

A Primer of Special Education Law

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Teachers and parents often find special education law complex and confusing. One way to get a basic foundation in special education law is to start with the *Top 5* case concepts from the Supreme Court. This *Top 5* represents 10 decisions; for some of these key concepts, the Supreme Court has decided more than one case. Each of the *Top 5* is a core concept under either (a) the Individuals With Disabilities Education Act (IDEA), which originated in 1975 under the name Education of the Handicapped Act and which Congress most recently reauthorized under the name Individuals With Disabilities Educational Improvement Act, or, less importantly but not to be ignored, (b) the overlapping pair of civil rights acts prohibiting disability discrimination—Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA).

Other Supreme Court cases arising in the context of special education did not make this lofty list. More specifically, the excluded decisions are (a) those that Congress subsequently reversed by amending the IDEA (e.g., *Smith v. Robinson* (1984), which concerned attorneys' fees and exclusivity, and *Dellmuth v. Muth* (1989), which concerned 11th Amendment immunity; and (b) those decisions in which the context was special education but the issue was based instead on the Constitution (e.g., *Zobrest*, 1993), which held that a school district's provision of an interpreter to a deaf student at a parochial school does not violate the Establishment Clause).

Following are the top five case concepts from the Supreme Court. They respectively illustrate and interpret these basic building blocks of the IDEA: (a) the entitlement, for eligible children, of "free appropriate public education" (FAPE), with particular attention to what "appropriate" means; (b) the FAPE component, in addition to special education, of "related services," with particular attention as to where the line is drawn for the medical services exclusion; (c) the high-stakes remedy of "tuition reimbursement," with particu-

lar attention to the FAPE-based formula, or criteria, for determining whether the parent is entitled to this remedial relief in the wake of a unilateral placement; (d) the issue of discipline in the form of a removal from school for more than 10 days, with particular attention to dangerous behavior; and (e) the requirements of Section 504 and the ADA for students who are not eligible under the IDEA, with particular attention to the special meaning of "disability" and "reasonable accommodation" under these sister statutes.

1. *Rowley*: FAPE

In its landmark decision in *Board of Education v. Rowley* (1982), the Supreme Court faced the parents of a deaf child who wanted, beyond the other services in her individualized education program (IEP), and a district that refused to provide a full-time interpreter for her academic classes; they argued that "appropriate" in FAPE meant an entitlement to an equal educational opportunity by hearing, or receiving via interpreter, all the instructional information that her nondisabled peers heard. Concluding that Congress's primary purpose was to provide access, or a door of opportunity more than a floor of opportunity, to students with disabilities, who had a history of exclusion from public schools and special education, the Court interpreted "appropriate" in the IDEA's FAPE mandate to have a dual meaning, which was primarily procedural and only secondarily substantive. First, the school district must provide procedural compliance with the Act. Second, the substantive standard is that the eligible child's IEP must be reasonably calculated to yield educational benefit. The result has been a focus on the many procedural requirements of the Act, such as the various provisions for parental participation, with a relatively relaxed standard for how much FAPE the eligible child is entitled to. The *Rowley* child lost her bid for interpreter services, but the numerous post-*Rowley* cases have had varying outcomes based on the individualized emphasis of the IDEA and the far from

precise standards established by the *Rowley* Court.

2. *Tatro* and *Garret F.*: Related Services

In both *Irving Independent School District v. Tatro* (1984) and *Cedar Rapids Community School District v. Garret F.* (1999), the two eligible children had severe physical disabilities, one requiring clean intermittent catheterization and the other requiring constant specialized nursing services. The defendant districts did not dispute that what these children needed fit under the broad definition of "related services" under the IDEA; rather, they argued that these services fit within the definition's express exclusion for "medical services" and, thus, were not part of their FAPE obligation. In these successive cases, the Court established a relatively clear boundary for the medical services exclusion in the related services component of FAPE: only if the service must be provided by a physician, it fits in this exclusion. Thus, each of these two children won. Although the determination of related services remains an individualized matter, the key question is whether the child needs the proposed service to benefit from special education. If the answer is yes, the district must provide it as part of FAPE unless only a physician may provide said service. Thus, the traditional narrow meaning of education and the accompanying concern with costs do not constitute the primary considerations under the IDEA.

3. *Burlington* and *Carter*: Tuition Reimbursement

In two successive decisions (*Burlington School Committee v. Department of Education*, 1985; *Florence County School District v. Carter*, 1993), the Court had to balance the IDEA's FAPE obligation of school districts with the Act's "stay-put" provision, which requires the child to remain in their pending placement upon either party filing for a due process hearing, and until the disputed issue is resolved. In each of these cases, the parent unilaterally placed the child rather than maintain the "stay-put," but the reason was that, in the parents' percep-

tion, the district was not meeting its FAPE obligation and, thus, should do so by reimbursing the parents for the tuition of the unilateral placement. The district disputed this requested remedy, and the lower courts were split on the issue. In these two successive decisions, the Court established a 3-step test for parents who unilaterally place the child outside the district and seek tuition reimbursement: (1) Was the district's proposed placement appropriate?; (2) If not, was the parents' unilateral placement appropriate (but with relaxed procedural standards for the parents); and (3) If so, do the "equities," such as the reasonableness of the cost in comparison to available private alternatives, warrant a reduction or elimination of the amount sought? The initial emphasis was on the district's FAPE obligation. The second step's relaxed requirements for parents was based on their disadvantaged, secondary position in terms of resources and knowledge. The finishing addition of the equities put a reasonableness boundary on both sides' conduct. The result has been a multitude of tuition reimbursement cases, with the parents taking a measured risk on the outcome depending on the ultimate determination of this flowchart-like set of criteria.

4. Honig: Discipline

In *Honig v. Doe* (1988), the defendant district had suspended for a long period of time two students with emotional disturbance who had victimized their classmates with dangerous behavior that related to their disability. Revisiting the exclusionary history that led to the IDEA and the Act's procedurally prescribed placement process, including the "stay-put" provision, the Supreme Court ruled that school districts do not have unilateral authority to exclude a special education student from school for more than 10 consecutive days for conduct that was a manifestation of the student's disability; rather, if the parents do not consent to such a change in placement, the only way under the IDEA was a preliminary injunction from a state or federal court. More recent amendments to the IDEA have preserved the *Honig* interpretation but have added refinements, such as setting forth the criteria for determining whether the behavior is a manifestation of the child's disability and providing impar-

tial due process hearing officers with authority to approve 45-day interim alternate placements where the student's behavior poses a substantial danger to self or others.

5. Davis, Toyota Motor, and Other Decisions: Section 504 and the ADA

The Court has issued various decisions that are applicable to students with disabilities in K-12 schools, although none has arisen in this specific context, in terms of the eligibility and nondiscrimination requirements under Section 504 and the ADA. In *Southeastern Community College v. Davis* (1979), the Court concluded that Section 504 requires educational institutions to provide "reasonable accommodation," not substantial modification, to students who meet the three-pronged definition of disability: (1) physical or mental impairment, (2) substantially limiting, (3) a major life activity. In more recent decisions, the Court interpreted the second and third prongs of this definition rather narrowly (e.g., *Sutton v. United Airlines*, 1999; *Toyota Motor Manufacturing v. Williams*, 2002); yet, the Court also interpreted "reasonable accommodation" to require waivers in athletics (*PGA Tour, Inc. v. Martin*, 2001). The result is that districts and parents must consider the federal requirements not only under the IDEA, but also the overlapping requirements under Section 504 and the ADA. For example, for students with IEPs who are otherwise eligible to participate in interscholastic athletics, absolute rules, such as No Pass, No Play, warrant careful consideration for individualized waivers. Further for students who are not eligible for IEPs under the IDEA, districts must have defensible procedures for determining whether the child meets the Section 504/ADA three-pronged definition of disability and, for if so, providing FAPE—whether accommodations, such as extra time for testing, or related services—typically via a Section 504 plan.

Conclusion

The remaining building blocks including the concepts of the IDEA's two-pronged definition of disability, its "least restrictive environment" (LRE) presumption, and the availability of attorneys' fees and compensatory education are found in (a) the IDEA, which

Congress has amended periodically, most recently in the 2004 reauthorization; (b) its regulations, which are currently in the proposal stage for the recent reauthorization; and (c) thousands of published hearing officer and court decisions. Various sources provide more detailed information about the IDEA (e.g., the texts listed in Sullivan & Zirkel, 1998), and, to a lesser extent, Section 504 and the ADA (e.g., Zirkel, 2000, 2004). Careful systematic study is both appropriate and necessary for teachers and parents in special education; for better or worse, the field is so legalized that literacy must be both educational and legal. Although specialized attorneys play an important role, the teachers who provide the services and the parents of the children who receive them need enough of the basic building blocks to be able to ask the right questions, understand the answers, and recognize the basic rights and duties under the IDEA, Section 504/ADA, and the related state special education laws.

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