

## THE PROMISE AND PRACTICE OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving the educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities [Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400(c)(1)].

With these words, the U.S. Congress clearly mandates that education is the means for a person with a disability to participate and function as a self-sufficient member of society in the same manner as a person without a disability. As such, these words are the rightful introduction to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), the foremost piece of legislation on the rights and benefits of students with disabilities. These words also reflect how much national policy has changed over the past three decades regarding the treatment of children with disabilities.

This chapter traces the evolution of the philosophy of education for all in the context of special education law in several ways. First, these words will be placed in a historical context by reviewing previous incarnations of educational legislation. Then, using the Six Principles of IDEA developed by H. Rutherford Turnbull, cofounder and codirector of the Beach Center

on Disability at the University of Kansas, the chapter explores how significant changes found in the new IDEA will affect the concept of education for all as we move forward.

### The History of IDEA

Before analyzing the impact of IDEA's newest reauthorization, we should reflect on how far special education law has come. As recently as the 1960s, national policy did not even address the fact that children with disabilities were routinely denied access to public schools. The reason was the belief that these children were uneducable and certainly not expected to lead independent, productive lives. As a result, many were hidden away in hospitals and institutions. As the 1960s moved on, however, political and social discourse became filled with words such as *discrimination*, *civil rights*, *equality*, and *segregation*, and soon disability rights activists began using those words to advocate for children with disabilities.

These activists also had the benefit of using one of the most important cases dealing with race and education: *Brown v. Board of Education of Topeka* (1954). Before *Brown*, local and state education agencies legally segregated students by race so the issue before the U.S. Supreme Court was whether this was constitutional. The Court analyzed the effect segregation had on the public education system and concluded that separating students on the basis of race generated feelings of inferiority and stigmatized those students far beyond the schoolyard. Thus, the Court held that segregation policies violated the separate-but-equal clause of the Fourteenth Amendment and altered the composition of school populations forever.

The application to children with disabilities is clear: if separate but equal is not allowed with regard to race, neither should it be allowed to segregate students with disabilities from participating in public school settings. Nor should individuals with disabilities continue to be warehoused in institutions

without an opportunity to participate in society. What logically followed, then, were a large number of individuals being returned to local communities and local school districts. To help serve this population, Congress enacted the first generation of education laws relating to students with disabilities.

The first law was the Elementary and Secondary Education Act of 1965 (ESEA), which addressed the first concern: funding for these programs. ESEA established the first federal grants to the states to assist them in educating children with disabilities. Once the mechanics were in place by 1974, Congress was able to move beyond money to frame the beginnings of education policy with the goal of "full education opportunities for all children with disabilities."

In 1975, Congress went a step further and enacted the Education for All Handicapped Children Act (EAHCA). Known as the law that established the doctrine of free appropriate public education (FAPE), the EAHCA also set forth policy statements that were both simple and profound: to ensure students access to FAPE, protect parent and student rights, support state and local education agencies, and put in place a means for assessing the effectiveness of the state and local efforts.

The EAHCA was reauthorized every five years, so substantial changes were made to the law between 1978 and 1986. These reauthorizations expanded incentives for preschool special education, early intervention, and transition programs (1978); authorized the recovery of attorneys' fees by parents after a due process hearing (1983); and authorized infant and toddler provisions (Part C) (1986). In 1990, the EAHCA became the IDEA and formalized the concept we continue to work with today: children with disabilities were entitled to a free, appropriate public education with special education and related services designed to meet their unique needs.

All of these changes came with controversy, criticisms, and case law. IDEA 1997 responded to the intense debate surrounding discipline, parent participation, and appropriate



programming by putting in place many of IDEA's procedures and compliance checklists. From a policy standpoint, Congress looked back to the four purposes of the EAHCA and confirmed that although there were successes in implementing IDEA at both the state and federal levels, special education still maintained low expectations for children with disabilities. There also was insufficient focus on research and methods of teaching special education students. Congress also acknowledged another serious problem: the overrepresentation of minority students in special education. Minority students were being placed into special education not because of a disability but because of inadequate instruction or limited English proficiency.

The solutions to these barriers are both student and parent focused and system focused. On the student side, Congress specifies that high expectations should be set for special education students. These students should have access to the general curriculum to the maximum extent possible with appropriate related services and supports. There also should be an increase in early intervention programs and whole school approaches to reduce the inappropriate labeling of students.

Parents are empowered through strengthened roles in the special education process. For the first time, parents and students were named as members of the individualized education program (IEP) team. The IEP team is responsible not just for evaluations but also for all programming and placement decisions, so team membership recognizes parents' unique perspectives, concerns, and right to participate in their child's education. IDEA 1997 also significantly expanded the rights of parents by providing for reimbursement of attorneys' fees if parents prevail in a due process hearing. This is an important issue for parents, since proceeding to due process is both costly and time-consuming. Without the right to seek reimbursement, many parents would be deprived from having legal counsel.

Systemically Congress encouraged high-quality, intensive professional development for all school personnel as well as a reduction of procedures that do not add to educational results.

More than any other prior reauthorization, IDEA 1997 spoke directly to the concept that "*all means all*" and that children with disabilities needed to be protected by established policies and procedures. This is best demonstrated in IDEA 1997's new discipline provisions. First, and most significant, IDEA 1997 states that a student with a disability cannot be expelled for more than ten days if the behavior was causally related to or a manifestation of the student's disability. Instead IDEA requires that a manifestation determination team consider three factors: whether the IEP services were appropriate and implemented, whether the disability prevented the student from understanding the impact and consequences of the behavior, and if the disability impaired the student's ability to control the behavior. If the answer to these is yes, the behavior is a manifestation of the disability and the child cannot be expelled. If the answer is no, the school can suspend the student for an extended period of time. If parents disagree with the manifestation determination, they can appeal the decision and the student is allowed to stay in the current placement until the dispute is resolved. A school can suspend a student with a disability for up to ten days, however, without triggering any such review. This is significant because it prevents schools from making unilateral placements and ensures that students receive interventions for behaviors resulting from their disability rather than being penalized for them. The concept of "*all means all*" can also be applied to the revised evaluation process. Evaluations were expanded to take into account the student's strengths and needs in all areas: cognitive, behavioral, physical, and developmental. This comprehensive approach helps to ensure that the IEP team collects sufficient information to identify all areas of need so an appropriate program can be developed.

## 2004 Reauthorization of IDEA

This brings us to the present: the 2004 reauthorization of IDEA and what topics and concerns are reflected in this latest incarnation of the law. Between 1997 and 2004, the debates about discipline and the measurements of success for children with disabilities continued. Districts argued that the discipline provisions of IDEA 1997 essentially gave special education students the means to avoid any type of "appropriate," behavioral consequences. They also argued that these provisions directly contradicted school policies designed to provide order and safety for all students.

There also were new laws and publications to consider, such as the No Child Left Behind Act of 2001 (NCLB), *Rethinking Special Education for a New Century* (Finn, Rotherham, & Hokanson, 2001), and the presidential commission report on improving special education (President's Commission on Excellence in Special Education, 2002). Both publications concluded that general and special education were ineffective in serving students with disabilities.

The President's Commission outlined numerous concerns about IDEA 1997, including how

- IDEA values process over outcomes and must be reformed to advance student achievement, reduce excessive paperwork, and ensure better outcomes for students with disabilities.
- Waiting for children to fail before starting any kind of intervention ignores the possibility that strong intervention based on research-based approaches could prevent many students from being categorized as special education.
- General and special education share the responsibility for educating children with disabilities. Just because a child is identified as special education does not waive the responsibility of general education.

- Parents do not feel empowered by the special education system, and in many situations, they have little or no recourse if their child fails to make progress.
- Extensive litigation has created a culture of compliance that diverts needed resources from actual programming.
- Students are misidentified because of outdated and invalid testing.
- Teachers are inadequately prepared to identify students' needs early and accurately.
- Research on special education is inadequate, and schools do not sufficiently apply evidence-based practices.
- The cultures of compliance and bureaucracy fail too many children and must be replaced by an emphasis on academic achievement, transition, and postsecondary outcomes (Turnbull, Stowe, & Huerta, 2007).

According to Finn, Rotherman, and Hokanson (2001), special education was also teaching students with disabilities that they were unable to participate in mainstream American life. Thus, they were entitled to be treated differently from other students (such as by having special discipline protections) and could expect a lifetime of support from the state and federal governments. Given this background, some of IDEA 2004's new provisions are not surprising.

In IDEA 2004 Congress affirms that U.S. national policy ensures equal opportunities, full participation, independent living, and economic self-sufficiency for children with disabilities. IDEA and special education are the avenues for ensuring this access. Congress acknowledged that students with access to FAPE and special education had demonstrated some progress and tangible results. However, low expectations and the lack of scientifically based research continue to impede these goals.

Accordingly, Congress provides eight solutions, some of which are repeats of solutions offered under IDEA 1997.



The first solution of having high expectations for special education students clearly responds to the continuing complaint that educators do not have high expectations for children with special education needs. High expectations, increased access to the general curriculum, and proper assessments to measure progress in that curriculum are essential components of preparing students to be independent and self-sufficient. The second solution attempts to address continuing parental concerns that despite the focus of IDEA 1997 to include them in the process, many parents still feel like marginalized participants. The third and fourth solutions emphasize that, along with higher expectations, special education should be an option only after all general education options have been exhausted. This means that any modifications available under special education, such as related services and supports, should be provided in the general education classroom. The fifth solution incorporates the concepts of highly qualified teachers and challenges schools to increase their capacity to serve children with disabilities. The sixth solution addresses the concerns discussed in IDEA 1997 about the overrepresentation of certain populations in special education. By providing incentives to schools to develop scientifically based early reading programs, positive behavioral supports, and early intervention services, Congress is hoping to reduce labeling students as disabled in order to provide services. The seventh solution addresses, once again, the idea of redirecting resources from paperwork and compliance documentation to teaching and learning. This appears to be a rather benign goal, but in practice, there are certain provisions designed to reduce paperwork such as allowing amendments to the IEP, which can have substantial effects on meeting participation, consent, and other principles under IDEA. Finally, Congress acknowledges that assistive technology devices and services are essential tools for maximizing accessibility for children with disabilities. These solutions clearly align IDEA with NCLB and NCLB's principles of accountability, highly qualified teachers, scientifically based interventions, local

flexibility, safe schools, and parent participation and choice (Turnbull, Huerta, & Stowe, 2006).

But how do these solutions link with the overarching purposes of IDEA 2004? In order to implement the proposed solutions, Congress also declared six purposes, only half of which deal directly with children with disabilities and their parents. The first purpose reflects the four national goals of opportunity, full participation, independent living, and economic self-sufficiency by linking independent living with education. The second confirms that IDEA remains in place to protect the rights of children with disabilities and their parents. The fourth addresses the concern that early intervention services could help prevent the over-identification of children into special education, especially those who are linguistically and culturally diverse. But the rest deal with increasing the capacity development of educational agencies through research, technical assistance, and staff development to improve the overall delivery system of special education. This language addresses the concern that special education as a whole needs to be evaluated outside the specific language of IDEA to gauge results from the new changes. IDEA 2004 remains the template for ensuring that as we move forward, education for all—special education and general education—is raised to a higher standard.

### **The Six Principles of IDEA**

To truly evaluate the impact that IDEA has on the concept of education for all, IDEA needs to be broken into themes. In 1977, H. Rutherford Turnbull divided IDEA into six principles that together form a framework for analyzing IDEA: zero reject, nondiscriminatory evaluation, appropriate education, least restrictive environment, procedural due process, and parent participation (Turnbull, Stowe, & Huerta, 2007). The first four principles trace the steps that school districts must follow in order to provide a free and appropriate public education. The fifth outlines the

procedures that parents and students can use to enforce the first four principles. Finally, the sixth principle summarizes all of the areas where parents participate in the special education process and become partners with the schools.

### Principle One: Zero Reject

Zero reject is at the heart of ensuring education for all children with disabilities and covers topics such as child find, private school services, and placement and discipline. *Zero reject* stands for the proposition that students with disabilities cannot be excluded, physically or functionally, from public education. In a phrase, "All means all." Thus, schools are responsible for enrolling and educating all children with disabilities regardless of the type or severity of their disabilities. This was not always the case.

Previously children with disabilities were segregated from nondisabled peers in school and in the community. Even if these children were allowed onto school grounds, many were prevented from having any meaningful access to the educational program. Thus, courts recognized that programs needed to be put into place to ensure children with disabilities the equal protection of the law (*Mills v. District of Columbia Board of Education*, 1972; *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 1971). Congress agreed and adopted a zero reject policy by stating that IDEA is meant to ensure that all students with disabilities, from ages three to twenty-one, have a right to a free and appropriate public education (FAPE).

IDEA initially grants students access to school by requiring each school district to find, identify, and locate all children with disabilities in the district. These children include homeless children, wards of the state (in state foster care), and children attending private school. The 2006 regulations expand this list by adding children suspected of having a disability despite the fact they are progressing from grade to grade and highly mobile children with disabilities, including those of migrant workers.

Generally known as *child find*, this program establishes the method for determining if these children are currently receiving the special education and related services that they need. The significance of this provision is its comprehensiveness; by adding homeless, migrant, and foster children, IDEA acknowledges the problems of poverty and the changing social structure of today's families. These provisions help to ensure that children with limited English proficiency and other minority students do not fall through the cracks.

Similarly, the zero reject principle supports educational services for all children with disabilities without regard for educational setting. IDEA extends its coverage to public elementary and secondary schools, publicly operated residential facilities that provide education, students placed in charter schools, and students who are incarcerated.

Several significant provisions under IDEA 2004 also clarify that child find extends to children placed in private parochial schools and nonparochial private schools. As a result, special education and related services may be provided on the premises of religious schools with two exceptions: services cannot exceed constitutional limits, and they must be secular and nonideological. The inclusion of private parochial schools is significant because it allows parents of disabled children the option of supplementing a secular education with religious values without depriving their child of services.

This comprehensive coverage does not mean that IDEA extends all of its funds, rights, and benefits to students in private schools. In fact, the school district is required only to provide a proportionate amount of its Part B funds. So while parents can choose to place their children in private schools for various reasons, including religious ones, in reality they are forgoing that child's right to receive all of the specific special education and related services that the child would receive if he or she attended the public school. In addition, from a benefits and rights perspective, although IDEA requires the ESEA and local districts to



offer students in private school an opportunity for an appropriate education at public expense, it does not require that education to be provided in the private school setting. If a free and appropriate public education is offered at the district level for these students and the choice is made for that student to attend the private school, the school district has met its obligation under IDEA.

Somewhere underneath the idea of education for all, though, is the division between IDEA as a concept and how IDEA works in practice. As a concept, children with disabilities are being physically included in school to learn through an appropriate education program. In practice, the concept of education for all does not ensure adequate programming or that parents and schools will agree as to whether a program is appropriate. That has led to one of the most litigated topic areas under IDEA: tuition reimbursement for private placements.

If parents believe that their district is not offering an appropriate education program, they can enroll their child in a private school or facility and seek tuition reimbursement from the district, usually through a due process hearing. A school district has to reimburse parents for tuition at a private placement if two factors are present: (1) the district did not provide an appropriate education program and (2) the private school was able to provide an appropriate education (*School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 1985). This reimbursement can be reduced or denied. First, reimbursement can be reduced or denied if parents do not inform the IEP team that they are rejecting the proposed placement in order to enroll their child in a private school at public expense. This can be done at the last meeting, or parents can give notice ten business days before removing their child from public school. A hearing officer can also determine that tuition reimbursement can be reduced "upon judicial finding of unreasonableness with respect to actions taken by the parents" (20 U.S.C. Sec. 1412(a)(10)(c)).

The reason for these limitations is fairness. Before a district should have to pay for a private placement, it should have an

opportunity to cure the deficiency by reviewing and adjusting the student's program. This can happen only if parents are required to give the district notice in advance. Fairness also works the other way: if the district prevents parents from providing the appropriate notice, if the parents were not informed that they even had to give notice, or if compliance with the notice requirement would "likely result in physical harm" to the child, reimbursement would not be reduced (20 U.S.C. Sec. 1412(a)(10)(c)(iv)). IDEA also recognizes that there are times when districts contract with private schools to educate some students. These students are beneficiaries of a contract between the private school and the district. All of the student's IEP rights follow him or her to the private placement. The district is still responsible for ensuring that the private school complies, at no cost to the parents, with all of the requirements of a free and appropriate education, such as providing special education and related services and following the IEP.

By providing provisions for parent placement in private schools and district placements in private schools, Congress was intending that the principle of zero reject apply to students in both situations. Either way, the state or the local district remains responsible for the education of these students, which reinforces that students with disabilities will continue to be educated.

Aside from physical locations of particular students, IDEA 2004 also clarifies that students cannot be excluded from programming on the basis of medication. Previously many educators were suggesting to parents that their child be put on medication or were making medications a condition of the child's attending school. Medication can no longer be a condition of school enrollment.

IDEA 2004 also preserves the discipline procedures of IDEA 1997, which established that students with disabilities have a right to a free and appropriate public education even if they have been suspended or expelled from school. The baseline rule is that districts can discipline students with disabilities in the same manner as students without disabilities. However, IDEA

provides important protections for special education students: services cannot be discontinued while a student is being disciplined, districts must address reoccurring or serious behavior, and a student cannot be punished for behaviors that result as a manifestation of a student's disability. IDEA categorizes behavior in several ways: violations of student rules of conduct; violations that involve weapons, drugs, or serious bodily injury; behaviors that result in removals of fewer than ten days (short term); and behaviors that result in removals of more than ten days (long term). This comprehensive approach leaves little to a district's discretion, which helps to ensure that children with disabilities continue to be protected.

In practice, discipline is one of the most complex procedural areas, and there remain many gray areas. One area of potential abuse is when a district regularly suspends a student for fewer than ten days at a time. The 2006 regulations state that a change of placement occurs if the student has been subjected to a series of removals that constitute a pattern. However, increased discretion has been given to the district to determine on a case-by-case basis whether a pattern of removals constitutes a change of placement. If a parent disagrees, this determination is subject to review through due process and judicial proceedings, but the new standard will make establishing a pattern much more difficult.

One reason that districts prefer not to have removals total more than ten days is that those removals are considered long-term removals and a disciplinary change of placement. During a long-term removal, the district must provide services and, when appropriate, a functional behavior assessment and behavioral intervention services and modifications. A long-term removal may also trigger the manifestation determination exception.

The manifestation determination process is one of the strongest safeguards in place for children with disabilities under IDEA to ensure that "all means all." If the behavior is a

manifestation of the student's disability, that student cannot be disciplined in the same manner as a student without the disability. To do so would essentially punish that student for having the disability, a clear violation of the zero reject principle. To be a manifestation, the team must determine if the behavior was caused by the student's disability, had a direct and substantial relationship to the student's disability, or was the direct result of the district's failure to implement the IEP. This language is substantially different from IDEA 1997, which focused on whether the student's ability to understand consequences of the behavior or control the behavior was impaired by the disability. Now, the language is narrower and requires a direct causal relationship for both the student and the district. Clearly this came about in response to the arguments that students with disabilities were avoiding discipline and thus accountability for their actions. Whether these stricter standards resolve this issue remains to be seen, but one of the strongest protections for students with disabilities has been weakened.

A second change affecting the idea of education for all is that the stay-put rule no longer has any real application with regard to discipline. Parents still have the right to appeal a manifestation determination or any decision regarding a disciplinary placement. However, during this appeal, the disciplinary placement ordered by the district is considered to be the stay-put placement during the hearing officer's review. In many cases, then, the student with the disability is removed from his or her current placement and will face the consequences of the transition and different setting even if it is later determined that the disability was the cause of the behavior.

A third change that potentially can result in the exclusion of students with disabilities for an extended period of time is the change from "calendar day" to "school day" for incidents involving weapons, drugs, or serious bodily injury (a new category). Currently, a district can remove a student for up to forty-five days to an "interim, alternative educational setting" (20 U.S.C.



Sec. 1415(k)(1)(G)). Changing the calculation to "school day" instead of "calendar day" effectively means that a student is out of school for nine weeks, almost a complete semester.

Zero reject is the principle at the heart of the concept of education for all. IDEA 2004 still supports the concept that students with disabilities are entitled to be found and educated through child find, appropriate programming, private school services, and placement. However, the new discipline provisions will be an area to watch as changed criteria, the loss of stay-put, and different timelines can result in special education students' spending more time outside their education programs.

### **Principle Two: Nondiscriminatory Evaluation**

Once a child is found under the principle of zero reject, the next step is for the district to determine whether the student has a disability and, if so, what must be done to develop an appropriate IEP. IDEA defines a child with a disability as a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairments, or specific learning disabilities and who, by reason of the disability, needs special education and related services. A multidisciplinary evaluation is the tool used to make this determination. An appropriate evaluation analyzes the student's existing levels of performance and related developmental needs and determines whether there need to be any additions or modifications to the student's program. An evaluation may not be biased because of race, culture, or language, and the instruments used by the team must be "validated" and "technically sound" (20 U.S.C. Sec. 1414(b)(3)). The team must use more than one instrument when conducting this evaluation and also needs to consider existing data and information from a multitude of sources. When done correctly, an evaluation will yield information on the four domains that

affect a student's education: cognitive, behavioral, physical, and developmental.

By making the evaluation's purposes explicit and requiring them to be connected to program and placement, IDEA has added another step to ensure that children with disabilities are given an appropriate education.

The evaluation, then, determines eligibility, and for many parents, this is an area of confusion because having a medical diagnosis of a disability does not guarantee eligibility for special education. These evaluations are meant to determine the student's educational needs, not the family's needs or the student's needs outside his or her educational placement. If the disability does not interfere with the student's ability to learn in the general education setting, that student would not be considered eligible for special education.

The more obvious the disability, then, the easier it is to make that eligibility determination. One disability that is harder to observe or define is "specific learning disability," so IDEA 1997 regulations provided for a quantitative discrepancy standard to facilitate eligibility determinations. IDEA 2004, however, changes this standard by stating that a district is not required to take into account whether the student has a "severe discrepancy between achievement and intellectual ability" (20 U.S.C. Sec. 1313(b)(6)). Furthermore, the district may, but is not required to, use a "process that determines the child responds to scientific, research-based intervention and state-approved grade-level standards" (34 C.F.R. 300.309(a)(2)).

Clearly, IDEA is responding to the concerns of overrepresentation of minority students in special education by narrowly defining the category of specific learning disability. However, narrowing the definition while removing the one quantitative standard to determine eligibility could result in students' being excluded from services. Since a large number of children simply do not perform as well as others but do not have any other obvious disabilities, IDEA is now also requiring that these children receive

appropriate, research-based instruction for a period of time before classification. However, during that time, they are not protected under the procedural safeguards of IDEA.

IDEA 2004 also clarifies that a reevaluation may not be done twice in one year unless the parents and the district agree. Districts and parents can also waive the three-year evaluation. This is one of those situations where IDEA is attempting to reduce the paperwork burden, but there could be unintentional effects on a student's education by not encouraging up-to-date evaluation information.

The evaluation process, then, is the second door that a student with a disability must pass through in order to benefit from special education. By requiring tests to be comprehensive and unbiased, IDEA gives educators the tools to educate special education students. As with any other process, however, there are students who have needs but do not fit a criterion exactly. So IDEA does somewhat expect parents and districts to work together to ensure that these students are still served within the spirit of education for all.

### Principle Three: Appropriate Education

After a school district finds and evaluates a student, the next step is to develop an appropriate education program for that student based on the evaluation data. Education for all means not only giving children with disabilities access to school but ensuring that the program confers some benefit.

The first special education decision from the U.S. Supreme Court, *Board of Education v. Rowley* (1982), remains the defining, two-pronged standard for what is an "appropriate" education. The first prong is a process standard: an appropriate education can result if all of IDEA's procedures are followed. These include conducting nondiscriminatory evaluations, developing IEPs, providing parents access to records, and convening due process hearings when necessary. The second prong is a benefit standard.

Since Congress did not intend to guarantee any particular level of educational benefit to students with disabilities, the only requirement is a basic level of opportunity. Thus, if the program provides the student with some educational benefit, the program is appropriate.

The mechanics for providing this education program are clear. The IEP is the universe for a student with a disability: if a service or goal is not in the IEP, it is not considered part of the program. Although there is no set format for an IEP from state to state or even district to district, there are basic components common to all. An IEP must contain the student's existing level of academic and functional performance, measurable annual goals, a means for reporting progress, a list of the special education and related services to be provided, a description of any accommodations needed for testing, transition services if applicable, and dates of service. The IEP also must account for why a student is removed from the general curriculum since Congress is clear that high expectations for students with disabilities means the option of being included with nondisabled peers.

Another critical part of the IEP that ensures that students with disabilities have the opportunity to remain in school is the section related to behavior and behavioral considerations. If a student exhibits behaviors that impede his or her learning or the learning of others, the district is obligated to use positive behavioral interventions and supports and other strategies to address that behavior. The hope is that this will help to control and modify negative behaviors, which will open up more inclusion possibilities for students in school and beyond.

The related services component also helps to ensure education for all by providing therapy services as well as nursing services when applicable. Such services even include catheterization and suctioning of a tracheotomy during the school day. Including related services as part of an IEP, then, supports placement in the least restrictive environment and helps to ensure that these children are not excluded on the basis of health or a district's



unwillingness to provide these services. Note that IDEA 2004 clarifies that “related services” do not include implanted medical devices such as cochlear implants.

Transition services are also linked to outcomes and confirm that education for students with disabilities requires additional steps. Transition services under IDEA start at age sixteen and are meant to give students with disabilities the means to move from school to postschool activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing adult education, adult services, independent living, or community participation. IDEA 2004 has added more results-oriented language, which implies that districts will be held more accountable for this segment of its student population.

IDEA 2004 maintains the structure of the IEP team and ensures that parents remain participating members of both the IEP and evaluation teams. New provisions state, however, that an IEP team member is not required to attend all or even part of the IEP meetings if the parents and the district agree the member’s presence is not necessary because the member’s area of the curriculum or the related services will not be discussed. Furthermore, a team member may be excused from attending all or part of an IEP meeting even when the meeting involves a discussion or modification of the member’s area. The parents and the district must consent to the excusal in writing, and the excused team member must submit a written report prior to the meeting. IDEA 2004 also allows parents and districts to agree not to convene an IEP meeting to amend or modify the existing IEP. Instead, they may opt to develop a written addendum.

Again, these new provisions reflect the congressional intent of paperwork reduction and reducing the administrative burdens on districts. However, parents will have to be extremely well informed to either agree or disagree with the excusals or agree to a change in services without convening an IEP team meeting. Since the IEP meeting is one of the few opportunities where

the individuals responsible for providing services to that child come together, waiving this meeting could dramatically affect the resulting IEP since it is next to impossible to forecast all areas that might be discussed.

#### **Principle Four: Least Restrictive Environment**

Least restrictive environment is the presumption that students with disabilities will be granted access to and educated in the general education curriculum and will participate in other general education activities. This presumption in favor of inclusion has always been part of IDEA. However, this is a rebuttable presumption. The amount of inclusion for a particular student is determined by each student’s individual needs. This is done through the nondiscriminatory evaluation as well as the IEP development process, showing once again how IDEA links evaluation, appropriate education, and least restrictive environment to create a seamless approach for educating students. If inclusion is not appropriate for a student, more restrictive placements will be considered. However, IDEA requires the IEP team to justify any removal from the least restrictive environment during the IEP process. Since education for all started out as a means to end segregation of students with disabilities, the concept of least restrictive environment is the way toward achieving that goal. No one disputes that educating students with special needs is challenging and requires staff and resources. There also is the temptation to consolidate resources and programs. Even more challenging is finding the means to include these students with nondisabled peers. Least restrictive environment does not force inclusion, but it does make the team reflect on the possibility, which certainly can open opportunities for these students.

To briefly review, the first four principles of zero reject, nondiscriminatory evaluation, appropriate education, and least restrictive environment trace the evolution of education for all and how IDEA has opened the door physically and functionally

for children with disabilities. The last two principles, procedural due process and parent participation, are the enforcement side of the equation.

### **Principle Five: Procedural Due Process**

Once rights are conferred, there needs to be a mechanism to enforce them. IDEA provides several means for parents and districts, including mediation, a special education administrative hearing run by a hearing officer known as a due process hearing, and appeals to state or federal court of those decisions. IDEA 2004 continues IDEA's prior protections, including notice, consent, access to records, and parent participation. However, Congress clearly acknowledges that although these safeguards are in place, the substantial increase of litigation since 1997 had an impact on its decision to provide expanded opportunities for parents and districts to resolve their disagreements in positive and constructive ways.

As a result, the thirty days preceding a due process hearing have become a resolution period, when parents and the district have several opportunities to express the problem and propose a solution. These opportunities include mediation and a new resolution session. The expectation is that parents will come prepared to discuss their complaint so the district will have an opportunity to resolve the complaint. Parents can also request mediation during the same time. Some states allow attorneys at both proceedings; others do not. IDEA provides for attorneys to attend resolution sessions only if both sides have counsel. Removing attorneys from the mix could create a less adversarial environment. However, once again, Congress is assuming that parents have access to the same level of information as the district. This is especially relevant when one considers that any agreement reached during these discussions is enforceable as a contract in court.

Ideally, the resolution period could bring parties together in another setting to discuss and resolve their issues prior to proceeding with a lengthy and costly due process. Practically, however, the mere fact that due process has been filed indicates

that a breakdown in communication has already happened. Prior IEP meetings and efforts to work with a district have failed. Requiring parents to attend an additional meeting to reiterate their concerns simply gives the opposing party access to information and testimony outside the original complaint. This is critical, especially because anything said at a resolution session can be used later at a due process hearing.

If an agreement is not reached, the parties proceed to due process, which resembles any other court proceeding. The parties have the right to counsel, to examine witnesses, to exchange evidence, to receive written or electronic verbatim record of the hearing, and to receive a written or electronic findings of fact and decisions. The party who makes the complaint has the burden of proof, which means that, for example, if a parent is questioning the appropriateness of an IEP goal, the parent has to present evidence that the goal is not appropriate. Opponents of parents' having the burden of proof (since parents are usually the ones filing) stated that districts have greater access to information and experts and should be in a better position to defend their own program, but the Supreme Court ended the debate by ruling otherwise in 2005 (*Schaffer v. Weast*, 2005).

Finally, IDEA 2004 gives districts the new option of seeking to recover legal fees against the parents' attorney, the parents, or both if the complaint is found to be "frivolous, unreasonable, or without foundation" (20 U.S.C. Sec. 1415(i)(3)). Districts can also sue for fees against the parents or the parents' attorney if the complaint was brought to "harass, cause unnecessary delay, or to needlessly increase the cost of litigation" (20 U.S.C. Sec. 1415(i)(3)). Attorneys might recognize that the "frivolous" standard is a high standard to reach and does not mean simply that a parent loses the case, but parents generally do not understand. This translates to parents' being afraid to file for due process on the threat of having to pay the fees for the other side. This might properly deter some cases, but critics are questioning whether it will dampen legitimate litigation as well since parents are financially in much different positions than districts. This means that if



a student's rights to an appropriate education are violated, thus negating the principle of education for all, there is a higher chance that the parents or the student will not pursue the issue in court.

### **Sixth Principle: Parent Participation**

The final principle, parent participation, is meant to encompass areas where parents and districts can become collaborators in making decisions about a student's education. The core of this principle is accountability: accountability for procedures and accountability for decisions. Parents are integral members of the evaluation, IEP, and manifestation determination teams. They have the right to place their children in private schools and seek recourse from the district for tuition if the district did not provide an appropriate placement. Under IDEA 2004, parents can waive the three-year evaluation and excuse IEP team members from attending meetings. Parents and the district can even make changes to an existing IEP without convening an IEP team meeting. Instead, they can develop an addendum to modify the IEP. These options place increased responsibility on parents and holds them accountable for their action, or inaction, with respect to their child's education.

These consequences are best seen in the seemingly benign procedure of consent. A district must obtain consent from a student's parents to conduct the initial and all subsequent evaluations. If a parent does not provide consent, the district can pursue mediation or due process to secure that evaluation. Thus, there remains the possibility that the district could still advocate for that child. However, if a parent does not consent to services after an evaluation, the district is not responsible for providing any special education or related services and cannot pursue due process to compensate for the lack of consent. Under those circumstances, the district is absolved from any obligations to provide a free and appropriate public education or develop an IEP for that student.

As a result, the implication under IDEA 2004 is that along with parent rights comes parent responsibility and accountability.

IDEA provides the opportunity for education for all, but parents must inform themselves about IDEA and its provisions in order to be knowledgeable advocates for their children. Parents who do not have a firm grasp of the law and the rights and responsibilities available under IDEA could mistakenly lose those same rights for themselves and their child.

### **Final Thoughts**

Taken as a whole, the evolution of special education cases and IDEA has made possible substantial progress toward the clear policy goal of educating these children so they can become independent, self-sufficient members of society. The philosophy of education for all is the heart of IDEA—whether one looks at access, evaluation, appropriate programming, least restrictive environment, procedural safeguards, or parent rights. IDEA 2004 raises the bar for parents with regard to what knowledge they need to make informed decisions, consent, and advocate for their child's rights. IDEA raises the bar for districts by requiring the use of scientifically based and research-validated interventions and the presence of highly qualified teachers to use these techniques. Most important, IDEA raises the expectations for special education students. Now that children with disabilities are in the classroom, the focus has to be on adequate programming.

IDEA 2004 continues to present many challenges and questions. Will the Rowley standard of "some educational benefit" be reconciled with the higher standards of the No Child Left Behind Act? Will the new resolution period prior to a due process hearing encourage issues to be settled before a hearing actually begins? Will the new emphasis on early intervention for children with learning disabilities and other developmental delays, especially for minority students, prior to eligibility result in these children incorrectly being left out of special education? Will the added responsibilities for parents, such as consent, result in parents inadvertently waiving their children's rights? Will the new discipline

provisions increase suspensions and open the door for removing these children via the juvenile justice system?

IDEA has always been a source of dynamic change, and its new provisions will be used to both answer these questions and create more. But as long as questions such as these are asked, the legislature, the parents, the districts, and the practitioners will continue to make their mark on education to come.

## **FROM THE FIELD: REFLECTING ON THE REALITIES OF IMPLEMENTING SPECIAL EDUCATION LAW**

**Marlene Canter**

I began my career in education as a special education teacher at Alta Loma Elementary School in Los Angeles, California, in the early 1970s. I spent the next eight years teaching at several schools throughout California working, often without an aide, with mostly elementary and middle school students. By requiring educators to better integrate children with special needs into our schools, Public Law 94-142 (adopted in 1975 and now called the Individuals with Disabilities Education Act, IDEA) codified many of the insights I learned early in my career. Indeed the individualized education program (IEP), which helped bridge communication gaps with all those involved in educating and caring for the student, was one of the seminal developments of the legislation. Most important, the IEP brought parents onto the team, helping them to understand their child's unique needs and empowering them to reinforce at home the work being done in school.

I have spent most of my adult life in education—first as a teacher, then as cofounder and co-CEO of a teacher training company, and now as a school board member for the Los Angeles Unified School District (LAUSD), the second largest school district in the nation. While I am now away from the

classroom, I remain intimately involved in decisions important to classroom practices. As a policymaker required to deliver on the promises of IDEA, I use my firsthand experience in the classroom, my work with families, and expertise in supporting beginning and veteran teachers.

LAUSD has almost nine hundred K-12 schools and over 700,000 students. In the past thirty years, we have seen the number of students identified for special education services increase from 10,000 to over 80,000. The evolution of IDEA and the growing population of students with disabilities have created many challenges for LAUSD, especially since the district receives only a portion of the funding needed from the federal government. The role of a school in a child's life has also evolved over the past thirty years. More so now than ever before, schools are expected to provide services beyond instruction, including health screenings, assistive technology, community-based instruction, and psychological and counseling services. Nancy Huerta discusses in detail how Congress addressed some of these challenges when it reauthorized IDEA in 2004. Here I have chosen to focus on a few essential points that Huerta makes in her review related to professional development, due process procedures, maintaining high expectations, and the least restrictive environment (LRE).

### **Professional Development**

The 2004 reauthorization of IDEA prioritizes "supporting high-quality, intensive pre-service preparation and professional development for all personnel who work with children with disabilities" (20 U.S.C. sec. 1400(c)(5)(E)). Most veteran general education teachers in classrooms today received their training at a time when services for students with disabilities occurred in separate settings and instruction for these students was provided exclusively by trained specialists. Today general and special educators must navigate in a world where



more students with disabilities are fully integrated in general education classrooms and schools increasingly favor collaboration, consultation, and coteaching models of instruction. Teachers, who often lack sufficient training, must learn to work effectively within these models, diversifying their skills as their roles and students' needs change.

Without question, school districts and school sites must continue to provide sufficient professional development and ongoing support to assist general educators in differentiating their instruction for struggling learners and those with identified disabilities. Districts must also depend on local institutions of higher education to provide adequate preservice and in-service training to the teaching force. When new teachers and teachers in training come to LAUSD, we find that many of them lack several essential skills. First, inexperienced teachers often over-refer students for special education evaluation simply because they appear disruptive in the classroom leading to an over-identification of students. Often these teachers do not have the skills to create the necessary structure, meaningful environment, and high expectations that students need in order to focus their energies on learning rather than participate in inappropriate behaviors. University training programs and districts must provide these teachers with assistance and training in how to appropriately manage a classroom. This was particularly important for me to learn during my first years in the classroom. It is essential that teachers have the skills needed to differentiate true learning needs from possible differences in culture, language, learning style, or a mismatch with the instructional environment, as well as appropriately manage their classrooms.

Second, classroom teachers need to know how to differentiate their instruction for students from diverse backgrounds. They have to be taught early in their career how to teach to the auditory, kinesthetic, and visual strengths of their students while integrating relevant familial, linguistic, and

cultural experiences. Too often teachers' methods and style of instruction are driven by a teacher's personal style and past educational experiences rather than the unique needs of the children in the classroom. When teachers fail to differentiate their instruction to meet individual learning needs, they risk missing whole groups of students who may or may not have additional learning issues. The situation worsens as these students progress through the grades without proper support. University and district training must be sensitive to these issues.

Finally, the process of improving service delivery for students with disabilities requires additional training for teachers by local universities, districts, and teacher organizations. Educational professionals must recognize their strengths and share those with colleagues while acknowledging their weaknesses and pursue opportunities to address those weaknesses. In order to become better teachers, they must recognize the obstacles and inadequacies that may exist at their sites, reflect on their practices, seek additional learning opportunities, and work to become true change agents toward a more just educational system for all learners.

### Due Process Procedures

The law affords parents of children with disabilities particular rights and protections. When they perceive that those rights have been violated, we increasingly find ourselves in unfortunate and costly legal battles with parents and advocates, creating ongoing adversarial relationships between schools and families. In 2000, the LAUSD spent \$880,000 in legal fees related to serving our special education population of just over eighty-three thousand students. In 2006 our legal fees grew to \$3 million, more than a 300 percent increase, while our special education population remained unchanged. Most would agree these monies would be better spent directly

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funding school programs for students with and without disabilities. The increase in litigation is symptomatic of a general disconnect between parents' expectations and school implementation. Schools and parents must work together to identify concerns at the earliest stage, not when an ongoing lack of appropriate service delivery later requires more intensive and costly remediation. Furthermore, school districts across the nation must continue to advocate for adequate funding from the federal government to support the general implementation of special education programs.

Ultimately it would be preferable to avoid litigation. Huerta discusses the implementation of a new resolution period written into IDEA 2004 when disagreements arise, giving all parties the opportunity to discuss the issues and propose solutions. Including such a mechanism within due process procedures is an excellent suggestion. However, this must be done in the spirit of resolution without the involvement of legal representation of either the district or the parents. These discussions should keep the needs of the child at the forefront and may require some level of compromise by both districts and families alike.

Desperately missing from current IEP meetings are the knowledge and practice of those skills necessary for educational professionals and families to work through disagreements. To my knowledge, teaching institutions and districts do not provide adequate training to educational professionals in skills such as problem solving, negotiating, and active listening, while respecting individual differences. Educational professionals must understand the journey and responsibility involved when a parent has a child with a disability. Teachers and administrators must demonstrate genuine empathy and compassion for these families and the twenty-four-hour-a-day care they provide. We must understand that parents, often consumed by the emotional burden of navigating a frequently confusing labyrinth of services and service providers, are

unable to articulate their questions and concerns. So too must families understand that educational professionals ultimately do care for their children and appreciate their vision for their child's future. In many instances, schools and families interact within a culture of mistrust and intimidation. This paradigm must change to one where partnerships are established and mutual respect exercised.

### **Maintaining High Expectations and a Least Restrictive Environment**

Prior to the reauthorization of IDEA 2004, Congress acknowledged the low expectations of many special education programs for students with disabilities and a lack of scientifically based instructional practices for these students. No one will argue the need to maintain high expectations and instructional standards for all students. However, I believe that when programs are coupled with the implementation of other legislative mandates, like No Child Left Behind, there can be some unintended consequences from these expectations. Some teachers and administrators may erroneously equate rigor with exclusive exposure to grade-level standards and curriculum at the expense of addressing individual student needs. Special education law is clear, as Huerta indicated, that access to general education and grade-level curriculum for students with disabilities is essential. The law is also clear that students' individualized education program must meet their unique learning needs.

The law also demonstrates high expectations for students with disabilities through its "presumption that students with disabilities be granted access to, and educated in, the general education curriculum when appropriate," according to Huerta. For some students, a general education program with support is the most appropriate placement; for other students, the least restrictive environment may constitute a separate classroom

for a portion of their day. The law supports a continuum of placements if the multidisciplinary team determines that the general education classroom is inappropriate for a given student. In those instances, IEP teams should consider alternative placements.

Maintaining high expectations and providing more inclusive experiences will require that teachers have the time, support, skills, and resources to provide students with the instruction designed to satisfy these requirements under the law. Districts and institutions of higher education must assist beginning special and general educators to work, teach, and plan together. Specialists and general educators need access to necessary materials to teach essential academic skills while maintaining access to grade-level standards and the interests of the students they teach. The successful implementation of balanced special education programs and inclusive experiences for students with disabilities will depend on the leadership and expertise of school site administrators to create the necessary environment, advocate for teachers and staff, and truly understand and respect special education law. It will also require policymakers to recognize what is needed to deliver these services under the law.

### Final Thoughts

The reauthorization process is necessary to continually refine the law to address these issues and other challenges, including providing adequate early intervention for all learners, using response to intervention as a method of disability identification, conducting nondiscriminatory evaluation, reducing the overidentification of minorities in special education programs, and increasing parent participation. Parents, educational professionals, policymakers, and advocates must be committed to improving the law and creating a culture where the focus remains always on the individual needs of the child.

As Huerta highlighted, "Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society" (IDEA, 20 U.S.C. 1400(c)(1)). School districts, communities, parents, advocates, and lawyers must embed this truth in all that we do. We should ask ourselves, "To what end do my efforts and actions support IDEA and ultimately the child's right to participate in and contribute to society?" As we move forward in implementing IDEA and as society evolves, needs change, and resources adjust, we need to ensure that we are focused on the child's experience and remember the ideals that gave birth to the Education for All Handicapped Children Act of 1975. IDEA has been an important piece of legislation that has helped raise our awareness and responsibility we have to all children—prompting ongoing collaboration with colleagues and families. Children with special needs, no longer forgotten, challenge educators every day to refine and improve the ways we educate them.