

The Legal Rights of American Students with Disabilities: An Overview

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Introduction

Australia, in a fashion similar to United States, is witnessing rapid legal growth and development concerning the educational rights of students with disabilities. Yet, since Australia, unlike the United States, lacks a cohesive set of federal laws on special education, it relies, for the most part, on state laws (Blatch, 1997; Lindsay, 1997). The United States, however, since the passage of the landmark statute, the Education for All Handicapped Children Act in 1975, now known as the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq.*, 1998),ⁱ has a highly developed body of federal statutes, regulations, and case law addressing the rights of children with disabilities.

The IDEA requires public school districts to provide each student who has a disability with a free appropriate public education (FAPE) in the least restrictive environment (LRE). The IDEA also accords these students, and their parents, due process rights, including the opportunity to contest decisions made by school officials over the delivery of a FAPE in the LRE. Consequent to the enactment of the IDEA, thousands of suits have been filed challenging the actions of school districts.

The IDEA is not the only American law governing special education. A second major statute, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, 1998), provides additional protections for individuals with disabilities. Section 504 prohibits programs that receive federal funds from discriminating against individuals with disabilities. Moreover, consistent with the situation in Australia (Blatch, 1997; Lindsay, 1997), all American states have statutes governing the delivery of special education. However, as this article focuses on developments in federal law, any detailed discussion of state law is beyond the scope of this manuscript.

In light of the broad statutory protections that federal law affords American students with disabilities, this article presents an overview of special education under both the IDEA and Section 504.ⁱⁱ In this way, the authors hope to provide lawyers, educators, and policy makers in Australia with an insight into the American system so that they might benefit from and improve upon the American approach.

History of Equal Educational Opportunities

Case law relevant to equal educational opportunities for all American children dates back to *Brown v. Board of Education of Topeka* (1954), the most significant ruling on education in the history of the United States Supreme Court. In acknowledging that '[e]ducation is perhaps the most important function of state and local governments' (*Brown*, 1954: 493), the Court struck down *de jure* racial segregation on the basis that it prevented minority children from receiving equal educational opportunities in the public schools. The principles of equal educational opportunity enunciated in *Brown* have ensured its place as the cornerstone upon which all subsequent legal developments protecting the rights of the disenfranchised, including individuals with disabilities, are grounded.

An attitude of not always benign neglect toward the disabled permeated federal, state, and local law which segregated or excluded persons with disabilities. Laws restricted the rights of individuals with disabilities to attend school, vote, obtain drivers' licenses, and hold office. In fact, as recently as the late 1950s, twenty-eight states required persons with a variety of mental and physical disabilities to be sterilised. At the same time, other states prohibited marriages between persons who were disabled or where one of the parties was mentally ill or retarded (Thomas & Russo, 1995).

Statistics from the Department of Education revealed that the number of educational programs for children with disabilities grew slowly but surely through the 1960s, as the percentage of all children with disabilities who were served increased from 12% in 1948 to 21% in 1963 and to 38% in 1968 (Ballard, Ramirez, & Weintraub, 1982: 2). In addition, a Report by the Committee on Education and Labor of the House of Representatives revealed a steady increase in the number of programs during the early 1970s. Yet, as significant as the growth in the number of students served was, the results were, at best, mixed.

In July 1, 1974, the Bureau for the Education of the Handicapped estimated that 78.5% of the 8,150,000 eligible children received some form of public education. More specifically, 47.8% of the students received special education and related services, 30.7% did not receive related services, and the remaining 21.5% did not receive educational services (House Report, 1975: 11). Despite these improvements, schools did not practice the current trend of 'zero reject', reflected in *Timothy W. v. Rochester, New Hampshire, School District* (1989), wherein no children with disabilities can be excluded from public education. As such, it is not surprising that the initial reliance of persons with disabilities on the good intentions of educators and legislators was eventually supplanted by their dependence on the courts. Two cases from federal trial courts, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania* (1971, 1972) and *Mills v. Board of Education of the District of Columbia* (1973), are of special significance as they laid the groundwork for later statutory developments.

At issue in *PARC* was a consent decree entered on behalf of retarded persons between the ages of six and twenty-one who were excluded from public schools in Pennsylvania. The original complaint challenged state laws that relieved schools of their duty to educate students who were classified as ineducable or untrainable by public school psychologists. The laws permitted educators to exclude students who had not reached the mental age of five and excused children from compulsory attendance if psychologists found them unable to profit from schooling, even though attendance was legally required of all pupils aged eight to seventeen.

The *PARC* deterraination greatly enhanced the educational rights of students with disabilities while setting the stage for subsequent developments in federal law. Under the consent decree, the parties agreed that children could neither be denied admission to a public school nor be subjected to changes in their educational placements unless they received formal due process. The parties also acknowledged that students who were mentally retarded were capable of benefitting from an education and that the state had to provide them with a free public program appropriate to their capacities. Further, the litigants recognised that placement in a regular classroom was preferable to any of the more restrictive and segregative options.

Mills v. Board of Education of the District of Columbia (1972) was filed on behalf of seven exceptional children who were certified as representatives of a class of some 18,000 similarly situated students whose educational needs were not being served by the public schools in Washington, D.C. *Mills* was similar to *PARC* insofar as it expanded the educational rights of children with disabilities. However, *PARC* and *Mills* differed in two important ways. First, *Mills* dealt with a wider class of students who were labelled as having behavioural problems, mental retardation, emotional disturbances, and hyperactivity. Second, *Mills* involved a trial on the merits of the case while *PARC* was based on a consent decree.

The *Mills* court dictated that the inadequacies in the school system could not impact more heavily on exceptional students than on children who were not disabled, that no pupils could be totally excluded from the public schools, and that youngsters with disabilities (and their parents) were entitled to due process before they could be denied any educational services. Moreover, since *Mills* originated in Washington, D.C., it is likely that it was among the more significant influences that moved federal law makers to act to ensure adequate statutory protection for children (and adults) with disabilities.

In light of the success that the plaintiffs enjoyed in *PARC* and *Mills*, it was not surprising that by June 1975 no less than forty-six law suits in twenty-eight states sought clarification of the educational rights of students with disabilities (House Report, 1975: 3). The plaintiffs in these cases generally were successful in gaining additional services; many even received programs that were specially designed to meet their unique needs. Even so, in the absence of actual or potential litigation, children with disabilities continued to be excluded from, or under-served by, the schools.

Four years prior to the adoption of the *Education for All Handicapped Children Act* in 1975, only seven states had mandatory legislation in all categories of exceptionality while twenty-six others had some form of required provisions. The figures improved dramatically in the interim so that by 1975 only a handful of states had failed to pass related statutes (House Report, 1975: 10); however, the laws varied substantially between and among states. Yet, most states had not developed sufficient guidelines for compliance or administrative procedures for resolving disagreements. Against this background, Congressional action in 1973 began the creation of the comprehensive system that is now known as special education.

Section 504 of the Rehabilitation Act of 1973

On September 23, 1973, Congress enacted the *Rehabilitation Act*. Included among its many provisions is section 504, the first federal civil rights law protecting the rights of the disabled. According to Section 504, 'No otherwise qualified individual with a disability in the United States

... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance 29 U.S.C. § 794(a): 1998’.

Section 504 requires recipients of federal financial assistance to file an assurance of compliance; engage in remedial actions where violations are proven; take voluntary steps to overcome the effects of conditions that resulted historically in limiting the participation of students with disabilities in their programs; conduct a self evaluation; designate a staff member, typically at the central office level, as compliance coordinator; adopt grievance procedures; and provide notice to students and their parents that their programs are non-discriminatory.

Section 504 offers broad-based protection. The Act defines an individual with a disability as one

‘who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment (29 U.S.C. § 706(7)(B), 1998)’.

Regulations enacted pursuant to section 504 define physical or mental impairments as including:

- (a) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disorders. 45 C.F.R. § 84.3(j)(2)(i), 34 C.F.R. § 104(j)(2)(i) (1998).

A note accompanying this list indicates that it is not intended to be exhaustive.

In order to have a record of impairment, an individual must have a history of, or have been identified as having, a mental or physical impairment that substantially limits one or more major life activities. For example, a person with a history of hospitalisation due to tuberculosis who currently tests negative could qualify as a person with a record of impairment.

An individual who is regarded as having an impairment has:

- (a) a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (c) none of the impairments ... but is treated by a recipient as having such an impairment. (45 C.F.R. § 84.3(j)(2)(iv), 34 C.F.R. § 104.3(j)(2)(iv) (1998).

Once a student is identified as having a disability, the next step is to determine whether he or she is ‘otherwise qualified’. In order to be qualified, as the term is applied to pre-school, elementary, and secondary school students, a child must be

- (i) of an age during which nonhandicapped persons are provided such services,

- (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or
- (iii) [a person] to whom a state is required to provide a free appropriate public education [under the IDEA], 45 C.F.R. § 84.3(k)(2) (1998)'.

Any individual who is 'otherwise qualified', meaning that he or she is eligible to participate in a program or activity despite the existence of an impairment, must be permitted to participate in the program or activity as long as it is possible to do so by means of a 'reasonable accommodation'.

Reasonable accommodations may involve modest adjustments such as permitting a student to be accompanied in school by a service dog (*Sullivan v. Vallejo City Unified School District*, 1990) or providing basic health services that would allow a child with a physical impairment to be present in the classroom (*Irving Independent School District v. Tatro*, 1984). At the same time, at least one court has held that Section 504 does not require affirmative efforts to overcome a student's disability but only prohibits discrimination on the basis of the disability (*Lyons v. Smith*, 1993).

Even when a child appears to be otherwise qualified, schools may assert one of three major defences to avoid being charged with non-compliance. First, schools can be excused from making accommodations that would result either in 'a fundamental alteration in the nature of [a] program' (*Southeastern Community College v. Davis*, 1979: 410) or, second, subject them to an 'undue financial burden' (1979: 412). The Supreme Court's language has since been addressed in regulations pertaining to schools (45 C.F.R. §§ 84.31-39, 41-47 (1998) and other employers (45 C.F.R. § 84.12 *et seq.* (1998).

Section 504's 'cost' defence illustrates a major difference between it and the IDEA.ⁱⁱⁱ Insofar as Section 504 does not provide funding for programs, a school can escape liability if a modification is too expensive. Under the IDEA, a school system must provide a program regardless of its cost.

The third defense available under Section 504 is that an otherwise qualified student with a disability can be excluded from a program if his presence creates a substantial risk of injury to himself or to others. For example, a child with poor vision may be excluded from a chemistry laboratory due to fear of exposure to the flames on a Bunsen burner; however, a school may have to offer the reasonable accommodation of providing a computer assisted program that accomplishes a goal similar to that of the laboratory class.

Along with the guidelines related to the education of children with disabilities, section 504 also prohibits discrimination. It requires schools to make individualised modifications for otherwise qualified students with disabilities by providing aid, benefits, or services that are comparable to those provided students who are not disabled. Accordingly, students with disabilities must receive comparable materials, teacher quality, length of school term, and daily hours of instruction. Further, such programs should not be separate from those available to those who are not disabled, unless such segregation is necessary for the program to be effective. Where programs are permissibly separate, facilities must be comparable.

Once identified, each qualified student with a disability is entitled to an appropriate public education, regardless of the nature or severity of his or her disability. In order to guarantee that an

appropriate education is made available, the regulations enacted pursuant to Section 504 include due process requirements for evaluation and placement similar to those under the IDEA.

Individuals With Disabilities Education Act

Appropriate Placement

The IDEA requires school districts to provide each student with a disability between the ages of three and twenty-one (20 U.S.C. § 1412(B), 1998) with a FAPE in the LRE. Yet, the law provides little guidance in defining an appropriate education. The IDEA's regulations indicate that an appropriate education consists of special education and related services that conform with a student's Individualised Education Program (IEP) (34 C.F.R. § 300.8, 1998). The IDEA further stipulates that an IEP must include statements about a student's current educational performance, annual goals and short term objectives, the specific educational services to be provided, the extent to which the child can participate in general education, the date of initiation and duration of services, and evaluation criteria to determine whether the objectives are being met (20 U.S.C. § 1401(20), 1998).

Regulations promulgated pursuant to the IDEA dictate that the parents (or guardians) of students with disabilities must be provided with opportunities to participate in the development of IEPs for their children (34 C.F.R. § 300.345, 1998). The regulations also require districts to obtain parental consent prior to evaluating children or making initial placements (34 C.F.R. § 300.504(b), 1998). Once students have been placed in special education, districts must provide the parents with proper notice before initiating a change in placement (20 U.S.C. § 1415(b)(1)(C), 1998). In addition, students' situations must be reviewed at least annually (34 C.F.R. § 300.343 (d), 1998) and reevaluated fully every three years (34 C.F.R. § 300.534(b), 1998).

As detailed as the directives in seeking to ensure that each child receives a FAPE are, '[n]oticably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded (*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 1982: 24)' under the IDEA. Consequently, it is necessary to review case law for guidance in determining what constitutes a FAPE under the IDEA.

Appropriate Defined

Board of Education of the Hendrick Hudson Central School District v. Rowley (1982), the first case wherein the United States Supreme Court addressed special education, provided a minimal definition of an appropriate education. *Rowley* arose when the parents of a kindergarten student with a hearing impairment protested against the school district's refusal to provide her with a sign-language interpreter that may have helped her to reach her full potential. Lower federal courts ordered the district to provide the interpreter on the basis that a FAPE was one that allowed a student with a disability to achieve at a level commensurate with that of her peers who were not disabled. After the district appealed, the Supreme Court reversed the decision on the basis that since the student, was 'a remarkably well-adjusted child ... [who] perform[ed] better than the average child in her class and [was] advancing easily from grade to grade' (*Rowley*, 1982: 185), without the sign-language interpreter, she was not entitled to one.

Stopping short of an unequivocal definition, the Court held that an appropriate education is one that is formulated in accordance with the IDEA's procedures and provides an IEP that is 'reasonably calculated to enable the child to receive educational benefits (1982: 206)'. According to the Court, since the student in *Rowley* received some educational benefit without the sign-language interpreter, the district was not required to provide one even though she might have achieved at a higher level with such assistance.

Rowley establishes a minimum standard for what constitutes a FAPE. However, as in Australia, individual states may set their own, higher, standards. For example, courts in North Carolina (*Burke County Board of Education v. Denton*, 1990; *Harrell v. Wilson County School*, 1982), New Jersey (*Geis v. Board of Education of Parsippany-Troy Hills*, 1985), Massachusetts (*David D. v. Dartmouth School Committee*, 1985); *Roland M. v. Concord School Committee*, 1990), Michigan (*Barwacz v. Michigan Dep't of Education*, 1988; *Nelson v. Southfield Public Schools*, 1986), and California (*Pink v. Mt. Diablo Unified School District*, 1990) have agreed that those states have higher standards of appropriateness than federal law requires. In some of these decisions the courts also specifically ruled that the higher state standard replaces the federal requirements since one of the essential elements of the IDEA is that special education programs must meet 'the standards of the state educational agency' (20 U.S.C. § 1401(a)(18)(B)(1998). In fact, the statutes in these states typically require districts to provide programs to maximise the potential of students with disabilities commensurate with the educational opportunities provided to their peers who are not disabled.

The *Rowley* standard has been further refined in recent years. Courts have indicated that 'some educational benefit' requires more than just minimal or trivial benefits (*Carter v. Florence County School District Four*, 1993; *Hall v. Vance County Board of Education*, 1985). Other courts have expanded the criteria by stating that the educational benefit must be meaningful (*Board of Education of East Windsor Regional School District v. Diamond*, 1986; *Polk v. Susquehanna Intermediate Unit 16*, 1988) or appreciable (*Chris C. v. Gwinnett County School District*, 1991). One court went so far as to maintain that the gains made by a student must be measurable to meet the *Rowley* criteria (*J.S.K. v. Hendry County School Board*, 1991).

Least Restrictive Environment

The IDEA states that a student with a disability must be educated in the least restrictive environment (20 U.S.C. § 1412(5)(B), (1998). This provision has generated a fair amount of controversy on account of the inclusion movement. Inclusion, sometimes also referred to as mainstreaming, is a philosophy whereby students with disabilities are educated in general education classrooms alongside their peers who are not disabled.

In two high profile cases, federal appellate courts in New Jersey in *Oberti v. Board of Education of the Borough of Clementon School District*, 1993 and California in *Sacramento City Unified School District Board of Education v. Rachel H.*, 1994) ordered districts to place students with moderate to severe disabilities in regular educational settings as opposed to segregated special education classrooms. In these and other cases, courts have held that there are specific factors that districts must consider when determining the LRE for a given student.

As summarised by the Ninth Circuit in *Sacramento City Unified School District Board of Education v. Rachel H.*, (1994), the four factors that school officials must consider in making a

placement are the educational benefits of placing a child with a disability in a regular classroom supplemented with appropriate aids and services, as compared with the benefits that might accrue in a special education class; the non-academic benefits of interacting with children who are not disabled; the effect that the student's presence would have on the teacher and other children in the class; and the costs of inclusion. Inherent in these decisions is the principle that districts must make all reasonable efforts to place students with disabilities in mainstream settings by providing supplementary aids and services to facilitate success.

The focus on inclusion notwithstanding, this does not mean that all students with disabilities must be placed in regular education classes. In fact, courts have approved segregated settings where districts were able to show that students could not function in regular education classrooms or would not benefit from such placements, even with supplementary aids and services (*Clyde K. v. Puyallup School District No. 3*, 1994); *Capistrano Unified School District v. Wartenberg*, 1995). The bottom line is that while inclusion should be the goal, it is not an absolute right. Even so, a segregated setting should be contemplated only if inclusion has failed despite a district's best efforts or there is overwhelming evidence that it is inappropriate.

Private and Residential School Placements

In spite of the IDEA's preference for full inclusion, it may not be feasible for all students. Thus, keeping in mind that the 'public' in FAPE has been interpreted as meaning an education that is provided at public expense, the IDEA requires districts to offer a continuum of placement alternatives to meet the educational needs of students with disabilities. The seven step continuum ranges from a regular classroom to a regular classroom with an aid to a regular placement with 'pull-out' for special services to an individualised (or 'self-contained') placement in a regular school to a special day school to hospital and home bound services to a residential facility (34 C.F.R. § 300.551(a) (1998).

A private school placement may be necessary when a district does not have an appropriate placement available. This may occur when a student has a low incidence disability and there are not enough children with the same type of disability within the district to warrant the development of a program (*Colin K. v. Schmidt*, 1983). Courts have consistently recognised that since smaller school systems cannot afford to develop specialised programs for minimal numbers of students, they must look elsewhere for placements. However, as reflected by a growing number of cases, difficulties may arise when the private school has a religious affiliation (*Zobrest v. Catalina Foothills School District*, 1993).

Courts may order residential placements if it can be shown that a student's disabilities require twenty-four hour per day programming or consistency between the school and home environments. Generally, such students have severe, profound, or multiple disabilities (*Gladys J. v. Pearland Independent School District*, 1981). Residential placements may also be necessary for students with significant behavioural disorders or who require total immersion in an educational environment in order to progress (*Chris D. v. Montgomery County Board of Education*, 1990).

If a residential placement is required for purely educational reasons, the costs of such a setting must be fully borne by a school district. Moreover, districts cannot require parents to contribute toward the cost of a residential placement (*Parks v. Pavkovic*, 1985). However, if the placement is made for other than educational reasons, for example, for medical or social purposes,

then a district is only required to pay for the educational component of the residential setting. In these instances a district may enter into a cost-share agreement with other agencies. Yet, at least one court held that a district was responsible for all costs associated with a residential placement when the student's educational, medical, social, and emotional needs were so intimately intertwined that they could not be treated separately (*North v. District of Columbia Board of Education*, 1979).

Extended School Year Programs

If a student with a disability requires an educational program that extends beyond the traditional school year, it must be provided. Moreover, since an extended school year program must be an available option, a district's refusal to consider one violates the IDEA (*Crawford v. Pittman*, 1983).

An extended school year program is generally required when a student's regression and the time it takes to recoup lost skills interferes with overall progress toward the attainment of the goals and objectives in the child's IEP (*Battle v. Commonwealth of Pennsylvania*, 1981). The student's regression must be greater than that which would normally have occurred during a school vacation. If the regression is minimal, an extended school year program is not required (*Anderson v. Thompson*, 1981).

Related Services

The IDEA requires school districts to provide related, or supportive, services to students with disabilities if they are necessary to assist them in benefitting from their special education programs (20 U.S.C. § 1401(a)(17) (1998)). The same section of the IDEA lists developmental, supportive, or corrective services such as transportation, speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation), social work services, counselling services (including rehabilitation counselling), medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.

The only limitation placed on what may be a related service is that medical services are excluded unless they are specifically for diagnostic or evaluative purposes. A comment in the IDEA's regulations states that since the list of related services is not exhaustive, other services may be required to assist a student with disabilities to benefit from special education (34 C.F.R. § 300.16 Note, 1998). The comment indicates that artistic and cultural programs or art, music, and dance therapy could be related services. The comment further implies that related services may be provided by persons of varying professional backgrounds with an array of occupational titles.

Related services must be provided only to students who are receiving special education services. Under the IDEA's definitions, a child is disabled only if he or she requires special education. A comment attached to the definition of special education indicates that since related services must be offered when necessary for a child to benefit from special education, a district is not required to offer such services when a child is not receiving special education (34 C.F.R. § 300.17 Note 1, 1998).

One of the more controversial topics under the rubric of related services involves the distinction between medical and school health services. In *Irving Independent School District v. Tatro* (1984), the Supreme Court held that a service such as catheterisation that can be performed by a school nurse or trained layperson is a required related service under the IDEA. At the same time, any procedures that must, by law, be performed by a licensed physician are exempted medical services. Thus, psychiatric therapy would not be a related service since a psychiatrist is a licensed physician. Many students with significant medical needs require round-the-clock nursing help, a service that falls somewhere on the continuum between school health services and medical services. At least one court has maintained that since having a nurse most nearly resembles a medical service, districts are not required to provide, and pay for, a full-time nurse while a student is in school (*Detsel v. Board of Education of Auburn Enlarged City School District*, 1987). Change may occur on the basis of litigation currently before the Supreme Court reviewing a decision of the Eighth Circuit that a district was required to provide the services of a full-time nurse. The Court is scheduled to hear oral arguments on the case in the Fall of 1998 and render a decision early in 1999 (*Cedar Rapids Community School District v. Garrett*, 1997).

Another potentially costly related service is 'assistive technology devices' or services. An assistive technology device is any item or piece of equipment that is used to increase, maintain, or improve the functional capabilities of students with disabilities (20 U.S.C. § 1401(a)(25) (1998)). These devices may include commercially available, modified, or customised equipment. An assistive technology service is designed to assist an individual in the selection, acquisition, or use of an assistive technology device (20 U.S.C. § 1401(a)(26) (1998)). Such a service may include an evaluation of a child's needs, provision of the assistive technology device, training in its use, coordination of other services with assistive technology, and maintenance and repair of the device. Assistive technology is ordinarily required when it is necessary for a student to receive a FAPE under the *Rowley* standard or when it can help a child to benefit from education in a less restrictive setting.

Discipline

Perhaps the most controversial legal issue in special education, especially for teachers and administrators who lack the requisite background, concerns disciplining students with disabilities. While the IDEA makes no direct reference to discipline, many of its provisions have implications for disciplinary sanctions applied to students in special education. This is a very sensitive issue as it may pit the duty of educators to maintain order, discipline, and a safe school environment against the right of students in special education to receive a FAPE in the LRE. Even though most will agree that the power of school officials to maintain discipline should not be frustrated, it must be understood that a student should not be denied the rights accorded by the IDEA if the misconduct in question is caused by the child's disability.

School officials may impose disciplinary sanctions on special education students as long as they follow procedures that do not deprive the students of their rights. As such, officials may use normal disciplinary sanctions with special education students, including suspensions, by following usual procedures and providing customary due process. Administrators do face some restrictions when they intend to impose more drastic punishments such as expulsion, or wish to

change a student's placement for disciplinary reasons. In these situations the IDEA's due process procedures replace the normal due process protections.

A lengthy list of cases beginning with *S-I v. Turlington* (1981) has held that students with disabilities cannot be expelled for misconduct that was related to their disabilities but could be excluded if there was no relationship between their misconduct and disability. While the Supreme Court's landmark decision in *Honig v. Doe* (1988) supported the prohibition of expelling students for disability-related misconduct, it states that special education students may be suspended for up to ten days. During the ten day 'cooling off period', educators may attempt to negotiate an alternative placement with a student's parents. If they are unsuccessful, and can show that the student is truly dangerous, educators may obtain an injunction or administrative order allowing them to exclude the student from school.

A 1997 amendment to the IDEA allows school officials to transfer a student who possesses a weapon or drugs to an alternative educational setting for a period of up to forty-five days (IDEA § 615(k)(1)(A) 1997). The transfer may even be carried out over the objections of the student's parents. Given the controversy that led to these changes, it will be interesting to observe how this rule evolves.

The 1997 amendments also stipulate that districts must continue to provide educational services to special education students who have been lawfully expelled for conduct unrelated to their disabilities (IDEA § 612(a)(1)(A) 1997). This provision codified existing policy from the United States Department of Education which maintained that educational services must be provided in this situation. The modification in the IDEA effectively reversed a controversial decision of the Fourth Circuit which held that no such requirement existed under the IDEA (*Commonwealth of Virginia Department of Education v. Riley*, 1997).

Remedies

When a school district fails to provide a student with a disability with a FAPE, the IDEA authorizes the courts to grant appropriate relief (20 U.S.C. § 1415(e)(2), 1998). The courts frequently order a district to provide specified special education and related services. However, if parents have unilaterally obtained the necessary services at their own expense, the courts may order a district to reimburse them for all legitimate expenses.

Damages

Litigants have had little success when filing suit for educational malpractice in special education. The courts generally have not imposed punitive damages on school authorities for failing to provide a student with a disability with a FAPE (*Marvin H. v. Austin Independent School District*, 1983). Similarly, the courts have typically not awarded general damages for 'pain and suffering' (*Ft. Zumwalt School District v. Missouri State Board of Education*, 1994). Yet, recent litigation indicates that this may be changing as courts have indicated that monetary damages may be available under other statutes, such as section 504, if the parents can show that school officials intentionally discriminated against a student or egregiously disregarded the child's rights (*W.B. v. Matula*, 1995). The operative word is intentional. If school officials act in good faith but fail to meet the statutory requirements, they are likely to be immune from damages.

Tuition Reimbursement

Parents who are dissatisfied with a school district's proffered placement sometimes unilaterally enrol their child with a disability in a private school and later seek to recover the cost of tuition. In *Burlington School Committee v. Department of Education, Commonwealth of Massachusetts* (1985), the Supreme Court ruled that parents are entitled to tuition reimbursement if they succeed in showing that a district failed to offer a FAPE and that their chosen placement is appropriate. The Court reasoned that awarding reimbursement essentially requires a district to pay retroactively for expenses that it should have borne all along. Subsequently, in *Florence County School District Four v. Carter* (1993) the Court held that parents are entitled to tuition reimbursement even if their chosen placement is not in a state approved facility as long as it provides an otherwise appropriate education. Even so, when parents make unilateral placements they do so at their own financial risk because they are not entitled to reimbursement if a district can show that it offered, and could provide, an appropriate educational placement.

Parents are also entitled to reimbursement for unilaterally obtained related services if they can demonstrate that a school district failed to provide the needed services. For example, courts have ordered districts to reimburse parents for the costs of counselling or psychotherapy after they succeeded in showing that these services were necessary in order for their children to benefit from special education (*Gary A. v. New Trier High School District Number 203*, 1986; *Straube v. Florida Union Free School District*, 1992).

Compensatory Services

An award of tuition reimbursement is of little use to parents who are unable to make a unilateral placement in a private school because they cannot afford to pay the tuition costs up front. When parents cannot afford to take the financial risk of making a unilateral placement, their child may well remain in an inappropriate setting for some time while the dispute winds its way through administrative due process hearings and judicial proceedings. In such a situation, a court may award additional educational services along with prospective relief to compensate the parents, and student, for the loss of appropriate educational services. Compensatory services can be provided during a time period when the student would not normally receive services, such as during the summer months or after the student's eligibility for services has expired.

In determining whether compensatory educational services are justified, most courts have applied a rationale similar to that used in tuition reimbursement cases. These courts have ruled that compensatory services, like reimbursement, simply compensate the student for a school district's failure to provide an appropriate placement. The reasoning behind compensatory educational services awards is that an appropriate remedy should not be available only to those students whose parents could afford to provide them with an alternative educational placement while litigation was pending (*Lester H. v. Gilhool*, 1990; *Todd D. v. Andrews*, 1991). Generally, compensatory services are provided for a time period equal to the duration that the child was denied services (*Valerie J. v. Derry Cooperative School District*, 1991) and may be granted even after the student has passed age limit for eligibility under the IDEA (*Pihl v. Massachusetts Department of Education*, 1993). Unless a district voluntarily offers compensatory educational services to resolve a dispute, they can be granted only when a hearing officer or court has determined that a school system failed to provide an appropriate placement.

Attorney Fees

The costs of litigation can be very high for both parents and school districts. Many parents, after successfully suing a district, believed that they should have been reimbursed for their legal expenses. These parents maintained that they achieved a hollow victory when they prevailed but were left with burdensome legal bills.

In *Smith v. Robinson* (1984) the Supreme Court held that recovery of legal expenses was not available under the IDEA. However, two years later Congress amended the IDEA by enacting the *Handicapped Children's Protection Act* (HCPA) (20 U.S.C. § 1415(e)(4)(B), 1998). The HCPA gave courts the power to award reasonable attorney fees to parents who prevailed against school districts in actions or proceedings brought pursuant to the IDEA. An award is to be based on the prevailing rates in the community in which the case arose. Under the HCPA, the courts may determine what is a reasonable amount of time to have spent preparing and arguing the case in terms of the issues litigated. An award may be limited if a district made a settlement offer more than ten days before the proceedings began that was equal to or more favourable than the final relief obtained. Moreover, a court may reduce a fee award if it finds that parents unreasonably protracted the dispute (*Howie v. Tippecanoe School Corporation*, 1990), an attorney's hourly rate was excessive (*Beard v. Teska*, 1994), or the time spent and legal services furnished were excessive in light of the issues litigated (*Mr. D. v. Gloucester School Committee*, 1989; *Hall v. Detroit Public Schools*, 1993). The HCPA was made retrospective to July 4, 1984, the day before the Supreme Court declared that attorney fees were not available under the IDEA.

In 1990 Congress specifically abrogated states' Eleventh Amendment immunity to suits in the federal courts for actions arising after October 30, 1990 (20 U.S.C. § 1403, 1998). This amendment was passed in response to *Dellmuth v. Muth* (1989), wherein the Supreme Court interpreted the original IDEA as not specifically abrogating sovereign immunity.

Conclusion

Federal laws guaranteeing students with disabilities free appropriate public educations and prohibiting discrimination on the basis of the disabilities have provided these children with unprecedented access to the public schools. At the same time, implementing these laws has not been without controversy. As a result of disputes between parents and school district officials, thousands of lawsuits have been filed in the past two decades making this one of the most explosive areas of school law.

By reviewing the parameters of American law then, lawyers, educators, and policy makers in Australia should be able to profit from the advances in the IDEA, while avoiding costly mistakes that have led to unnecessary litigation that has diverted funds away from what should be the schools' primary concern of educating all children.

References

- Ballard, J., Ramirez, B.A., & Weintraub, F.J. (Eds.) (1982). *Special education in America: Its legal and governmental foundations*. Reston, VA: Council for Exceptional Children.
- Blatch, P. (1997). *School Law, 1997 National Seminar Papers, Special Education Issues*.

Code of Federal Regulations (1998). 34 C.F.R. § 104(j)(2)(i), (iv); 34 C.F.R. § 300.8; 34 C.F.R. § 300.16 Note; 34 C.F.R. § 300.17 Note 1; 34 C.F.R. § 300.345; 34 C.F.R. § 300.551(a); 34 C.F.R. § 504(b); 34 C.F.R. § 343(d); 34 C.F.R. § 534(b); 45 C.F.R. § 84.3(j)(2)(i), (iv); 84.3(k)(2); 45 C.F.R. § 84.12 *et seq.*; 45 C.F.R. §§ 84.31-39, 41-47; 34 C.F.R. § 104(j)(2)(i).

House Report No. 332, 94th Congress, 1st Session (1975).

Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq.*).

IDEA Amendments of 1997 §§ 612(a)(1)(A); 615(k)(1)(A).

Lindsay, K. (1997). *School Law, 1997 National Seminar Papers, Discrimination Law & Special Education*. LAAMS, Sydney.

Osborne, A.G. (1996) *Legal Issues In Special Education* Boston: Allyn & Bacon.

Rehabilitation Act, Section 504, 29 U.S.C. § 794 (1998); 29 U.S.C. § 706(7)(B) (1998).

Thomas, S.B & Russo, C.J. (1995). *Special Education Law: Implications and Issues for the 90s*. Topeka, KS: NOLPE.

Caselist

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).

Board of Educ. of East Windsor Reg. Sch. Dist. v. Diamond, 808 F.2d 987 (3d Cir. 1986).

Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990).

Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983).

(1985) *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983).

David D. v. Dartmouth Sch. Comm., 775 F.2d 411 (1st Cir. 1985).

Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist., 820 F.2d 58 7(2d Cir. 1987).

Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940 (7th Cir. 1986)

Geis v. Board of Educ. of Parsippany-Troy Hills, 774 F.2d 575 (3d Cir. 1985).

Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985)

J.S.K. v. Hendry County Sch. Bd., 941 F.2d 1563 (11th Cir. 1991).

Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).

Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348 (5th Cir. 1983).

Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204 (3d Cir. 1993).

Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985)

Polk v. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990).

Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).

S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981)

Timothy W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954 (1st Cir. 1989).

Todd D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991)
W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995)
Beard v. Teska, 31 F.3d 942 (10th Cir. 1994).
Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d (9th Cir. 1995).
Cedar Rapids Community Sch. Dist. v. Garrett, 106 F.3d 822 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 1793 (1998).
Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396 (9th Cir. 1994).
Commonwealth of Va., Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997).
Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184 (1st Cir. 1993).
Barwacz v. Michigan Dep't of Educ., 681 F. Supp. 427 (W.D. Mich. 1988).
Battle v. Commonwealth of Pa., 513 F. Supp. 425 (E.D. Pa. 1981).
Chris C. v. Gwinnett County Sch. Dist., 780 F. Supp. 804 (N.D. Ga. 1991).
Chris D. v. Montgomery County Bd. of Educ., 743 F. Supp. 1524 (M.D. Ala. 1990).
Ft. Zumwalt Sch. Dist. v. Missouri State Bd. of Educ., 865 F. Supp. 604 (E.D. Mo. 1994).
Gladys J. v. Pearland Indep. Sch. Dist., 520 F. Supp. 869 (S.D. Tex. 1981).
Hall v. Detroit Pub. Schs., 823 F. Supp. 1377 (E.D. Mich. 1993).
Howie v. Tippecanoe Sch. Corp., 734 F. Supp. 1485 (N.D. Ind. 1990).
Lyons v. Smith, 829 F. Supp. 414 (D.D.C. 1993).
Mills v. Board of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).
Mr. D. v. Glocester Sch. Comm., 711 F. Supp. 66 (D.R.I. 1989).
North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979).
Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).
Pink v. Mt. Diablo Unified Sch. Dist., 738 F. Supp. 345 (N.D. Cal. 1990).
Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164 (S.D.N.Y. 1992).
Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947 (E.D. Cal. 1990).
Valerie J. v. Derry Cooperative Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991)
Nelson v. Southfield Pub. Schs., 384 N.W.2d 423 (Mich. Ct. App. 1986).
Harrell v. Wilson County Sch., 293 S.E.2d 687 (N.C. Ct. App. 1982).
Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).
Brown v. Board of Educ. of Topeka (U.S., 1954), 347 U.S. 483 (1954).
Burlington Sch. Comm. v. Department of Educ., Commonwealth of Mass., 471 U.S. 359 (1985).
Carter v. Florence County Sch. Dist. Four, 950 F.2d 156 (4th Cir. 1991), *aff'd on other grounds sub nom. Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).
Dellmuth v. Muth, 491 U.S. 223 (1989).
Honig v. Doe 484 U.S. 305 (1988).
Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).
Smith v. Robinson, 468 U.S. 992 (1984).

Southeastern Community College v. Davis, 442 U.S. 397 (1979).
Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 312 (1993).

Endnotes

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- i With the exception of two references to the Education for All Handicapped Children Act, in order to avoid confusion, unless otherwise noted, this article uses the current title and/ or acronym, IDEA, throughout.
 - ii For a more in-depth discussion of these issues *see* Thomas, S.B. & Russo, C.J. (1995) *Special Education Law: Issues & Implications For The '90s*, Topeka, KS: NOLPE; Osborne, A.G. (1996) *Legal Issues In Special Education* Boston: Allyn & Bacon.
 - iii Another major difference, and one that impacts significantly upon schools as employers, deals with eligibility. Section 504 does not have any age restrictions while the IDEA covers students ages three to twenty one. The ages under the IDEA are a range so that an nineteen year old student with an IEP who graduates high school at that time is no longer eligible for services under the Act.