Free Appropriate Public Education in the Fourth Circuit

By Carie Little Hersh and Ingrid M. Johansen

The Individuals with Disabilities Education Act (IDEA) is a federal law that helps states provide special education and related services to children with disabilities.[1] Under IDEA, states receive federal grants if they satisfy the conditions set out by the federal government. These conditions include (1) compliance with the conditions of the act, (2) assurances that funds will be used only in accordance with the acts, (3) disclosure of other sources of funding for the same purposes, and (4) disclosure of whatever other information is required by law.[2] States may choose whether or not to participate in the program—but there are large monetary incentives for doing so based on the number of eligible children in each state.

The central purpose of IDEA grants is to help participating states provide a "free appropriate public education" (FAPE) to all eligible students. To be eligible, a child must be evaluated (according to prescribed procedures) and identified as having one or more of the disabilities listed in the act. (See "Identification and Evaluation," below.) Additionally, the child must be in need of special education and related services.[3] The act defines FAPE as special education and related services that

(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the state educational agency;
(C) include an appropriate preschool, elementary, or secondary school education in the state involved; and
(D) are provided in conformity with the individualized education program [IEP] required by section 1414(d) of this title.[4]

This definition provides a good foundation for understanding state and local responsibilities under IDEA, although some requirements may change as the courts continue to clarify various parts of the act and as the federal government modifies the act or adds new instructions to the Code of Federal Regulations (C.F.R.).

One important step in defining FAPE occurred in 1982 in *Board of Education of Hendrick Hudson Central School District v. Rowley*.[5] In *Rowley* the U.S. Supreme Court established a two-part inquiry for determining whether a child is receiving FAPE. The *Rowley* test requires states to comply with both the procedures and the substance set forth in IDEA. It therefore asks two questions:

- Has the state complied with the procedures set forth in the act?
- Is the resulting IEP reasonably calculated to enable the child to receive educational benefits?[6]

If the answer to both questions is "yes," FAPE has been provided and IDEA requires nothing more, although there may be additional state requirements. If procedural violations occurred, but they were not prejudicial to the development of an IEP reasonably calculated to give educational benefit, again IDEA requires nothing further. If procedural violations occurred and were prejudicial, or if the IEP was inadequate, the courts must decide what remedies are appropriate.

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1. 20 U.S.C. § 1400 *et seq.* (2007). IDEA incorporates its predecessor, the Education of the Handicapped Act, P.L. 94-142, and its amendments, P.L. 98-199 and P.L. 99-457. In addition to the fifty states, the word *States* includes the District of Columbia and the Commonwealth of Puerto Rico. IDEA also covers "outlying areas": the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. 20 U.S.C. § 1401(22), (31).
2. 20 U.S.C. § 1412.
3. 20 U.S.C. § 1401(3).
4. 20 U.S.C. § 1401(9).
5. 458 U.S. 176 (1982).
6. *Id.* at 206–07

The *Rowley* Decision in the Fourth Circuit

In the years since the *Rowley* decision, the Fourth Circuit Court of Appeals—which hears federal appeals in cases from North Carolina, South Carolina, Maryland, West Virginia, and Virginia—has expanded upon the *Rowley* test. Examination of the court's analyses in several of these cases allows us to piece together a more comprehensive understanding of what it means under IDEA to provide free appropriate public education to North Carolina children with disabilities.

This article looks first at the two parts of the *Rowley* test as they affect the specific responsibilities and rights of schools, parents, and students. It then considers the issues raised when the court determines that FAPE is *not* being provided and examines suitable remedies. Finally, there is a brief discussion of North Carolina's state law on the education of children with disabilities. Throughout the article, relevant cases illustrate the issues discussed in each section. The end of the article provides a partial list of websites and articles that contain additional information about IDEA and FAPE.

Procedural Requirements

Has the state complied with IDEA's procedures?

The first part of the *Rowley* test concerns the numerous procedures set forth in IDEA and the C.F.R. The *Rowley* Court noted in particular Section 1415 of IDEA, which directs participating states to "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies."[7]

Section 1415 requires state education agencies (SEAs) and local education agencies (LEAs) to (1) provide parents opportunities to examine records and participate in the identification, evaluation, and educational placement of their child; (2) establish procedures to protect the rights of children whose parents are unknown; (3) give parents prior written notice when the agency proposes to change the child's placement or refuses parents' request for change; and (4) provide opportunities for parents to complain, appeal, and take the school's decision to mediation.[8] The C.F.R. contains more detailed provisions for addressing these issues.[9]

LEAs bear the chief responsibility for following these procedures, and in some cases, failure to follow procedural requirements, by itself, can support a finding that an LEA has failed to provide a disabled child with FAPE.[10]

Tice v. Botetourt County School Board (1990)

The parents of Matthew Tice, a student who suffered from learning and emotional disabilities, formally requested that he be evaluated for special education services. School officials began evaluating him but delayed six months before determining that he was not disabled. The Tices requested an outside evaluation, and the school agreed to pay for it. In the meantime, Matthew's condition worsened: he was hospitalized and treated for depression, paranoia, and anxiety. As a result of a psychiatrist's assessment, the school rescinded its earlier decision and found Matthew eligible for special education services as a child with disabilities. When the parents brought suit under IDEA, the Fourth Circuit ruled that the LEA's original procedural lapses and the resulting six-month delay were directly responsible for the fact that there was no IEP for Matthew at the time of his hospitalization. Therefore, because the LEA had failed to comply with procedural requirements, it had failed to provide Matthew with FAPE.[11]

While it is a dangerous practice to neglect IDEA's procedural requirements, failure to do so will not always result in a finding against school officials. The act provides that a child did not receive FAPE *only if* the procedural inadequacies impeded the child's right to FAPE, significantly impeded parents' right to participate, or caused deprivation of educational benefits.[12] In short, the procedural inadequacy must be prejudicial.

IDEA's procedural requirements can be categorized under three main headings: (1) identifying and evaluating students with disabilities; (2) determining a child's appropriate placement through creation of an IEP; and (3) providing parents with full and meaningful participation throughout their child's education.[13]

Identification and Evaluation

Participating school districts must seek out and identify all students in their district who qualify for special education on the basis of one or more of the following disabilities specified in IDEA: mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, and multiple disabilities.[14]

7. 20 U.S.C. § 1415(a).

8. 20 U.S.C. § 1415 (b)(1)–(5).

9. *See, e.g.,* 34 C.F.R. § 300.500–.515.

10. Hudson v. Wilson, 828 F.2d 1059, 1063 (4th Cir. 1987). *See also* Board of Educ. v. Dienelt, 843 F.2d 813, 815 (4th Cir. 1988); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).

11. *Tice*, 908 F.2d 1200, 1206–07 (4th Cir. 1990).

12. 20 U.S.C. § 1415(f)(3)(E)(ii).

13. *See* Nessa G. Siegel, Esq., and Kerry M. Agins, "Free Appropriate Public Education" (April 2000) at www.nessasiegel.com/free_app_ed.htm (last visited June 17, 2007).

14. 20 U.S.C. § 1401(3)(A). A "specific learning disability" is a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental

In addition, states and LEAs may adopt the term *developmental delay* for children aged three through nine who meet the state's definition of the term and need special education and related services.[15] Children not meeting the act's criteria for disability do not receive special education and related services under IDEA.

In some cases, the Fourth Circuit has specifically distinguished characteristics of *behavior* from characteristics of a *disability*. In *Springer v. Fairfax*, for example, the court determined that a child's social maladjustment was not conclusive evidence that he was "seriously emotionally disturbed" (and therefore disabled). As the court stated, "a 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded," considering the population targeted by the statute.[16] Changing the definition to include them would exponentially enlarge the burden IDEA places on education authorities and appears not to have been Congress's intention.

This distinction can become tricky, however, when courts must separate manifestations of a child's disability from other behaviors in determining what services apply and what disciplinary measures are permitted under IDEA.

A.W. v. Fairfax County School Board (2004)

A.W., "a gifted and talented" elementary school student, received special education assistance under IDEA for his "difficulty maintaining focus and completing academic tasks" and for avoiding tasks that involved writing. In the sixth grade, however, he began exhibiting aggressive behavior patterns and persuaded another student to leave a death threat on the computer of a student A.W. disliked. A review committee determined that A.W.'s emotional disability did not prevent him from either understanding school rules or behaving appropriately; thus the LEA was allowed to discipline him for the violation as it would any other student. When the LEA transferred A.W. to another school, his parents appealed the decision, arguing that A.W.'s behavior stemmed from his Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiance Disorder (ODD) and that his IEP failed to adequately compensate for the latter. A.W.'s behavior, they argued, was a result of his disabilities and therefore he was protected by IDEA from the transfer and from any other disciplinary measures. The reviewing courts had to determine (1) what disabilities qualified A.W. for IDEA services, and (2) whether those disabilities were related to his behavior problems. If they were related, the LEA's disciplinary measures would be governed by stringent IDEA regulations. The Fourth Circuit affirmed the lower court's rulings that A.W. qualified for special education services for his ADHD, but not for ODD. Because ADHD was not involved in the behavior for which A.W. was disciplined, the LEA was able to treat his actions as they would those of any other student.[17]

Individual Education Program (IEP)

Once the school district has conducted an evaluation and identified a child as disabled, parents and educators are expected to work together to create an appropriate IEP. The IEP is prepared by a team consisting of a qualified representative of the LEA, the child's teacher, the parents or guardian, and (when appropriate) the child.[18] Depending on the nature of the disability and requested services, additional personnel (such as a speech pathologist or an occupational therapist) may take part. In *M.M. v. School District of Greenville County*, the Fourth Circuit Court recently stated that an appropriate IEP must

- contain statements concerning an eligible child's level of educational performance,
- set measurable annual achievement goals,
- describe the services to be provided,
- explain the extent to which the child will not participate with nondisabled children in regular classroom activities, and
- establish objective criteria for evaluating the child's progress.[19]

LEAs are responsible for reviewing the child's IEP on an annual basis. This requirement remains in effect even when parents remove the child from public school and place him or her in a private institution.

Gray *ex rel.* Gray v. O'Rourke (2002)

Lauren was identified as learning disabled under IDEA and was eligible for special education services. An IEP was approved, and an annual review date was set. After the eighth grade, her parents placed her in a private school without the LEA's approval. Lauren's parents persistently requested that the LEA reimburse them for her private school tuition, but in each instance the LEA's representative verbally declined. The court found that her parents' repeated requests for reimbursement constituted a request to change Lauren's educational placement. In essence, they were requesting a new IEP, which triggered the IDEA requirement that the school provide a written response, which it failed to do. Additionally, the school failed to review Lauren's IEP, which it was required to do at least annually. Under IDEA the LEA was not relieved of this responsibility, even though her parents had placed her in a private school during the proceedings.[20]

Appropriate Placement

Finally, the IEP team must make a placement decision about where the services the child needs will be delivered. There

aphasia. Disorders do *not* include a learning problem that is primarily the result of visual, hearing, motor disabilities, or mental retardation, or of emotional disturbance, or environmental, cultural, or economic disadvantage. 20 U.S.C. § 1401(30).

15. 20 U.S.C. § 1401(3)(B).

16. *Springer*, 134 F.3d 659 (4th Cir. 1998) ("Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people."). *Id.* at 664.

17. *A.W.*, 372 F.3d 674 (4th Cir. 2004).

18. 20 U.S.C. § 1414(d)(1)(B).

19. *M.M.*, 303 F.3d 523, 527 (4th Cir. 2002).

20. *Gray*, 48 Fed. Appx. 899, Slip Copy (4th Cir. (Md.) 2002).

is a continuum of possible placements ranging from full integration into a nondisabled classroom, to homebound instruction, to a residential school. The general rule is that services must be provided in the "least restrictive environment" (LRE) possible.[21] When choosing an appropriate placement for a child, schools must balance a number of the considerations outlined below.

Least restrictive environment and mainstreaming

IDEA demands that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, [be] educated with children who are nondisabled." Separate schooling should occur "only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." In other words, the "placement is to be made in 'the least restrictive environment,' given the child's unique educational needs and the placement's 'potential harmful effect.'"[22]

Although the word *mainstreaming* does not appear in the text of IDEA, the Supreme Court in *Rowley* suggested that the language and goals of the act indicate a preference for mainstreaming.[23] Mainstreaming is defined as keeping children with disabilities in regular school programs where they might have opportunities to socialize and study with nondisabled children. As the Fourth Circuit stated in *DeVries v. Fairfax County School Board*, this is not just a laudable goal, but a requirement of IDEA. When an LEA and a parent disagree about a child's placement and both proposed placements would provide FAPE, the least restrictive environment is preferred. Even "[i]n a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting."[24]

IDEA directs LEAs making the mainstreaming decision to "take into account, as one factor, the geographical proximity of the placement";[25] that is, the placement should be as close as possible to the child's home and, if possible, in the school the child would attend if he or she were not disabled. This is not, however, an absolute obligation, and the child's IEP may require another arrangement.[26]

Moreover, the preference for mainstreaming does not mean that every school must provide every special education service. Such services may be centralized so as to better serve a larger number of disabled students by pooling resources.

Barnett v. Fairfax County School Board (1991)

Michael Barnett, a student with a hearing impairment, received special education services under IDEA. Since the first grade, he had participated in a cued-speech program—a comprehensive, integrated program involving interpreter services, speech and language therapy, and resource-teacher assistance. Michael thrived under this system and was increasingly mainstreamed into regular classes, becoming fully mainstreamed in high school. His parents agreed with the appropriateness of the program but objected to the location of the cued-speech program at a school five miles from his base school. His parents requested that the program be duplicated at his base school, but the LEA refused: it argued that the centralized program was better, given the scarcity of highly trained personnel and resources, the small number of students utilizing the cued-speech program, and the educational advantages gained by centralizing the program for a broad geographical area. The Fourth Circuit agreed, stating that this arrangement satisfied IDEA's preference for mainstreaming. The program was not located at a "center" attended only by students with disabilities but at a regular high school. Michael attended regular classes with nondisabled students, took part in the special program (in this case, cued speech), and participated with nondisabled students in nonacademic activities.[27]

The Fourth Circuit has found that, despite the strong congressional preference for it, mainstreaming may not be appropriate for every child with disabilities. The court, while according "the proper respect for the strong preference in favor of mainstreaming," recognizes that

> some handicapped children simply must be educated in segregated facilities[,] either because the handicapped child would not benefit from mainstreaming because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.[28]

21. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550–.556.

22. 20 U.S.C. § 1412 (a)(5); 34 C.F.R. § 300.550; Barnett v. Fairfax County Bd. of Educ., 927 F.2d 146, 153 (4th Cir. 1991) (quoting 34 C.F.R. § 300.552).

23. Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 181 n.4, 203 (1982).

24. *DeVries*, 882 F.2d 876, 878–79 (quoting Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983)).

25. *Barnett*, 927 F.2d at 153 (citing Pinkerton v. Moye, 509 F. Supp 107, 112 (W.D.Va. 1981), which adopted a similar interpretation).

26. 20 U.S.C. § 1412(a)(5) permits schools to provide educational services in less-integrated settings if necessitated by the student's disability. *See also* A.B. *ex rel.* D.B. v. Lawson, 354 F.3d 315, 330 (4th Cir. 2004).

27. *Barnett*, 927 F.2d at 153. Cued speech is "a phonetic system in which hand shapes in different positions near the mouth, together with the shape of the lips, visually distinguish the sounds made by the speaker, enabling a deaf child to 'hear' what the speaker is saying." Goodall v. Stafford County (Va.) Sch. Bd., 60 F.3d 168 n.1 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996).

28. *DeVries*, 882 F.2d at 879 (quoting *Roncker*, 700 F.2d at 1063).

DeVries v. Fairfax County School Board (1989)

Michael was a severely autistic high school student who attended a private day school for children with disabilities. At his IEP meeting, his mother insisted that he be mainstreamed into his local high school, but the LEA refused, insisting that the private school was the more appropriate placement. The Fourth Circuit agreed with the LEA's determination that, even with supplementary aides and services to assist him, Michael would "simply be monitoring classes" with nondisabled students.[29] His disability would make it difficult to bridge the difference in cognitive levels between him and other students. Michael would understand little in the lectures, and his individual work would be at a much lower level. In contrast, the alternative private placement provided a structured program with necessary one-to-one instruction, including appropriate instruction in academic subjects, vocational and social skills, community-based work experiences, and access to all the programs and facilities of the public high school. In short, Michael would not receive an "appropriate public education" at the mainstream high school, while the private placement was giving him better support and providing FAPE in the least restrictive environment.

Stay-put provision

There is a presumption in IDEA that the child's current placement is correct. When a disagreement over an IEP arises between the LEA and the parents, the child is to remain in the current placement until the disagreement is resolved,[30] though exceptions may be made in cases of serious disciplinary problems. Either side can contest the placement, and parents always have the right to remove their children from school programs. Removal does not affect parents' ability to challenge the LEA's decisions and IEP options; nor does it alter their right to claim reimbursement for the cost of private services if the court later decides that the LEA has not provided FAPE.[31]

According to a recent Fourth Circuit ruling, if an LEA feels compelled to move a student during proceedings, it is not in violation of the "stay-put" provision if "a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of 'mainstreaming' and affording access to a FAPE." For example, in *A.W. v. Fairfax County School Board*, both the parents and the LEA agreed that a child's transfer from the gifted and talented program of one school to the same program at another school provided materially identical educational offerings in an identical setting. By following the spirit of IDEA, the goal of the stay-put provision—protection of the student's educational placement—is met. In contrast, if a change "results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in 'educational placement' occurs," the LEA is in violation of the stay-put provision, and FAPE has been denied.[32]

In general, however, when an LEA wishes to permanently remove a student from his or her current placement, it must obtain either the parents' permission or a court order. A school may, on its own, suspend for up to ten school days any student who violates the student conduct code—at least to the extent that such a suspension is authorized for nondisabled children.[33] During this "cooling down" period, LEA officials can initiate IEP review and attempt to persuade the child's parents to agree to an interim placement. If the student is truly dangerous, and his or her parents refuse to permit any change in placement, the ten-day suspension gives LEA officials an opportunity to seek the court's assistance.[34] The LEA must then show the court that maintaining the current placement is "substantially likely" to lead to injury to the student or others.[35]

A suspension of longer than ten school days is considered a "change in placement" and is a violation of the stay-put provision. LEA officials cannot use indefinite suspension and expulsions to permanently and unilaterally exclude a child with disabilities—even one they consider dangerous—from school.[36]

Honig v. Doe (1988)

Jack, who attended a developmental center for students with disabilities, was described as a socially and physically awkward teenager who had considerable difficulty controlling his impulses and anger. In response to taunts, he attacked and choked a fellow student and kicked out a window. The U.S. Supreme Court determined that the LEA could not indefinitely suspend students with disabilities like Jack's but that, because LEA officials have an interest in maintaining a safe learning environment for all their students, they could seek an injunction to remove him from his "then current educational placement" in public school pending outcome of administrative and judicial proceedings.[37]

Determination of placement appropriateness

The question of an appropriate placement is a particularly sensitive one, because parents and LEAs often have very different ideas about the child's needs. When there is a

29. *Id.* at. 878.

30. 20 U.S.C. § 1415(j); Honig v. Doe, 484 U.S. 305, 327–28 (1988).

31. School Comm. of Burlington v. Dep't. of Educ. of Mass., 471 U.S. 359, 371–72 (1985); Stockton v. Barbour County (W.Va.) Bd. of Educ., 112 F.3d 510 (4th Cir. 1997).

32. *A.W.*, 372 F.3d 674 (4th Cir. 2004).

33. 20 U.S.C. § 1415(k)(1)(B).

34. *Honig*, 484 U.S. at 326.

35. *Id.* at 328.

36. *Id.* at 325-26 (citing 20 U.S.C. § 1415(e)(3)). *See also* Gary Knapp, Annotation, *Parents' remedies, under Individuals with Disabilities Education Act provisions (20 USCS §§ 1415(e)(2) and 1415(e)(3)), for school officials' failure to provide free appropriate public education for child with disability—Supreme Court cases*, 126 L. Ed. 2d 731, 738 (1998).

37. *Honig*,484 U.S. at 327.

conflict, however, courts almost always defer to the LEA unless there is a distinct violation. In *Barnett v. Fairfax County*, the Fourth Circuit noted that Congress had deliberately left educational policy choices to state and local school officials, who are "far better qualified and situated" than the courts to make those choices.[38]

Once an LEA has established an appropriate program, it may consider the cost of a student's placement. The U.S. Supreme Court has noted that furnishing children with disabilities with "appropriate" education "does not mean providing the best possible education that a school could provide if given access to unlimited funds."[39] IDEA requires states to establish priorities for providing FAPE to all children; the Fourth Circuit's interpretation of this requirement is that "Congress intended the states to balance the competing interests of economic necessity . . . and the special needs of a handicapped child in making education placement decisions."[40]

Barnett v. Fairfax County School Board (1991) (continued)

As noted above (p. 4), Michael's parents objected to the extra distance he had to travel to participate in the cued-speech program at a centralized location in a large school district. The Fourth Circuit found centralization to be a fair balancing of financial considerations. The highly specialized center, created to pool resources for deaf children from a large area, provided excellent educational opportunities to children, rather than duplicating less-effective programs at individual high schools.[41]

For a few students with disabilities, hospitalization may be the most appropriate placement; IDEA's definition of "special education" includes instruction provided in hospitals and other institutions. The LEA's contributions in such cases are limited, however, because it is required to fund only the educational or assessment expenses associated with hospitalization.[42]

Related Services

As stated at the beginning of this article, IDEA was established to help states provide special education and "related services" to children with disabilities. The act defines these services as "transportation and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education."[43] Included in the list of eligible "other supportive services" are

- speech-language pathology and audiology services,
- psychological services,
- physical and occupational therapy,
- recreation, including therapeutic recreation,
- social work services,
- counseling services, including rehabilitation counseling,
- orientation and mobility services,
- medical services (for diagnostic and evaluation purposes only), and
- early identification and assessment of disabling conditions.[44]

The courts continue to flesh out this definition, determining whether a particular service may be provided to disabled students under IDEA. In 1984, for example, the U.S. Supreme Court determined that providing a qualified person to administer clean intermittent catheterization (CIC) to avoid kidney damage is an IDEA-required related service, not a medical service (which would have been denied).[45] More recently, in 1995, the Fourth Circuit ruled that providing a transliterator for cued speech is a related service.[46]

Parental Rights and Responsibilities

The U.S. Supreme Court in *Rowley* strongly emphasized the importance of meaningful participation of parents in the education of children with disabilities. In fact, their involvement is so important that an LEA is always required to adhere to proper procedures—even when parents behave in what LEA officials perceive as a hostile manner.

Board of Education of County of Cabell v. Dienelt (1988)

The parents of Paul, a learning-disabled child, became dissatisfied with his progress and hired a psychologist and an educational expert to evaluate him. When their meeting with the LEA was unsatisfactory, the Dienelts placed Paul in a private school and initiated IDEA's complaint process, demanding reimbursement. The LEA argued that the procedural violations it had committed were insufficient to prove that it had failed to provide FAPE. In addition, it argued, the parents had acted in "an adversarial fashion" and therefore should not be reimbursed. The Fourth Circuit strongly disagreed on both counts. The court found that the LEA did not conduct the required multidisciplinary review, did not hold a placement advisory committee meeting, and did not otherwise adequately involve the Dienelts in the

38. *Barnett,* 927 F.2d 146, 152 (4th Cir. 1991). *See also* Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982).

39. *Barnett*, 927 F.2d at 154 (quoting *Rowley,* 458 U.S. at 199).

40. *Id.* (examining 20 U.S.C. § 1412(3) as Education of the Handicapped Act).

41. *Id.* at 151 (quoting district court decision).

42. Tice v. Botetourt County Sch. Bd., 908 F.2d 1200, 1208 (4th Cir. 1990) (quoting district court finding and 20 U.S.C. § 1401(a)(16)).

43. 20 U.S.C. § 1401(26).

44. 20 U.S.C. § 1401(26)(A).

45. Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984) (The Court noted that the parents were not asking the school district to provide equipment, but only to provide a qualified person).

46. Goodall v. Stafford County (Va.) Sch. Bd., 60 F.3d 168 (4th Cir. 1995). *Transliterators* are specialists who provide cued-speech service. (See n.27 above.)

preparation of Paul's proposed IEP. Therefore, the LEA "utterly failed to determine the special educational needs of Paul Dienelt or to provide him with an adequate IEP." Further, the court determined that the Dienelts had acted as "concerned and responsible parents facing poor results from the public schools."[47] Regardless of their adversarial behavior, they were entitled to reimbursement.

Because the IEP is so integral to providing FAPE for the child and for ensuring meaningful parental participation in the child's education, parents have the right to "a full and fair involvement in the process."[48] IDEA's procedural safeguards require that (1) parents be notified of all decisions affecting their child and (2) have an opportunity to object to those decisions.[49]

Parental notification

LEAs must apprise parents of their procedural protections. If not, as the Fourth Circuit has stated, parents will assume that they have "no real say" in their child's education and IDEA's goal of meaningful parental participation will go unrealized.[50] LEA officials must also provide parents with written notice before making any change in (or refusing to change) a child's evaluation or IEP.[51] (The few exceptions to this requirement are discussed below in "When is the LEA *Not* Liable for Procedural Violations?")

Hall v. Vance County Board of Education (1985)

James, a severely dyslexic child, was identified as disabled, and his parents and the LEA agreed upon an IEP for him. When his academic performance did not improve under the IEP, the LEA suggested hiring a tutor but failed to inform his parents that public funds might pay for the tutor. Moreover, when his parents announced their intention to withdraw James from public school, the LEA failed to discuss with them the possibility of public funding for residential schooling; they also did not inform them of the appropriate procedures for arranging such a placement. Finally, when the LEA prepared a second IEP for James, LEA officials failed to inform the parents of their procedural rights. As a result, the Fourth Circuit found that the LEA failed in its duty to the parents and failed to provide James with FAPE.[52]

School Committee of Burlington v. Department of Education of Massachusetts (1984)

In a First Circuit case, the parents of Michael, a child with disabilities, disagreed with the LEA's placement proposal and rejected the IEP. They set an administrative review in motion and placed Michael in a private school. LEA officials stated that they attempted to review and revise Michael's IEP in accord with his progress at the private school but that the parents had refused to make him available for evaluation. The First Circuit decided (and the Supreme Court and Fourth Circuit agreed) that this was not a proper excuse for failing to provide the parents notice of the IEP team meeting. LEA officials had failed to comply with the procedures established by IDEA regulations.[53]

Parental opportunity to object

IDEA has an established appeals process to ensure meaningful parental participation. If the parents of a child with disabilities become dissatisfied with the LEA's decisions (particularly in matters concerning whether their child is receiving FAPE), they can present their complaints and demand a hearing.[54] LEAs have a duty to notify parents of their right to contest LEA decisions—including their right to a due process hearing.[55] IDEA requires that LEAs once a year give parents a handbook detailing the procedural safeguards to which they are entitled. When an LEA takes an action triggering parents' right to protest, it must again provide the parents with a copy of the procedural safeguards.[56] Parents may also request an additional copy. In addition, when an LEA takes any action implicating parents' protest rights, it is required to give written notification detailing the specific action and the rationale behind it and to inform parents where they may obtain help in pursuing any objections they may have to the action.[57] Without this notification, parents would in essence have no recourse against the LEA and the LEA would have failed to provide their child with FAPE.

Jaynes *ex rel.* Jaynes v. Newport News School Board (2001)

Stefan was diagnosed with autism at age two. In 1993 his parents requested a referral from the LEA. His mother signed a "consent to testing" form but was not advised of her parental rights. In 1994 Stefan was deemed eligible for special services and the LEA developed an IEP. His parents received notice of the IEP team meeting but did not attend. They received a copy of the IEP by mail, and both parents signed it. However, neither parent received an "Advisement of Parental Rights" form or was ever otherwise informed of their right to a due process hearing. The LEA delayed implementation of the IEP, despite repeated requests by Stefan's parents. The next year, a second IEP meeting was held that reduced the services Stefan would receive. His mother signed the IEP, but the LEA later altered it without telling her. When Stefan's parents realized he was making no progress, they placed him in a private program. They did not learn until 1996 that they had the right to contest the IEPs in a due process hearing. The Fourth Circuit determined that the LEA had repeatedly failed to notify Stefan's parents of their right to a hearing and that these procedural violations constituted failure to provide Stefan with FAPE.[58]

47. *Dienelt*, 843 F.2d 813, 815 (4th Cir. 1988).

48. Spielberg v. Henrico County Pub. Sch., 853 F.2d 256, 259 (4th Cir. 1988).

49. 20 U.S.C. § 1415(b)(3), (6). *See also* M.M. *ex rel.* D.M. v. Sch. Dist. of Greenville County, 303 F.3d 523, 527 (4th Cir. 2002) (citing Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997)).

50. Hall v. Vance County Bd. of Educ., 774 F.2d, 629, 634 (4th Cir. 1985).

51. 20 U.S.C. § 1415(b)(3).

52. *Hall*, 774 F.2d. at 634–35.

53. *Burlington*, 736 F.2d 773, 795 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985); *M.M.*, 303 F.3d at 527; 34 C.F.R. § 300.504.

54. 20 U.S.C. § 1415(b)(6).

55. *Id.* at (b)(3), (c)(1), and (d).

56. 20 U.S.C. § 1415(d).

57. 20 U.S.C. § 1415(c)(1).

58. *Jaynes*, 13 Fed. Appx. 166, (4th Cir. (Va.) 2001).

Parental responsibilities in objecting

To benefit from IDEA's procedural protections, parents too must follow specific procedures. While LEAs must provide parents with opportunities to object, parents are responsible for exhausting all proper administrative remedies for challenging an LEA's decision.[59] The act sets out a detailed appeals process, each step of which must be concluded before moving on to the next. In *M.M. v. School District of Greenville County*, the Fourth Circuit found only three narrow exceptions to this exhaustion requirement:

(1) when the administrative process would have been futile;
(2) when an LEA failed to give parents proper notification of their administrative rights (*see* "Parental opportunity to object," above); or
(3) when administrative exhaustion would have worked severe harm upon a child with disabilities.[60]

Parents challenging multiple IEPs in court must also, the court pointed out, exhaust their administrative remedies for *each academic year* in which they object to an IEP. Even if during the proceedings parents choose to remove their child from the LEA's schools, they are expected to complete the proceedings.

M.M. v. School District of Greenville County (2002)

M.M. was a young girl who suffered from autism and a muscular disease called myotonic dystrophy. Her parents requested IDEA services and received approval from the LEA. After the first year, her parents strongly disagreed with the LEA's proposed IEP because it did not include participation in a Lovaas program.[61] They believed firmly in this system and refused to compromise with the LEA, ultimately declining to cooperate in the IEP proceedings. During the third school year, the LEA made no IEP offer for M.M., and her parents requested a due process hearing. The parents complained that the LEA was not providing an IEP for the next three years, but they did not request any more due process hearings. They claimed that they were not obligated to do so because (as they asserted) the LEA was engaged in an ongoing violation of IDEA. The court rejected this argument, stating that it was the parents' responsibility to exhaust their administrative remedies for each of the following three years.

When Is the LEA *Not* Liable for Procedural Violations?

Even when an LEA commits a procedural violation, it may not be held responsible for the violation. The court must determine the effect of any violation on the child with disabilities to see whether it resulted in loss of an educational opportunity great enough "to support a finding that an agency failed to provide a free appropriate public education."[62] If it did not, the court may rule that a child with disabilities received (or was offered) FAPE *in spite of* the violation.

Tice v. Botetourt (1990) (continued)

As explained above (p. 2), Matthew's LEA failed to comply with procedural requirements, resulting in a failure to provide him with FAPE. However, even though its development and implementation were unduly delayed, the IEP was created with full parental input. The burden was then on the parents to prove that the IEP was "not reasonably calculated to enable the child to receive educational benefits." (See further discussion of this case below in "When Is Relief Appropriate?") Matthew's parents could not prove this, so the Fourth Circuit Court determined that the procedural violations created no denial of FAPE once the IEP was in effect.[63]

LEAs are also not liable when a student is not entitled to particular IDEA services.

Dibuo *ex rel.* Dibuo v. Board of Education of Worcester (2002)

Mark was identified as having a speech/language disability called pervasive developmental disorder that qualified him for special education services. His parents agreed with the LEA's proposed IEP but felt strongly that he should receive Extended School Year (ESY) services during the summer. In support of this proposal, they submitted written evaluations from several professionals. The LEA, believing that Mark was not eligible for ESY services, staunchly refused to read or review any of these evaluations. The Fourth Circuit determined that the LEA's refusal violated IDEA but also ruled that Mark was not entitled to ESY services. Therefore, the LEA's refusal to consider ESY services did not interfere with provision of FAPE to Mark.[64]

Finally, LEAs are not liable when the procedural error is due solely to parents' lack of cooperation.

M.M. v. School District of Greenville County (2002) (continued)

As explained above, M.M.'s parents' were engaged in several claims against the LEA. Most of their claims did not succeed because they had not exhausted their administrative remedies for each year. One claim was properly lodged, however. In it, the parents argued that the LEA violated procedural requirements by *not* offering them a finalized IEP placement for M.M. during her third year. The court found this to be true but stated that the parents had been "fully advised of the proceedings regarding [their child], and they were afforded an adequate opportunity to participate as a member of her IEP team." Thus they "had been afforded a

59. 20 U.S.C. § 1415(l).

60. *M.M.,* 303 F.3d 523, 527 (4th Cir. 2002).

61. The Lovaas method for the education of children with autism was developed by Dr. O. Ivar Lovaas at UCLA. The program breaks down activities into discrete tasks and rewards the child's accomplishments. It requires intensive parental involvement, early intervention, and treatment in the home and community, rather than just in school.

62. Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997) (citing Tice v. Botetourt County Sch. Bd., 908 F.2d 1200, 1207 (4th Cir. 1990)); *M.M.,* 303 F.3d. at 534 (citing Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982 (4th Cir. 1990) ("[The child] has benefited educationally from the instruction provided under the Board's IEP. Federal law requires no more.")).

63. *Tice,* 908 F.2d at 1207.

64. *Dibuo*, 309 F.3d 184 (4th Cir. 2002).

full and fair involvement in the process" but had stated at the time of the proposed IEP that they would have refused to agree to any FAPE that did not include reimbursement for an in-home Lovaas program—in which the parents placed M.M. without the school's permission. Because M.M. suffered no prejudice or "lost educational opportunity" from the LEA's failure to agree to her parents' demands, the proposed IEP was considered acceptable and the LEA was not responsible for the procedural error.[65]

Substantive Requirements

Is the IEP developed through IDEA procedures reasonably calculated to enable the child to receive educational benefits?

Even if an LEA has followed proper procedures in formulating and implementing an IEP, the student may not be receiving FAPE. The second question in the *Rowley* test, therefore, relates to the substantive content of the IEP. This is a difficult test for parents. Once a procedurally proper IEP has been formulated, courts are very hesitant to second-guess the judgment of education professionals or to substitute their own notions of sound educational policy for those of LEA authorities. An LEA's decision must be deferred to as long as the IEP gives the child "the basic floor of opportunity that access to special education and related services provides."[66]

The *Rowley* test for a substantively appropriate IEP is that it must

- include educational instruction specially designed for the unique needs of the child, and
- be reasonably calculated to enable a child to (1) receive educational benefit and (2) make educational progress.[67]

This test raises many questions. How are LEAs to know how much educational benefit is sufficient? Who determines what is educationally beneficial?

How Much Educational Benefit Is Sufficient?

No single standard can adequately specify how much educational benefit is sufficient. Because FAPE must be tailored to the individual child's capabilities, the U.S. Supreme Court in *Rowley* left that matter to the courts to determine on a case-by-case basis. Even if courts demand only minimal results in the case of a severely disabled child, those minimal results may be insufficient in the case of a different child. LEAs cannot discharge their duty to students by simply providing a program that produces "some minimal academic advancement, no matter how trivial."[68] Therefore, each case must be assessed individually and in full to determine whether FAPE is provided.

One important measure of an IEP's adequacy is whether the child has made progress on the basis of such objective criteria as "achievement of passing marks and advancement from grade to grade." At the same time, while these criteria are important in determining whether a child is receiving FAPE, the *Rowley* Court found that "a child's ability or inability to achieve such marks and progress does not automatically resolve the inquiry where the 'free appropriate public education' requirement is concerned."[69]

As mentioned above (in "Determination of placement appropriateness"), IDEA does not require LEAs to offer a child with disabilities *the best possible education*; once the criteria of FAPE have been met, the LEA does not need to offer any additional educational services.[70] LEAs are responsible for providing specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child"; they need not furnish "every special service necessary to maximize each handicapped child's potential." Nor, according to the U.S. Supreme Court, do special education service providers have to possess every conceivable credential relevant to children's disabilities.[71]

Matthews v. Davis (1984)

David was a severely and profoundly retarded child. His IEP consisted of a list of simple tasks such as sorting objects, learning to say simple words, using the toilet, and eating with a fork. The LEA recommended that David continue in a day program, but his parents preferred a residential program. The Fourth Circuit sided with the LEA, deciding that if the LEA could supply an appropriate education in a day-only program, it did not need to offer the child any further services.[72]

Who Determines Educational Benefit, and How?

As mentioned above in the discussion of placement (p.5), LEAs are given broad authority to determine an appropriate placement for a child with disabilities. The same is true of educational benefit. Although there is a larger requirement that placements provide educational benefits, the choice of which particular educational methodology to employ

65. *M.M.,* 303 F.3d at 535 (citing district court opinion M.M. v. Sch. Dist. of Greenville County, CA-98-2971-3-17 (D.S.C. Aug. 17, 2000) at 15 ("[I]t would be improper to hold [the] School District liable for the procedural violation of failing to have the IEP completed and signed, when that failure was the result of [the parents'] lack of cooperation.").

66. *Tice*, 908 F.2d at 1207 (internal citation and quotations omitted).

67. Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188–89, 206–07 (1982).

68. Hall v. Vance County Bd. of Educ., 774 F.2d, 629, 635–36 (4th Cir. 1985) (citing *Rowley*, 458 U.S. at 202–03).

69. M.M. *ex rel.* D.M. v. Sch. Dist. of Greenville County, 303 F.3d 523, 532 (4th Cir. 2002) (quoting *Rowley*, 458 U.S. at 207 n.28).

70. *Rowley,* 458 U.S. at 192.

71. Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997) (quoting *Rowley*, 458 U.S. at 199–200).

72. *Matthews*, 742 F.2d 825, 830 (4th Cir. 1984) (citing Hessler v. State Bd. of Educ. of Md., 700 F.2d 134 (4th Cir. 1983) (Availability of a better private program does not render inappropriate an otherwise sufficient public school program.)).

is left largely to the LEA. In addition, the party protesting the placement—generally the parents—bears the burden of proving its inappropriateness.[73]

Parents' involvement in planning their children's education is intended to ensure that appropriate services are made available to every child. Nonetheless, parents who disagree with the LEA's choice have a difficult presumption to overcome. Even if the parents' IEP is considered better than the LEA's, the LEA's IEP may also provide FAPE. Once FAPE is provided, the LEA does not need to provide anything further. In *M.M.* the Fourth Circuit found a proposed IEP acceptable because it would confer some educational benefit, even though it was not what the parents considered an optimal program.[74] Here are a few examples of services that parents may consider optimal but the courts have not always seen as essential to FAPE:

- *Extended school year (ESY) services*. ESY Services are not included in every child's IEP. They are required only when the benefits a child has received during the regular school year are "significantly jeopardized" without a summer educational program, or when ESY would prevent regression of skills or knowledge that would seriously affect the child's progress toward self-sufficiency.[75] Each case must be assessed separately, and support for ESY can be provided by expert testimony based on a professional evaluation.[76] A showing of actual regression is not required, but simply arguing that regression is likely is not enough; the probable regression must be shown to "substantially thwart the goal of 'meaningful progress.'"[77]
- *ABA/Lovaas program*. Applied behavioral analysis (ABA)/Lovaas programs for autistic children are frequently used, as in *M.M. v. School District of Greenville County*.[78] Whether implemented at home or at school, these programs may be included in a child's IEP if the team determines that they are suitable for the particular child. The Fourth Circuit has not, however, considered them mandatory for every autistic child, especially when other services are available.[79]
- *Sign Language Interpreter*. A sign language interpreter may be proper in some cases, but not when the child is otherwise receiving an adequate education.

Hendrick Hudson Central School District v. Rowley (U.S. 1982)

Amy was a deaf student receiving services under IDEA. She had minimal residual hearing and was an excellent lip reader. During her first-grade year, the LEA prepared an IEP providing education in a regular classroom and special aides and instructions. Her parents, however, insisted that a sign language interpreter be provided in all her classes. The U.S. Supreme Court determined that Amy was already provided with an adequate education without the need of a translator. The evidence showed that Amy "(1) performed better than the average child in her class, (2) was advancing easily from grade to grade, and (3) was receiving personalized instruction and related services calculated by the school officials to meet the child's educational needs."[80]

Remedies

If LEAs do not provide FAPE, because of either procedural or substantive failings, a range of possible remedies, including changes in services or placement, may be applied as long as they are "appropriate in light of the purpose of IDEA."[81] In granting appropriate relief, courts have broad discretion.

Reimbursement

Appropriate relief may include retroactive reimbursement to parents. If parents have paid for services that the LEA would have been providing if it had developed a proper IEP, the LEA may be required to pay parents for these expenses.[82] In determining the extent of reimbursement costs, however, courts may also consider what is appropriate and reasonable in the particular situation. Even if the court rules that parents must be reimbursed, the costs they've incurred may be unreasonably high. For example, if a court decides that the costs of the private school education chosen by the parents are unreasonable or otherwise inappropriate, the court is free to award lower costs.[83]

Injunction

As mentioned above in discussing the stay-put provision, an injunction, or court order, may also be a proper remedy. If an LEA fails to fulfill the child's IEP or there is a dispute

73. Schaffer v. Weast, 546 U.S. 49 (2005).

74. M.M. *ex rel.* D.M. v. Sch. Dist. of Greenville County, 303 F.3d 523, n.15 (4th Cir. 2002).

75. *Id.* (citing district court opinion M.M. v. Sch. Dist. of Greenville County, CA-98-2971-3-17 (D.S.C. Aug. 17, 2000) at 19 (affirmed by *id.* at 537)).

76. Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990).

77. *M.M.*, 303 F.3d at 538 (quoting Polk v. Cent. Susquehanna Intermed. Unit 16, 853 F.2d 171, 184 (3d Cir. 1988)).

78. See above, n.61 and accompanying text.

79. Jaynes *ex rel.* Jaynes v. Newport News, 13 Fed. Appx. 166 (4th Cir. (Va.) 2001).

80. *Rowley*, 458 U.S. 176 (1982); Gary Knapp**,** Annotation, *Parents' remedies, under Individuals with Disabilities Education Act provisions (20 USCS §§ 1415(e)(2) and 1415(e)(3)), for school officials' failure to provide free appropriate public education for child with disability—Supreme Court cases*, 126 L. Ed. 2d 731, 740 (1993).

81. Knapp, *Parents' remedies under IDEA*, at 741 (citing School Comm. of Burlington v. Dep't. of Educ. of Mass., 471 U.S. 359 (1985)).

82. *Burlington*, 471 U.S. 359, 369–71.

83. Gadsby v. Grasmick, 109 F.3d 940, 955 (4th Cir. 1997) (quoting Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993)).

over an IEP and the parents cannot continue to fund private education, they may seek an injunction to pay for it.[84] The injunction may be granted if the child was in private school when the dispute over the IEP arose. Under the stay-put provision, the school district must pay for the private school placement until the dispute is resolved.

An injunction may also be granted as preliminary relief; that is, in the course of a conflict, the court can award a temporary injunction to either parents or the LEA. In such cases, the relief granted depends on whether the LEA actually denied the child FAPE and whether the private placement is proper.

Compensatory Education

By granting compensatory education, a court may order an LEA to provide educational services in the future to fix past wrongs. The intention is to "remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." The Fourth Circuit has recently determined that IDEA allows for this type of award in some circumstances.[85]

G. v. Fort Bragg Dependent Schools (2003)

G., an autistic child, was receiving special education services when his mother became interested in the Lovaas method (see n.61). She communicated to his teachers her belief that the method held great promise for G. When the LEA did not consent to providing Lovaas therapy, G.'s mother paid for a consultant trained in the method to work with G. in their home, and G. made significant progress. G's mother rejected the LEA's IEP because it did not contain the complete Lovaas program and requested a due process hearing. The hearing officer determined that the LEA had not provided FAPE and ordered it to reimburse G. for expenses to date and to secure funding to provide him with future Lovaas treatment. The case reached the Fourth Circuit, which concluded that it could not determine whether the IEP was reasonably calculated to provide G. meaningful educational benefit and returned the case to a lower court to make this decision. However, the Fourth Circuit Court did say that if the LEA's IEP did not provide meaningful educational benefit, then G. might be eligible for future services, otherwise called "compensatory educational services."

Inappropriate Forms of Relief

Not all forms of relief are appropriate. Neither the U.S. Supreme Court nor the Fourth Circuit have ever approved an award of compensatory damages—that is, a cash award for suffering and loss—for a violation of IDEA requirements. Nor has the Supreme Court ever approved punitive damage awards, which are cash awards designed to punish the schools for violating IDEA. In fact, the Supreme Court has taken "pains to emphasize that . . . reimbursement [for appropriate specialized education] should not be characterized as 'damages.'" The courts are hesitant to turn IDEA into a tool for remedying pain and suffering, preferring instead to focus on the act's original goals: "the provision and, when appropriate, restoration of educational rights."[86]

Sellers v. School Board of the City of Manassas (1998)

Kristopher was eighteen years old when his parents filed a complaint under IDEA. He had recently been diagnosed as learning disabled and emotionally disturbed, but his disability had gone undiscovered for years. He received no special education services until he was a teenager, even though his test scores as early as fourth grade "should have alerted" the LEA of the need to evaluate him as disabled. His parents claimed that this failure was a procedural error and that as a result he did not receive FAPE. They argued that the LEA's failing entitled them to compensatory and punitive damages. The Fourth Circuit found that such damages were outside the intention of IDEA. Appropriate relief, if warranted, must be oriented toward providing FAPE.

When Is Relief Appropriate?

Reimbursement is allowed if the court determines that the LEA was not providing the child with FAPE and that the parents' placement was proper under IDEA—even if that placement was in private special education. Denying reimbursement of the costs of private education "where it is subsequently determined that the [LEA's] proposed IEP was inappropriate would mean that 'the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards [are] less than complete.'"[87]

In two of the Fourth Circuit cases described above—*G. v. Fort Bragg Dependent Schools* and *Jaynes v. Newport News School Board*—the court's decision hinged on whether the LEAs' IEPs, which did not provide for a complete Lovaas education for autistic children, were "reasonably calculated to provide educational benefit" to the children. In both cases, the Fourth Circuit remanded the cases to the lower district court to determine whether the IEPs met

84. Stockton v. Barbour County Bd. of Educ., 112 F.3d 510 (4th Cir. 1997).

85. G. by R.G. v. Fort Bragg Dependent Schools, 343 F.3d. 295, 309 (4th Cir. 2003). *See also* Sandhya Gopal, "Compensatory Education and the IDEA," *School Law Bulletin* 35 (Spring 2004): 14–22.

86. Sellers v. Sch. Bd. of Manassas, Va., 141 F.3d 524, 527 (4th Cir. 1998); Hall v. Knott County Bd. of Educ., 941 F.2d 402, 407 (6th Cir. 1991) (citing *Burlington*, 471 U.S. at 370). The Fourth Circuit argued in *Sellers* that "the touchstone of a traditional tort-like remedy is redress for a broad range of harms 'associated with personal injury.'" In contrast, "the touchstone of IDEA is the actual provision of a free appropriate public education. To advance this goal, IDEA provides a panoply of procedural rights to parents to ensure their involvement in decisions about their disabled child's education." *Id*. at 527 (internal citations omitted).

87. *Gadsby,* 109 F.3d at 950 (quoting *Burlington,* 471 U.S. at 369 (emphasis in original)). As the Fourth Circuit stated, "parents who disagree with a proposed IEP prior to the beginning of a school year must either go along with the IEP to the detriment of their child if the placement is, in fact, inappropriate or pay for what they consider to be the appropriate placement." *Id*. at 950 (quoting *Burlington* at 359).

this standard. If the district courts find that they do not, the LEAs will be required to reimburse the parents for the home-based private program they had arranged.[88]

If an LEA does not meet the educational benefit requirement, parents can remain eligible for reimbursement even if

- they violate the stay-put rule by placing their children in private placements,
- they choose a program or school that has not been approved by the state over one that has been approved,
- they fail to comply with state approval requirements, or
- they arrange a private placement during a delay caused by the LEA's decision to postpone developing an IEP for their child.[89]

Tice v. Botetourt County School Board (1990) (continued)

As explained in an above example, Matthew Tice's LEA unnecessarily delayed implementation of his IEP. When he was hospitalized, the LEA decided to wait until he left the hospital to provide for his special education. Because LEA officials delayed making a placement for Matthew, they failed to provide FAPE. The Fourth Circuit held the LEA responsible for partial reimbursement and ordered it to repay Matthew's parents for the costs of instruction he received while hospitalized.[90]

When Is Relief *Not* Appropriate?

Parents of hospitalized children like Matthew (above) may be reimbursed only for the cost of special education and related services, thus excluding medical services except those conducted for diagnostic or evaluative purposes. However, even if hospitalization is not required for a child to receive FAPE, he or she may receive services while hospitalized that could be defined as reimbursable "special education and related services."[91]

In general, parents who choose private placements during review proceedings do so at their own financial risk. Even if the court subsequently finds that the LEA has denied a student FAPE, reimbursement may not be warranted if he or she suffered no loss of educational opportunity as a result.[92] And if the court finds that the LEA's placement did offer FAPE, parents' private school expenses will generally not be eligible for reimbursement, even if their chosen placement is equally (or more) appropriate for the child. Under certain circumstances, such parents may still receive reimbursement up to the amount it would have cost to place the child in an option offered by the IEP.[93]

Goodall v. Stafford County School Board (1991, 1996)

Until 1984 Matthew Goodall, a profoundly hearing impaired child, received free special education services—including interpreter, speech and language, and learning disability services—in Stafford County (Va.) public schools. In 1984 Matthew's parents enrolled him in a private religious school. When the LEA refused to provide a cued-speech transliterator (*see* "Related Services," above) at Matthew's private religious school, the Goodalls hired the necessary services on their own, then sued the LEA for reimbursement. The Fourth Circuit found that even though Matthew's IEP included the services of a specially trained aide to accompany him to class in public school, the LEA did not have to reimburse his parents' expenses for providing the aide in his private religious school because (1) IDEA did not include a provision requiring it to do so, and (2) doing so would violate the Establishment Clause of the First Amendment.[94] Several years later, in another case, the U.S. Supreme Court found no constitutional bar to allowing payment for transliterators in sectarian schools under IDEA as long as the services are provided in a religion-neutral manner.[95] As a result, Matthew's parents again brought their case to the Fourth Circuit, which found that the Goodalls still were not entitled to reimbursement because the need to place Matthew at such a school had not been appropriately established.

Since the *Goodall* decision, IDEA has undergone some relevant changes. One revision affirms the permissibility of providing services to children with disabilities in private religious schools, as long as special education and services are provided in a "secular, neutral, and nonideological" fashion.[96] Another new provision also requires LEAs to do more extensive "child find" searches for parentally placed children with disabilities in private schools and to consult with parents about provision of IDEA services.[97] According to one association of religious educators, these changes in the law "should help students with disabilities who are in private schools obtain more equitable treatment than in the past."[98] However, the revised act leaves in place the provision that an LEA that has offered FAPE to a child with disabilities does not need to pay educational costs (including special education and related services) for the child if

88. Further information on these cases may be found at www.wrightslaw.com/news/2003/fortbragg.aba.4thcir.htm. For the Lovaas method, see n.61 above.

89. *Gadsby*, 109 F.3d at 951 (citing *Carter*, 510 U.S. at 14) and 954.

90. *Tice*, 908 F.2d 1200, 1208 (4th Cir. 1990).

91. *Id*. at 1208–09 (quoting 20 U.S.C. § 1401(8)(B)).

92. Gray *ex rel.* Gray v. O'Rourke, 48 Fed. Appx. 899, Slip Copy (4th Cir. (Md.) 2002).

93. Jennings v. Fairfax County Sch. Bd., 39 Fed. Appx. 921(4th Cir. 2002) (citing district court opinion, No. 00-1898 at 19–20 (E.D. Va. Aug. 14, 2001)); 20 U.S.C. S § 1412(a)(1)(C)(iii)(I).

94. Goodall v. Stafford County Sch. Bd., 930 F.2d 363 (4th Cir. 1991) (Goodall I), *cert. denied*, 502 U.S. 864 (1991). The ruling in Goodall I regarding IDEA was affirmed in Goodall v. Stafford County Sch. Bd., 60 F.3d 168 (4th Cir. 1995) (Goodall II), *cert. denied*, 516 U.S. 1046 (1996).

95. Zobrest v. Catalina Foothills Sch. Dist., 509 US 1 (1993).

96. 20 U.S.C. §§ 1412(a)(10)(A)(i)(III),1412(a)(10)(A)(vi)(II).

97. 20 U.S.C. § 1412(a)(10)(A)(ii), (iii).

98. National Catholic Educational Association at www.ncea.org/public/IDEASpecialEducation.asp (last visited June 17, 2007).

parents placed the child in private school without the LEA's consent or referral.[99]

Who Is Liable for Failing to Provide FAPE?

The state educational agency (SEA) is responsible for ensuring that each child within its jurisdiction is provided a free appropriate public education and may be held responsible if LEAs do not meet IDEA requirements.[100] The LEA working under the SEA may also be held liable if it fails to meet its responsibilities. In determining relief, courts must determine the responsibilities and liabilities of each of the agencies.

State Requirements

The federal requirements discussed so far are "baseline" (minimum) educational benefits that all states must implement under IDEA. States are not required to do more, but they are free to set higher standards both procedurally and substantively.[101] For many years North Carolina took this approach, and LEAs in the state were required to meet higher substantive standards than those contained in IDEA. North Carolina law stated that "it is the policy of the State of North Carolina . . . to ensure every child a fair and full opportunity to reach his full potential and that no child [with special needs] shall be excluded from service or education for any reason whatsoever."[102]

State courts interpreted this statement as meaning that the North Carolina General Assembly "intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible," and so "[u]nder this standard, a disabled child should be given an opportunity to achieve his full potential commensurate with that given other children."[103] The Fourth Circuit, too, interpreted this section as requiring more than the "free appropriate public education" required under federal law: "[W]ithin the State of North Carolina, it has been recognized that state lawmakers have built upon the federal floor created by the EHA [IDEA's predecessor] and have decided to provide the handicapped children, within the state, with a level of educational services that surpasses the national minimum."[104]

As of July 1, 2006, the General Assembly brought the state back into line with IDEA's substantive baseline, using language taken almost verbatim from the current IDEA: "[I]t is the goal of the State to provide full educational opportunity to all children with disabilities who reside in the state."[105] Further, the purposes of the state's special education code are "to (i) ensure that all children with disabilities ages three through 21 have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepares them for further education, employment, and independent living; (ii) ensure that the rights of these children and their parents are protected; and (iii) enable the State Board of Education and local educational agencies to provide for the education of all children with disabilities."[106]

There do remain, however, a few (really very few) procedural differences between IDEA and North Carolina law, particularly in the area of statutes of limitation. Although IDEA specifies a two-year time limit within which administrative proceedings must begin (that is, two years from the time parents knew, or should have known, of the decision under protest), states may set their own statutes of limitation.[107] North Carolina has set its statute of limitations at one year.[108] Both federal and state law provide for the tolling of these statutes in cases of bad faith action by the LEA (e.g., willful refusal to disclose information). In addition, both laws require that LEA officials provide parents with written notice when it (the LEA) has taken an action that triggers the right to request an impartial due process hearing.[109]

As to the limitations period for filing civil actions, IDEA and North Carolina law, again, differ. IDEA allows parents ninety days after the announcement of a final administrative hearing decision to file a civil action. North Carolina allows them thirty days to file a civil action in state court and follows IDEA's requirement for federal court filings.[110]

Conclusion

In the Fourth Circuit, and nationally, the wealth of court cases involving IDEA has resulted in a definition of "free

99. 20 U.S.C. § 1412(a)(10)(C)(i).

100. Gadsby v. Grasmick, 109 F.3d 940, 952 (4th Cir. 1997) (citing 20 U.S.C. 1412(6)).

101. Because IDEA's definition of FAPE (20 U.S.C. § 1401(9)) requires that educational services "meet the standards of the State educational agency," SEAs have congressional permission to set higher standards.

102. N.C. Gen. Stat. 115C-106(a) (hereinafter G.S.), *repealed* by S.L. 2006-69, Sec. 1, eff. 7/1/06.

103. Harrell v. Wilson County Schools, 58 N.C. App 260, 264–65 (1982) (citations and footnotes omitted), appeal dismissed, 295 S.E.2d 759 (N.C. 1982), *cert. denied*, 460 U.S. 1012 (1983).

104. *In re* Conklin v. Anne Arundel County Bd. of Educ., 946 F.2d 306, 318 (4th Cir. 1991).

105. G.S. 115C-106.1, reflecting the IDEA language found at 20 U.S.C. § 1412(a)(2).

106. G.S. 115C-106.2(a), reflecting the IDEA language found at 20 U.S.C. § 1400(d)(1).

107. 20 U.S.C. § 1415(f)(3)(C).

108. G.S. 115C-109.6(b).

109. 20 U.S.C. § 1415(c)(1); G.S. 115C-109.5.

110. 20 U.S.C. § 1415; G.S. 115C-109.9(d).

appropriate public education" much deeper and more nuanced than it was when Congress first enacted the law. It is difficult to foresee what further changes will be brought about by Congress's reauthorizations or by the new No Child Left Behind legislation. One thing is certain, though: the definition of FAPE will continue to evolve as legislation changes and challenges to the act are brought into court.

In the meantime, the cases reviewed above suggest several important points for SEA and LEA officials in the Fourth Circuit to keep in mind as they work with parents and IEP teams to determine the best placements for students with disabilities.

- *Identifying students*. LEAs must seek out and identify all students in their district (including those in private schools) who qualify for special education and related services because of one or more of the disabilities listed in IDEA.
- *Evaluating students*. LEAs must conduct a multifactor evaluation for each child suspected of having a disability. LEAs are not responsible for following IDEA procedures when a student's behavior is unrelated to his or her disability. Nor are LEAs responsible under IDEA for providing additional services to the student for such unrelated behaviors.
- *Creating an IEP*. A qualified LEA representative must work with the child's teacher and parents to create an appropriate IEP for a child with a disability. Appropriate IEPs must contain statements concerning a child's level of educational performance, set forth measurable annual achievement goals, describe the services to be provided, explain the extent to which the child will not participate with nondisabled children in regular classes and activities, and establish objective criteria for evaluating his or her progress.
- *Reviewing an IEP*. LEAs have a responsibility to review the child's IEP on an annual basis, even if the child's parents remove the child from the school and place him or her in a private institution.
- *Determining appropriate placement*. In a dispute between parents and an LEA over two placements that both would provide FAPE, the appropriate placement is the one that offers the least restrictive environment. LEAs must consider whether the necessary education services could also be provided in a mainstream setting. A mainstream placement should be as close as possible to the child's home and, if feasible, in the school the child would attend if he or she were not disabled. However, schools may pool resources and provide specialized programs in centralized locations in order to better serve students with a disability.
- *The stay-put rule*. When parents and the LEA disagree over the IEP, the current placement is presumed to be correct, and the child must remain there until the disagreement is resolved. Suspensions of more than ten days are considered violations of IDEA's stay-put requirement. Because an LEA has an interest in maintaining a safe learning environment for all its students, it may seek a court injunction to remove a truly dangerous child from school for the duration of the proceedings.
- *Appropriate, not best*. LEAs are only required to offer a child with disabilities a free appropriate public education—not the best possible education. LEAs are responsible for providing services sufficient to confer some educational benefit upon the child but are not responsible for furnishing every special service necessary to maximize each child's potential.
- *Parental involvement*. Parents must be given the opportunity for "a full and fair involvement in the process" of creating an IEP for their child. LEAs must notify parents of decisions affecting their child and provide parents with the opportunity to object to

Resources on FAPE on the World Wide Web

(*last visited June 18, 2007*)

www.copaa.net
Website of the Council of Parent Attorneys and Advocates. Provides summaries of relevant Fourth Circuit Court cases and other IDEA news.

www.fape.org
The Families and Advocates Partnership for Education website.

www.ideapractices.org
Website of the Council for Exceptional Children. Extensive information on IDEA, FAPE, and new regulations for 2004 IDEA.

www.ncpublicschools.org/ec/
North Carolina's homepage for the Division of Exceptional Children.

www.nasdse.org/
National Association of State Directors of Special Education.

www.idea.ed.gov/explore/home
U.S. Department of Education's home page for its Office of Special Education Programs.

www.disabilityrights.org/title.htm
A parent's guide to special education, includes sample letters for parents to use in communicating with their LEAs.

those decisions. This includes providing written notice before making any change in (or refusing to change) the child's evaluation or IEP.

- *Benefit and progress*. Courts generally defer to LEAs' decisions about IEPs, as long as the IEP includes educational instruction specially designed for the unique needs of the child and is reasonably calculated to enable the child to receive educational benefit and make educational progress. In assessing the appropriateness of each child's IEP, LEAs need to consider whether the child has made progress on the basis of objective criteria such as grades and advancement in school, among other things.
- *Notifications and limitations*. In North Carolina, LEAs must provide parents with written notice of decisions they make regarding a child with disabilities and must inform parents of their right to file a contested case petition, the procedure for doing so, and the sixty-day time limit for filing.

For further information about FAPE, IDEA, and relevant on-going cases, please visit the websites listed in "Resources on FAPE on the World Wide Web." ■