bases of inclusion, in statue, regulation, and case law, including the relevance of behavior; (3) "The Duty To Address Behavior," which discusses the nature and scope of the obligation under IDEA to address behavior; and (4) "The Right To Learn the 'Regular' or 'General' Curriculum," which examines the relationship between inappropriate, and illegal, expulsion from the regular education curriculum and exclusion from the regular education classroom; and (5) "Looking Systematically," which offers starting points for identifying issues that might be ripe for systemic advocacy. (Each paper includes references.) (CR)

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IDEA AMENDMENTS STRESS QUALITY, EDUCATION REFORM FOR STUDENTS WITH DISABILITIES

Eileen L. Ordover

The Individuals with Disabilities Education Act ("IDEA") Amendments of 1997,[1] signed into law on June 4 of that year, provide parents, students, educators and advocates important new tools for ensuring that all children with disabilities receive a high quality education. The new law makes it clearer than ever that students with disabilities must be given meaningful opportunities to learn the bodies of knowledge and skills that all students are expected to master; must be included in state- and district- wide assessments; and must receive services designed to address unique disability-related needs *and* enable them to succeed in the general curriculum.

Federal law has long contained these requirements. For example, the "free appropriate public education" to which IDEA[2] entitles all students has always included, by definition, "an appropriate elementary or secondary education in the state involved" that "meets the standards of the State educational agency."[3] The regulations implementing Section 504 of the Rehabilitation Act of 1973,[4] which prohibits discrimination on the basis of disability, require schools to provide children with disabilities with educational programs and services comparable to those provided

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[1] P.L. 105-17, 111 Stat. 37 (June 4, 1997).

[2] 20 U.S.C. §1400 *et seq.*

[3] *See* former 20 U.S.C. §1401(a)(18), recodified by the 1997 amendments at 20 U.S.C. §1402(8).

[4] 29 U.S.C. §794.

their peers.[5] These legal rules meant that all along, schools should have been designing special education programs and Individualized Education Plans ("IEPs") to allow children to attain the skills and standards all other children are expected to attain. They also should have ended practices such as providing children with disabilities with a watered-down curriculum, and excluding them from assessments. Unfortunately, this has not been the case in many communities.

The new IDEA amendments make these existing rights and requirements *explicit* in the law for the first time. The introduction to the new law notes that, 27 years after the special education law was first passed, low expectations still plague the education of children with disabilities.[6] Congress went on to state 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.[7] The new law makes more explicit many rights that parents, educators and advocates can use to transform these goals into reality. The following are highlights of these new provisions.

Evaluations: Evaluations must gather information about strategies and interventions that the child needs to participate and progress in the general curriculum.[8]

Individualized Education Plans: IEPs must describe how the child's disability affects participation and progress in the general curriculum. They must also contain goals and objectives geared towards enabling them to do so. IEPs are to include special education, related services, supplementary aids and services and supports for school personnel that will allow the student to progress in the general education curriculum. IEPS must be reviewed periodically and revised to address any lack of expected progress in the general curriculum.[9]

In addition, IEPs must include any individual modifications needed in administering general state or district wide assessments (*see discussion below).* If, in an unusual circumstance, the IEP team determines that the child will not participate in

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[5] *See* 34 C.F.R. §§104.4(b)(1), (2), (4), 104.34(c).

[6] 20 U.S.C. §1401(c)(4), as amended.

[7] 20 U.S.C. §1401(c)(5), as amended.

[8] 20 U.S.C. §1414(b)(2)(A), (c)(1)(iv), as amended.

[9] 20 U.S.C. §1414(d)(1)(A), (d)(4), as amended.

all or part of such an assessment, a statement of why the assessment is not appropriate and how the child will be assessed must be set forth in the IEP.[10]

IEP and Placement Teams: IEP teams must include someone knowledgeable about the general education curriculum, as well as one of child's regular education teachers.[11] In addition to being IEP team members, parents must be members of any group that makes placement decisions about their child.[12]

Assessment: Children with disabilities must be included in general state and district-wide assessments, with appropriate accommodations where necessary. For the small number of children who cannot participate even with accommodations, states and school districts must create alternate assessments.[13] There should be at least two kinds of alternate assessments. The first kind of alternate assessment should be for children who are capable of learning what the general assessment tests, but need a different way of showing it. A second type must be developed for the small number of children who are so seriously cognitively impaired that they cannot learn what is being tested, even with special education and related services -- and so are receiving a different curriculum.

Performance Goals: States must set goals for the performance of students with disabilities. These goals must be consistent with any goals and standards the State has set for students in general.[14] This means that the state cannot set separate, weaker standards for students with disabilities. Rather, the state must supplement the goals and standards it uses for all students with any additional ones required by the unique needs of children with disabilities. Specific references in the 1997 amendments to performance goals, State and district-wide assessments and the general curriculum must, based on the *rule of construction* provision, be read in a manner that is consistent with the principles of the Act and Section 504. Under this provision nothing in IDEA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children

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[10] 20 U.S.C. §1414(d)(1)(A).

[11] 20 U.S.C. §1414(d)(1)(B)(iv), (v).

[12] 20 U.S.C. §§1414(d)(1)(B), 1414(f) as amended.

[13] 20 U.S.C. §1412(17) as amended.

[14] 20 U.S.C. §1412(16) as amended.

with disabilities,...."[15]

Accountability: The new law requires states and school districts to gather and make public information that parents can use to hold schools accountable for how well their children do in school. First, states must set "performance indicators" they will use to assess how well they are doing in educating children with disabilities, including at least performance on assessments, drop-out rates and graduation rates. The state must report to the public on how well it is doing on these indicators every two years. In addition, the state must make public statistics showing how children with disabilities fare on the general assessments given to all students, including how many are participating and how they achieve. It must do the same regarding children who take alternate assessments.[16]

State improvement grants: The IDEA Amendments of 1997 create a new set of State improvement grants that address those aspects of early intervention, general education, and special education programs that need to be improved to enable children with disabilities meet the State performance goals. The State's improvement plan must be revised based on assessment of progress toward the State performance goals and describe how the State will change its policies and procedures to address systemic barriers to improving children's educational results, hold LEAs and schools accountable, and provide technical assistance to LEAs and schools to improve their students' performance, including professional development to address the needs of school personnel.[17]

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[15] 20 U.S.C. §1415(l) as amended.

[16] 20 U.S.C. §§1412(16), (17) as amended.

[17] 20 U.S.C. §§1451 *et seq.*

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INCLUSION OF STUDENTS WITH DISABILITIES WHO ARE LABELLED "DISRUPTIVE": ISSUE PAPERS FOR LEGAL ADVOCATES

Eileen L. Ordover

November 1997

#2: THE LEGAL UNDERPINNINGS OF INCLUSION

[Note about this series: This is the second in a series of five issue papers on the inclusion in regular education of students with disabilities who are labelled disruptive because of their behavior. The other papers in this series are #1: Background and Overview; #3: The Duty to Address Behavior; #4: The Right to Learn the "Regular," or "General," Curriculum; and #5: Looking Systemically.]

Introduction

Courts have long recognized the rights of students with disabilities to be educated with their non-disabled peers under the United States Constitution,[1] the Individuals with Disabilities Education Act [IDEA],[2] Section 504 of the Rehabilitation Act of 1973,[3] and the regulations implementing these statutes.[4] In *Hairston v. Drosick*,[5] for example, an early decision based on the federal statutes, a federal court expressly found:

> "It is an educational fact that the maximum benefits to a child are received by placement in as normal an environment as possible....A child has to interact in a social way with its peers and denial of this opportunity during his minor years

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[1] *See, e.g., Mills v. Board of Education of the District of Columbia*, 343 F. Supp. 866, 880-881 (D.D.C. 1972).

[2] 20 U.S.C. §1400 *et seq.*

[3] 29 U.S.C. §794.

[4] *See* 34 C.F.R. parts 300.550-556 (1996) (implementing IDEA); 34 C.F.R. §104.34(b) (implementing §504).

[5] 423 F. Supp. 180 (S.D. W.Va. 1976).

imposes added lifetime burdens upon a handicapped individual."[6]

The court further held that any exclusion of a child with disabilities from a regular classroom setting, except as a last resort in situations in which educational needs cannot be met within that classroom, violates both §504 and IDEA.

This paper discusses the key legal principles that have emerged from judicial decisions interpreting and applying the IDEA provision requiring that children with disabilities be educated in regular education settings to the maximum extent appropriate in light of their needs, and prohibiting their exclusion unless education there cannot be achieved satisfactorily even with appropriate supplementary aids and services. Other legal requirements equally critical to full inclusion for children with behavioral manifestations are discussed in the remaining papers in this series.

Presumption and Burden of Proof

IDEA mandates that "to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs 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."[7] Courts have held variously that this language creates a legal "presumption" of, or a statutory "preference" for, education in regular education classrooms with non-disabled peers.[8]

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[6] *Id.*, at 183-84.

[7] 20 U.S.C. §1412(a)(5), as amended by the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17 (June 4, 1997). This provision formerly was codified at 20 U.S.C. §1412(5)(B).

[8] *Hartmann v. Loudon Co. Bd. of Ed.*, ___ F.3d ___, ___, 26 IDELR [Individuals with Disabilities Education Law Report] 167, 169 (4th Cir. 1997) ("mainstreaming provision establishes a presumption"); *Bd. of Ed. Sacramento City Unified School District v. Holland*, 14 F.3d 1398, 1403 (9th Cir. 1994), *cert. denied*, 114 S.Ct. 2679 (provision sets forth Congress's preference for educating children with disabilities in regular classrooms with their peers"), *affirming* 786 F. Supp. 874, 878 ("strong preference for mainstreaming which rises to the level of a rebuttable presumption'); *Oberti v. Bd. of Ed. of Borough of Clementon School District*, 995 F.2d 1204, 1214 (3rd Cir. 1993) ("presumption in favor of mainstreaming"); *Greer v. Rome City School District*, 950 F.2d 688, 695 (11th Cir. 1991), *opinion withdrawn and remanded on other grounds*, 956 F.2d 1025 (11th Cir. 1992), *previous opinion reinstated by rehearing en banc*, 967 F.2d 470 (11th Cir. 1992) ("[w]ith this directive...Congress created a statutory preference for educating handicapped children with nonhandicapped children"); *Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036, 1045 (5th Cir. 1989) ("presumption in favor of mainstreaming"); *Lachman v. Illinois Bd. of Ed.*, 852 F.2d. 290, 295 (7th Cir. 1988), *cert. denied*,

Similar to IDEA, the U.S. Department of Education regulations implementing §504 provide that persons with disabilities shall be educated with non-disabled persons "to the maximum extent appropriate" and shall be placed in the regular program "*unless it is demonstrated by the recipient* that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."[9]

Prior to the 1997 amendments to IDEA, neither IDEA nor the §504 regulations defined the "supplementary aids and services" required to be provided to achieve maximum appropriate inclusion. IDEA now defines the term, somewhat circularly, as "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate...."[10] Consistent with the developing case law in this area, the U.S. Department of Education has stated that "any modifications to the regular education program, i.e. supplementary aids and services that the IEP team determines the student needs to facilitate the student's placement in the regular education environment must be described in the student's IEP and must be provided the student."[11] Examples include

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488 U.S. 925) ("strong preference"); *A.W. v. Northwest R-1 Schl. Dist.*, 813 F.2d 158, 162 (8th Cir. 1987), *cert. denied*, 484 U.S. 847 ("strong congressional preference"); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196 ("very strong Congressional preference").

Note that the maximum appropriate integration requirement also protects children whose needs cannot be met in regular education classes from being placed in overly restrictive and isolated placements. Thus, for example, IDEA and §504 integration requirements (discussed below) would be violated if a child who could be educated appropriately in a special education classroom within a "regular" education elementary school were, nonetheless, placed in a segregated school for children with disabilities. *See, e.g., Roncker.*

[9] 34 C.F.R. §104.34(a) (emphasis added). In addition, the §504 regulations more generally state that schools may not, on the basis of disability, "provide different or separate aid, benefits, or service to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others," or where legally permissible "separate or different programs or activities [are] provided...deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different." 34 C.F.R. §§104.4(b)(1)(iv), (b)(3). The regulations implementing Title II of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, contain similar requirements and prohibitions. *See* 28 C.F.R. §35.130(b)(1)(iv), (2).

[10] 20 U.S.C. §1401(29) as amended.

[11] Judith E. Huemann and Thomas Hehir, U.S. Department of Education/Office of Special Education Programs, Memorandum 95-5, November 23, 1994, reprinted at 21 IDELR 1152 (hereinafter "OSEP Memorandum").

assistance of an itinerant teacher with special education training, a classroom aide, use of computers or other assistive technology devices, modification of the regular education curriculum, consultation between the regular education teacher and special education personnel, provision of some special education and related services within the regular education classroom, etc.[12]

Courts have held that IDEA "does not permit states to make mere token gestures to accommodate [students with disabilities in regular education classrooms]; its requirement for modifying and supplementing regular education is broad."[13] The mandate for maximum appropriate placement in the regular education classroom may not be avoided by a mere showing that a separate placement may be academically superior to placement in an unmodified regular classroom; rather, the school must demonstrate that it has considered "whether supplemental aids and services would permit satisfactory education in the regular classroom."[14]

As the above-emphasized language in the §504 regulation indicates, a school district proposing to remove a child from the regular education classroom has the burden of proving that such removal - whether partial or total - is necessary because education there cannot reasonably be accomplished with the use of supplementary aids and services and/or modification of the regular education curriculum. Courts have held that school districts bear this burden of proof as an IDEA matter as well.[15] In addition, the 1997 Amendments to IDEA recognize and underscore that the burden of proof rests with the school district: effective July 1, 1998, all Individualized Educational Programs must contain "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class...."[16]

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[12] *Id. See also Oberti, supra*, 995 F.2d at 1216 (supplemental aids and services include resource rooms, itinerant instruction, special education training for the regular teacher, behavior modification, "or any other available aids or services appropriate to the child's particular disabilities").

[13] *Daniel R.R., supra* 874 F.2d at 1048. *See also Oberti, supra*, 995 F.2d at 1216.

[14] *Greer, supra*, 950 F.2d at 696.

[15] *E.g., Oberti, supra*, 995 F.2d at 1219; *Daniel R.R., supra*, 874 F.2d at 1044-45 (5th Cir. 1985) (preference for mainstreaming rises to the level of a rebuttable presumption); *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 458 (3rd Cir. 1981), *cert. denied*, 458 U.S. 1121; *Holland, supra*, 786 F. Supp. at 880 n.7, 882; *Davis v. District of Columbia Board of Education*, 530 F. Supp. 1209, 1211-1212 (D.D.C. 1982). *But see Hudson v. Bloomfield Hills Public Schools*, 910 F. Supp. 1291 (E.D. Mich. 1995), *affirmed and opinion adopted*, 108 F.3d 112 (6th Cir. 1997). As virtually all public schools receive federal funds and therefore must comply with 34 C.F.R. §104.34(a), the school will always bear the burden of proof as a §504 matter, regardless of judicial interpretations of the burden of proof under IDEA.

[16] 20 U.S.C. §1414(d)(1)(A)(iv) as amended.

In contrast, prior law required "a statement of...the extent to which such child will be able to participate in regular education programs."[17]

Substantive Standards

The majority of inclusion cases brought to date have been decided under IDEA, rather than §504 or the Americans with Disabilities Act. While differing somewhat in their precise formulations, the federal courts have recognized the following six factors as relevant to the determination of whether a placement is consistent with IDEA's presumption or preference in favor of education in the regular education setting with needed supplementary aids and services. It is critical to note that these cases have not addressed denial of instruction in the content provided in the regular education curriculum but, rather, physical presence in the regular education classroom.[18]

1. the educational benefits available to a child in a regular classroom supplemented by appropriate aids and services compared to the educational benefits of a special education classroom;

   [note that a school district cannot exclude a child from the regular education classroom simply because he or she does not achieve at the same level as nondisabled children in the class[19]]

2. the non-academic benefits of regular classroom placement;

3. the rigor and extent of the school's consideration of supplementary aids and services;

4. the effect of the child's presence on the teacher and other students in the classroom;

5. the harm to a child with disabilities of being placed in segregated classes;

6. the costs of supplementary aids and services necessary to integrate the child with a disability in a regular classroom.

The district court and Third Circuit opinions in *Oberti, supra*, include particularly helpful discussions of these factors, as do the district court and Ninth Circuit opinions in *Holland*,

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[17] See former 20 U.S.C. §1401(a)(20).

[18] For a discussion of curriculum issues, see Paper #4 in this series, *The Right to Learn the "Regular," or "General," Curriculum.*

[19] *See, e.g., Daniel R.R., supra*, 874 F.2d at 1047.

supra, the Eleventh Circuit decision in *Greer*, *supra*, and *Mavis v. Sobol.*[20]

Individualized Determination

As is the case with all decisions under IDEA, decisions implicating the right to be educated in the regular education classroom to the maximum extent appropriate must be based upon individual student circumstances; generalizations or assumptions based upon a child's particular disability are impermissible, as are decisions based upon administrative convenience.[21] Thus in *Daniel R.R.*, *supra*, for example, the appellate court stated that the analysis required by IDEA is "an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the school's response to the child's needs."[22] Similarly, the trial court in *Holland*, *supra*, emphasized that "the decision as to whether any particular child should be educated in a regular classroom setting...is necessarily an inquiry into the needs and abilities of one child, and does not extend to a group or category of handicapped children...."[23]

The required individualized inquiry extends beyond the child's needs and abilities, encompassing as well the efficacy of various strategies for meeting them in the regular classroom.. As held by the Court of Appeals for the Eleventh Circuit in *Greer*, *supra*, "before the school district may conclude that a [child with disabilities] should be educated outside the regular classroom, it must consider...the whole range of supplemental aids and services...for which it is obligated under [IDEA] and the regulations promulgated thereunder to make provision."[24] Moreover, consideration of these issues must occur "prior to and during the development of the IEP."[25]

The Relevance of Behavior

As noted above, federal courts have recognized as a factor relevant to inclusion analysis "what effect the presence of the...child [with a disability] in a regular classroom

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[20] 839 F. Supp. 968 (N.D.N.Y. 1994).

[21] OSEP Memorandum, *supra* (educational decisions under IDEA may not be based solely on category or severity of disability, administrative convenience, the availability of space or the configuration of the delivery system); *Response to Inquiry of Latshaw*, EHLR [Education for the Handicapped Law Report] 213:124 (OSEP 3/1/88).

[22] 874 F.2d at 1048.

[23] 786 F. Supp. at 878.

[24] 950 F.2d at 696.

[25] *Id.*

would have on the education of other children in that classroom."[26] Courts applying this factor have examined two ways in which the "effect" of a child's "presence" has been claimed (by schools) to weigh against inclusion: (1) the child requires a disproportionate amount of teacher attention and/or (2) the child's behavior disrupts the class. Decisions make it clear that such "effects" are relevant only where they persist *even with* the provision of appropriate services aimed at ameliorating them.

In considering the first kind of claimed effect, *Greer, supra*, rejected the notion that the mere fact that a child requires more teacher attention than his or her peers justifies exclusion, emphasizing the school's obligation to consider supplemental aids and services that accommodate the child's need for additional attention.[27] The 1997 amendments to IDEA make even more explicit this obligation, requiring IEPs to include, *inter alia*,"a statement of the program modifications or supports for school personnel that will be provided for the child...to be educated with...nondisabled children."[28]

The Third Circuit decision in *Oberti, supra*, explicitly addressed the second claimed effect, i.e. the child's behavior is too disruptive for regular education placement. The school district there had excluded the student from the regular education classroom because of, in the court's words, his "extremely disruptive behavior" in a prior inclusive kindergarten placement, and in other teaching environments. The district court had found, however, that "the behavioral problems Rafael experienced...`were exacerbated and remained uncontained due to the inadequate level of services provided there,' [and] that Rafael's behavioral problems were diminished in settings where an adequate level of supplementary aids and services were provided."[29] The lower court also found "`nothing in the record to suggest that *at this point in time* Rafael would present similar behavior problems if provided with an adequate level of supplementary aids and services within the matrix of a regular

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[26] *Greer, supra*, 950 F.2d at 697; *see also Hartmann, supra*, 26 IDELR at 167; *Oberti, supra*, 995 F.2d at 1217; *Daniel R.R., supra*, 874 F.2d at 1049; *Roncker, supra*, 700 F.2d at 1063. In so holding, courts have relied upon a Department of Education comment to its regulations implementing IDEA's inclusion mandate, which states

> "[W]here a handicapped child is so disruptive in a regular classroom that the education of other students is *significantly* impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs."

Comment to 34 C.F.R. §300.552 (1996), citing 34 C.F.R. part 104 Appendix, ¶24 (emphasis added). *See also* OSEP Memorandum, *supra*, 21 IDELR at 1155 (explaining relevant factor as being "the degree of disruption of the education of other students, resulting in the inability to meet the unique needs of the disabled student").

[27] *Greer, supra*, 950 F.2d at 697. *See also Oberti, supra*, 995 F.2d at 1217.

[28] 20 U.S.C. §1414(d)(1)(A)(iii)(III) as amended.

[29] 995 F.2d at 1222-23.

education class."[30] All of this being the case, the Third Circuit held, "consideration of the possible negative effects of Rafael's presence on the regular classroom environment does not support the School District's decision to exclude him from the regular classroom."[31]

A Note About "Neighborhood," "Base," or "Home" Schools

In addition to the statutory prohibition on unnecessary removal from regular education settings, the IDEA regulations provide that a child be placed as close to home as possible, and that, unless inconsistent with the IEP, he or she be educated in the same school he or she would attend if nondisabled.[32] The federal Courts of Appeals generally have not been receptive to the contention that these provisions entitle a child to attend his or her home school. Instead, they have held that IDEA permits schools to centralize certain programs and services, and have upheld individual placements so long as the students were sufficiently participating in regular education settings in the non-home school.[33] While a critique of these decisions is beyond the scope of this paper, advocates should be aware that these cases were not necessarily correctly decided, nor do they exhaust all of the possible legal bases for challenging removal from "home," "base" or "neighborhood" schools.

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[30] *Id.* at 1222 (emphasis in original).

[31] *Id.* at 1223.

[32] 34 C.F.R. §300.552(a)(3), (b) (1996). In addition, the §504 regulations provide that "whenever a recipient places a person in a setting other than the regular education environment...it shall take into account the proximity of the alternate setting to the person's home." 34 C.F.R. §104.34(a).

[33] *E.g.*, *Flour Bluff Independent Schl. Dist. v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 948 (1997); *Murray v. Montrose Co. Schl. Dist.*, 51 F.3d 921 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 278; *Schuldt v. Mankato Independent Schl. Dist. No. 77*, 937 F.2d 1357 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 937 (1992); *Barnett v. Fairfax Co. Schl. Bd.*, 927 F.2d 146 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 175).

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INCLUSION OF STUDENTS WITH DISABILITIES WHO ARE LABELLED "DISRUPTIVE": ISSUE PAPERS FOR LEGAL ADVOCATES

Eileen L. Ordover
November 1997

#1: BACKGROUND AND OVERVIEW

[Note about this series: This is the first in a series of five issue papers on the inclusion in regular education of students with disabilities who are labelled disruptive because of their behavior. The other papers in this series are #2: The Legal Underpinnings of Inclusion; #3: The Duty to Address Behavior; #4: The Right to Learn the "Regular," or "General," Curriculum; and #5: Looking Systemically.]

Discrimination against and neglect of students with disabilities that involve behavioral manifestations was a key impetus behind the 1975 enactment of what is now called the Individuals with Disabilities Education Act (IDEA).[1] In passing IDEA, Congress explicitly acted to make real the equal protection rights recognized in *Mills v. District of Columbia Board of Education*,[2] which had been brought on behalf of a class of children with disabilities "labelled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive....,"[3] and excluded from school or relegated to segregated programs with inadequate services. Congress also had before it statistics showing that nationwide in 1974-75, 82% of children with emotional disturbance were unserved by public education.[4]

Building upon *Mills*, Congress organized IDEA around four core principles: public education for *all* children, regardless of the nature or severity of their disabilities; a broad understanding of "education," including social, emotional, physical, health and self-help needs as well as academic ones; individualized instruction and services based upon individual needs; and a mandate that all children receive their education in regular education settings to the maximum extent feasible in light of their particular needs, with appropriate supplementary aids and services.

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[1] 20 U.S.C. §1400 *et seq.*

[2] 348 F. Supp. 866 (D.D.C.).

[3] *Id.* at 368.

[4] *Honig v. Doe*, 484 U.S. 305, 309 (1988) (citing legislative history).

Twenty-two years into the implementation of IDEA, students whose disabilities include behavioral manifestations are routinely subjected to the very abuses IDEA was intended to eliminate. Behavioral manifestations are treated as discipline problems; "services" are commonly limited to school attempts to control or "manage" students, rather than the provision of appropriate behavioral supports, related services and educational interventions; and students are excluded in alarming numbers from "regular," or "general," education classrooms, and isolated from their peers. Exclusion from general education *classrooms* often inappropriately and unlawfully also entails exclusion from the *content* of general education, with separate programs providing only a watered-down version of the curriculum offered other children. Students are thus twice penalized for their behavioral disabilities: segregated from their peers, they are also denied the opportunity to learn what all other children are taught. Not surprisingly, these students have high drop out rates, low graduation rates and post-school difficulties.

Exclusion from the general curriculum and denial of appropriate behavioral services often lead to academic "deficits" that are then used to justify continued segregated placement. Similarly used are challenging behaviors that have been exacerbated by past failures to provide appropriate services.[5] In a vicious cycle, schools cite what are really the consequences of inappropriate and often illegal educational practices to pronounce students unable to be physically present in regular education, unable to learn, even with special education supports, what students in the regular education curriculum are taught, and/or unable to derive sufficient educational benefit from regular education placement.

Breaking this cycle and vindicating the right to a free appropriate public education in the least restrictive environment requires a variety of legal strategies and approaches. In addition to looking to the statutory and regulatory provisions explicitly addressing placement issues and exclusion from regular education, parents, students and their advocates must make part of their strategy meaningful enforcement of, *inter alia*, the right to appropriate behavioral services provided by qualified, knowledgeable personnel as a part of the "free appropriate public education" IDEA and the regulations implementing Section 504 of the

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[5] Indeed, courts have recognized that inappropriate school actions can cause, or contribute to, the very "behavior problems" for which schools then penalize students. *See, e.g., Morgan v. Chris L.*, 25 IDELR [Individuals with Disabilities Education Law Report] 227, 230 (6th Cir. January 21, 1997) ("[w]hen school systems fail to accommodate a disabled student's behavioral problems, these problems may be attributed to the school system's failure to comply with the requirements of the IDEA"); *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (school's "handling of the plaintiff may have contributed to her disruptive behavior"); *Howard S. v. Friendswood School District*, 454 F. Supp. 634, 640 (S.D. Tex. 1978)(finding that plaintiff, whom school officials sought to expel following a suicide attempt and hospitalization, "was not afforded a free, appropriate public education during the period from the time he enrolled in high school until December of 1976, [which] was...a contributing and proximate cause of his emotional difficulties and emotional disturbance"); *Frederick L. v. Thomas*, 408 F. Supp. 832, 835 (E.D. Penn. 1976) (recognizing that an inappropriate educational placement can cause antisocial behavior).

Rehabilitation Act of 1973[6] require; the right to meaningful access to the general education curriculum under IDEA, civil rights laws, education reform laws and state constitutions; and the requirement under the regulations implementing §504 and Title II of the Americans with Disabilities Act ("ADA")[7] that prohibit "criteria and methods of administration" that have the "effect" of subjecting students with disabilities to discrimination.[8] Also pressing is the need to investigate school systems as *systems*, in order to diagnose large-scale problems and develop responsive legal theories and advocacy strategies.

This series of issue papers is intended to assist advocates in this undertaking. Paper #2, *The Legal Underpinnings of Inclusion*, discusses the legal bases of inclusion, in statute, regulation and caselaw, including the relevance of behavior. Paper #3, *The Duty to Address Behavior*, discusses the nature and scope of the obligation under IDEA to address behavior as a critical component of education; as a related service; as a means to prevent inappropriate discipline; and as a component of the right to learn in the least restrictive environment. Paper #4, *The Right to Learn the "Regular," or "General," Curriculum*, examines the relationship between inappropriate, and illegal, exclusion from the regular education curriculum and exclusion from the regular education classroom. Finally, Paper #5, *Looking Systemically*, offers starting points for identifying issues that might be ripe for systemic advocacy.

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[6] 29 U.S.C. §794.

[7] 42 U.S.C. §12101 *et seq.*

[8] 34 C.F.R. §104.4(b)(4) (implementing §504); 28 C.F.R. §35.130(b)(3) (implementing the ADA).

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INCLUSION OF STUDENTS WITH DISABILITIES WHO ARE LABELLED "DISRUPTIVE": ISSUE PAPERS FOR LEGAL ADVOCATES

Eileen L. Ordover

November 1997

#3: THE DUTY TO ADDRESS BEHAVIOR

[Note about this series: This is the third in a series of five issue papers on the inclusion in regular education of students with disabilities who are labelled disruptive because of their behavior. The other papers in this series are #1: Background and Overview; #2: The Legal Underpinnings of Inclusion; #4: The Right to Learn the "Regular," or "General," Curriculum; and #5: Looking Systemically.]

Introduction

All children who are "children with disabilities" within the meaning of the Individuals with Disabilities Education Act ("IDEA")[1] have an enforceable federal entitlement to a free appropriate public education ("FAPE") consisting of an appropriate elementary or secondary education along with necessary special education and related services in the least restrictive environment consistent with their individual needs. For students whose disabilities entail behavioral manifestations, this right includes the right to the services necessary to effectively address the behavior and the problems underlying it.

This issue paper examines the origin and the nature of this right, including the legislative history of IDEA; the broad meaning of "education" under IDEA, and the consequences for behavioral programming; the interplay between least restrictive environment/inclusion rights and the right to behavioral services; and the relevance of "state of the art" practices. It ends with a case study providing a model analysis of the duty to address behavior.

Historical Background

Congress enacted the Individuals with Disabilities Education Act, formerly called the Education for All Handicapped Children Act, in 1975, in response to evidence of mistreatment and abuse, including that "for years [disabled] children of this country have been kept in the

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[1] 20 U.S.C. §1400 *et. seq.*

dark, deprived of a full, free public education."[2] Passage of the Act was the culmination of legislative attempts by Congress, begun in 1966, to address the national failure to provide children with disabilities "educational opportunity that has been long considered the right of every other American child,"[3] by progressively increasing federal responsibility for such education.[4]

At regional hearings held in 1973 and 1974, the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare heard numerous witnesses, including parents, teachers, special education professionals, and other professionals experienced in the education and care of children with disabilities, testify that substantial numbers of children were excluded from school, denied necessary services, and subjected to educational neglect.[5] Parents and educators discussed the widespread failure of states to provide the breadth of supportive services necessary to meet the varied needs of children with disabilities. Prominent among the services discussed were many that would assist emotionally disturbed students and others whose disabilities included behavioral manifestations to benefit from and participate in special education programs, such as specialized diagnostic evaluations, individualized tutoring, behavioral support programs, psychological counseling, and self-help and self-care skills training programs.[6] Statistics compiled for Congress by the Office of Education estimated that of eight million children with disabilities in the United States, nearly two million were excluded from public schools, and more than four million of these children were receiving an inappropriate education.[7] Eighty-

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[2] 121 Cong. Rec. H 37027 (daily ed., Nov. 18, 1975) (remarks of Rep. Gude).

[3] Cong. Rec. S 20427 (daily ed., Nov. 19, 1975) (remarks by Sen. Randolph).

[4] Pub. L. No. 89-10, 79 Stat. 27 [codified at 20 U.S.C. §§ 236-244 (1965)]; amended by Pub. L. No. 89-750, §161, 80 Stat. 1204 [codified at 20 U.S.C. §§1201-1213 (1966)]; amended by Pub. L. No. 91-230, §§601-662, 84 Stat. 175-88 [codified at 20 U.S.C. §§1401-1461 (1970); amended by Pub No. 93-380, §§611-621, 88 Stat. 579-585 [codified at 20 U.S.C. §§1401-1461 (Supp. 1975)]; amended by Pub. L. 94-142, 89 Stat. 773 [codified at 20 U.S.C. §§1401-1461 (1976)] (Education For All Handicapped Children Act of 1975).

H.R. Rep. No. 332, 94th Cong., 1st Sess. 2-7 (1975) [hereinafter "House Report"]; S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975), reprinted in 1976 U.S. Code Cong. & Ad. News, 1425, 1429-32 [hereinafter "Senate Report"].

[5] Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on The Handicapped of the Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. (1973-74) [hereinafter "Senate Hearings"]; House Report, *supra*, at 5-6.

[6] Senate Hearings, *supra*, at 45, 87, 797, 809, 813, 790, 833.

[7] Senate Report, *supra*, at 8; House Report, *supra*, at n.12.

two percent of those children classified as emotionally disturbed were unserved.[8]

Congress was also aware that these practices and abuses had in fact been recently and successfully challenged in two prominent federal actions: *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*,[9] and *Mills v. District of Columbia Board of Education*.[10] These cases established the principle that exclusion from public education violates constitutional equal protection rights, and that *appropriate* educational services must be provided. *Mills* in particular vindicated the rights of children whose disabilities entail behavioral manifestations, brought as it was on behalf of a class of children "labelled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive....,"[11] who had been excluded from school or relegated to segregated programs with inadequate services on that basis. As the Supreme Court has repeatedly recognized, Congress enacted IDEA in order to make real the rights recognized in *Mills* and *PARC*.[12]

Securing appropriate education and services for children whose disabilities entail behavioral manifestations was thus a key impetus behind enactment of IDEA. Congress acted to end not only the denial of education to these children, but also the provision, to those who ostensibly *were* being schooled, of inadequate and inappropriate education.[13] Embedded in the history of IDEA is the understanding that for children with behavioral manifestations, access to school is meaningless if not accompanied by a right to programming that takes into account behavioral needs.

Failure to Address Behavior Effectively as a Denial of FAPE: the Broad Meaning of Education Under IDEA

Despite this history, many schools still abdicate their duty to address appropriately the behavioral consequences of disability. Some ignore this duty altogether. Others purport to provide behavioral programming, but in reality focus their efforts exclusively on controlling the child in school. Rather than addressing behavior and its roots as part and parcel of the child's educational and developmental needs, behavior is viewed narrowly as something to be "managed" or "controlled" so as not to disrupt classroom activities. Behavioral needs are thus, explicitly or implicitly, treated as addenda to education -- often in the form of "behavior

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[8] *Id.*

[9] 343 F. Supp. 279 (E.D. Pa. 1972).

[10] 348 F. Supp. 866 (D.D.C. 1972).

[11] *Mills,* 348 F. Supp. at 368.

[12] *See Honig v. Doe*, 484 U.S. 305, 324-25 (1988); *Board of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 192 (1982).

[13] *Honig, supra*, 484 U.S. at 309.

management plans" -- rather than as subjects for education, and special education services, in their own right. Similarly, behavioral manifestations are often viewed as relevant areas of educational concern (apart from discipline) only to the extent that they prevent a child from making sufficient *academic* progress, or deriving sufficient "benefit" from the education already being provided.

These approaches violate the duty to provide FAPE. IDEA reflects the broad understanding of education reflected in the hearings and litigation preceding its enactment. The "free appropriate public education" ("FAPE") IDEA obliges schools to provide to all children with disabilities,[14] regardless of their nature or severity,[15] includes, *inter alia*, "special education and related services."[16] "Special education," in turn, means "specially designed instruction...to meet the unique needs of a child with disabilities."[17] Related services include "such developmental, corrective and other supportive services...as may be required to assist a child with disabilities to benefit from special education."[18]

The concept of education under IDEA is broad, encompassing, *inter alia*, a child's unique social and emotional needs as well as his or her academic ones.[19] For children

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[14] 20 U.S.C. §1412(a)(1). The IDEA Amendments of 1997, Pub. L. 105-17 (June 4, 1997), renumbered and recodified many pre-existing IDEA provisions. Citations herein are to IDEA as amended by Pub. L. 105-17, unless otherwise noted.

[15] 20 U.S.C. §1412(a)(3)(A).

[16] 20 U.S.C. §1401(8).

[17] 20 U.S.C. §1401(25).

[18] 20 U.S.C. §1401(22).

[19] *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) ("[e]veryone agrees that A.S. is exceptionally bright and thus able to test appropriately on standardized tests. This is not the sine qua non of `educational benefit,' however. The term 'unique educational needs' [shall] be broadly construed to include...academic, social, health, emotional, communicative, physical and vocational needs"); *see also, e.g., Babb v. Knox County School System*, 965 F.2d 104, 109 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 380 (education under IDEA encompasses "both academic instruction and a broad range of associated services traditionally grouped under the general rubric of `treatment'"). For examples of other cases stressing the broad meaning of education under IDEA, see *Timothy W. v. Rochester School District*, 875 F.2d 954, 962 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 ("the Act's concept of special education is broad, encompassing not only traditional cognitive skills, but basic functional skills as well"); *Kruelle v. New Castle County School District*, 642 F.2d 687, 693-94 (3rd Cir. 1981) ("the concept of education is necessarily broad...[w]here basic self-help...skills...are lacking, formal education begins at that point"); *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 275 (3rd Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) (same). *Cf. Stacey G. v. Pasadena Independent School District*, 547 F. Supp. 61, 77 (S.D. Tex. 1982) ("...an

whose disabilities entail behavioral consequences, FAPE thus requires "special education," or "specially designed instruction," aimed at behavioral issues, as well as any necessary behaviorally-related "related services."

The duty to address behavior as a component of FAPE extends to behavior exhibited outside, as well as inside, of school. Consistent with the broad notion of education encompassed by the statute, the purpose of addressing non-academic needs such as behavior under IDEA is to enable children with disabilities to function effectively in all settings, not simply in school. Thus in *David D. v. Dartmouth School Committee,*[20] the court held that the school committee's proposed placement did not provide a free appropriate public education, because "although David had performed relatively well in the rather cloistered and familiar environment of the school...in less familiar settings, or where relatively unsupervised, he frequently showed little or no self-control in his conduct towards other persons". Similarly, *Chris D. and Cory M. v. Montgomery County Bd. of Ed.*[21] rejected as insufficient and a denial of FAPE a school's attempt at behavior management, noting that to the extent that the child at times behaved appropriately in class, "it is only because a teacher or other adult is literally standing over him," and that "[c]learly such a dependency building approach does nothing and in fact may make it more difficult to enable Cory to behave in a regular classroom or in the real world."[22]

The IDEA Amendments of 1997 underscore one aspect of schools' duty to address behavior. 20 U.S.C. §1414(d)(3)(B) as amended by the 1997 legislation provides that as a "special factor," "in the case of a child whose behavior impedes his or her learning or that of others," the IEP team shall "consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior."[23] This provision makes explicit in the statute the long-standing IDEA requirement, derived from the statutory definitions of "FAPE," "special education," and "related services," that schools provide the

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essential element of an appropriate education for a child as handicapped as Stacey is an opportunity to develop skills that would allow Stacey to be as self-sufficient as possible and to function outside of an institution").

[20] 775 F.2d 411, 423 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1790 (1986).

[21] 753 F. Supp. 922 (M.D. Ala. 1990).

[22] 753 F. Supp. at 933.

[23] *See also* 20 U.S.C. §1415(k)(1)(B) (requiring functional behavior assessment and implementation/revision of behavioral intervention plan after disciplinary actions); 20 U.S.C. §1415(k)(3) (requiring that the "interim alternative educational setting" into which children may be placed following certain incidents involving dangerous weapons or drugs, or upon a finding by a hearing officer that maintaining a child in his or her current placement is substantially likely to result in injury to the child or others, include services to address the behavior that triggered the placement change).

behavioral supports necessary to sustain in-school learning. It in no way limits or diminishes other aspects of the duty to address behavior (including those discussed above) similarly derived from these definitions.[24]

Failure to Address Behavior Effectively as a Violation of the Right to Be Educated in Regular Education Classes to the Maximum Extent Appropriate

IDEA's mandate that all children receive their education in the least restrictive environment (LRE) is a second, independent source of schools' legal duty to address behavior. As is the case with the duty arising under the FAPE requirement, the LRE-based duty to address behavior has two aspects: the provision of services necessary to mitigate impediments to (regular education) classroom learning, and the provision of services that recognize behavioral issues as a subject of education in their own right. Failure to provide either one may violate LRE rights.

IDEA requires states and school systems to ensure that "[t]o the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular education classes with the use of supplementary aids and services cannot be achieved satisfactorily."[25] Virtually all Courts of Appeals that have considered the issue have held that, in determining whether a child's education can be "achieved satisfactorily" in the regular education classroom, schools may take into account the extent to which a child's behavior would be disruptive there.[26] As a corollary, however,

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[24] The 1997 Amendments did not alter the definitions of "free appropriate public education," "special education" or "related services."

[25] 20 U.S.C. §1412(a)(5)(A). The U.S. Department of Education regulations implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, contain the same requirement. *See* 34 C.F.R. §104.34(a). *See also* 28 C.F.R. §35.130(d) (implementing Title II of the Americans with Disabilities Act, 42 U.S.C. §12132 *et seq.*) (public entities "shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities"); 28 C.F.R. §35.130(b)(2) ("[a] public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities").

[26] *Hartmann v. Loudon Co. Bd. of Ed.*, __ F.3d ___, 26 IDELR [Individuals with Disabilities Education Law Report] 167 (4th Cir. 1997); *Bd. of Ed. Sacramento City Unified School District v. Holland*, 14 F.3d 1398 (9th Cir. 1994), *affirming* 786 F. Supp. 874 (E.D. Cal. 1992), *cert. denied*, 114 S.Ct. 2679; *Oberti v. Bd. of Ed. of Borough of Clementon School District*, 995 F.2d 1204 (3rd Cir. 1993); *Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036 (5th Cir. 1989) . *See also* Note to 34 C.F.R. §300.552 (1996) ("...where a handicapped child is so disruptive in a

courts have recognized that the failure to provide appropriate behavioral supports, interventions and services *within* the regular education classroom may cause the objected-to "disruption," thereby setting a child up for failure and/or creating the ostensible justification for exclusion.[27] Such failure violates LRE rights.[28] As an integral part of the IEP development process, schools must consider the whole range of behaviorally oriented services that might make regular classroom placement work.[29]

Failure to address behavioral manifestations with appropriate services may also violate the LRE rights of children properly placed, for the time being, in separate, more restrictive settings. Just as the right to FAPE encompasses the right to services that will allow a child to function effectively in all settings, not merely in school, the right to be educated in the LRE encompasses the right to services that will allow a child to move into less restrictive educational settings. Where children are denied the behaviorally oriented services they need in order to reach the point where their education can be achieved satisfactorily in regular

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regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs...."). For a further discussion of the circumstances under which "disruptive" behavior may and may not justify exclusion from the regular education classroom, see Paper #2 in this series, *The Legal Underpinnings of Inclusion*.

[27] *Oberti, supra*; *Mavis v. Sobol*, 839 F. Supp. 968 (N.D.N.Y. 1994). *Cf. Morgan v. Chris L.*, 25 IDELR 227, 230 (6th Cir. 1997) ("[w]hen school systems fail to accommodate a disabled student's behavioral problems, these problems may be attributed to the school system's failure to comply with the requirements of the IDEA"); *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (school's "handling of the plaintiff may have contributed to her disruptive behavior"); *Howard S. v. Friendswood School District*, 454 F. Supp. 634, 640 (S.D. Tex. 1978)(finding that plaintiff, whom school officials sought to expel following a suicide attempt and hospitalization, "was not afforded a free, appropriate public education during the period from the time he enrolled in high school until December of 1976, [which] was...a contributing and proximate cause of his emotional difficulties and emotional disturbance"); *Frederick L. v. Thomas*, 408 F. Supp. 832, 835 (E.D. Penn. 1976) (recognizing that an inappropriate educational placement can cause antisocial behavior).

[28] *Oberti, supra*; *Mavis, supra*.

[29] *Oberti, supra*, 995 F.2d at 1216 ("the school must consider the whole range of supplementary aids and services, including...special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child's particular disabilities"); *Greer, supra*, 950 F.2d at 696 ("prior to and during the development of the IEP" a school "must consider...the whole range of supplemental aids and services...for which it is obligated under [IDEA] and the regulations promulgated thereunder to make provision").

education classes, this aspect of LRE rights is violated.[30]

The right to education in regular education settings embraces the right to effective opportunities to learn the regular curriculum as well as physical presence in the regular classroom.[31] Failure to address behavioral needs appropriately and consequent exclusion from regular settings often results, albeit unlawfully, in placement in separate settings that offer an inferior, diluted curriculum. This aspect of LRE rights, and their violation, is discussed in further detail in Paper # 4 of this series, entitled *The Right to Learn the "Regular," or "General," Curriculum.*

State of the Art Practices

IDEA expressly requires states to acquire and disseminate significant knowledge derived from educational research and other sources to teachers, administrators, school board members, and related services personnel, and to adopt, when appropriate, promising practices, materials, and technology.[32] Local school districts must do the same.[33] *Timothy W., supra*, held

> "[t]he law explicitly recognizes...that educational methodologies are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's

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[30] *Chris D. and Cory M., supra.*

[31] *See Rowley, supra*, 458 U.S. at 202-03 ("[w]hen that `mainstreaming' preference...has been met and a child is being educated in the regular classrooms of a public school system...the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancements to higher grade levels are permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit."). *See also* Judith E. Huemann and Thomas Hehir, U.S. Department of Education/Office of Special Education Programs, Memorandum 95-5, November 23, 1994, reprinted at 21 IDELR 1152 (pursuant to 34 C.F.R. §300.346(a)(3) (1994), individualized determination must be made for each child as to "the extent that the student will be able to participate in regular education programs").

[32] 20 U.S.C. §1412(a)(14), incorporating by reference 20 U.S.C. §1453(c)(3)(D)(vii). Prior to enactment of the IDEA Amendments of 1997, this requirement appeared at 20 U.S.C. §1413(a)(3)(B). *See also* 34 C.F.R. §300.382(b), (c) (1996).

[33] 20 U.S.C. §1413(a)(3)(A) (local educational agencies must ensure that all personnel necessary to carry out this part are appropriately and adequately prepared, consistent with the requirements of section 1453(c)(3)(D)).

individual needs."[34]

Advocacy strategies that include enforcement of these obligations may play a critical role in compelling schools to abandon outmoded, limited and ineffective practices that focus on control and punishment, in favor of approaches that do in fact provide a free appropriate public education in the least restrictive environment.

A Case Study: Chris D. and Cory M. v. Montgomery County Bd. of Ed.

The case of *Chris D. and Cory M., supra*, illustrates effective use of the above-described principles, and provides a model for vindicating the right to appropriate behavioral services.

1. Facts

Cory M. had a long history of problem behavior, academic deterioration and disciplinary sanctions. After four years of academic failure and what the court termed "severely disruptive behavior," Cory M. was evaluated and found ineligible for special education services. Over the next year and one half, he continued to experience academic failure, including being retained in the fourth grade, and his behavior became more severe. He was repeatedly disciplined for verbal abuse, hitting other students and refusing to follow instructions, and was suspended several times. At his parents' request he was reevaluated and this time - six years after his academic and behavioral problems emerged - found eligible for special education services. After misclassifying Cory as having mental retardation, school officials eventually classified him as emotionally conflicted following an independent evaluation obtained by his parents. The IEP developed for him, however, "contained no mention of any goals or techniques for teaching Cory to control his conduct,"[35] and, predictably, his behavior further deteriorated. Staff often restrained him. At one point school officials instructed his parents to keep him out of school until further notice, resulting in an absence of approximately two months. At the time of the dispute, Cory was placed in a segregated classroom for children who had learning disabilities or were emotionally conflicted.

At trial, Cory's parents presented expert testimony on, *inter alia*, the characteristics of

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[34] 875 F.2d at 973. *See also* 875 F. 2d at 966-967, discussing the history of amendments to IDEA, noting the "thesis present in the original Act, that it is the state's responsibility to experiment, refine, and improve upon the educational services it provides," and observing that "Congress clearly saw education for the handicapped as a dynamic process, in which new methodologies would be continually perfected, tried, and either adopted or discarded, so that the state's educational response to each handicapped child's particular needs could be better met."

[35] 753 F. Supp. at 925-26.

appropriate behavioral services for emotionally conflicted children, the deficiencies in the school district's treatment of Cory's academic and behavioral needs, and the content of an appropriate program for him. Expert testimony indicated that appropriate educational programming would likely enable Cory to enter successfully a regular, age-appropriate classroom at some point during the next academic year.

2. Rulings

The court held that the school system had failed to provide Cory with the free appropriate public education to which he was entitled, and had violated IDEA's LRE requirement. As to the failure to provide FAPE, the court reasoned that "for several years school system officials ignored obvious signs suggesting that Cory suffered from a serious emotional disturbance, and even when they finally agreed he should be classified as emotionally conflicted, they failed...to develop any program for addressing his inappropriate behavior."[36] The court found "[t]he system of behavioral control...Cory's teachers have implemented [to be] woefully inadequate," and an impermissible substitute for "attempting to teach him to control his own behavior."[37] The court faulted the school system for the fact that "[t]he few behavioral `goals' contained in Cory's most recent IEP actually describe only general classroom rules and the punishments and rewards for breaking or following these rules, rather than any individualized strategies for changing Cory's behavior."[38] To the extent that Cory at times behaved appropriately in class, the court noted, "it is only because a teacher or other adult is literally standing over him."[39] This was unacceptable because "[c]learly such a dependency-building approach does nothing and in fact may make it more difficult to enable Cory to behave in a regular classroom or in the real world."[40] Thus, the court held, the school system had failed to provide Cory with sufficient educational benefit "because its programs do not address the behavioral problems that hinder his learning."[41]

The court also ruled that the academic component of Cory's program failed to afford him sufficient educational benefit, thereby denying him FAPE.[42] The court faulted the school's IEPs for providing "a generic educational program which offers no hope of improving Cory's stilted rate of learning; which trains him simply to swallow and promptly regurgitate correct answers rather than to master facts and ideas; which lacks a mechanism for

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[36] *Id.* at 932.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 933.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 931.

evaluating and revising instructional strategies; and which does not seek to teach him to work independently as he would have to in a regular classroom."[43] Turning to the LRE issue, the court further held that the failure to provide Cory with appropriate behavioral programming violated the requirement that children with disabilities be educated alongside their non-disabled peers to the maximum extent feasible in that "it offers him no realistic prospect of returning to the `regular' class setting, which, of course, would be the least restrictive environment for any student."[44]

3. Relief

As relief, the court ordered the school system to adopt the IEP developed by Cory's expert, which addressed his academic and behavioral needs, and to work with his parents to develop and implement a plan for parent training and counselling (to complement and support the IEP).[45] Expressing concern, based upon the expert testimony, that school system staff lacked the expertise and training to implement the IEP, the court ordered further hearings to identify the nature and extent of the deficiency, and strategies for remedying it.[46]

4. Chris D. and Cory M. Facts and the 1997 IDEA Amendments

Chris D. and Cory M. was decided in 1990, based upon even earlier occurrences. The IDEA Amendments of 1997 offer additional protection for students in Cory's situation. Under similar facts under current law, the school district would have been in violation of the explicit mandate to consider and include in IEPs "positive behavioral interventions, strategies, and supports to address" behavior that impedes learning.[47] Furthermore, Cory's two-month suspension from school, illegal under prior as well as current law, would under current law trigger a duty on the school district's part to obtain a functional behavioral assessment, and develop a behavioral intervention plan.[48]

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[43] *Id.*

[44] *Id.* at 934.

[45] *Id.* at 935-36.

[46] *Id.*

[47] 20 U.S.C. §1414(d)(3)(B) as amended.

[48] 20 U.S.C. §1415(k)(1)(B) as amended.

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INCLUSION OF STUDENTS WITH DISABILITIES WHO ARE LABELLED "DISRUPTIVE": ISSUE PAPERS FOR LEGAL ADVOCATES

Eileen L. Ordover

November 1997

#4: THE RIGHT TO LEARN THE "REGULAR," OR "GENERAL," CURRICULUM

[Note about this series: This is the fourth in a series of five issue papers on the inclusion in regular education of students with disabilities who are labelled disruptive because of their behavior. The other papers in this series are #1: Background and Overview; #2: The Legal Underpinnings of Inclusion; #3: The Duty to Address Behavior; and #5: Looking Systemically.]

Introduction

The right to education in regular education settings embraces access to what is taught in the regular classroom as well as physical presence. Failure to address behavioral needs appropriately and consequent exclusion from regular settings for behavioral reasons often results in placement in separate programs that, albeit unlawfully, offer a diluted curriculum that does not teach what "regular education" students are expected to learn.

In addition, schools' failure to address behavioral manifestations properly often leads to what is then characterized as a child's academic failure.[1] As students lag behind in developing the basic academic skills needed for successful further learning, or otherwise continue to fall behind their peers, they are often placed in classes with a diluted curriculum, on the ground that they are not able to learn or achieve what is expected of all other children. Denied a curriculum that teaches what their peers are learning, they fall even farther behind academically. The academic deficits thus created by school practices then become the justification for excluding these children from regular education, ostensibly because they cannot learn what their peers are being taught, and need a curriculum based upon lower academic expectations and different skills.

Such denial of equal educational opportunity to children with behavioral disabilities has obvious and profound consequences. The advent of standards-based education reform only augments the potential harm. Virtually all states have set, or are in the process of

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[1] For a discussion of the nature and scope of schools' obligation to address behavior under the Individuals with Disabilities Education Act, Paper #3 in this series, *The Duty to Address Behavior.*

setting, content and student performance standards encompassing what all students are expected to know and be able to do. Statewide and districtwide assessments of students are intended to measure if students are, in fact, meeting those standards. Assessment results are then used not only to hold schools accountable but, in many places, to make high-states decisions about students, such as whether they will be promoted or awarded a high school diploma.

The Individuals with Disabilities Education Act ("IDEA"),[2] Section 504 of the Rehabilitation Act of 1973,[3] and Title II of the Americans with Disabilities Act ("ADA")[4] entitle students with behavioral disabilities to appropriate opportunities to learn what all other children are expected to know and be able to do -- "standards," or skills and competencies embodied in the regular or general curriculum. Title I of the federal Elementary and Secondary Education Act[5] and some state constitutions create similar rights. Depending upon a child's individual circumstances, appropriate opportunities may mean full participation in the regular curriculum (with necessary special education services and supports), or provision of a modified or alternative curriculum that teaches the knowledge and skills contained in the regular curriculum, but in a manner better suited to the child's needs. This aspect of these laws provides additional tools for securing inclusive placements. For example,

* parents, students and advocates may use them to challenge segregated placements that do not teach the skills and competencies of the regular curriculum;

* a school's past denial of appropriate instruction and services geared towards the standards encompassed by the regular curriculum -- and consequent academic "failure"-- may be used to counter school claims that a child cannot be included in regular classes because she cannot sufficiently master what her peers are being taught; and

* by insisting that separate programs and classes teach what all other children are expected to learn, parents, students and advocates can ensure that students do not fall behind academically during any legally permissible exclusion from regular classes, thus minimizing the duration of the exclusion and building a strong foundation for academically successful inclusion.

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[2] 20 U.S.C. §1400 *et seq.*

[3] 29 U.S.C. §794.

[4] 42 U.S.C. §12132 *et seq.*

[5] 20 U.S.C. §6301 *et seq.*

The Right to be Taught What Other Students are Expected to Learn as a Component of LRE and Inclusion Rights

Much of the inclusion litigation to date, brought directly under IDEA's least restrictive environment provision,[6] has focussed upon establishing the child's right to be physically present in the classroom, and has been brought on behalf of children who, due to the nature and degree of their cognitive impairments, were not necessarily expected at that time to master the content of the regular education curriculum.[7] These cases have clarified that children cannot be denied access to the regular setting solely because their education emphasizes different competencies.[8] However, the right to be educated in regular education settings embraces access to what is *taught* in the regular classroom as well as physical presence there.[9] This being the case, the rigorous statutory protections against exclusion from the regular education classroom apply with equal force to exclusion from what is taught there. Before a child with a behavioral disability may be denied instruction in the knowledge and skills embodied in the regular education curriculum, then, educators must demonstrate that "the nature or severity of the disability is such" that this "cannot be achieved satisfactorily," even with the full range of special education and related services required to be provided under IDEA, and "with the use of supplementary aids and services."[10]

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[6] 20 U.S.C. §1412(a)(5), formerly 20 U.S.C. §1412(5)(B). The IDEA Amendments of 1997, Pub. L. 105-17 (June 4, 1997) renumbered and recodified many pre-existing IDEA provisions. Citations herein are to IDEA as amended by Pub. L. 105-17, unless otherwise noted.

[7] *See, e.g., Greer v. Rome City School District*, 950 F.2d 688 (11th Cir. 1991), *opinion withdrawn*, 956 F.2d 1025 (11th Cir. 1992), *reinstated*, 967 F.2d 470 (11th Cir. 1992); *Oberti v. Bd. of Ed. of Borough of Clementon School District*, 995 F.2d 1204 (3rd Cir. 1993).

[8] *See, e.g., Oberti, supra; Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036 (5th Cir. 1989).

[9] *See Board of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 202-03 (1982) ("[w]hen that `mainstreaming' preference...has been met and a child is being educated in the regular classrooms of a public school system...the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancements to higher grade levels are permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit."). *See also* Judith E. Huemann and Thomas Hehir, U.S. Department of Education/Office of Special Education Programs Memorandum 95-5 (hereinafter "OSEP Memorandum"), November 23, 1994, explaining that pursuant to the IDEA regulation at 34 C.F.R. §300.346(a)(3), an individualized determination must be made for each child as to "the extent that the student will be able to participate in regular education programs." The memorandum is published at 21 IDELR [Individuals with Disabilities Education Law Report] 1152.

[10] 20 U.S.C. §1412(a)(5), formerly §1412(5)(B); 34 C.F.R. §104.34(a) (implementing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794).

Pursuant to standards articulated by the courts and the U.S. Department of Education, the required inquiry is a far-reaching one. Schools "must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction."[11] Supplemental aids and services also include computers and other assistive technology, the use of special education techniques, such as multisensory instruction, teacher training, curriculum modification, parallel instruction, or any other available aids and services appropriate to the child's particular disabilities.[12]

The Right to Be Taught What Other Children are Expected to Learn as a Component of FAPE Under IDEA

The content of education under IDEA begins with the four-pronged statutory definition of the "free appropriate public education" (FAPE) IDEA requires states and local school systems to provide:

> "The term `free appropriate public education' means special education and related services that --
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> (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, or secondary education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under [IDEA]."[13]

Subsections (B) and (C) of the statutory definition of free appropriate public education establish that the goals and content of the specially designed instruction and related services provided a child with disabilities is not to be designed in a vacuum but, rather, by reference to public education as defined by state law and practice. The notion that the content of the education provided all students is an important part of the framework within which special education is to be designed reflects Congress' purpose in enacting IDEA. Congress acted not only to end the complete exclusion of many children with disabilities from public education, but also in response to its finding that "more than half of the children with disabilities in the United States do not receive *appropriate* educational services which would enable them to have *full equality of opportunity*."[14] Accordingly, IDEA and its implementing regulations require states and local school systems to adopt and implement a goal of providing "full

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[11] *Greer*, 950 F.2d at 696.

[12] *Oberti*, 995 F.2d at 1210, n.9, 1216, 1222; OSEP Memorandum, *supra*.

[13] 20 U.S.C. §1401(8), formerly 20 U.S.C. §1401(a)(18).

[14] 20 U.S.C. §1400(c)(2)(B), formerly 20 U.S.C. §1400(b)(3). Emphasis added.

educational opportunity" to all children with disabilities.[15]

The regular education curriculum, including any content and student performance standards upon which it is based, define "an appropriate...elementary or secondary education in the State involved," pursuant to subsection (C). State-adopted content and performance standards also comprise "standards of the State educational agency" within the meaning of subsection (B).[16] To afford FAPE, then, special education and related services must include, *inter alia*, specialized instruction and support services aligned with the regular education curriculum and the standards set for all students.[17] Put another way, students with disabilities must be given meaningful opportunities to learn the bodies of knowledge and skills that all students are expected to master, including instruction and services designed to address their unique disability-related needs[18] *and* enable them to succeed in the general curriculum.

The 1997 amendments to IDEA reinforce and make more explicit this mandate from prior law. Critical provisions include the following:

Evaluations: Evaluations must gather information about strategies and interventions that the child needs to participate and progress in the general

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[15] 20 U.S.C. §§1412(a)(2), 1413(a)(1), formerly 20 U.S.C. §§1412(2)(A), 1414(a)(1)(c); 34 C.F.R. §300.304 (1996).

[16] The State educational agency standards referenced by 20 U.S.C. §1401(a)(18)(B) include general education standards as well as standards explicitly addressing the education of children with disabilities. *See Students of California School for the Blind v. Honig*, 736 F.2d 538, 544-45 (9th Cir. 1984), *vacated as moot*, 471 U.S. 148 (1985) (holding that state seismic safety standards for schools fell within the purview of §1401(a)(18)(B)).

[17] *See Rowley, supra*, 458 U.S. at 188-89 ("[a]lmost as a checklist for adequacy under the Act, the definition [of FAPE] requires that such [specially designed] instruction and services be provided at public expense and under public supervision, *meet the State's educational standards*, approximate the grade levels *used in the State's regular education*, and comport with the child's IEP...Thus if personalized instruction is being provided with sufficient support services to permit the child to benefit from the instruction, *and the other items on the definitional checklist are satisfied*, the child is receiving a `free appropriate public education' as defined by the Act") (emphasis added). *See also Carter v. Florence County School District No. 4*, 950 F.2d 156, 159-60. (4th Cir. 1991), *affirmed*, 510 U.S. 7, 114 S.Ct. 361 (1993) ((agreeing with district court's conclusion that "the IEP's goals of a mere four months progress [per school year] in mathematics and reading allowed Shannon to `continue to fall behind her classmates at an alarming rate' and therefore `ensured the program's inadequacy from its inception'").

[18] For a discussion of the broad meaning of education under IDEA, see Paper #3 in this series, *The Duty to Address Behavior*.

curriculum.[19]

Individualized Education Programs: IEPs must describe how the child's disability affects participation and progress in the general curriculum. They must also contain goals and objectives geared towards enabling him or her to do so. IEPs are to include special education, related services, supplementary aids and services and supports for school personnel that will allow the student to progress in the general education curriculum. IEPs must be reviewed periodically and revised to address any lack of expected progress in the general curriculum.[20]

IEP and Placement Teams: IEP teams must include someone knowledgeable about the general education curriculum, as well as one of child's regular education teachers.[21] In addition to being IEP team members, parents must be members of any group that make placement decisions about their child.[22]

State of the Art Practices: As did prior law, IDEA as amended in 1997 requires states and school systems to keep abreast of state of the art practices for teaching students with behavioral and other disabilities the general curriculum, and to incorporate them as appropriate into IEPs.[23]

Assessment: Children with disabilities must be included in general state and district-wide assessments, with appropriate accommodations where necessary.[24]

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[19] 20 U.S.C. §1414(b)(2)(A), (c)(1)(iv), as amended.

[20] 20 U.S.C. §1414(d)(1)(A), (d)(4) as amended.

[21] 20 U.S.C. §§1414(d)(1)(B) as amended.

[22] 20 U.S.C. §1414(f) as amended.

[23] 20 U.S.C. §1412(a)(14) as amended, incorporating by reference 20 U.S.C. §1453(c)(3)(D)(vii) (formerly codified at 20 U.S.C. §1413(a)(3)(B));20 U.S.C. §1413(a)(3)(A), incorporating by reference 20 U.S.C. § 1453(c)(3)(D)); 34 C.F.R. §300.382(b), (c) (1996). *See also Timothy W. v. Rochester School District*, 875 F.2d 954, 966-67, 973 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 ("Congress clearly saw education for the handicapped as a dynamic process, in which new methodologies would be continually perfected, tried, and either adopted or discarded, so that the state's educational response to each...child's particular needs could be better met"; "...educational methodologies are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs.").

[24] 20 U.S.C. §1412(a)(17)(A) as amended. For the small number of children who cannot participate even with accommodations, states and school districts must create

Performance Goals: States must set goals for the performance of students with disabilities. These goals must be consistent with any goals and standards the State has set for students in general.[25]

Accountability: The new law requires states and school districts to gather and make public information that parents can use to hold schools accountable for how well their children do in school. First, states must set "performance indicators" they will use to assess how well they are doing in educating children with disabilities, including at least performance on assessments, drop-out rates and graduation rates. The state must report to the public on how well it is doing on these indicators every two years. In addition, the state must make public statistics showing how children with disabilities fare on the general assessments given to all students, including how many are participating and how they achieve. It must do the same regarding children who take alternate assessments.[26]

On October 22, 1997, the U.S. Department of Education published in the Federal Register proposed regulations implementing IDEA as amended.[27] The proposed regulations underscore the right to learn what all other students are expected to learn in two important ways. First, they clarify that the "general curriculum" means the content of the curriculum adopted for all children, and can be used in any educational setting or placement.[28] Second, in defining "special education" as "specially designed instruction...to meet the unique needs of a child with a disability," they clarify that "specially designed instruction" means, *inter alia*, "adapting content, methodology or delivery of instruction...to ensure access of the child to the general curriculum, so that he or she can meet the educational standards...that apply to all

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alternate assessments. *Id.* There should be at least two kinds of alternate assessments. The first kind of alternate assessment should be for children who are capable of learning what the general assessment tests, but need a different way of showing it. A second type must be developed for the small number of children who are so seriously cognitively impaired that they cannot learn what is being tested, even with special education and related services -- and so are receiving a curriculum geared towards different skills and competencies.

[25] 20 U.S.C. §1412(16) as amended. This means that the state cannot set separate, weaker standards for students with disabilities. Rather, the state must supplement the goals and standards it uses for all students with any additional ones required by the unique needs of children with disabilities.

[26] 20 U.S.C. §§1412(16), (17) as amended.

[27] 62 Fed. Reg. 55025 (October 22, 1997).

[28] Proposed 34 C.F.R. §300.12, 62 Fed. Reg. 55071 (October 22, 1997).

children."[29]

The Right to Equally Effective Educational Programming Under §504 and the ADA

Independent of any IDEA requirements, the regulations implementing §504 and Title II of the ADA require schools to provide the vast majority of students with disabilities with the curriculum and instructional supports necessary to allow them to attain the knowledge and skills embodied by the regular curriculum, including any performance standards the state has adopted for all students. These regulations may also require schools to modify institutional structures and practices that impede effective access to the regular curriculum, or other instruction keyed to standards.

The §504 regulations require public school systems to provide all children with disabilities a "free appropriate public education" consisting of "regular or special education and related aids and services that are designed to meet...individual educational needs as adequately as the needs of nonhandicapped persons are met...."[30] The regulations also prohibit schools from affording students with disabilities "an opportunity to participate in or benefit from...[an] aid, benefit or service that is not equal to that afforded others," providing "an aid benefit or service that is not as effective as that provided to others," or providing "different or separate aid, benefits or services unless...necessary to provide...aid, benefits, or services that are as effective as those provided to others."[31] The ADA regulations applicable to state and local governmental services contain a parallel prohibition.[32]

In order to be "equally effective" under these regulations, aids benefits and services "must afford...equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the [student's] needs."[33] The regular education curriculum and content and performance standards, define the inputs and outcomes, respectively, of a quality education - and so the "aid, benefit or service" that is public education. Where students capable of mastering them are denied educational opportunities keyed to attainment of the standards set for all students, they are provided instead an "aid, benefit or service that is not equal to that afforded others," that "is not as effective as that provided to others," and that is unnecessarily "different

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[29] Proposed 34 C.F.R. §300.24, 62 Fed. Reg. 55073 (October 22, 1997).

[30] 34 C.F.R. §104.33(a), (b)(1).

[31] 34 C.F.R. §§104.4(b)(1)(ii) - (iv).

[32] *See* 28 C.F.R. §35.130(b)(1)(ii) - (iv).

[33] 34 C.F.R. §104.4(b)(2); 28 C.F.R. §35.130(b)(1)(iii).

or separate," in violation of the §504 and ADA regulations.[34]

The §504 regulations also make it illegal for school systems running programs to "utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,[or] (ii) that have the...effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons...."[35] The ADA regulations contain a similar ban.[36]

In public school systems, mastery of the content embraced by standards and the regular curriculum is one of the key "objectives of the program or activity."[37] "Criteria or methods of administration" that limit the opportunities for students with disabilities to receive the educational programming necessary for them to do so "have the...effect of defeating or substantially impairing the accomplishment of"[38] this objective, and constitute prohibited discrimination. Avoiding such discrimination requires school systems to identify and examine policies and practices that may have the effect of limiting access to the instructional content necessary to attain performance standards or otherwise achieve in the regular curriculum. Depending upon the circumstances, any number of policies and practices might have this effect. Examples include lack of coordination (in terms of both scheduling and

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[34] For an example of a U.S. Department of Education/Office of Civil Rights (OCR) decision reaching a similar conclusion in an analogous case, see *Muscogee (GA) County School District*, EHLR [Education of the Handicapped Law Report] 257:540 (OCR 6/30/84), where OCR investigated a complaint involving the curriculum provided students in a separate program for high school students with cognitive impairments and learning disabilities. Students in the program were not taught biology, a subject required by state standards for receipt of a regular high school diploma. OCR found that the failure to offer biology violated the above-quoted regulations.

[35] 34 C.F.R. §104.4(b)(4). OCR has defined "criteria" as written or formal policies, and "methods of administration" as a state or school system's actual practices and procedures. *Illinois State Bd. of Ed.*, 20 IDELR 687 (OCR 12/3/93).

[36] *See* 28 C.F.R. §35.130(b)(3). *See also* 28 C.F.R. §35.130(b)(7) (public entity must make reasonable modifications in policies, practices or procedures when necessary to avoid discrimination on basis of disability, unless entity can demonstrate that modifications would fundamentally alter the nature of its program, service or activity); 28 C.F.R. §35.130(b)(8) (public entity may not impose or apply eligibility criteria that screen out or tend to screen out individuals with disabilities *or any class of individuals with disabilities* from fully and equally enjoying any service, program or activity unless such criteria can be shown to be necessary for provision of the service, program or activity being offered) (emphasis added).

[37] 34 C.F.R. §104.4(b)(4)(ii).

[38] 34 C.F.R. §104.4(b)(4)(ii).

content) between pull-out programs like resource rooms and the mainstream academic curriculum; providing a diluted curriculum in programs and classes denominated as serving students with behavioral disabilities;[39] inappropriate reliance upon punitive discipline, including disciplinary exclusion; and the failure to provide for the appropriate integration of special education supports and related services, including behavioral supports, into what are conceived of as regular education classes.[40]

Title I of the Elementary and Secondary Education Act

Title I of the Elementary and Secondary Education Act also requires that students with disabilities be provided effective opportunities to learn what all other children are expected to learn. Title I, formerly known as "Chapter 1," provides funding to schools to improve educational outcomes for low-income, low-achieving students. Title I funds may be used for two kinds of programs: "schoolwide programs," in which Title I money is used for schoolwide reform to benefit all students, and "targeted assistance programs," in which only those students who are furthest behind their peers are served. Both types of programs must be designed around the challenging state content and performance standards being set in the state for all students.[41] A schoolwide program must apply reform strategies that provide opportunities for "all" children to meet the state's student performance standards, are based on effective means of improving achievement and utilize instructional strategies that increase the amount and quality of learning time afforded children.[42] These strategies must address the needs of "all" children in the school.[43] The broad language of these provisions means that children with disabilities attending schools that are Title I schoolwide programs must be

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[39] *See also* 34 C.F.R. §104.34(c) (services provided in facilities identifiable as being for individuals with disabilities be comparable in quality to those provided to nondisabled individuals).

[40] *See also* OSEP Memorandum, *supra* (educational decisions under IDEA may not be based solely on category or severity of disability, administrative convenience or the configuration of the delivery system); *Response to Inquiry of Latshaw*, EHLR 213:124 (OSEP 3/1/88).

[41] If a state has already developed or adopted content and performance standards, it must use those in operating Title I programs, modified as necessary to meet Title I requirements. States that have not adopted content and performance standards for all students must implement a strategy and schedule for developing them by 1997-98 in at least reading/language arts and math for children served under Title I; such standards must include the same knowledge, skills, and levels of performance expected of all children. 20 U.S.C. §6311(b)(1).

[42] 20 U.S.C. §6314(b)(1)(B)(i) - (iii).

[43] 20 U.S.C. §6314(b)(1)(B)(iv)(I).

provided curricula and instruction aligned to state standards.[44]

Schools that are schoolwide programs must also, on an ongoing basis, modify and supplement learning opportunities for children experiencing difficulty in mastering any of the state standards during the course of the school year. These requirements, too, apply to students with disabilities attending such schools. "Effective, timely additional assistance" must be provided.[45]

Those children with disabilities selected to participate in Title I targeted assistance programs,[46] like all children in such programs, must also be provided instruction and services designed to enable them to meet state student performance standards.[47] Targeted assistance programs must be based upon effective means for improving achievement, and employ effective instructional strategies that provide a high-quality curriculum.[48] Schools must review the progress participating children are making towards meeting state student performance standards on an ongoing basis, and revise the targeted assistance program accordingly.[49]

The Significance of Education Rights Under State Constitutions

In recent years, lawsuits have been brought in many states alleging that state systems for financing and operating public schools violate state constitutional provisions regarding public education. While some have focussed solely on funding inequities, others have challenged the substantive adequacy of the education actually provided by the state system. A number of the latter cases have resulted in decisions establishing broad educational outcomes for students in the states involved. In those states, a constitutionally adequate

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[44] In its declaration of policy and statement of purpose for Title I, Congress states that it "recognizes that educational needs are particularly great for...children with disabilities...." 20 U.S.C. §6301(b)(3).

[45] 20 U.S.C. §6314(b)(1)(H). Towards this end, schools must implement measures that (1) ensure that students' difficulties are timely identified, and (2) yield the information necessary to fashion effective assistance. *Id.*

[46] Children with disabilities are eligible for services in targeted assistance programs on the same basis as other children. 20 U.S.C. §6315(b)(2)(i). Eligible children, are those identified by school personnel as failing, or most at risk of failing, to meet the State's challenging student performance standards. 20 U.S.C. §6315(b)(1). Schools may not use Title I funds to provide special education and related services required by IDEA or other laws, but may use Title I money to coordinate or supplement such services. 20 U.S.C. §6315(b)(2)(ii).

[47] 20 U.S.C. §6315(c)(1)(A).

[48] 20 U.S.C. §6315(c)(1)(B), (D).

[49] 20 U.S.C. §6315(c)(2)(B).

public education system is one designed and operated to enable students to attain these outcomes.

The outcomes articulated in these cases are part of what constitutes "an appropriate elementary or secondary education in the State involved," for purposes of IDEA's definition of "free appropriate public education," as well as a baseline against which the opportunities afforded children with disabilities may be compared for purposes of anti-discrimination analysis under §504 and the ADA. In addition, and quite apart from the way in which the outcomes they require may be linked to IDEA or §504, many of these cases emphasize that "all" children in the state have a right to an education designed to provide these outcomes. This creates the basis for an independent legal claim under the state constitution when children with disabilities are denied opportunities to attain them.[50]

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[50] *See Alabama Coalition for Equity v. Hunt*, 19 IDELR 810 (1993). The decision is also published as an appendix Alabama Supreme Court's *Opinion of the Justices No. 338*, 624 So.2d 107 (Ala. 1993).

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INCLUSION OF STUDENTS WITH DISABILITIES WHO ARE LABELLED "DISRUPTIVE": ISSUE PAPERS FOR LEGAL ADVOCATES

Eileen L. Ordover

November 1997

#5: LOOKING SYSTEMICALLY

[Note about this series: This is the last in a series of five issue papers on the inclusion in regular education of students with disabilities who are labelled disruptive because of their behavior. The other papers in this series are #1: Background and Overview; #2: The Legal Underpinnings of Inclusion; #3: The Duty to Address Behavior; and #4: The Right to Learn the "Regular," or "General," Curriculum]

Introduction

Most inclusion litigation to date has focussed upon obtaining appropriate, inclusive placements for individual children. These important cases have turned upon the individual entitlement provisions of the Individuals with Disabilities Education Act ("IDEA")[1]: the right to a "free appropriate public education,"[2] and the right to receive that education to the maximum extent feasible in the regular education setting with supplementary aids and services.[3] Supplemental strategies for legal and policy advocacy are needed if exclusion is to be redressed on a systemic basis. Legal bases for some of these strategies are found elsewhere in IDEA, in the anti-discrimination provisions of Section 504 of the Rehabilitation Act,[4] Title II of the Americans with Disabilities Act,[5] Title VI of the Civil Rights Act of 1964[6], and

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[1] 20 U.S.C. §1400 et seq. The IDEA Amendments of 1997, Pub. L. 105-17 (June 4, 1997), renumbered and recodified many pre-existing IDEA provisions. Citations herein are to IDEA as amended by Pub. L. 105-17, unless otherwise noted.

[2] 20 U.S.C. §1412(a)(1).

[3] 20 U.S.C. §1412(a)(5).

[4] 29 U.S.C. §794.

[5] 42 U.S.C. §12101 *et seq.*

[6] 42 U.S.C. §2000d.

the regulations implementing these laws.

This paper suggests starting points in law and fact for looking systemically at issues of inclusion and exclusion. It is intended to assist advocates in beginning to diagnose what is happening, in light of some of the things that the law says should and should not be happening, at the state, school system and school building levels. From this beginning, strategies for systemic legal advocacy -- whether through litigation, legislative or administrative advocacy -- may be developed.

Continuum of Alternative Placements

In order to implement IDEA's least restrictive environment requirements, states and local school districts must "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."[7] This continuum must include, among other things, instruction in regular classes, including the provision for supplementary services such as resource room or itinerant instruction, in conjunction with regular class placement.[8]

Do the state and all local school districts in fact have in place such a continuum? Is it available to students with all categories of disability, or are students with particular disabilities limited to the more restrictive end of the continuum? Are behavioral support services available only on the restrictive end? Do state policies and procedures demonstrate how the state meets the continuum requirement, as required by IDEA regulation,[9] or do they merely recite that the state does so? Do school district documents filed with the state to establish eligibility for IDEA funds demonstrate compliance with the continuum requirement, including the availability of regular education placement for children of all disability types? Does the annual placement data collected by the U.S. Department of Education[10] indicate that children with certain disabilities are underrepresented in regular education placements?

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[7] 34 C.F.R. §300.551(a) (1996). On October 22, 1997, the U.S. Department of Education ("ED") published in the Federal Register new proposed regulations implementing IDEA. The proposed regulations retain the continuum requirement. *See* 62 Fed. Reg. 55107 (October 22, 1997).

[8] 34 C.F.R. §300.551(b) (1996). ED's proposed regulations retain this requirement. See. 62 Fed. Reg. 55107 (October 22, 1997).

[9] 34 C.F.R. §300.550(a) (1996) (SEA "shall ensure that each public agency establishes and implements procedures that meet the requirements" of §300.551). ED's proposed regulations reword this provision, requiring states to "demonstrate...that the State has in effect policies and procedures to ensure that it meets" the requirements of §300.551. 62 Fed. Reg. 55106-55107 October 22, 1997).

[10] *See* 20 U.S.C. §1418(a)(1)(A)(iii), (iv) as amended.

State Funding Mechanisms

Does the state distribute state special education funds to local districts on the basis of the type of setting in which each child is served? Does this funding mechanism result in overly restrictive placements? If so, the state must implement policies and procedures to ensure that such violations of inclusion rights do not occur, or revise the funding mechanism.[11]

Patterns of IEP and Placement Decisions

1. By disability

Are students with the same classification/label assigned to the same special education classrooms, i.e., are the classrooms identifiable on the basis of disability? Are different special education placements identifiable on the basis of disability. e.g., students with mild mental retardation disproportionately placed in substantially separate special education classes, and students with learning disabilities placed in regular classes with resource rooms as a supplemental service? Does degree of inclusion in academic and non-academic activities vary within classification by disability (suggesting that the unique needs of each child are being taken into account), or does it appear to reflect decisions made globally based on students' classifications? Does the LEA consider and explore other altematives prior to excluding *any* student from the regular education classroom, or is there evidence that such consideration varies based upon the nature of a student's classification and/or extent of disability? Do students' IEPs contain the required explanation of the extent, if any, to which each child will not participate in the regular class?[12] Do these explanations truly "explain" the basis of any exclusion from regular class participation? Are they individualized, or are they "boilerplate"? Is there any evidence in the educational records of students with challenging behavior that non-regular classroom placements are reviewed annually? Does data reflect that these children return to regular classrooms, or are their exclusions routinely renewed?

Such patterns might indicate that the school system fails to make individualized placement determinations, as required by both IDEA and §504, and instead is making illegal categorical placements. Little mobility out of separate classes and programs suggests a failure by those settings to provide appropriate educational services, including academic and behavioral programming, in violation of rights under IDEA and §504 to a free appropriate

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[11] 20 U.S.C. §1412(a)(5)(B) as amended.

[12] 20 U.S.C. §1414(d)(1)(A)(iv), as amended, effective July 1, 1998. Prior law required "a statement of...the extent to which such child will be able to participate in regular education programs." See prior 20 U.S.C. §1401(a)(20)(C).

public education, and an education as effective as that provided nondisabled students.[13]

2. By race or national origin

Are substantially separate special education programs and classrooms racially identifiable? Are minority students with a particular disability disproportionately excluded from regular education classrooms relative to other students with that disability? Once excluded from regular education, are minority students placed in more restrictive settings than other excluded students? Are minority students disproportionately placed in separate programs and classrooms that are identifiable as for children with a particular disability? Are there discrepancies in the extent to which IEP teams consider and explore alternatives prior to excluding minority students from regular education settings, as compared to other students? Once excluded from regular education classrooms, do minority students remain excluded for longer periods than do their non-minority peers?

Such practices not only suggest a violation of IDEA and §504 individualization requirements, but unlawful race and national origin discrimination under Title VI of the Civil Rights Act of 1964.[14] The Title VI statute prohibits *intentional* discrimination.[15] In addition, however, the regulations implementing Title VI prohibit schools from using "criteria or methods of administration that have *the effect* of subjecting individuals to discrimination because of their race, color or national origin, or have *the effect* of defeating or substantially impairing accomplishment of the objectives of the [education] program as respect individuals of a particular race, color or national origin."[16]

1997 changes to IDEA should assist advocates in obtaining information about racial disproportionality in the placement of children with disabilities, and in forcing change. The new law requires states to collect and report annually to the U.S. Department of Education data on the number of children with disabilities, by race, ethnicity and disability category, who are participating in regular education or are in separate classes, separate schools or facilities, or public or private residential facilities.[17] States must examine the data, and

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[13] For a discussion of these rights, see Paper #3 in this series, *The Duty to Address Behavior*, and Paper #4, *The Right to Learn the "Regular," or "General," Curriculum*.

[14] 42 U.S.C. §2000d. Title VI is enforced by the U.S. Department of Education/Office for Civil Rights, as well as through private law suits.

[15] *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 608 n.1 (1983).

[16] 34 C.F.R. §100.3(b)(2). *See also Guardians Association, supra*, 463 U.S. at 607 n.27, 608 n.1 (§100.3(b)(2) establishes, permissibly, a racial impact standard).

[17] 20 U.S.C. §1418(a)(1)(A)(iii), (iv) as amended. The U.S. Department of Education/Office for Civil Rights also collects data on racial disparities in placement, as part of its Elementary and Secondary Education Civil Rights Compliance Report. OCR data is

determine whether "significant disproportionality based on race" is occurring in the placement of children in particular settings.[18] Where disproportionality exists, the state must review and revise relevant policies, practices and procedures to ensure compliance with IDEA identification, evaluation and placement procedures.[19]

Personnel Qualification and Development

What training has been provided teachers (regular and special education) to inform them of their responsibility to comply with the IDEA and §504 requirement that all children, including those with challenging behavior, be integrated in regular education settings to the maximum extent feasible? What training or technical assistance has been provided (or is available) to teachers so as to assist them in integrating and supporting children with behavioral issues in their classrooms? Are teachers and IEP teams basing their work on current research and best practices for providing positive behavioral supports in regular education settings? Is the SEA providing them with such information, and ensuring its incorporation into school practice? Are teachers in restrictive placements and programs qualified in the content areas (e.g., math, biology, Spanish) they are teaching, apart from any special education credentials?

The IDEA regulations require the SEA to "carry out activities to ensure that all teachers and administrators...are fully informed about their responsibilities for implementing [maximum feasible integration requirements]...and...[a]re provided with technical assistance and training necessary to assist them in this effort."[20] In addition, the "comprehensive system of personnel development," which a state must have in effect in order to receive IDEA funds,[21] must describe how the state "will enhance the ability of teachers and others to use strategies, such as behavioral interventions" to meet the needs of children whose behavior impedes

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collected at the school level, while data collected under IDEA is aggregated for the entire state.

[18] 20 U.S.C. §1418(c)(1) as amended. States must also collect data on the number of children with particular disabilities by race and ethnicity, and identify any significant racial disproportionality is occurring with respect to the identification of children as having disabilities as a whole, or with respect to a particular disability category. See *id.* and 20 U.S.C. §1418 (a)(1)(A)(i).

[19] 20 U.S.C. §1418(c)(2) as amended. The state must do the same where racial disproportionality exists in the identification of children as having disabilities in general, or as having a particular disability. *Id.*

[20] 34 C.F.R. §300.555. ED's proposed regulations retain this requirement. 62 Fed. Reg. 55108 (October 22, 1997).

[21] 20 U.S.C. §1412(a)(12) as amended.

learning.[22] Furthermore, this system of personnel development must establish a mechanism by which the state "will acquire and disseminate, to teachers, administrators, school board members, and related services personnel, significant knowledge derived from educational research and other sources, and...when appropriate, adopt promising practices, materials, and technology."[23] Under both IDEA and §504, students with disabilities are entitled to meaningful opportunities to master the content of the general curriculum, and attain the standards all students are expected to meet.[24] Staffing separate classes or programs with teachers unqualified to teach that content thus violates both laws.

State Monitoring and Enforcement

Does the state educational agency (SEA) proactively and effectively monitor and enforce local compliance with maximum feasible integration requirements? With the requirement that each local school district have in effect a continuum of alternate placements? Does the state ensure that local educational agencies develop new placement alternatives as necessary to implement IEPs in accordance with the right of students with disabilities to be integrated to the maximum extent appropriate? Does monitoring include examination of placements and services provided children with behavioral manifestations? Does the SEA have procedures for monitoring and evaluating IEPs, as required by the IDEA regulations?[25] Are the procedures followed? Does the state require school districts to take meaningful corrective action when it finds noncompliance with IDEA?

Does the state maintain or review data on special education programs' outcomes, particularly regarding academic gains by students with behavioral manifestations? Is any data maintained evidencing the graduation rates and drop out rates for students by disability classification? By percentage of time outside of the regular education classroom? By timely achievement of educational outcomes identified in IEPs? By post secondary school placement or degree of independence and integration in the community, job placement?

Under IDEA, the (SEA) is ultimately responsible for ensuring that all students receive the free appropriate public education to which they are entitled, in the setting in which they are entitled to receive it; indeed, the SEA must exercise "general supervision" over all

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[22] 20 U.S.C. §1453(c)(3)(D)(vi), incorporated by reference into 20 U.S.C. §1412(a)(14) as amended.

[23] 20 U.S.C. §1453(c)(3)(D)(vii), incorporated by reference into 20 U.S.C. §1412(a)(14) as amended.

[24] For a discussion of this issue, see Paper #4 in this series, *The Right to Learn the "Regular," or "General," Curriculum.*

[25] 34 C.F.R. §300.130(b)(2) (1996). ED's proposed regulations retain this requirement. See proposed 34 C.F.R. §300.128(b)(2), 62 Fed. Reg. 55076 (October 22, 1997).

educational programs for children with disabilities in the state.[26] In addition, the IDEA regulations explicitly require the SEA to "carry out activities to ensure" that each local school districts implements IDEA's maximum feasible integration and continuum requirements.[27] Where there is evidence that a district makes placements that are inconsistent with inclusion rights, the SEA must review the district's justification for its actions and assist in planning and implementing any corrective action.[28] The SEA also has an independent obligation under the Education Department General Administrative Regulations ("EDGAR") to evaluate programs carried out with IDEA funds, and to ensure IDEA compliance by the school districts to which it makes subgrants.[29]

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[26] 20 U.S.C. §1412(a)(11) as amended.

[27] 34 C.F.R. §300.556 (1996). ED's proposed regulations retain this requirement. 62 Fed. Reg. 55108 (October 22, 1997).

[28] *Id.*

[29] See 34 C.F.R. §76.770 (state must have procedures for "reviewing and approving applications for subgrants and amendments to those applications, for providing technical assistance, evaluating projects, and performing other administrative responsibilities the State has determined are necessary to ensure compliance with applicable statutes and regulations").

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