What's Wrong with the IDEA? A Close Look at the Current Law's Challenges and Recommendations for Reauthorization

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What's The Big IDEA? Taking A Fresh Look At The Individuals With Disabilities Education Act

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Background

The Individuals with Disabilities Education Act (IDEA), first enacted in 1975,[1] is an American success story. Before 1975, more than a million students with mental, physical, and other disabilities were excluded from school and approximately 3.5 million did not receive appropriate services. Now students are identified, served, and provided with due process rights under the IDEA.[2] Notably, students with disabilities (SWDs) are also eligible for identification, services, and due process rights under Section 504 of the Rehabilitation Act of 1973 (Section 504)[3] and the Americans with Disabilities Act of 1990 (ADA) (future references to which also include the ADA Amendments of 2008).[4]

In its effort to suggest improvements to the IDEA in its next reauthorization, the National School Boards Association (NSBA) looked to the Council of School Attorneys (COSA) for guidance on identifying current areas of concern and recommending statutory and regulatory changes to address those concerns. A subset of COSA members, all with years of experience in the special education arena, has worked for over four years on recommendations for the next iteration of the IDEA. We propose the following goals:

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[1] First called the Education for All Handicapped Children Act when enacted, the IDEA is a funding statute through which the federal government assists states to educate students with disabilities (SWDs). The 2004 reauthorization of the IDEA was titled the "Individuals with Disabilities Education Improvement Act" (IDEIA). However, in practice, in litigation, and throughout this White Paper, it is still commonly referred to as the IDEA.

[2] Today, six million SWDs (approximately 14% of all public school students) have access to a "free appropriate public education" (FAPE) in the least restrictive environment (LRE). Their parents have the right to participate in (and dispute) the school's development of an individualized education program (IEP) for their child. Seventy to 80% of SWDs are mildly/moderately disabled, are students with specific learning disabilities (SLD), speech and hearing impairments, and/or other health impairments, such as ADD and ADHD. Twenty to 30% have more severe or profound disabilities, such as cognitive impairments, multi-handicapping conditions, deafness or blindness.

[3] 29 U.S.C. § 794.

[4] 42 U.S.C. §§ 12101-12134.

Goals for IDEA Reauthorization

- To focus on progress and demonstrable positive outcomes for all students;
- To promote collaboration and trusting relationships between parents and schools;
- To reduce complexity of compliance and to provide guidelines and flexibility to schools so they can improve student success by focusing on teaching/learning for all students;
- To fully fund the IDEA at the level (40%) promised. Special education cost estimates range from $80 billion to $110 billion per year. The federal contribution has been less than 20% with the states and local school district assuming the balance of the funding burden.

Specific Recommendations

Focus on educational outcomes and success, not on compliance:

- Continue to enhance the success of early intervention and response to intervention (RTI) programming.
- Promote informed and informal collaboration between parents and school in developing appropriate IEP's.

Retain current practices that provide flexibility to states and school districts:

- Retain the definition of FAPE as developed by courts and general practice.
- Retain burden of proof standards as provided by state law and recognized by federal and state court practice.
- Retain the authority of a court to award reasonable attorney fees to parents and schools, with both sides bearing their own expert fees.
- Retain state control over regulation of seclusion and restraint, allowing IEP Team designation of seclusion and restraint, when appropriate, to protect students, school personnel and school property.
- Retain current requirements stating that the mapping of cochlear implants is to be performed by medical providers, not schools.
- Retain the prohibition of general damages awards by hearing officers, and refrain from expanding remedies to parents or school districts.
- Retain the two year limit to awards of compensatory services and create a shorter statute of limitations period for appeals to court in order to assure the speedy resolution of disputes.

Establish cost effective measures that focus on saving precious educator time and school funds:

- Permit school district-paid independent educational evaluations only upon a showing that the school's evaluation failed to comply with the IDEA requirements.
- Require a reasonable period of enrollment in the school district's proposed placement for the student before the family may seek public funding for a unilateral private school placement.
- Limit a school district's financial obligation for a private or other out-of-district private placement to costs of services that are primarily educational in nature.
- Require the parties to a dispute arising under the IDEA to engage in alternate dispute resolution prior to due process.

- Require a party bringing an IDEA due process complaint to allege specific facts supporting his or her claim.
- Make clear that a student's "stay put" placement during a dispute is the last agreed-upon placement; and limit a school district's financial obligation once a court has determined its placement to be appropriate.
- Specify that the IDEA supersedes Section 504 and the ADA regarding school districts' obligation to provide a free appropriate public education to students with disabilities.
- Align the ESEA and the IDEA regarding assessments.

FAPE and LRE

Courts have interpreted and applied the definition established in the seminal *Rowley* decision for over thirty years,[5] and now interpret the meaning of "FAPE" relatively consistently, with some exceptions. The addition of a specific definition for FAPE in the statute is simply unwarranted given the established law on the subject. States can go beyond the standard articulated in *Rowley*, and some have. There is no need to impose a new federal standard that would affect some state legal standards. We strongly recommend that there be no proposed change in the definition of FAPE. *Endrew F., a Minor, by and through His Parents and Next Friends, Joseph F. and Jennifer F. v. Douglas County School District RE-1*, 798 F.3d 1329 (10th Cir. 2015), *pet. for cert. filed*, No. 15-827 (U.S. December 22, 2015), *Solicitor General invited to file a brief* (May 31, 2016).

An obvious tension between the FAPE mandate and the LRE preference presents itself in the provision of extended school year (ESY) services during the summer months when schools are out of session and regular attendance by children without disabilities is rare. The IDEA itself contains no reference to ESY services, but according to court rulings, [*e.g.*, *Yaris v. Special Sch. Dist. of St. Louis Cty.*, 728 F.2d 1055 (8th Cir. 1984); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986); *Johnson by & through Johnson v. Indep. Sch. Dist. No. 4 of Bixby, Tulsa Cty., Okl.*, 921 F.2d 1022 (10th Cir. 1990); *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523 (4th Cir. 2002); *L.M.H. v. Arizona Dep't of Educ.*, No. CV-14-02212-PHX-JJT, 2016 WL 3910940 (D. Ariz. July 19, 2016)] the FAPE mandate encompasses an obligation to provide such services to children who would experience substantial regression during the summer months without a summer program. Federal regulations implementing the IDEA also require as much.[6] However, practical issues can make it objectively impossible or impracticable for an LEA to place children with disabilities receiving ESY services in either public or private school programs that can satisfy both ESY FAPE requirements and the LRE preference, especially during the summer, when many school districts no longer offer programs for regular education students. To mainstream a child with disabilities in a private school during the summer months not only is very expensive, but also is operationally impossible in many locations because such programs simply do not exist.

Courts have long ruled that when there is tension between the IDEA's FAPE mandate and LRE preference, both are satisfied if a child's educational placement allows the child to receive an appropriate public education under the IDEA. *See A.L. v. Jackson Cty. Sch. Bd.*, 635 F. App'x 774

[5] *Board of Educ., Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
[6] *See* 34 C.F.R. § 300.116.

(11th Cir. 2015); *but see T.M. v. Cornwall Cent. Sch. Dist.,* 752 F.3d 145, (2d Cir. 2014). This rule is critical in the context of ESY services and their focus on the specific skills and developmental levels a child might lose without such services, so that the child can benefit from FAPE upon returning to the regular school year.

Despite the case law holding the appropriateness of the child's program to be of paramount importance, a parent may still claim an LEA did not strictly apply the LRE preference to ESY program**.** Nonetheless, an LEA's failure to choose the LRE for an ESY placement can be challenged, including in litigation over tuition reimbursement by parents who unilaterally place their child in a summer school placement of their choice. *T.M. v. Cornwall Cent. Sch. Dist.,* 752 F.3d 145, (2d Cir. 2014). There is no question that tuition reimbursement cases significantly drain school resources that otherwise would be available to achieve the IDEA's overarching goals, which encompass the provision of ESY services under the IDEA's FAPE mandate.

Mapping of Cochlear Implants

A recent federal court of appeals decision[7] upheld the U.S. Department of Education's regulations excluding the mapping of cochlear implants from the IDEA's definition of "related services" which school districts must provide if the child needs the services in order to benefit from special education. Parent groups are seeking to amend the IDEA to state that school districts will be responsible for the mapping of cochlear implants.

Mapping is the process by which an audiologist organizes the amount of stimulation that the electrodes provide to the auditory nerve. The audiologist maps an implant by measuring the user's response to electrical stimulation by connecting the device's speech processor to a computer with specialized software. Based on the child's response to the stimuli, the audiologist calibrates the speech processor so that the electrodes stimulate the auditory nerve in a way that the child can process the sounds around him/her. Mapping must be performed periodically so that the cochlear implant can accurately transmit auditory information to the brain. Such mapping must be performed by an audiologist.[8]

In *Petit v. United States Dep't of Educ.*,[9] the District of Columbia Circuit Court of Appeals held that regulations promulgated by the United States Department of Education that exclude the mapping of cochlear implants from audiology services within the list of related services were not contrary to the plain language of the IDEA. In effect, the court upheld the exclusion of the mapping of cochlear implants from services that must be provided by school districts to special education students.

In 2004, Congress amended the IDEA to state that the terms "related services" and "assistive technology devices" do not include a medical device that is surgically implanted, or the replacement of such device.[10] Under the 2004 IDEA Amendments, a school district is required to provide assistive technology services only for devices falling within the IDEA's definition of

[7] *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769 (D.C. Cir. 2012).
[8] *Id.* at 774.
[9] *Petit*, 675 F.3d 769.
[10] 20 U.S.C. § 1401(26)(B), (1)(B).

"assistive technology devices".[11] Therefore, school districts are not responsible for selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing surgically implanted medical devices.[12] However, the statutory definition of "related services" does not explicitly address whether school districts must provide optimization and maintenance services (e.g., mapping) for surgically implanted medical devices.[13]

The parents of children who use cochlear implants sued the U.S. Department of Education to invalidate regulations promulgated by the Department in 2006, which state that school districts are not required to provide the mapping of cochlear implants as a related service.[14] Specifically, the regulatory definition of "related services" excludes a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device and the replacement of that device.[15]

The court of appeals concluded that the phrase "audiology services" as used in the related services definition does not unambiguously encompass mapping of cochlear implants. The court of appeals further found that the regulations encompass a permissible construction of the IDEA because they are rationally related to the underlying objectives of the IDEA. The court of appeals further found that the regulations did not substantially lessen the protections afforded by the 1983 regulations since the term "audiology services" did not have a fixed meaning as used in the IDEA. The court of appeals held that the Department's construction of its regulations was neither plainly erroneous, nor inconsistent with the regulations and, therefore, the Court of Appeals upheld the U.S. Department of Education's exclusion of the mapping of cochlear implants as a related service that must be provided by school districts to special education students under the IDEA.[16]

IEP Meetings

IEP meetings were intended by Congress to be collaborative processes in which all individuals involved in the education of the child, including the parent, work together to develop an appropriate educational program. Unfortunately, due to the lack of trust engendered by the adversarial process at work in the statute, IEP meetings can be overly focused on procedure rather than outcomes and substance, and at times contentious. The statute is also overly prescriptive in terms of attendance at IEP meetings, creating classes of "mandatory" and "non-mandatory" IEP team members and then creating a complex "excusal" process by which mandatory IEP team members can be excused.

Whatever the merits of this type of formulation in 1975, school districts today are far more sophisticated in terms of how to develop an IEP and should be given substantially greater leeway in management of the IEP process as well as attendance at the IEP team meeting consistent with federal requirements governing Section 504 Plans.

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[11] 20 U.S.C. § 1401(2).
[12] 20 U.S.C. § 1401(2)(C).
[13] *Petit*, 675 F.3d at 771.
[14] *Id.*; *see also* 34 C.F.R. § 300.113(b)(2).
[15] *Petit*, 675 F.3d at 771; *see* 34 C.F.R. § 300.34.
[16] *Petit*, 675 F.3d at 772.

The proposed language aligns the IDEA's language with the language of the Section 504 implementing regulations.[17] It also enhances the Section 504 regulatory language by specifically including the parents as members of the IEP team but leaves the composition of the IEP team otherwise at the discretion of the LEA. As an additional protection, however, the proposed language retains the current requirement that a regular education teacher, to the extent appropriate, participate in the development of the IEP. Added language permits this teacher to be one who *may teach* the child in the future (as opposed to currently teaches).

This will allow LEAs to allocate the time and resources of its staff while protecting the longstanding Congressional goal of parent involvement in their child's IEP. It will also avoid disputes and litigation regarding issues of attendance (and excusal from attendance) at IEP meetings. It also furthers the goal of aligning federal education legislation and minimizing federal involvement in essentially local school district educational decisions.

Due Process

Parents' due process pleadings are often vague and leave school systems with little idea of the areas of dispute, information upon which the parent is relying in arriving at a conclusion contrary to the school system, and exactly what the parent seeks as a remedy. This greatly increases the inefficiency and cost of special education due process hearings. We propose that 20 U.S.C. § 1415(b)(7)(A)(ii)(IV) require a certain level of specificity in the due process complaint notice.

Also, parents sometimes file due process petitions in which they seek to change their child's placement or services without ever having sought such changes within the IEP process. Such filings divest the IEP team of its authority as the primary decision-maker in special education matters, run counter to the collaborative spirit of the law, and unnecessarily increase litigation costs.

We propose that 20 U.S.C. § 1415(b)(6)(A) limit a Hearing Officer's jurisdiction to include only those issues about which an IEP team has made a decision. Hearing officers should be required to dismiss, without prejudice, any claims that raise issues on which the IEP team has not made a decision, either because the team has never been presented with the issue or is still collecting information. In the latter circumstance, there should be a timeline within which the IEP team must make a decision, unless any delay is due to the parent.

Such a change reinforces the collaborative process contemplated by the law by directing parents back to the IEP team for those issues it has not already discussed, while allowing hearings to proceed without excessive delays on those issues that have already been fully vetted.

[17] See 34 C.F.R. § 104.35 of the U.S. Department of Education's (ED) Section 504 Regulations, which allow funding recipients discretion and flexibility with respect to evaluations and member of the team making educational placement decisions. The regulations require recipients of federal funds to "ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 C.F.R. § 104.35(c)(3).

Conclusion

While there are many issues for Congress to consider in the reauthorization of the IDEA, our White Paper is intended to assist Congress make the IDEA a more collaborative and less adversarial process that will lead to positive outcomes for all students. With appropriate funding and increased focus on teaching/learning, the IDEA can become an even better vehicle to ensure that all students receive the educational services needed to better prepare them for life beyond high school.