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Post IDEA '97 Case Law and Administrative Decisions: Access to the General Curriculum

A Policy Paper for Educators and Families

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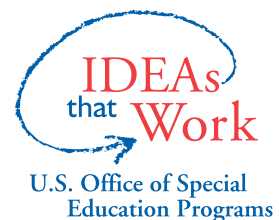


Table of Contents

I. Introduction	3
II. Case Law Prior to IDEA '97: FAPE and LRE	4
FAPE.....	4
LRE.....	5
III. Interpretation of Access to the General Curriculum.....	7
IV. Interpretation of Involvement in the General Curriculum	8
Claims Pertaining to Involvement Brought Under FAPE	8
Claims Pertaining to Involvement Brought Under LRE.....	14
V. Interpretation of Progress in the General Curriculum	16
VI. Conclusion.....	18
Access	19
Involvement	19
Progress.....	20
VII. References.....	20
VIII. Legal References.....	21

Post IDEA '97 Case Law and Administrative Decisions: Access to the General Curriculum

By Joanne Karger

I. Introduction

In 1997, Congress reauthorized the Individuals with Disabilities Education Act (IDEA), introducing a number of changes intended to raise expectations for the educational performance of students with disabilities and improve their educational results. Expanding upon the statute's long-standing concepts of "free appropriate public education" (FAPE)¹ and the "least restrictive environment" (LRE),² Congress added the requirement that students with disabilities have access to the general curriculum – i.e., the same curriculum as that provided to students without disabilities (34 C.F.R. § 300.347(a)(1)(i)). IDEA '97 also requires that students with disabilities be involved in and progress in the general curriculum. The overall right to have access to the general curriculum can, in fact, be viewed as consisting of three interrelated stages: access, involvement and progress (Hitchcock *et al.*, 2002). The first stage, "access," refers to whether the general curriculum is accessible to the student. Involvement, the second stage, can be thought of as the on-going process of meaningful participation in the general curriculum and, as such, is an interim phase that links access to progress. Finally, the third stage, progress, refers not only to the final outcome, but also serves as an evaluative measure to feed back into the earlier stages of access and involvement. Various provisions in IDEA '97 fall under these three rubrics.

This paper analyzes case law and administrative proceedings following the 1997 reauthorization of IDEA in order to ascertain how the statutory requirements associated with access, involvement and progress have been interpreted by courts and hearing officers. Section 1 provides a brief background of case law prior to IDEA '97, interpreting the important concepts of FAPE and LRE. Section 2 presents a discussion of proceedings relating to the right to have access to the general curriculum. Section 3 discusses interpretation of claims pertaining to involvement in the general curriculum that have been brought under FAPE and LRE. Finally, Section 4 focuses on interpretation of progress in the general curriculum as it relates to the participation of students with disabilities in Statewide assessments.

¹ FAPE is defined as special education and related services provided at public expense, meeting State educational standards, including an appropriate educational level and conforming with the student's education program (20 U.S.C. §1401(8)).

² LRE refers to the education of students with disabilities to the maximum extent appropriate in a setting together with students without disabilities (20 U.S.C. §1412(a)(5)(A)).

II. Case Law Prior to IDEA '97: FAPE and LRE

FAPE and LRE have been the cornerstones of IDEA since its enactment in 1975. Because claims pertaining to access to the general curriculum have often been brought under FAPE and LRE, it is important to analyze case law interpreting these earlier concepts in order to understand their relationship to access to the general curriculum. This section briefly explores case law prior to IDEA '97 in which the concepts of FAPE and LRE have been interpreted.

FAPE

In 1982, in *Board of Education v. Rowley*, the United States Supreme Court first interpreted the meaning of an “appropriate” education under FAPE (458 U.S. 176 (1982)). In *Rowley*, the parents of a deaf student, who had been receiving instruction in a regular classroom with the help of a hearing aid, claimed that their daughter had been denied a free appropriate public education when the school district refused to provide her with the services of a sign language interpreter (*Id.* at 184-5). The Supreme Court decided in favor of the district, stating:

By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful (*Id.* at 200)(*emphasis added*).

The Court found that the statute provided merely a “basic floor of opportunity” (*Id.*). In concluding that the statute did not require any requisite level of educational benefit, the court noted that “the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside” (*Id.* at 192).

The Court then developed a two-pronged inquiry for determining whether a school district had provided a student with FAPE:

- (1) Compliance with the procedural requirements of the statute;
- (2) Development of an IEP reasonably calculated to enable the child to receive some educational benefit (458 U.S. at 206-07).

Applying the two-pronged test, the Court found that the school district in *Rowley* had complied with the procedural requirements of the statute and that the student was receiving educational benefit because she was performing better than the average student and was advancing easily from grade to grade (*Id.* at 210).

Lower federal courts have utilized the *Rowley* two-pronged test to interpret further the concept of FAPE. With respect to procedural compliance, some courts have found that a procedural violation alone can constitute a denial of FAPE (*see, e.g., Tice v. Botetourt County School Board*, 908 F.2d 1200, 1206-07 (4th Cir. 1990)).³ For the most part, however, courts have held that a procedural violation, without evidence of loss of educational opportunity to the student, does not constitute a denial of FAPE (*see, e.g., Doe v. Alabama Department of Education* (774 F.2d 629, 660-62 (4th Cir. 1985))).⁴

With respect to the second prong, because the *Rowley* Court did not adopt a bright-line test to determine what constituted educational benefit, subsequent courts have struggled with determination of the necessary quantum. Some courts have held that although FAPE does not require students to receive the maximum potential benefit, the benefit must be more than minimal (*see, e.g., Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989)).⁵ On the other hand, other courts have held that the amount of educational benefit does not have to be meaningful. For example, in *JSK v. Hendry County School Board*, the Eleventh Circuit held that under *Rowley*, districts were required to provide students with disabilities only a “basic floor of opportunity” – i.e., meaningful “access to a public education,” not meaningful “educational benefit” (941 F.2d 1563, 1572 (11th Cir. 1991)).⁶

LRE

The second fundamental component of IDEA that has been in place since 1975 is that students with disabilities be educated in the “least restrictive environment” (20 U.S.C. § 1412(a)(5)). LRE creates a rebuttable presumption that students with disabilities are to be educated in the regular education classroom to the maximum extent appropriate. The statute also requires that school districts have a continuum of services available for their students with disabilities (34 C.F.R. § 300.551). Because the Supreme Court has not ruled directly on the LRE provision, the standards established at the circuit court level represent the highest authority regarding LRE, with the various circuits providing a number of

³ *See also W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1484-85 (9th Cir. 1992); *Board of Educ. of the County of Cabell v. Dienelt*, 843 F.2d 813, 815 (4th Cir. 1988); *Hall v. Vance*, 774 F.2d 629, 634-35 (4th Cir. 1985).

⁴ *See also Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990); *Doe v. Defendant 1*, 898 F.2d 1186, 1189-91 (6th Cir. 1990); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990); *Evans v. Dist. No. 17 of Douglas County*, 841 F.2d 824, 829-30 (8th Cir. 1988).

⁵ *See also Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179-80 (3d Cir. 1988); *Board of Educ. v. Diamond*, 808 F.2d 987, 991-92 (3d Cir. 1986).

⁶ *See also Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 613 (8th Cir. 1997).

different tests. While the LRE tests adopted by the circuit courts vary to a certain extent, they include similar criteria to be used as determinants of appropriate placement in the LRE.

In 1989, the Fifth Circuit developed what is perhaps the most widely used test for LRE, the *Daniel R.R.* test (*Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1048-49 (5th Cir. 1989)). This test consists of two parts, based on the following factors:

- (1) Can education in the regular classroom, with the use of supplementary aids and services, be achieved satisfactorily for a particular student?
 - (a) Has the school taken sufficient steps to accommodate the student in the regular classroom with the use of supplementary aids and services and modifications?
 - (b) Will the student receive educational benefit from the regular education?
 - (c) What will be the effect of the student's presence in the regular education classroom on the education of the other students?
- (2) If the student is to be removed from a regular education classroom and placed in a more restrictive setting, has the student been mainstreamed to the maximum extent appropriate? (874 F.2d at 1048-49).

In 1993, in *Oberti v. Board of Education*, the Third Circuit adapted the *Daniel R.R.* test by expanding consideration of the factors in the first part of the test (995 F.2d 1204 (3d Cir. 1993)). In *Oberti*, the court held that the district “must consider the whole range of supplemental aids and services” (*Id.* at 1216). The court also noted that the need for modifications “is ‘not a legitimate basis upon which to justify excluding a child’ from the regular classroom unless the education of other students is significantly impaired” (*Id.* at 1222). This latter consideration was incorporated into IDEA '97 (34 C.F.R. § 300.522(3)).

Other courts interpreting LRE have identified additional factors affecting placement decisions. For example, in 1994, in *Sacramento Unified School District v. Rachel H.*, the Ninth Circuit adopted its own test that involved a balancing of the following four factors:

- (1) Educational benefits of placement in the regular classroom with supplemental aids and services, compared to benefits in a special education classroom;
- (2) Non-academic benefits of interaction with children without disabilities;

- (3) Effect of the presence of the student on the teacher and other students; and
- (4) Cost of placing the student in the regular classroom (14 F.3d 1398, 1400-04 (9th Cir. 1994)).

III. Interpretation of Access to the General Curriculum

Following the 1997 reauthorization of IDEA, a number of proceedings have considered the right of students with disabilities to have access to the general curriculum by addressing the question: What is the general curriculum? As noted, IDEA '97 describes the general curriculum as the same curriculum as that provided to students without disabilities (34 C.F.R. § 300.347(a)(1)(i)). The statute, however, does not define the term further, leaving the details to be filled in by States and local districts.

A recent hearing in Massachusetts addressed the question of whether FAPE includes the right to have access to the material in the Massachusetts curriculum frameworks – i.e., the specific curriculum standards established by the State (*In re: Boston Public Schools*, 39 IDELR 20 (Mass. SEA 2003)).⁷ In his analysis, the hearing officer first noted the requirement in IDEA that students with disabilities have access to the general curriculum. He then concluded that, based on FAPE and language in the Massachusetts special education regulations, in conjunction with an advisory opinion from the Massachusetts Department of Education, students with disabilities must be provided the opportunity to learn the material in the Massachusetts curriculum frameworks in accordance with their individual needs.

This hearing has particular relevance in light of the recent passage of the No Child Left Behind Act of 2001 (NCLB), the purpose of which is to “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education” (Sec. 1001 (*emphasis added*)). NCLB requires, among other provisions, that States adopt challenging content and achievement standards for all students, including students with disabilities (Sec. 1111(b)(1)(A)-(B)). It is likely that, as a result of this requirement in NCLB, future claims brought under IDEA for a denial of FAPE may very well include consideration of access to State curriculum frameworks. Therefore, although the above hearing relates only to Massachusetts law, it provides useful insight for other jurisdictions as well.

In another post '97 hearing in Massachusetts, the hearing officer addressed the issue of what constituted the general curriculum of a district's high school (*In re: Worcester Public Schools*, BSEA #00-0912, 6 MSER 194 (Mass. SEA 2000)). He concluded that physical and health education classes as well as

⁷ See also *In re: Georgetown Public Schools*, 38 IDELR 78 (Mass. SEA 2002); *In re: Medford Public Schools*, BSEA #02-0640, 8 MSER 329 (Mass. SEA 2002); *In re: Gill-Montague Public Schools District*, BSEA # 02-1776, 8 MSER 245 (Mass. SEA 2002).

computer elective courses were important components of the general curriculum (*Id.*). As a result, he found that the student in question should receive needed instruction in Braille and self-advocacy skills after school, as part of extended day programming, rather than in place of the physical and health education classes and computer courses, so that the instruction would not interfere with the student's access to the general curriculum (*Id.*).

A number of proceedings have also discussed the question of what constitutes the general curriculum for the purposes of an "interim alternative educational setting." IDEA '97 requires that when a student with a disability is placed in such a setting because of a violation of school rules, the setting must enable the student to continue to progress in the general curriculum (34 C.F.R. § 300.522(b)(1)). In *Farrin v. Maine School Administrative District No. 59*, the court found that the student's "expulsion IEP," which called for placement in an interim alternative setting but did not provide instruction in art, physical education and computers, did not prevent the student from obtaining the small number of credits or skills at a later date and did not impede his progress in the general curriculum (165 F. Supp. 2d 37, 53 (D. Me. 2001)). In other words, the court concluded that the student in the interim setting did not have to receive access to every aspect of the general curriculum as long as he was able to make progress.

While the hearing officer in the Massachusetts proceeding concluded that physical and health education classes and computer courses were part of the general curriculum, the court in the Maine discipline case concluded that art, physical education and computers were not part of the general curriculum in the context of an interim alternative educational setting. Thus, access to the general curriculum has a different meaning for students who are placed in an interim alternative educational setting than for the general population of students with disabilities. In the former, the district does not have to provide the student with all aspects of the general curriculum as long as the student is progressing. For the general population of students with disabilities, however, districts must ensure that these students have access to and are involved in all components of the general curriculum.

IV. Interpretation of Involvement in the General Curriculum

Claims Pertaining to Involvement Brought Under FAPE

Because FAPE has been one of the basic components of IDEA since its inception in 1975, claims pertaining to involvement in the general curriculum have often been brought under FAPE – i.e., does a violation of a requirement in IDEA '97 relating to involvement in the general curriculum constitute a denial of FAPE? As noted, the Supreme Court decision *Rowley v. Board of Education* created a two-

pronged test for the determination of FAPE: (1) procedural compliance and (2) conferral of some educational benefit. The present section examines interpretation by courts and hearing officers of claims pertaining to involvement in the general curriculum that have been brought under procedural and substantive FAPE.

Procedural FAPE. In the majority of post '97 cases and hearings, district failure to comply with one or more of the IDEA '97 requirements pertaining to involvement has been treated by courts and hearing officers as a minor procedural violation that did not constitute a denial of FAPE. That the violations have been found to be technical is not surprising because, as noted, courts and hearing officers have usually considered procedural violations to be trivial issues that alone do not constitute a denial of FAPE (*see e.g., Doe v. Alabama Department of Education*, 774 F.2d at 660-62).⁸

One area in which procedural violations have been discussed relates to three obligatory statements concerning involvement in the general curriculum that IDEA '97 requires the IEP to contain. The IEP must state: (1) how the student's disability affects his/her involvement in the general curriculum; (2) the goals and objectives that will enable the student to be involved in the general curriculum; and (3) the supplemental aids and services, program modifications and support for personnel that will help the student to be involved in the general curriculum (20 U.S.C. §§ 1414(d)(1)(A)(i)-(iii)).

Claims concerning these three requirements have tended to focus on the sufficiency of the statement in the IEP. For example, in *J.S. & T.S. v. Shoreline School District*, parents claimed that the statement in their son's IEP regarding how his disability affected his involvement and progress in the general curriculum was insufficient (220 F. Supp. 2d 1175, 1187 (W.D. Wash. 2002)). The court found that although the IEP made only passing reference to the student's ADHD, the impact of the sparseness of this statement was minimal (*Id.*). The court noted that there was no legal authority prescribing a "threshold level of comprehensiveness" for such a statement (*Id.*). Therefore, the court concluded that the district had met its obligation and that the student had not been denied FAPE (*Id.*).⁹ Similarly, in *J.W. v. Contocook Valley School District*, the court found that although some of the IEP goals were not measurable or appropriately related to the general curriculum, the violation was not substantive (154 F.

⁸ See also *Fairfax County Pub. Schs.*, 38 IDELR 275 (Va. SEA 2003); *Long Beach Unified Sch. Dist.* (36 IDELR 150 (Cal. SEA 2002)); *Mountain Bd. of Coop. Educ. Servs.*, 38 IDELR 85 (Colo. SEA 2002)).

⁹ See also *John M. v. Board of Educ. of Evanston Comm. Consol. Sch. Dist.* 65, No. 01-C-1052, 01-C-1063, 2002 U.S. Dist. LEXIS 10931 (N.D. Ill 2002); *Ysleta Indep. Sch. Dist.*, 33 IDELR 53 (Tex. 2000); *Mountain Bd. of Coop. Educ. Servs.*, 38 IDELR 85 (Colo. SEA 2002); *Yarmouth Sch. Dept.*, 36 IDELR 148 (Me. SEA 2001).

Supp. 2d 217, 222 (D. N.H. 2001)).¹⁰ With respect to the third requirement concerning involvement, in *John M. v. Board of Education of Evanston Community Consolidated School District 65*, the court found that although the IEP contained the sparse statement: “support + consultation as needed and determined by staff,” the district had met its obligation because it had made sufficient services available to the student (No. 01-C-1052, 01-C-1063, 2002 U.S. Dist. LEXIS 10931 (N.D. Ill 2002)). The court noted, “The fact that the IEP does not go into detail cannot be concluded to be a procedural violation of the Act” (*Id.*).¹¹

Thus, courts and hearing officers seem to have a minimal standard for sufficiency that is relatively easy for districts to satisfy with respect to these three IEP requirements. This approach is not entirely surprising given the tendency of courts and hearing officers, following *Rowley*, to hold districts to a “basic floor” standard and not to require them to maximize the potential of each child. The interpretation given by the courts and hearing officers means that districts must show that they have met their obligations concerning these statements, but only on a minimal level.

In a small number of proceedings pertaining to involvement in the general curriculum, parents have brought claims relating to the requirement in IDEA '97 that the IEP team must include the student's regular education teacher (if the child is, or may be, participating in the regular education class) (20 U.S.C. §§ 1414(d)(1)(B)(ii)). For example, in *Special School District #1*, the student's regular education teacher had not attended the IEP meeting (30 IDELR 419 (Minn. SEA 1999)). The hearing officer found that this violation was only a harmless error and did not constitute a denial of FAPE because it “did not prevent the parents from being equal participants in the development of their child's IEP” (*Id.*)¹² (*but see* discussion of *Arlington* and *Smithtown* below).

Several cases and hearings have similarly addressed the requirement in IDEA '97 that the IEP state how the parents will be regularly informed of their child's progress (20 U.S.C. § 1414(d)(1)(A)(viii)(II)). Unlike the previously mentioned proceedings, however, some of the cases and hearings in this area have found that there was a denial of FAPE. For example, in *Beaverton School District*, the hearing officer

¹⁰ See also *Barber v. Bogalusa City Sch. Bd.*, 2001 U.S. Dist. LEXIS 8156, 5-6 (E.D. La 2001); *John M.*, No. 01-C-1052, 01-C-1063, 2002 U.S. Dist. LEXIS 10931 (N.D. Ill 2002); *Yarmouth Sch. Dept.*, 36 IDELR 148 (Me. SEA 2001); *Board of Educ. of the Penfield Centr. Sch. Dist.*, 38 IDELR 80 (N.Y. SEA 2002); *Ysleta Indep. Sch. Dist.*, 33 IDELR 53 (Tex. SEA 2000).

¹¹ See also *Yarmouth Sch. Dept.*, 36 IDELR 148 (Me. SEA 2001).

¹² See also *Mountain Bd. of Coop. Educ. Services*, 38 IDELR 85 (Colo. SEA 2002). In *Shaw v. District of Columbia*, the parents alleged that DCPS failed to meet its burden that the representative of the district at the student's IEP meeting was knowledgeable about the general curriculum (238 F. Supp. 2d 127, *32 (D.D.C. 2002)). Because the parents had not first raised this claim at the due process hearing, however, they were precluded from doing so in district court (*Id.*).

found that although the district had met frequently with the parents throughout the year to discuss the student's progress toward IEP goals, the district should also have provided timely written reports to the parents (30 IDELR 740 (Or. SEA 1999)). Similarly, in *Anaheim Union High School District*, the hearing officer found that the district had not satisfied its obligation of notifying the parents about their child's progress (34 IDELR 192 (Cal. SEA 2001)). It is significant that these hearings are two of the few instances in which a denial of FAPE was found based on a procedural violation that involved one of the IDEA '97 requirements. Perhaps the reason that parents were able to prevail in this area is that courts place a high value on the right of parents under IDEA to participate in educational decisions pertaining to their children. The Supreme Court in *Rowley* noted that parental participation is one of the key aspects to consider in addressing procedural violations (458 U.S. at 206). Nevertheless, in two similar hearings, the parents did not prevail on such a claim (*see Mountain Bd. of Coop. Educ. Servs.*, 38 IDELR 85 (Colo. SEA 2002); *Wake County Pub. Sch. Sys. Bd. of Educ.*, 39 IDELR 29 (N.C. SEA 2003)). The fact that some of the hearings in this area were decided for parents and others against illustrates the individualized nature of claims under IDEA.

In summary, in the majority of post '97 cases and hearings, failure on the part of a district to satisfy one or more of its obligations pertaining to involvement in the general curriculum has been treated as a technical violation not resulting in a denial of FAPE. Courts and hearing officers have tended to hold districts to a minimal standard of sufficiency for satisfying their obligations concerning involvement in the general curriculum under IDEA '97. The one exception is the requirement that the parents be regularly informed of their child's progress. This discrepancy may reflect the emphasis in IDEA on parental participation.

Substantive FAPE (Conferral of Educational Benefit). The second prong of the *Rowley* test is a determination of whether the IEP is reasonably calculated to provide some educational benefit. Following the 1997 reauthorization of IDEA, several authors anticipated that the new requirements would raise the bar of the *Rowley* standard or make the standard obsolete (*see, e.g., Eckrem & McArthur, 2001; Eyer, 1999*). The hearing officer in a recent proceeding addressed the question of the impact of the 1997 Amendments on the *Rowley* standard (*Roswell Indep. Sch. Dist.*, 36 IDELR 19 (N.M. SEA 2001)). The parents in this hearing had claimed that the Congressional findings in IDEA '97, highlighting the past failings under IDEA to focus on effective research and the need for high expectations for the performance of students with disabilities, showed that Congress intended to supersede the *Rowley* standard (*Id.*). The hearing officer concluded, however, that *Rowley* was still the prevailing standard, noting that as part of the 1997 Amendments, Congress did not change the statutory definition of FAPE:

The fact that no change was made to this key section and that the Congressional findings merely reiterated an existing statutory requirement, both indicate legislative intent to leave the *Rowley* definition intact (*Id.*).

The hearing officer also noted that to date there had been no cases indicating that IDEA '97 had modified the *Rowley* standard (*Id.*).

Although the hearing officer in *Roswell* found that the 1997 Amendments had not superseded the *Rowley* standard, a small number of cases and hearings have nevertheless raised the bar of *Rowley* by considering the IDEA '97 requirements as part of a determination of a substantive denial of FAPE.¹³ In these proceedings, failure to comply with one or more of the IDEA '97 requirements has had a significant impact on the determination of educational benefit. For example, in *Arlington Central School District*, the court found that the student's IEP was not reasonably calculated to confer educational benefit, in violation of the substantive prong of *Rowley*, because the special education curriculum set in place by the IEP had "watered-down" the 7th grade textbook to a 4th grade level and had not enabled the student to progress and may, in fact, have caused the student to regress (No. 02 Civ. 2117 (DLC), 2002 U.S. Dist. LEXIS 21849, at *26-*28 (S.D. N.Y. 2002)). The court further found that the absence of the student's regular education teacher at the IEP meeting contributed to the denial of educational benefit because this teacher "may have illuminated the extent ... that [the student] could ever be integrated successfully into the regular education curriculum" (*Id.* at *26). Although in other proceedings described earlier under procedural violations, the absence of the regular education teacher at the IEP meeting was found to be merely a technical error, the court in the present case concluded that the student's regular education teacher could have provided useful insight.

The *Arlington* case is important for two reasons. First, the court found that a curriculum that is significantly modified may not allow the student to have meaningful access to the general curriculum. This finding means that in order to satisfy its obligation to provide services and supports that enable the student to be involved in the general curriculum, the district must be careful to choose accommodations that are appropriate for the particular student and do not water down the curriculum. Second, the opinion reflects the intent of the statute with respect to the inclusion of the regular education teacher as a member

¹³ In a small number of proceedings, courts and hearings officers have considered progress in the general curriculum as a measure of educational benefit, but have used the traditional *Rowley* test and found that the student had made sufficient progress to satisfy the *Rowley* standard (see *Ysleta Indep. Sch. Dist.*, 33 IDELR 53 (2000); *Mansfield Indep. Sch. Dist.*, 34 IDELR 189 (Tex. SEA 2001); *Fairfax County Pub. Schs.*, 38 IDELR 275 (Va. SEA 2003)).

of the IEP team by noting the critical role that this teacher plays in the design of an appropriate educational program.

Similarly, in *Board of Education of Smithtown Central School District*, the hearing officer found that the student's IEP was "substantively defective" and did not confer educational benefit because, among other criteria, the IEP did not include a statement of the extent to which the student would participate in the general curriculum, and the IEP team was not properly composed (the student's regular education teacher and parent were not present) (35 IDELR 53 (N.Y. SEA 2001)). The first violation – a lack of a statement regarding participation in the general curriculum – differs from cases discussed in the previous section under procedural violations, where the issue was usually the sufficiency of the statement in the student's IEP. In *Smithtown*, the issue was a lack of such a statement. Thus, based on the interpretation in *Smithtown* and the previously mentioned proceedings, districts are obligated to make sure that the IEP addresses the student's involvement in the general curriculum at least on a minimal level. With respect to the second violation, inadequate composition of the IEP team, the absence of the regular education teacher and the parent, together with other violations (not related to access to the general curriculum), was found to be a substantial violation. This finding pertaining to the regular education teacher is similar to the interpretation made by the court in *Arlington* but differs from that in *Special School District #1*, discussed under procedural FAPE. It appears that the impact of the absence of the regular education teacher may depend on the context of the situation.

In a third proceeding, *Escondido Union High School District*, the hearing officer addressed the question of the right to have access to the general curriculum in decisions about placement (37 IDELR 269 (Cal. SEA 2002)). Highlighting the importance of this right, she concluded that the district's placement did not provide the student with access to the general curriculum (*Id.*). The hearing officer noted that the placement did not enable the student to receive sufficient assistance to complete classroom tests and assignments on time and did not provide him with appropriate services and supports, including preferential seating or assistive technology (*Id.*). The interpretation of the hearing officer in this proceeding appears to have included each of the three stages of access to the general curriculum: accessibility (assistive technology), involvement (appropriate services and supports) and progress (completion of tests and assignments).

Arlington, *Smithtown* and *Escondido* are significant because they have considered the IDEA '97 requirements in the manner that was intended by Congress – i.e., the requirements were incorporated into IDEA '97 for the purposes of raising the level of expectations for the educational performance of students

with disabilities and improving their educational results. *Arlington, Smithtown and Escondido* provide guidance for courts and hearing officers in the future to embrace a more comprehensive understanding of the concept of the right to have access to the general curriculum that goes beyond the notion of a checklist of “sufficient” IEP statements. Moreover, these three proceedings have particular relevance in light of the recent passage of the NCLB Act of 2001. It is anticipated that in the future, as a result of the requirements in NCLB pertaining to the establishment of challenging academic standards, high-quality, yearly academic assessments and systems of accountability, the concept of the right to have access to the general curriculum may, in fact, have a stronger meaning for courts and hearing officers when they consider claims brought under IDEA for a denial of substantive FAPE.

It is unclear why a majority of the proceedings have interpreted the IDEA '97 requirements pertaining to involvement from a procedural standpoint based on a minimal standard of sufficiency. A possible explanation is that because these requirements were incorporated into IDEA at such a recent date, it may take some time before they appear in court cases and hearings. At the same time, the 1997 Amendments may nonetheless be having a significant impact on the education of students with disabilities in a different manner – namely, by influencing actual practice in the schools. Hehir (1990) found that although few parents proceed to a full due process hearing, the due process mechanism in place under IDEA leads districts to create more extensive and legally compliant options for their students with disabilities. It appears likely that the phenomenon that Hehir described earlier may be operating with respect to access, involvement and progress. In other words, an awareness of the law by school districts, together with the threat of a due process hearing, may serve as an additional mechanism providing accountability and may be leading schools to adopt practices that provide students with disabilities with access to the general curriculum. There is anecdotal evidence that the IDEA '97 provisions are, in fact, having an impact on practice in the schools – for example, that general education teachers have begun to feel more responsible for the education of students with disabilities than in previous years (Thurlow, 2002) and that teachers of students with significant disabilities are beginning to think about the general curriculum in ways that they had not in previous years (Zatta, 2003).

Claims Pertaining to Involvement Brought Under LRE

Because the second cornerstone of IDEA has been the requirement that students with disabilities be educated in the LRE, claims pertaining to involvement in the general curriculum have also been brought under LRE. Unlike post '97 claims relating to FAPE, which have involved a variety of requirements under IDEA '97, claims relating to LRE have involved only two obligations on the part of districts: (1) that the IEP contain an explanation of the extent, if any, to which the student will not participate with

students without disabilities in the regular class (20 U.S.C. §1414(d)(1)(A)(iv)); and (2) that the student cannot be removed from education in age-appropriate classrooms solely because of needed modifications in the general curriculum (34 C.F.R. §300.522(3)).¹⁴ There have been only a small number of cases and hearings involving the above two requirements, and the decisions in these proceedings seem to have held districts to a minimum standard.

An example is *Mountain Board of Cooperative Educational Services*, in which the hearing officer found that the requirement that the IEP contain an explanation of the extent to which the student will not participate in the regular class was satisfied by the statement that the student would receive services outside of the general classroom 21% to 60% of the time and would spend 90 minutes per day in the Resource Room as well as any other time he or the teacher felt would be beneficial (38 IDELR 85 (Colo. SEA 2002)). This statement merely provides the amount of time the student would spend outside of the regular class without further explanation. Moreover, the range of time – between 21% and 60% – is very broad. Thus, the hearing officer in *Mountain Board* seems to have held the district to a minimal standard of sufficiency.

With respect to the second requirement, the court in *Pace v. Bogalusa City School Board* found that although the student received “some instruction” in a self-contained classroom for students with mild to moderate disabilities, he was being educated in the LRE because he participated in “several classes” with students without disabilities and was not removed from the regular classroom merely because of needed modifications in the general curriculum (137 F. Supp. 2d 711, 716 (E.D. Lo 2001)). In this case, as in *Mountain Board*, the court appears to have held the district to a minimal standard, as seen in the sparse and very general discussion by the court of the factual circumstances – for example, the student attended “several classes” with other students and received “some instruction” in a self-contained room. Moreover, the reason for the student’s placement in the self-contained class was not given.¹⁵ At the same time, the fact that the district had to explain that removal from the regular classroom did not occur because of needed modifications is noteworthy because, at least on a minimal level, the district had to account for its decision.

¹⁴ As noted earlier, this regulation was taken from the *Oberti* decision, which stated that the need for modifications “is ‘not a legitimate basis upon which to justify excluding a child’ from the regular classroom” (995 F.2d 1204, 1222 (3d Cir. 1993)).

¹⁵ See also *Barber v. Bogalusa City School Board*, 2001 U.S. Dist. LEXIS 8156 (E.D. Lo. 2003).

Most of the post '97 proceedings that involve LRE claims do not refer to the two requirements mentioned above. Rather, the cases and hearings continue to rely, for the most part, on the various circuit tests for LRE that existed prior to IDEA '97. For example, in *A.S. v. Norwalk Board of Education*, in its determination of LRE, the court considered the various factors related to LRE determination specified in the Third Circuit's *Oberti* decision (183 F. Supp. 2d 534 (D. Conn. 2002)). Similarly, in *Bair v. Molalla River School District*, the court used the Ninth Circuit's *Rachel H.* four-factor LRE test (2000 U.S. Dist. LEXIS 20321 (2000)).

One reason for the small number of proceedings involving the two requirements that pertain to LRE may be that some practitioners and attorneys are confusing the concept of involvement in the general curriculum with the statute's general mandate that students be educated in the LRE. Although being educated in the LRE (commonly referred to as inclusion) is sometimes used interchangeably with access to the general curriculum, the latter, in fact, exceeds earlier notions of inclusion. Whereas inclusion has tended to focus on placement in the regular education classroom, access to the general curriculum addresses the quality of educational services provided to students with disabilities. A second reason for the small number of proceedings involving the two LRE access requirements may be that, as noted with respect to FAPE claims, the IDEA '97 requirements were incorporated into the law at a recent date. As a result, it may take some time before these requirements appear in cases and hearings. Finally, as with substantive FAPE, it is important to consider the impact of the requirements pertaining to LRE on practice in the schools. For example, Thurlow (2002) notes that there is anecdotal evidence suggesting that the requirement that students with disabilities have access to the general curriculum as well as to State content standards has resulted in fewer students with disabilities being pulled out of regular education classes.

V. Interpretation of Progress in the General Curriculum

A small number of court cases have addressed the issue of the progress of students with disabilities in the general curriculum in terms of participation in Statewide assessments. IDEA '97 requires that students with disabilities take part in State and district-wide assessments, with appropriate accommodations where necessary or by means of alternate assessments (20 U.S.C. § 1412(a)(17)(A)). In 2001, in *Rene v. Reed*, students with disabilities filed a class action lawsuit against the State of Indiana Board of Education, alleging, among other claims, that the State's failure to allow certain accommodations listed in the students' IEPs in the administration of a graduation exam violated IDEA (751 N.E.2d 736, 746 (Ind. App. 2001)). The court held that the State did not need to honor every accommodation in an IEP, if certain

accommodations would adversely impact the validity of the results of the test – for example, reading questions to a student that are intended to assess reading comprehension (*Id.*).

Similarly, in *A.S.K. v. Oregon State Board of Education*, students with disabilities alleged that the State did not recognize certain accommodations on the State’s high stakes assessment and did not provide an alternative assessment, in violation of IDEA (Fine, 2001). The parties reached a settlement, which created an expert panel to examine Oregon’s assessment system in order to ensure that it did not discriminate against students with disabilities. The panel’s report made several recommendations, including expansion of the list of acceptable accommodations for the State assessment (Disability Rights Advocates, 2001). The Oregon DOE ultimately agreed to expand the list and allow the same accommodations used by students in the classroom unless the State could show that the accommodations affected the validity of the test. The State also agreed to develop an alternate assessment for students who were unable to take the regular assessment even with accommodations (O’Neill, 2003).

In 2002, in *Chapman v. California Board of Education*, the district court for the Northern District of California granted a preliminary injunction ordering the State of California to allow students with disabilities to take the California High School Exit Exam with any accommodation or modification specified in the student’s IEP, including calculators, spell-checkers or extra time, and to develop an alternate assessment for students who were unable to take the State exit exam even with the use of accommodations or modifications (229 F. Supp. 2d 981 (N. D. Cal. 2002)). The Court of Appeals for the Ninth Circuit upheld the preliminary injunction with respect to allowing students to take the exam with the accommodations or modifications in their IEPs, noting that the Department of Education had already implemented this requirement, but also found that the issue of the State’s development of an alternate assessment was not yet ripe for adjudication (*Smiley v. California Dept. of Educ.*, 53 Fed. Appx. 474, 474-75 (9th Cir. 2002)). The court also highlighted the right of the State of California to establish meaningful diploma requirements (*Id.* at 474).

These three cases demonstrate the degree to which States are struggling with the obligation to include students with disabilities in Statewide assessments with appropriate accommodations and by means of alternate assessments. Of particular complexity is the question of the validity of inferences drawn from scores on assessments on which students receive accommodations. Testing accommodations that are appropriate can be thought of as a “corrective lens” through which “to correct for distortions in a student’s true competence caused by a disability unrelated to the construct being measured” (National Research Council (NRC), 1997, pp. 173, 176). There is the risk, however, that the accommodations may

over- or under-compensate for such distortions and thereby interfere with the validity of the inferences being drawn from the assessment scores. Unfortunately, there has been little research on the effect of accommodations on the validity of inferences made from the scores of students with specific types of disabilities (NRC, 1997, 1999).

Two of the lawsuits described above were brought prior to the 2001 passage of NCLB, which contains a number of provisions pertaining to assessments and accountability that go beyond those provided in IDEA '97. IDEA does not mandate the establishment of assessment systems but rather requires that if a State or district has such a system in place, students with disabilities must be included. In contrast, NCLB mandates that States must establish “high-quality, yearly student academic assessments” that are to be the same for all children (Sec. 1111(b)(3)(A), (C)(i)). In addition, NCLB requires States to measure whether schools and districts are making “adequate yearly progress” toward enabling all students, including students with disabilities, to meet or exceed the proficiency level on State assessments within 12 years (Sec. 1111(b)(2)(A), (F)).¹⁶ Although one federal court case¹⁷ has held that individual claims cannot be brought under the assessment and accountability provisions of NCLB, it is likely that in the future, the strict requirements in NCLB pertaining to assessments and accountability will provide further impetus for additional claims to be brought under IDEA. Moreover, all three of the cases mentioned above involved the attachment of high stakes for the individual student. Although NCLB does not attach high stakes for the individual student, many States on their own have done so. The above cases show how important it is for an assessment system to be legally compliant with IDEA when high stakes are involved.

VI. Conclusion

This paper has analyzed post '97 case law and administrative hearings that have interpreted the right of students with disabilities to have access to the general curriculum. A theoretical framework has been utilized that conceptualizes the overall right to have access to the general curriculum as comprising three interrelated stages that form an ongoing cycle: access, involvement and progress.

¹⁶ NCLB contains a number of specific provisions pertaining to the inclusion of students with disabilities in Statewide assessments. For example, the implementing regulations that were published in the Federal Register on December 9, 2003 allow States to develop alternate academic achievement standards for students with the most significant cognitive disabilities who take an alternate assessment (34 C.F.R. § 200.1(d)).

¹⁷ See *Assoc. of Comm. Organizations for Reform NOW v. New York City Dept. of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003).

Access

With respect to the first stage, access, post '97 cases and hearings have concluded that the meaning of access to the general curriculum will depend on the particular curriculum of the State or district. Moreover, determination of access to the general curriculum for students in an interim alternative educational setting is different from that for the general population of students with disabilities. For the former, the district is not required to provide the student with access to every component of the general curriculum; for the latter, districts must ensure that students have meaningful access to all components of the general curriculum. Further defining the general curriculum for all students is the requirement in NCLB that States adopt challenging academic standards. It is likely that future claims pertaining to access to the general curriculum brought under IDEA and FAPE will also include consideration of access to curriculum standards.

Involvement

Examination of interpretations made by post '97 cases and hearings in the area of involvement reveals that courts and hearing officers have tended to hold districts to a minimal standard of sufficiency. In the majority of the proceedings, district failure to comply with one or more of the requirements in IDEA '97 pertaining to involvement has been treated as a minor procedural violation, not constituting a denial of FAPE. The one exception, perhaps reflecting the emphasis in IDEA on parental participation, is the requirement that parents be regularly informed of their child's progress. Only a small number of proceedings have involved the two IDEA '97 requirements pertaining to LRE, and in these decisions, as well, courts and hearing officers have tended to hold districts to a minimal standard.

At the same time, three proceedings were found to have considered the IDEA '97 requirements in the manner intended by Congress for the purposes of raising expectations for the educational performance of students with disabilities and improving their educational results. These three proceedings interpreted the right to have access to the general curriculum as part of a determination of substantive FAPE. It is likely that in the future, the requirements in NCLB pertaining to high standards, assessments and accountability will help to define more clearly for courts and hearing officers the meaning of involvement in the general curriculum, thus helping to guide the evolution of the concept of involvement. Moreover, although a majority of the proceedings have interpreted the IDEA '97 requirements based on a minimal standard of sufficiency and have not found a denial of FAPE, anecdotal evidence suggests that the requirements are in fact having an impact on actual practice in the schools.

Progress

Finally, examination of post '97 cases in the area of progress shows that States are struggling with the inclusion of students with disabilities in Statewide assessments, particularly with respect to the use of appropriate accommodations and alternate assessments. The cases also demonstrate how important it is for an assessment system to be legally compliant with IDEA when high stakes are attached for the individual student. In the future, as States attempt to comply with the strict requirements in NCLB pertaining to assessments and accountability, it is likely that additional claims will be brought under IDEA involving the use of appropriate accommodations and alternate assessments.

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