

# Chapter 2

## RIGHTS TO A FREE APPROPRIATE PUBLIC EDUCATION

### Key Updates

- Analysis of *Endrew F. v. Douglas County School District*
- Review of court decisions on FAPE since *Endrew F.*
- Examination of what constitutes educational benefit
- Updates on case law on the IDEA's child-find requirement

The Individuals with Disabilities Education Act (IDEA),<sup>1</sup> which provides qualified students with unprecedented access to public education, directs all school boards in the United States to provide children with disabilities with free appropriate public educations (FAPEs) in the least restrictive environments. The IDEA requires teams of educators and parents to identify and describe the services students require to ensure that they receive FAPEs, consisting of needed special education and related services, in their individualized education programs (IEPs). Even though the IDEA provides a definition of a FAPE,<sup>2</sup> neither Congress nor the U.S. Department of Education has established substantive standards by which to judge the adequacy of special education services.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley (Rowley)*,<sup>3</sup> its first case interpreting the IDEA, the Supreme Court held that a child with hearing impairments was entitled to personalized instruction and support services sufficient to permit her to benefit from the instruction that she received. Thirty-five years later, in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1 (Endrew F.)*,<sup>4</sup> the Court clarified that programs for children should be appropriately ambitious in light of their circumstances. Not surprisingly, as evidenced by the amount of litigation this book examines, courts must frequently consider the level of services required to meet the IDEA's minimum standards. Even so, in *Rowley* the Justices cautioned lower courts not to impose their views of preferable educational methods on school officials.<sup>5</sup>

This chapter reviews eligibility requirements for special education and related services, an important matter because issues often arise concerning whether students qualify for identification and placement in one of the IDEA's disability categories in order to receive services. This chapter also delineates the rights of children to access services and programs regardless of whether they attend public or non-public schools.

## Free Appropriate Public Education

According to the IDEA, each child with a disability is entitled to a FAPE. The term “free appropriate public education” means 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 school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under [this law].<sup>6</sup>

In order to qualify under the IDEA, children with disabilities must meet four statutory requirements. First, they must be between the ages of three and twenty-one;<sup>7</sup> under this provision, children remain twenty-one until the day before they turn twenty-two, unless state law extends this time period. However, local boards need not provide special education to persons aged eighteen through twenty-one who are incarcerated in adult facilities if they were not previously identified as disabled and lacked IEPs when they were incarcerated<sup>8</sup> or who graduated from high school with regular diplomas.<sup>9</sup>

Second, students must have specifically identifiable disabilities. The IDEA defines children with disabilities as having intellectual impairments, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.<sup>10</sup> Figure 2.1 summarizes the components of a FAPE.

The third and fourth requirements under the IDEA, which must be taken together, are that qualified children, “by reason thereof, need . . . special education and related services.”<sup>11</sup> This means that children must receive FAPEs in the least restrictive environment directed by the contents of their IEPs.

**Figure 2.1 • Components of a Free Appropriate Public Education**

<ul style="list-style-type: none"> <li>• <b>Specifically Designed Instruction:</b> Students with disabilities are entitled to personalized instruction designed to meet their unique needs.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Appropriate Peer Group:</b> Students should be educated, whenever possible, with peer groups including children of approximately the same age and developmental level.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Least Restrictive Environment:</b> To the maximum extent feasible, students with disabilities must be educated with peers who are not disabled.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Educational Benefit:</b> The special education and related services children receive should be designed to assist them in making meaningful progress toward the goals and objectives of their IEPs, consistent with their individual circumstances.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Procedural Requirement:</b> IEPs must be developed in accordance with the requirements of the IDEA and state law.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Related Services:</b> Children are entitled to supportive services if they are necessary for them to benefit from their educational programs.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Assistive Technology:</b> Students must receive assistive technology services and devices if they are necessary for them to receive educational benefit.</li> </ul>
<ul style="list-style-type: none"> <li>• <b>Public Expense:</b> Children must be provided with programs and all of their components at no cost to them or their parents.</li> </ul>

The IDEA uses the term *special education and related services* in its definition of a FAPE. Even so, children with disabilities do not necessarily have to need related services in order to be eligible for special education services under the IDEA. Children are entitled to related services only when they need such developmental, corrective, or supportive services in order to benefit from their special education.

In *Irving Independent School District v. Tatro*,<sup>12</sup> the Supreme Court ruled that the IDEA does not obligate school boards to provide related services to students with disabilities who do not need such services to benefit from their special education. For this reason, it is unnecessary for students to need related services in order to qualify under the IDEA as long as they need special education. By the same token, students are not entitled to related services if they do not require special education. Put another way, while some school boards provide students with disabilities with related services in conjunction with special education, not all students who receive IDEA services need or are entitled to related services.

IEPs are the cornerstones upon which FAPEs are built as they prescribe the special education and related services school boards will provide to students with disabilities. The IDEA defines an IEP as “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.”<sup>13</sup> Section 1414(d) outlines all of the components of IEPs, including students’ current levels of performance, annual goals, and short-term objectives, as well as the specific educational services that schools will provide.<sup>14</sup>

The IDEA and its regulations require school board officials to provide a continuum of alternative placements for all students with disabilities.

The IDEA and its regulations require school board officials to provide a continuum of alternative placements for all students with disabilities. In practice, this range of options progresses from full inclusion in regular education classrooms; to inclusion with supplementary assistance such as paraprofessionals; to partial inclusion, meaning that children split time between regular classrooms and resource room placements;<sup>15</sup> to self-contained or individualized placements.<sup>16</sup> The IDEA prefers to have all four of these options provided in the local neighborhood schools that children would otherwise have attended, unless they require other arrangements to receive FAPEs. The more restrictive settings on the continuum range from special day schools to hospital or homebound instruction, which should not be confused with homeschooling, to residential placements.<sup>17</sup> Figure 2.2 gives an example of a continuum of placement options.

**Figure 2.2 • Continuum of Placement Options**

Less Restrictive	
↑ ↓	Full inclusion with supplementary aids and services
	General education with pull-out services
	Special class with mainstreaming
	Full-time special education
	Special day schools
	Residential facilities
	Homebound instruction
More Restrictive	

Because neither the IDEA nor its regulations include a precise definition of the term *appropriate*, it is necessary to turn to judicial interpretations for guidance on the meaning of FAPE.

Although the IDEA states a preference for the first four options to be offered in the local neighborhood schools that children with disabilities would ordinarily attend,<sup>18</sup> it offers little guidance in defining what may be considered appropriate. The IDEA's regulations indicate that an appropriate education consists of special education and related services that are provided in conformance with children's IEPs.<sup>19</sup> Because neither the IDEA nor its regulations include a precise definition of the term *appropriate*, it is necessary to turn to judicial interpretations for guidance on the meaning of FAPE.

## The *Rowley* and *Endrew F.* Standards

As noted in the preceding pages, the Supreme Court has twice addressed what the IDEA requires for IEPs to be appropriate. In *Rowley*,<sup>20</sup> the Court offered a minimal definition of a FAPE, which has become known as the “some educational benefit” standard. In its second FAPE opinion, *Endrew F.*, the Court clarified that minimal progress was insufficient to meet the IDEA's standard.

### **Rowley: IDEA Requires Some Educational Benefit**

*Rowley* involved parents in New York who challenged school officials who refused to provide a sign-language interpreter for their kindergarten-aged daughter with hearing impairments. A hearing officer and lower courts ordered board officials to provide an interpreter for the child on the basis that an appropriate education was one that afforded her the opportunity to achieve at a level commensurate with that of her peers who did not have disabilities.

On further review, the Supreme Court, pointing out that the child in *Rowley* was achieving passing marks and advancing from grade to grade without the sign-language interpreter, reversed in favor of the board.<sup>21</sup> Deciding that the child was not entitled to an interpreter, the Court reasoned that an appropriate education was one formulated pursuant to all of the IDEA's procedures and “sufficient to confer some educational benefit”<sup>22</sup> on students with disabilities.<sup>23</sup> To the extent that the child in *Rowley* received “some educational benefit” without the sign-language interpreter, the Court was satisfied that the school board did not have to provide her with one, even though she might have achieved at a higher level had she received this additional assistance.<sup>24</sup>

An appropriate education is one that is formulated in accordance with all of the IDEA's procedures and is “sufficient to confer some educational benefit” on children with disabilities. The IDEA requires an educational program reasonably calculated to enable children to make progress that is appropriate in light of their circumstances.

*Rowley* established a minimum standard for what constitutes a FAPE under federal law. Yet, one state, West Virginia, has gone so far as to enact a statute specifying that no “state rule, policy, or standard . . . nor any county board rule, policy, or standard governing special education may exceed the requirements of federal law or regulation.”<sup>25</sup> Conversely, courts in North Carolina,<sup>26</sup> New Jersey,<sup>27</sup> Michigan,<sup>28</sup> and California<sup>29</sup> acknowledged that those states had higher standards of appropriateness at the time the decisions were issued. Further, in the case from New Jersey, the Third Circuit explained that the higher state standards replaced the federal requirements because one of the essential elements of the IDEA is that special education programs must “meet the standards of the state educational agency.”<sup>30</sup>

## Endrew F.: IDEA Demands More Than Minimal Progress

After *Rowley*, lower courts applied the “some educational benefit” criterion to specific factual situations. Some cases reflected the judicial view that minimal benefits met this standard, but in other cases courts held that the IDEA required more.<sup>31</sup> The Supreme Court revisited the issue of what constitutes a FAPE in *Endrew F.*<sup>32</sup>

The dispute in *Endrew F.* began when the parents of a boy in Colorado, who was diagnosed as having autism and attention deficit hyperactivity disorder, contested a proposed IEP for his fifth-grade year. Lower courts found the IEP to be appropriate, stating that because the child had made progress under similar IEPs in the past, it was reasonably calculated to provide him with some educational benefit. These courts agreed that minimal benefit met the *Rowley* standard.

On appeal in *Endrew F.*, though, the Supreme Court vacated the earlier orders, declaring that the IDEA demands more than minimal progress. The Justices explained that when it is not reasonable to expect children to progress smoothly through the regular curricula, their IEPs need not aim for grade-level advancement. Insisting that although their goals may be different, all children should have the chance to meet challenging objectives, the Court clearly interpreted the IDEA as requiring educational programs reasonably calculated to enable all children to make appropriate progress in light of their circumstances.

## Indicators of Educational Benefit

Courts review the appropriateness of IEPs both retrospectively and prospectively. That is, depending on the circumstances, they evaluate the appropriateness of past IEPs and assess whether proposed IEPs meet the IDEA’s standards. In assessing whether children made progress under their IEPs, courts consider an array of indicators,<sup>33</sup> as summarized in Figure 2.3.

### Report Card Grades and Promotion

In *Rowley*, the Supreme Court wrote that the programs provided to students with disabilities who attend class predominantly in general classroom settings should enable them to achieve passing marks and advance from one grade to the next. Although various courts agreed that students who did advance from grade to grade received FAPEs,<sup>34</sup> in *Rowley*’s aftermath other courts responded that promotion to the next grade by itself is not proof that students received FAPEs.<sup>35</sup> For instance, in a case from North Carolina, the Fourth Circuit affirmed that promotion alone, especially in conjunction with test scores revealing minimal progress, did not satisfy *Rowley*’s standard of “some educational benefit.”<sup>36</sup> Subsequently, the same

**Figure 2.3 • Indicators of Educational Benefit**

Courts frequently examine the following factors to determine whether students received educational benefit from their special education programs:
• Standardized test scores
• Report card grades
• Promotion from grade to grade
• Teachers’ assessments
• Anecdotal teacher comments
• Progress toward IEP goals and objectives

court observed that although passing marks and annual grade promotions were important considerations under the IDEA, achieving each did not automatically mean that a student received an appropriate education.<sup>37</sup> In other words, courts do not view so-called social promotions as indicators of students having received FAPEs.

Along similar lines, although some courts view high school diplomas as evidence that students received appropriate educations,<sup>38</sup> not all courts agree. For example, the highest court of Massachusetts remarked that a student's having graduated and received a high school diploma did not mean that he received a FAPE. The court thus rescinded the diploma that the school committee awarded to an eighteen-year-old student who was unable to adapt to life in a sheltered workshop or to live independently after graduation.<sup>39</sup> The court was of the opinion that awarding a diploma to the student, who was unable to earn one under normal requirements even by the age of twenty-two, was substantively inappropriate. The critical factor in such cases is whether the students legitimately earned diplomas by satisfactorily completing all requirements. Thus, school boards cannot absolve themselves of their obligation to educate children with disabilities through the age of twenty-one by issuing diplomas that students have not earned by meeting the usual prerequisites.

### Academic Progress

In considering whether proposed IEPs are appropriate, evidence of students' academic progress is relevant, but not dispositive, in evaluating whether they received FAPEs in the past.<sup>40</sup> Courts have agreed that past progress in the same or similar programs, along with evidence that the progress should continue, indicated that programs would confer educational benefit,<sup>41</sup> even if it was incremental in nature.<sup>42</sup> Likewise, courts have concurred that continuing IEPs that failed to produce educational benefits is inappropriate.<sup>43</sup> One court even rejected an IEP that reduced services as insufficient to confer a FAPE when the child had not received meaningful educational benefits.<sup>44</sup> On the related topic of regression, courts tend to interpret a decline in student performance after the discontinuation of services or programs as an indicator that the education that the child received following the cessation of services was not meaningful.<sup>45</sup>

The progress of special education students should be comparable with the advances achieved by similarly situated children. Progress should be measured in terms of the ability of students as children with disabilities.

Generally speaking, especially in view of *Andrew F.* that the adequacy of IEPs turns on children's unique circumstances, the progress of special education students should be comparable with the advances achieved by similarly situated children.<sup>46</sup> To this end, even prior to *Andrew F.* various courts decreed that progress should be measured in terms of the ability of students as children with disabilities.<sup>47</sup> In this respect, courts agree that not all students, particularly those with severe disabilities, can meet standard curricula requirements.<sup>48</sup> For example, the Third Circuit affirmed that a child from Pennsylvania who was not fully integrated into a regular classroom was unlikely to advance at the same rate as peers without disabilities and that her slow progress did not indicate that her IEPs were not challenging.<sup>49</sup> Similarly, the Fourth Circuit, in a case from Maryland, affirmed that an IEP including reasonably ambitious goals focused on the child's unique circumstances was appropriate for a student whose IEP did not aim for grade-level advancement through the curriculum.<sup>50</sup>

At the same time, lack of progress does not necessarily mean that students' programs are inappropriate. Courts realize that some students are not motivated and that other factors, such as substance abuse, poor conduct, failure to complete homework, and absenteeism, may contribute to their lack of success.<sup>51</sup> Because most IEPs have multiple goals and objectives, the fact that some students may not achieve all of their goals does not mean they were denied FAPEs.<sup>52</sup>



In order to evaluate whether students are making meaningful or significant progress, courts may rely on objective data, including test scores and the opinions of experts in the field, such as psychologists and educational diagnosticians.<sup>53</sup> Even so, the Third Circuit cautioned that good grades earned in special education classes should not be viewed the same way as grades earned in mainstream classrooms.<sup>54</sup> Reversing an earlier order from the federal trial court in New Jersey to the contrary, the court feared that there could be a disconnect between educators' assessments of students in special education as opposed to general education settings, insisting that course grades alone could not be used to evaluate whether special education programs provided educational benefits. In other words, because the criteria for awarding grades in special education classes may not be the same as in general education, the grades in each cannot be considered to be equivalent.

### Retrospective and Prospective Review

Although IEPs are prospective, courts or hearing officers can, and often do, examine them retrospectively. Insofar as due process appeals and judicial actions generally occur after IEPs were to have been implemented, those reviewing them have the benefit of hindsight in evaluating their appropriateness. How much weight should be accorded subsequent history was subject to debate in a case from New Jersey. Affirming that a school board's actions could not have been judged exclusively in hindsight, a divided Third Circuit explained that such a finding must be based on whether a child's IEP was appropriate when developed, not on whether he actually received benefit as a result of a placement.<sup>55</sup> The court also commented that students' gains could have been attributed to other factors besides their educational programs. The dissent argued that evidence of what actually happened was material even though it might not have impacted the final outcome.

Courts approve proposed IEPs when educators can show that the IEPs have been individually tailored to meet students' unique needs, contain appropriate goals and objectives, and include strategies to address students' weaknesses.

In judging IEPs prospectively, that is, considering whether they were reasonably calculated to confer educational benefit when they were proposed, courts evaluate whether the services and supports proposed are sufficient to meet students' needs.<sup>56</sup> In doing so, courts consider the services proposed in IEPs in light of children's identified disabilities and deficits.<sup>57</sup> Courts uphold proposed IEPs as appropriate when educators can show that they have been individually tailored to meet the students' unique needs, contain appropriate goals and objectives, and include strategies to address students' weaknesses.<sup>58</sup> In this respect, when educators and parents disagree over proper methodology, courts typically defer to the expertise of school officials.<sup>59</sup>

### Failure to Implement an IEP Fully

IEPs are essentially roadmaps of the services school board officials intend to provide to students with disabilities. Unfortunately, for various reasons, good intentions sometimes go awry, and educators are not always able to implement agreed-on IEPs fully. Although on the surface it may appear that the failure to implement IEPs fully would result in IDEA violations, courts have not always agreed that this is so.<sup>60</sup> In one of the first cases to address this issue, the Ninth Circuit reasoned that minor discrepancies between the services outlined in a student from Oregon's IEP and those actually provided did not necessarily result in a denial of a FAPE.<sup>61</sup> As pointed out by the Eleventh Circuit, in order to prevail on a failure-to-implement claim, parents must demonstrate more than minor shortfalls by showing that school officials failed to implement substantial or significant provisions of IEPs.<sup>62</sup> To assess whether the failure to implement all services called for in IEPs translates into denials of FAPEs, courts review whether children still received sufficient educational benefit without the missing services.<sup>63</sup>

## Failure to Identify a Placement Location in an IEP

An array of courts have addressed whether “placement” refers to the programs and services provided rather than specific locations where IEPs are implemented<sup>64</sup> and whether the failure of school officials to name placement locations in IEPs may justify parental rejections of those IEPs.<sup>65</sup> The Fourth Circuit, in a dispute from Virginia, acknowledged that an IEP that failed to identify the school at which special education services were to have been provided was not sufficiently specific for parents to evaluate its appropriateness.<sup>66</sup> However, other courts reached the opposite result.<sup>67</sup> According to these courts, because the term *educational placement* refers only to the general type of educational programs in which children are placed, rather than specific schools, IEPs not identifying the schools in which services are to be delivered are not defective.

## Least Restrictive Environment

The IDEA requires all states and local education agencies to educate students with disabilities in the least restrictive environment (LRE).<sup>68</sup> This provision applies across the continuum of placement alternatives discussed earlier. Specifically, the IDEA obliges states to establish procedures assuring that students with disabilities are educated, to the maximum extent appropriate, with peers who do not have disabilities. Further, children can be placed in special classes or separate facilities, or otherwise be removed from general education environments, only when the nature or severity of their disabilities is such that instruction in general education classes cannot be achieved satisfactorily, even with supplementary aids and services.<sup>69</sup>

These provisions apply to students who attend private schools, institutions, or other care facilities at public expense as well as to children who attend public schools.<sup>70</sup> Because the IDEA and its regulations only obligate educational agencies to spend proportionate amounts of federal funds on students who attend private schools at parental expense, the degree to which such children can be educated in inclusionary settings at their private schools may be limited.<sup>71</sup> When addressing the provision of FAPes for students with disabilities, courts must consider the IDEA’s LRE provisions in tandem with the services children need.

In two important cases, federal appellate courts directed school boards to place students with disabilities in regular settings as opposed to segregated special education classrooms. Both courts agreed that educators must consider a variety of factors when formulating the LREs for children with disabilities. Figure 2.4 lists factors the courts consider in evaluating LREs.

**Figure 2.4 • Determining the Need for a More Restrictive Placement**

Students may require more restrictive placements when
• They failed to progress in their then-current placements, even with the use of supplemental aids and services.
• The cost of maintaining them in less restrictive environments is unreasonable.
• They require specialized environments to receive FAPes.
• They need specialized techniques or resources that are unavailable in regular public school programs.
• They have low-incidence–type disabilities requiring contact with peers who have similar disabilities.
• They need 24-hour programs of instruction and care.
• They require consistency of approaches between their home and school environments.
• They need total immersion in programs in order to make progress.
• Their presence in the less restrictive environments is disruptive to the educational process of peers.
• Their potentially dangerous behavior puts themselves and/or others at risk of harm.



## Identifying the Least Restrictive Environment

In *Oberti v. Board of Education of the Borough of Clementon School District*,<sup>72</sup> a case from New Jersey, the Third Circuit adopted a two-part test, originally proposed by the Fifth Circuit,<sup>73</sup> for assessing compliance with the LRE mandate. The first element of the test asks whether children with disabilities can be educated satisfactorily in regular classrooms with the use of supplementary aids and services. The second part of the test addresses what occurs if placements outside of regular classrooms are necessary. This inquiry addresses factors educators must consider in determining whether children are mainstreamed to the maximum extent appropriate.

As the Ninth Circuit summarized in *Sacramento City Unified School District Board of Education v. Rachel H.*,<sup>74</sup> educators must consider four factors in making placements: the educational benefits of placing children with disabilities in regular classrooms, the nonacademic benefits of such placements, the effect that the presence of students with disabilities would have on teachers and other children in classes, and the costs of inclusionary placements. IEP teams must take all of these factors into account in making placement decisions for students with disabilities.

Educators must make reasonable efforts to place students with disabilities in fully inclusive settings by providing them with supplementary aids and services to ensure their success. Even with the focus on inclusion, not all students with disabilities must be placed in regular education classes.

Inherent in these judicial tests is the principle that educators must make reasonable efforts to place students with disabilities in fully inclusive settings by providing them with supplementary aids and services to ensure their success.<sup>75</sup> Even with the focus on inclusion, not all students with disabilities must be placed in regular education classes because inclusion is a goal, not a mandate.

## When More Restrictive Placements Are Necessary

Courts have approved segregated settings over parental objections<sup>76</sup> where IEP teams demonstrated that students with disabilities could not have functioned in regular classrooms or would not have benefited in such settings, even with supplementary aids and services.<sup>77</sup> As the First Circuit explained in a case from Massachusetts, IEP teams must choose placements that strike appropriate balances between the restrictiveness of the settings and educational progress.<sup>78</sup> In a case originating in California, the Ninth Circuit affirmed that the LRE for a student with multiple disabilities was a special education class with some mainstreaming as he was nonverbal, could only respond to “yes–no” questions, and did not interact with peers.<sup>79</sup>

Courts have been reluctant to order inclusionary placements for students who exhibit disruptive behaviors.<sup>80</sup> By way of example, a federal trial court in Pennsylvania approved a placement in a private day school for a child who exhibited extremely aggressive behavior, was disrespectful, and was difficult to manage.<sup>81</sup> The court commented that the child’s behavior, which negatively impacted the ability of other students to learn, justified the segregated placement. The bottom line is that inclusionary placements should be the settings of choice, with segregated settings contemplated only if fully inclusive placements failed despite the best efforts of educators, or there is overwhelming evidence that they are not reasonable.<sup>82</sup>

## Least Restrictive Environment in Summer Programs

There has been some judicial disagreement over whether school boards must provide inclusionary settings for students with disabilities who attend summer school programs.<sup>83</sup> The Second Circuit held that a school board in New York violated the IDEA’s LRE requirement by placing a student in a more restrictive setting for his summer program than his disability required.<sup>84</sup> The court wrote that the child’s summer

program was part of his overall placement and was subject to the LRE mandate. Conversely, in a case from Florida, the Eleventh Circuit ruled that the IDEA did not require a school board to create a mainstream summer program to serve the needs of one student, but had to offer the LRE option from its continuum of placements appropriate for the child's needs.<sup>85</sup>

## Entitlement to Services

The IDEA mandates that school boards provide FAPEs to all eligible children regardless of the severity of their disabilities. In the seminal case of a child from New Hampshire with severe disabilities, *Timothy W. v. Rochester, N.H., School District*, the First Circuit insisted that the IDEA's unequivocal language neither includes exceptions for those with severe disabilities nor requires students to demonstrate the ability to benefit from services in order to be eligible.<sup>86</sup> This case is thus known for reinforcing the concept of "zero reject," meaning that once children are identified as being in need of IDEA services, they must be served. The court also defined education in a broad sense, encompassing training in basic life skills.

The IDEA makes it clear that all eligible children are entitled to receive a FAPE regardless of the severity of their disabilities.

In *Honig v. Doe*,<sup>87</sup> the Supreme Court pointed out that even students with disabilities who are dangerous cannot be denied the IDEA's educational benefits. Yet, as noted, not all students with disabilities need to be educated within public school settings. Although the IDEA and its regulations allow residential or private placements of students at no cost to them or their parents,<sup>88</sup> the law does not cover children who have problems with drug addiction or sexual aggression unless they also meet the criteria for one of the IDEA's disability categories.<sup>89</sup>

## Age Requirements

The IDEA obligates states, through local education agencies, to provide special education services to students aged eighteen to twenty-one if educational services are offered to peers of the same age who do not have disabilities.<sup>90</sup> The Ninth Circuit posited that a statute enacted in Hawaii<sup>91</sup> barring students from attending public school after the last day of the school year in which they turned twenty violated the IDEA even though it applied to both general and special education students.<sup>92</sup> Because the state's education department operates a network of adult-education schools, which the court ascertained constituted secondary education, the panel insisted that it must also provide IDEA services to students with disabilities aged twenty and twenty-one. Similarly, the First Circuit observed that Rhode Island's scheme of funding a network of community-based organizations to deliver adult education to twenty-one- and twenty-two-year-old students no longer attending public schools qualified as public education for purposes of the IDEA.<sup>93</sup> Consequently, the court remarked that the state's practice of terminating services for students with disabilities on their twenty-first birthday violated the IDEA.

School boards are not required to continue services for students through the age of twenty-one if they no longer need special education or they have completed their formal education.

School boards are not required to continue services for students through the age of twenty-one if they no longer need special education or they have completed their formal education. For example, a federal trial court in Michigan upheld a school board's permitting a student with disabilities to graduate, thereby terminating his eligibility for special education services.<sup>94</sup> The court ruled that because the student had

completed all of his graduation requirements and had shown exceptional performance in mainstream classes, he was no longer eligible to receive special education services.

As straightforward as the IDEA and its regulations seem to be, controversy continues over eligibility for special education and related services. Much debate has transpired over the specified disability categories defined in the IDEA and its regulations. As reflected in the following sections, litigation over controversial eligibility criteria examined the delivery of special education and/or related services to students attending private schools by choice of their parents, prompting Congress to address this issue in the IDEA's most recent amendments.

## Eligibility

Students who may be identified under any of the categories of disabilities listed in the IDEA are eligible for services as long as their disabilities adversely affect their educational performances. Individual states may specify disability categories in addition to those listed in the IDEA or may provide special education services on a noncategorical basis. Figure 2.5 lists the IDEA's disability categories.

### Serious Emotional Disturbance

One of the more controversial disability categories identified in the IDEA addresses students with serious emotional disturbances.<sup>95</sup> In order to be classified as having emotional disturbances, students' conditions must adversely affect their educational performance. The definition in the IDEA's regulations<sup>96</sup> lists characteristics of serious emotional disturbance as an inability to learn that cannot be explained by other factors, an inability to build and maintain interpersonal relationships, inappropriate behavior or feelings under normal circumstances, a general pervasive mood of unhappiness or depression, or a tendency to develop physical symptoms or fears.<sup>97</sup> This definition includes schizophrenia but specifically excludes "children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed."<sup>98</sup>

**Figure 2.5 • IDEA's Disability Categories**

The IDEA defines a "child with a disability" as a child who has one of the following conditions and who consequently requires special education and related services:
• Intellectual disabilities
• Hearing impairments (including deafness)
• Speech or language impairments
• Visual impairments (including blindness)
• Serious emotional disturbance
• Orthopedic impairments
• Autism
• Traumatic brain injury
• Other health impairments
• Specific learning disabilities
For children aged three through nine, the IDEA adds the category of developmental delays in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development.

Source: 20 U.S.C. § 1401(3).

Courts varied in their judgments when evaluating whether students qualify for services under the category of serious emotional disturbance.

Courts varied in their judgments when evaluating whether students qualify for services under the category of serious emotional disturbance. In an illustrative case from Virginia, the Fourth Circuit affirmed that a student was not seriously emotionally disturbed,<sup>99</sup> pointing out that a drop in his grades was directly attributable to his truancy,<sup>100</sup> drug and alcohol use,<sup>101</sup> and delinquent behavior rather than any emotional disturbance. The Eighth Circuit, in a dispute from Minnesota, commented that the factor that controlled eligibility under the IDEA was not whether a student's problem was educational or noneducational but, rather, whether her behavior needed to be addressed in order for her to learn.<sup>102</sup> The court concluded that because the student had social and emotional problems preventing her from receiving educational benefit, she was entitled to receive special education services in a residential setting.<sup>103</sup>

In another case, the Second Circuit found that a student from New York whose inability to learn could not be explained solely by intellectual, sensory, or health factors, and whose emotional difficulties adversely affected her educational development, was entitled to special education.<sup>104</sup> The record revealed that the student exhibited a pervasive mood of unhappiness, depression, and despondency, as evidenced by a suicide attempt. The court was convinced that under normal circumstances the child exhibited inappropriate behavior, such as lying, cutting classes, failing to complete assignments, stealing, and being defiant. In addition, the Sixth Circuit was of the view that a student from Tennessee who had average intelligence but demonstrated a long history of academic failure, difficulty making and maintaining friendships, and the inability to create normal social bonds was seriously emotionally disturbed and entitled to services under the IDEA.<sup>105</sup>

Two cases from California reaching the Ninth Circuit demonstrate how the unique facts of cases can be determinative in terms of classifying students as having emotional disturbances. In the first, the court affirmed that a student who suffered from post-traumatic stress syndrome did not meet requirements for classification as emotionally disturbed because she was able to develop and maintain satisfactory relationships and her condition did not adversely affect her educational performance.<sup>106</sup> In the second case, the court decreed that a student with suicidal tendencies who was diagnosed as having bipolar disorder, among other disabilities, qualified as having an emotional disturbance even though his performance in general education classes was satisfactory.<sup>107</sup> Although his school board had not provided him with special education services, it did offer some educational, behavioral, and counseling services not ordinarily available to students in general education settings, which the court thought eased his impairments. The court added that the student's disabilities adversely affected his attendance which, in turn, hurt his academic performance.

## Other Health Impairment

A growing area of concern involves children who are diagnosed as having attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD), conditions that the IDEA's regulations classify under the category of "other health impairment." In order to be covered by the IDEA, such students must demonstrate

limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as asthma, attention deficit or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.<sup>108</sup>

In a case from Texas, the Fifth Circuit affirmed that a student with ADHD who earned passing grades and scored successfully on state tests was ineligible for special education even though his condition adversely affected his educational performance.<sup>109</sup> On the other hand, the Eighth Circuit affirmed that a student from Missouri, whose hyperactivity, impulsivity, and inattention severely impaired his ability to learn, qualified for special education.<sup>110</sup> Further, a federal trial court in California was convinced that a student whose lack of motivation was attributed to his ADHD was eligible for special education because his condition adversely affected his educational performance.<sup>111</sup>

A concern arises because school nurses typically administer medication to students with ADHD who must take their prescriptions during school days. The Eighth Circuit, in two separate cases from Missouri, agreed that school officials did not violate the rights of students with disabilities who were diagnosed as having ADHD by refusing to administer Ritalin to them in dosages that exceeded the amount called for in the *Physician's Desk Reference*,<sup>112</sup> a book that doctors commonly rely on in prescribing medications.<sup>113</sup> The IDEA now explicitly prohibits education officials from requiring parents to obtain prescriptions for their children for substances such as Ritalin under the Controlled Substances Act as a condition of attending classes, being evaluated, or receiving special education services.<sup>114</sup>

In a matter related to other health impairments, it is well settled that students with contagious diseases or other illnesses are entitled to FAPEs under the IDEA or reasonable accommodations under Section 504 of the Rehabilitation Act<sup>115</sup> and that their parents are not required to disclose their illnesses to school officials as a precondition for admission or continued enrollment.<sup>116</sup> Also, children with medical issues cannot be classified as “other health impairment” unless their diseases have progressed and affect their ability to perform in school.

During the height of the AIDS epidemic, multiple high-profile cases addressed the obligations of school boards toward students with this syndrome.<sup>117</sup> For instance, a court in New York declared that an unidentified student did not qualify as disabled merely due to having AIDS, but such a child could become eligible for services under the IDEA as the disease progressed.<sup>118</sup> The court observed that in order to qualify as having a disability under the IDEA, the child's educational performance had to have been adversely affected as a result of limited strength, vitality, or alertness due to having AIDS. Similarly, a federal trial court in Illinois declared that the IDEA applied to students with AIDS only if their physical condition adversely affected their ability to learn and to complete required classroom work.<sup>119</sup> In both cases, as well as in other litigation involving students with AIDS, the courts made it clear that federal law protects the rights of children who are in need of special education services.

It is well settled that students with contagious diseases or other illnesses are entitled to FAPEs under the IDEA or Section 504.

In a related vein, students with disabilities cannot be excluded from public schools due to their health problems, even when they are afflicted with contagious diseases, if the risk of transmission of their illnesses is low. Exclusions due to health problems would violate Section 504, the Americans with Disabilities Act,<sup>120</sup> and/or the IDEA. In such a dispute, the Second Circuit affirmed that students who were carriers of the hepatitis B virus could not be excluded from their public schools in New York or segregated within them because of their medical conditions.<sup>121</sup> In like fashion, a court in Illinois posited that a student with hepatitis B was entitled to an education in a regular setting.<sup>122</sup> Both courts agreed that the risk of transmission was low and could be reduced further through the use of proper prophylactic procedures.

The Eleventh Circuit vacated an earlier order to the contrary in asserting that before a student can be excluded from school, a court must evaluate whether reasonable accommodations can reduce the risk of transmission.<sup>123</sup> The student was classified, in the language used at the time, as mentally retarded



and excluded from the public schools in Florida, in part because she was incontinent and drooled. On remand, the trial court decided that insofar as the risk of transmission from the student's bodily secretions was remote, she was to be admitted to a special education classroom. The analyses in the cases involving hepatitis and AIDS can also be applied to litigation focusing on children with other infectious diseases.

As this is being written, schools are closed throughout the U.S. as a result of the COVID-19 pandemic. In light of the uncertainty surrounding how COVID-19 is transmitted, as schools reopen, it bears watching how courts will respond to litigation involving students with disabilities who may not be able to conform to requirements for social distancing or wearing personal protective equipment.

### Specific Learning Disabilities

School boards traditionally used a discrepancy criterion to identify students as having specific learning disabilities. Under this criterion, students may be considered as having learning disabilities if a statistically significant gap exists between their intellectual potential and academic achievement.<sup>124</sup> When Congress amended the IDEA in 2004, it stipulated that board officials may not be required to use the discrepancy model when evaluating whether children have specific learning disabilities as defined by the statute.<sup>125</sup> Rather, the IDEA dictates that state officials must allow local educators to use what has become known as the Response to Intervention (RTI) model.

The RTI model permits school personnel to evaluate whether students have specific learning disabilities by assessing their responses to scientific, research-based intervention strategies. The Ninth Circuit declared that the Hawaii Department of Education violated this provision in the IDEA when officials failed to use the RTI model instead of the severe discrepancy criterion to evaluate whether a child with dyslexia qualified for special education services.<sup>126</sup> In doing so, the court struck down a state regulation in force at the time that conditioned eligibility for special education on the existence of a severe discrepancy between academic achievement and intellectual ability. This does not mean that the discrepancy model may not be used, but it may not be the exclusive method IEP teams employ to establish eligibility for students suspected of having learning disabilities.

### Nontraditional Program Schedules and Extended School Year Programs

In most states, students typically attend school six hours a day, 180 days a year, for twelve years. Still, courts agree that students with disabilities are entitled to programming arrangements and schedules that deviate from this pattern if this is necessary for them to receive FAPEs. Because the IDEA requires IEPs to be tailored to meet the needs of individual students,<sup>127</sup> this provision sometimes requires nontraditional schedules for the delivery of services.

#### Extended Eligibility

Courts may award compensatory services to extend students' eligibility beyond the maximum age for benefits the IDEA mandates. The Eleventh Circuit affirmed that an eighteen-year-old from Georgia with a third-grade reading level due to his learning disabilities was entitled to additional services for five years or until he graduated, whichever came first, because school officials failed both to evaluate his progress for more than five years and to implement his IEP in a timely fashion.<sup>128</sup> The panel agreed that these compensatory services would put him in the situation he would have been in but for the failure of officials to provide him with the educational benefits that he should have received. Conversely, the Tenth Circuit affirmed the denial of compensatory services to a student from New Mexico who dropped out of school and demonstrated her unwillingness to return.<sup>129</sup> The court noted that she could have received the services she sought simply by reenrolling.



## Extended School Year

Courts established that students with disabilities are entitled to educational programming extending beyond the parameters of traditional school years if the combination of regression during vacation periods and recoupment time prevents meaningful progress.

Early in the history of the IDEA, courts established that students with disabilities are entitled to educational programming extending beyond the parameters of traditional school years if the combination of regression during vacation periods and recoupment time prevents meaningful progress. Further, the IDEA's regulations require officials to provide extended school year services only if IEP teams are convinced that this programming is necessary for the provision of FAPEs.<sup>130</sup> Extended school year programs are required only to prevent regression, not to advance skills in IEPs that students have not yet mastered.<sup>131</sup> If students with disabilities need educational programs extending beyond regular school years, such services must be provided at public expense.<sup>132</sup>

Extended school year programs are generally necessary when students regress and the time needed to recoup lost skills interferes with their overall progress toward attaining their IEP goals and objectives. Courts agree that policies or practices serving to limit programs for students with disabilities to 180 days violate the IDEA.<sup>133</sup> In a case from Kentucky, the Sixth Circuit held that a child with cerebral palsy who also had delayed cognitive and communication development was not entitled to an extended school year placement because his parents were unable to demonstrate that such a program was essential to avoid more than adequately recoupable regression.<sup>134</sup> The court thought that although the parents may have wished for a more extensive placement for their son than the IDEA required, the student was not entitled to such a placement because school officials developed an appropriate IEP placing him in an inclusive setting with special education support and assistive technology adaptations.

In order for students to qualify for extended school year placements, the regression they experience must be greater than that which normally occurs during school vacations. In a leading case, the Fifth Circuit affirmed that a child from Texas was not entitled to an extended school year placement unless regression was severe or substantial.<sup>135</sup> Federal trial courts in Alabama,<sup>136</sup> California,<sup>137</sup> and New Hampshire<sup>138</sup> adopted essentially the same position in agreeing that students' being academically behind was not a valid reason to require their boards to provide them with extended school year placements.

## Nontraditional Schedules

At the same time, due to the nature of their disabilities, students who may be unable to tolerate long periods of instruction may require shortened school days. In apparently the only reported case dealing with the issue, the Fifth Circuit affirmed that a school board in Texas was not required to provide a full day of educational programming for a student with multiple disabilities whose educational programming consisted of basic sensory stimulation because it was not in his best interest.<sup>139</sup> Due to the child's inability to sustain a response to prolonged stimulation, the court agreed with special educators in his district that there was no reason to provide him with a full school day.

## Private and Residential Special Education Placements

The courts continue to recognize that the IDEA's preference for full inclusion is not feasible for all students with disabilities.<sup>140</sup> Consequently, the IDEA and its regulations require school officials to offer a continuum of placement alternatives to meet the educational needs of children with disabilities.<sup>141</sup> In this regard, public school officials may need to place children in privately operated facilities when boards lack appropriate placements,<sup>142</sup> such as when a student has a low-incidence disability and there are not enough children with the same type of disability within a school system to warrant the development of a

program.<sup>143</sup> These courts conceded that inasmuch as boards in smaller districts probably cannot afford to develop specialized programs, they must look elsewhere for placements.<sup>144</sup>

If private day or residential school placements are necessary for educational reasons, school boards must provide them at no cost to students or their parents. States or local school boards may share the cost of placements with other agencies but may not assign any financial responsibility to parents. It is well settled that policies requiring parents to pay a portion of the costs of residential placements are unacceptable.<sup>145</sup>

States have adopted different regulations regarding residential placements. To the extent that a number of jurisdictions provide some, if not all, of the funding for residential placements, state agencies occasionally become involved in these placement decisions. Once placed, students with disabilities do not necessarily need to remain in private day or residential programs indefinitely. Because one of the IDEA's major goals is to have students with disabilities educated in fully inclusive settings, children should be returned to such placements as soon as it is feasible to do so.

### Twenty-Four-Hour Programming Needed

Courts may order residential placements for students with severe, profound, or multiple disabilities<sup>146</sup> if they need twenty-four-hours-per-day programming or consistency between their school and home environments. Residential placements may also be necessary for students who have significant behavioral disorders,<sup>147</sup> emotional disturbances,<sup>148</sup> or require total immersion in educational environments in order to progress.<sup>149</sup> For example, the Sixth Circuit ruled in favor of parents from Ohio who unilaterally placed their child with behavioral disabilities in a private residential facility.<sup>150</sup> The court approved of the placement because the child's behavior and grades improved in the school. Further, it is conceivable that children who are dangerous to themselves and/or others may be sent to residential facilities. For instance, in a case from Puerto Rico, the First Circuit affirmed that a student's need for constant supervision and an in-school psychologist necessitated a private school placement.<sup>151</sup>

### Residential Placement Costs

If students need residential placements for purely educational reasons, school boards must bear their entire cost and cannot require parents to contribute toward payment.<sup>152</sup> On the other hand, if placements are made for other than educational reasons, such as for medical, behavioral, or social purposes, or are essentially custodial in nature,<sup>153</sup> then school systems may be required to pay only for the educational components of the residential settings<sup>154</sup> and may enter into cost-share agreements with other agencies.

At the same time, boards may not even be required to pay the educational costs of residential placements that are made predominantly for noneducational reasons if they are able to show that they could provide FAPEs locally.<sup>155</sup> However, the issue can be complicated because students' educational disabilities are often inextricably intertwined with their noneducational challenges. In such instances, the Fifth Circuit directed lower courts within its jurisdiction to examine each part of student placements in evaluating which costs boards must bear.<sup>156</sup> Even so, courts have ordered boards to assume all costs of residential placements when student needs are intimately intertwined and it is not realistically possible to assign financial responsibility to appropriate agencies.<sup>157</sup>

Litigation often arises over whether residential placements are being made for medical, rather than educational, reasons. These disputes occur most often in the context of placements in psychiatric facilities. Under the IDEA, school boards are not required to pay medical expenses for students other than those for diagnostic or evaluative purposes.<sup>158</sup> Also, psychiatric facilities are typically characterized as hospitals because psychiatrists are medical doctors. Moreover, students with physical disabilities are frequently placed in facilities where some services of a medical nature are offered. As some of the cases cited herein demonstrate, it is often impossible to separate the various services provided by rehabilitation facilities

and assign the costs accordingly. Whether programs taken as a whole are considered to be medical or educational depends on the extent and purpose of the medical services students receive.

## Child-Find

It should go without saying that before school boards can provide FAPes, they must first locate and identify all students within their jurisdictions who are eligible for special education. The IDEA and its regulations require states, through local educational agencies or school boards, to identify, assess, and serve all children with disabilities,<sup>159</sup> regardless of the severity of their disabilities. This mandate includes homeless children, wards of the state, and, as discussed later in more detail, children whose parents have placed them in nonpublic schools, including religiously affiliated elementary and secondary schools.<sup>160</sup> Regarding students in nonpublic schools, the IDEA's regulations place the child-find obligation on the public school boards in the districts where the nonpublic schools are located, rather than the ones in which the children and their families reside.<sup>161</sup>

## Timely Evaluations

School officials cannot ignore signs that children may have disabilities. A school board's failure to timely evaluate students and make eligibility determinations may result in a finding that the board denied FAPes.

School officials cannot ignore signs that children may have disabilities.<sup>162</sup> A school board's failure to timely evaluate students and make eligibility determinations may result in a finding that the board denied FAPes.<sup>163</sup> Be that as it may, disputes have arisen under the child-find provision centering on when school personnel knew, or should have known, that children possibly had disabilities.<sup>164</sup> It is a common practice for educators to employ various types of remedial strategies to assist struggling children before referring them for special education. Given the IDEA's emphasis on educating students in the LRE, referring children for special education evaluations should not be teachers' first responses when children encounter difficulties. On the other hand, waiting too long to evaluate students when other remedial tactics fail to produce results can deny FAPe.<sup>165</sup>

In a case from Pennsylvania, the Third Circuit affirmed that delaying special education evaluations while implementing remedial strategies and accommodations often is warranted, particularly with young children.<sup>166</sup> By the same token, the Second Circuit agreed that it was appropriate for a school board in Connecticut initially to monitor and provide accommodations for a student with suicidal and homicidal ideations before evaluating him for services under the IDEA.<sup>167</sup> The court pointed out that the IDEA's definition of emotional disturbance refers to a condition exhibited over a long period of time.

Although it is reasonable for school boards to proceed deliberately, such that they are not necessarily required to evaluate all students who are struggling, two cases from Texas that the Fifth Circuit resolved illustrate that school boards cannot ignore their child-find obligations when it is clear that the remedial strategies and accommodations they have implemented are not working. In the first case, the court affirmed that a high school student's academic decline and behavioral difficulties should have led officials to suspect her need for special education and that they failed to take steps to comply with their child-find obligations.<sup>168</sup> In the second case, the court explained that the reasonableness of a delay in evaluating a child for special education is defined not by the amount of time, but by the steps taken by school officials during the period in question.<sup>169</sup> Here, the court insisted that school personnel should have known that the interventions they implemented with a student who exhibited various behavioral problems were not working and that their continual use of them was not a proactive step toward compliance with their child-find obligation, resulting in a violation of the IDEA.

## Early Identification

In order to locate young children who may have disabilities, school board officials typically disseminate information about the services available to qualified students via school websites, newspaper articles, radio announcements, and advertisements on cable television. In addition, many officials may leave information pamphlets in locations frequented by parents of young children, such as pediatricians' offices, day care centers, and shopping malls.

Early identification and assessment of children with disabilities is a related service under the IDEA.<sup>170</sup> In providing this service, many school boards offer annual screenings for preschool- and kindergarten-aged children. While the kindergarten screening process is generally conducted as part of normal registration activities, educators usually set up special dates to screen preschool-aged children. Parents who suspect that their young children may be disabled can ask for screenings by appointment at any time during the school year.

## Students in Nonpublic Schools

Students with disabilities who attend religiously affiliated nonpublic schools may be entitled to services under the IDEA and/or Section 504.<sup>171</sup> Accordingly, this section primarily reviews issues that arise when educators in public schools seek to provide special education services to children who attend religiously affiliated nonpublic schools.

## Establishment Clause and Child Benefit Test

Issues surrounding the delivery of special education services to children who attend religiously affiliated, or faith-based, nonpublic schools often involve the Establishment Clause of the First Amendment to the U.S. Constitution,<sup>172</sup> according to which “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This section will not discuss the lengthy and complex history of litigation involving the limits of aid to religious schools under the Establishment Clause. Rather, it is sufficient to acknowledge that the Child Benefit Test, which permits a variety of forms of aid to children in nonpublic schools on the basis that the aid is provided to the children (and their families), not their schools, has had a checkered history since the Supreme Court first enunciated it in 1947.<sup>173</sup> Put another way, depending on the composition of the Court, some Justices have been more supportive of the Child Benefit Test than others. Further, virtually all litigation involving the Establishment Clause has been examined in light of the tripartite test enunciated by the Supreme Court in *Lemon v. Kurtzman* (*Lemon*).<sup>174</sup> Under this seemingly ubiquitous test,

every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion.”<sup>175</sup>

The low point of the Child Benefit Test, from the point of view of its supporters, occurred in 1985, when, in *Aguilar v. Felton*,<sup>176</sup> the Supreme Court forbade the onsite delivery of remedial Title I services in religiously affiliated nonpublic schools in New York City. The Court struck down the program, fearing that having public school educators provide services in religious schools might create “excessive entanglement” between the government and religion. Consequently, because school boards still had to provide services at public schools or neutral sites, many students who attended religiously affiliated nonpublic schools were denied equal educational opportunities under Title I.

The landscape with regard to state aid to K–12 education began to shift in 1993, when the Supreme Court revitalized the Child Benefit Test in *Zobrest v. Catalina Foothills School District* (*Zobrest*).<sup>177</sup> In

*Zobrest*, the Court found that the Establishment Clause did not bar a public school board from providing the onsite services of a sign-language interpreter for a student who attended a sectarian high school. The Court reasoned that insofar as the interpreter was essentially a conduit through whom information passed, the onsite delivery of such assistance did not violate the Establishment Clause.<sup>178</sup> Four years later, in *Agostini v. Felton*,<sup>179</sup> following up on *Aguilar*, the Court essentially lifted the ban against the onsite delivery of services to students who attend religiously affiliated nonpublic schools in New York City because appropriate safeguards were in place.<sup>180</sup> However, as discussed in the section that follows, subsequent changes in the IDEA's regulations restrict the amount of aid local school boards must provide to students with disabilities.

Later, in *Mitchell v. Helms*,<sup>181</sup> the Supreme Court, in a plurality (meaning that it lacked the necessary five-Justice majority needed to make it binding precedent), upheld the constitutionality of Chapter 2 (now Title VI) of the Elementary and Secondary Education Act, a far-reaching federal statute permitting the loan of state-owned instructional materials, such as computers, slide projectors, television sets, tape recorders, maps, and globes, to nonpublic schools. In the part of the case most relevant to special education, but which was not appealed to the Supreme Court, the Fifth Circuit<sup>182</sup> upheld state laws from Louisiana permitting the onsite delivery of special education services to children who attended faith-based schools while providing them with free transportation to and from school.

Most recently, the Supreme Court's decision in *Espinoza v. Montana Department of Taxation*,<sup>183</sup> coupled with its earlier order in *Trinity Lutheran Church of Columbia v. Comer*,<sup>184</sup> prevent public officials from denying generally available benefits to individuals or schools solely because they are religious. It bears watching to see whether these judgments result in litigation on behalf of children with disabilities in faith-based schools.

## Statutory and Regulatory Provisions

The IDEA now includes provisions clarifying the obligations of public school systems to provide special education and related services to students in nonpublic schools. Unfortunately, neither Congress nor the courts has conclusively answered questions about the delivery of special education for children in religiously affiliated nonpublic schools.

The IDEA regulations, and earlier case law, make it clear that children in religious schools are entitled to receive some special education services, but the laws set funding restrictions in place limiting the amount of money boards must spend on permissible services these children can receive onsite in their religious schools.

The IDEA regulations, and earlier case law, make it clear that children in religious schools are entitled to receive some special education services. Yet, as noted, the IDEA and its regulations put funding restrictions in place that limit the amount of services that these children can receive onsite in their religious schools. The net result is that these students are likely to receive fewer services if public school officials follow the letter of the law and do not make additional services available to qualified students in religious schools.

The IDEA<sup>185</sup> and its regulations<sup>186</sup> state that children whose parents voluntarily enroll them in nonpublic schools are entitled to some level of special education services.<sup>187</sup> Further, the IDEA permits the onsite delivery of special education for students with disabilities whose parents have placed them in "private schools," including religious, elementary, and secondary schools,<sup>188</sup> as long as safeguards are in place to avoid "excessive entanglement" between public school systems and religious institutions. This approach is consistent with settled law that public school personnel can conduct diagnostic tests onsite in religiously affiliated nonpublic schools to evaluate whether children are eligible for services in programs that are supported by public funds.<sup>189</sup>



The regulations incorporate statutory changes and provide guidance on meeting the IDEA's requirements while borrowing from preexisting Education Department General Administrative Regulations (EDGAR regulations).<sup>190</sup> The EDGAR regulations require school boards to provide students in nonpublic schools with opportunities for equitable participation in federal programs.<sup>191</sup> This means that students in nonpublic schools are entitled to participate in federal programs that are comparable in quality to those available to their peers in public schools.<sup>192</sup> In developing programs, public school personnel must consult with representatives of the nonpublic schools to consider which students are to be served, how their needs are to be identified, what benefits they are to receive, how the benefits are to be delivered, and how the programs are to be evaluated.<sup>193</sup>

## Nonpublic School Students Defined

Public school officials must locate, identify, and evaluate all students with disabilities who attend nonpublic or, as the IDEA refers to them, "private schools" within their jurisdictions.<sup>194</sup> This means that boards must develop plans to permit these students to participate in programs carried out pursuant to the IDEA.<sup>195</sup> The regulations define students in nonpublic schools as those whose parents have voluntarily enrolled them in such schools or facilities.<sup>196</sup> This definition does not include students whose school boards have placed them in private facilities at public expense in order to provide them with FAPEs.

## Spending Restrictions

The IDEA and its regulations limit the amount of money public school boards must spend in providing services to students in nonpublic schools.<sup>197</sup> The total is limited to a proportionate amount of the federal funds received, which must equal the number of students with disabilities in nonpublic schools divided by the total number of pupils with disabilities in the jurisdiction.<sup>198</sup> The IDEA does not prohibit boards from using state funds to offer more than its provisions call for because the regulation establishes only a minimum amount that they must spend on qualified children.<sup>199</sup>

Under its regulations, public school boards cannot use IDEA funds to benefit nonpublic schools.<sup>200</sup> More specifically, boards cannot use public funds to offer impermissible aid to religious institutions by financing existing instructional programs, otherwise providing them with direct financial benefits such as money, or organizing classes based on students' religions or schools they attend.<sup>201</sup> Still, the regulations allow boards to employ public school personnel in nonpublic schools as long as they are not supplanting services these institutions normally provide.<sup>202</sup> The regulations further permit boards to hire personnel from nonpublic schools to provide services outside of their regular hours of work as long as they are under the supervision and control of officials from the public schools.<sup>203</sup> Finally, educators can only use property, equipment, or supplies purchased with IDEA funds onsite in nonpublic schools for the benefit of students with disabilities.<sup>204</sup>

## Comparable Services

Pursuant to the IDEA's regulations, students who attend nonpublic schools do not have individual rights to receive some or all of the special education and related services that they might have received in public schools.<sup>205</sup> This does not mean that children in nonpublic schools are denied all services under the IDEA. Rather, the regulations afford public school officials the authority to develop service plans and to decide which students from nonpublic schools will be served.<sup>206</sup> The regulations also require public school officials to ensure that representatives of nonpublic or faith-based schools have the opportunity to attend such meetings or participate by other means, such as individual or conference calls.<sup>207</sup>

Students in nonpublic schools are entitled to receive services from personnel who meet the same standards as educators in public schools,<sup>208</sup> even if they receive different amounts of services than their peers



in public schools.<sup>209</sup> Because students with disabilities who attend nonpublic schools are not entitled to the same amount of services as similarly situated peers in public schools, the regulations do not require the development of IEPs. Instead, the regulations obligate school officials to develop service plans describing the aid they will provide to students.<sup>210</sup> Service plans must not only meet the same content requirements as IEPs but must also be developed, reviewed, and revised in a manner consistent with the IEP process.<sup>211</sup>

## Delivery of Services

The IDEA's regulations specify that services may be offered onsite in religiously affiliated nonpublic schools.<sup>212</sup> In its categorization of nonpublic schools, the regulations specifically use the phrase "including religious schools" to reflect the fact that religiously affiliated nonpublic schools are included within the IDEA's framework.<sup>213</sup> The IDEA permits, but does not require, public boards to provide onsite services in nonpublic schools.<sup>214</sup>

If it is necessary for children to receive benefits from services that are not offered onsite, and students must be transported to alternative locations to receive them, school boards must provide transportation between the students' schools or homes to sites where they receive services<sup>215</sup> and from the service sites to their nonpublic schools or homes, depending on the time of day.<sup>216</sup> Yet, boards are not required to transport students from nonpublic schools from their homes to their schools.<sup>217</sup> In addition, it is important to bear in mind that the cost of transportation may be included in calculating the minimum amount of federal funds that boards must spend on students in nonpublic schools.<sup>218</sup>

Even though students attending nonpublic schools do not have an individual right to receive special education services, officials of public school boards should make it clear to the parents of all students with disabilities that services are available should they choose to enroll their children in the public schools. As the Second Circuit decided, school boards are required to offer IEPs to resident children even if they have been enrolled in nonpublic schools outside the boundaries of their home school districts.<sup>219</sup>

## Dispute Resolution

The IDEA's procedural safeguards are generally inapplicable to complaints that boards failed to deliver services to students in nonpublic schools.<sup>220</sup> The due process provisions do apply to complaints that boards failed to comply with the child-find requirements applicable to students in nonpublic schools<sup>221</sup> and to complaints pursuant to allegations arising in connection with state administration of special education.<sup>222</sup>

## Child-Find in Nonpublic Schools

The IDEA and its regulations direct officials in public schools to identify children with disabilities whose parents enrolled them in nonpublic schools, including religious, elementary, and secondary schools, in their districts rather than simply those who live within the school districts.<sup>223</sup> Nevertheless, this requirement does not preclude parents from requesting evaluations from the school boards in the districts within which they reside.<sup>224</sup> Under these provisions, public school officials must provide accurate counts to state education agencies of the number of children from nonpublic schools who are evaluated, determined to have disabilities, and served.<sup>225</sup>

These changes also require school boards to employ child-find activities for students in nonpublic schools similar to those used to identify children who attend public schools.<sup>226</sup> Further, the cost of such activities does not count in calculating whether school systems exceeded the amount that they spent in serving students who attend private schools.<sup>227</sup>

## Frequently Asked Questions

**Q: Are public school boards required to provide students with disabilities with the best possible education regardless of cost?**

A: No, the IDEA does not require public school boards to provide students with disabilities with the best education possible regardless of cost, although state law may dictate that they do so. This is based on the principle that equal protections allows states to provide more, but not fewer, services than the IDEA mandates. Under the IDEA, school boards must provide educational programs that confer educational benefits consistent with students' circumstances, meaning that children must make more than minimal or trivial progress. Even so, the programs educators provide need not be ideal.

**Q: Are school boards required to adopt methodologies preferred by students' parents?**

A: No, courts consistently agree that the choice of methodology is up to school board officials. Thus, educators may choose from among competing methodologies and are not required to adopt the parents' choice. Educators are not even required to adopt what may be considered to be the best approach, as long as their chosen methods are generally accepted in the professional community.

**Q: Are school boards required to educate all students with disabilities in inclusionary settings?**

A: No, the IDEA is clear that inclusion is a goal, not a mandate, when it comes to educating students in the LRE. For some students, the LRE may be substantially separate programs. School board officials may educate students with disabilities in more restrictive settings only when such placements are necessary to provide children with FAPes. Also, officials must provide reasonable supplementary aids and services to enable students to be educated in the less restrictive environments.

**Q: When are school boards required to pay for residential placements?**

A: School boards are required to pay for residential placements when they are necessary for educational reasons. Boards are not obligated to pay the room and board portion of such placements when they are made for noneducational reasons. Often, boards can share the costs of residential placements with other agencies.

**Q: When are school boards required to provide educational services beyond the traditional school year?**

A: Students with disabilities are entitled to programming beyond traditional school years if they suffer regressions during school breaks that, combined with the time required to recoup lost skills, substantially interfere with the attainment of educational goals. When the cumulative effects of regression and recoupment time result in little or no educational gains over periods of time, students may be entitled to extended school year placements.

**Q: What responsibility do school boards have for students who attend nonpublic schools at their parents' expense?**

A: School boards must spend a proportionate share of the federal money they receive on students with disabilities who attend nonpublic schools, including those in religiously affiliated nonpublic schools. School board representatives must consult with officials from nonpublic schools to decide how these funds will be spent. Because students in nonpublic schools do not have an individual right to receive special education and related services at public expense, they lack the right to receive the same level of services that they would have received in public schools. Even so, school personnel should offer to develop IEPs for nonpublic school students if they wish to enroll in the public schools.

## Recommendations

Before turning to specific recommendations, it almost goes without saying that school officials should be honest, good listeners who provide support for parents. Still, in offering hope to parents, school officials should be realistic about the status of children and keep parents up to date at all times. Moreover, to the extent that all children with disabilities are entitled to IEPs to direct their schooling, educators should do the following:

- Work to provide all students, including, within limits, children whose parents place them in nonpublic and religiously affiliated schools, with FAPEs in the LREs. Thus, in seeking to become knowledgeable about all aspects of the IDEA, educational leaders must seek regular professional development opportunities for themselves and their staffs.
- Address the educational needs of students on their individual merits because all children have unique talents, abilities, and needs. Even in recognizing that a continuum of placements is available, educators must make genuine efforts to serve the needs of all children, meaning that they should provide students with all needed related and support services.
- Keep in mind that state standards, only a few of which provide greater protection than the IDEA, must be taken into consideration when evaluating whether placements are appropriate. If higher state standards are in place, school boards must meet them.
- Avoid segregating special education students by placing them in LREs.
- Balance appropriate levels of specialized services and placements in inclusionary settings.
- Take nonacademic benefits into consideration when justifying inclusive settings, even if students' academic progress does not come as quickly as it would in segregated placements. It is important to strike an appropriate balance.
- Whenever possible, be careful to avoid using private day or residential schools in lieu of inclusive placements for children with low-incidence-type disabilities.
- Recall that if needed, placements in residential facilities, or year-round placements, must be made at no cost to parents. Moreover, educators would be wise to consider ways of sharing the costs of such placements with other agencies, particularly when residential placements are necessary for reasons not strictly educational.
- Use a variety of criteria, such as standardized test scores, anecdotal teacher reports, report card grades, and portfolios in addressing whether the services students receive are conferring an educational benefit on these children.
- Recall that insofar as students with disabilities who attend religiously affiliated nonpublic schools may be entitled to some services under the IDEA and/or Section 504, liaisons should be appointed to work with staff members in these schools.
- Take steps to ensure the early identification of all children with special needs, regardless of where they attend school.
- Good educational practices, coupled with the IDEA's LRE mandate, dictate that teachers should attempt remedial strategies prior to referring students who are having difficulty to special education, but evaluations must be conducted when it becomes clear that these measures are not working.

## Questions for Discussion

1. In *Rowley* the Supreme Court set the standard that to be appropriate, IEPs must be designed to confer some educational benefit. In *Andrew F.* the Court clarified that IEPs should enable children to make progress appropriate in light of their specific circumstances. How has *Andrew F.* impacted the Supreme Court's interpretations of the IDEA's FAPE requirement?
2. Courts are mixed on whether the LRE provision applies to summer school programs for students with disabilities. If students with disabilities need extended school year programs to prevent regression, should the summer components provide the same degree of mainstreaming as the school-year components?
3. Consistent with the LRE mandate, it is not uncommon for school personnel to implement remedial strategies and offer accommodations to students who are struggling with curricula before proceeding with a special education evaluation. What factors should school officials consider in determining when evaluations become necessary for them to avoid child-find violations?

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