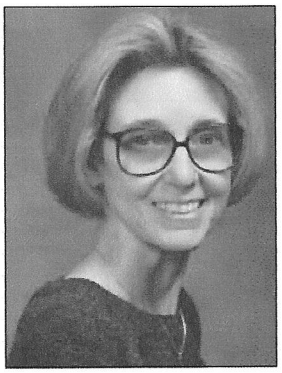
Advocating for "Appropriate" Special Education Services: Focusing on the IEP

By Andrea F. Blau



Increased public responsibility for the identification and education of children with special needs, virtually nonexistent 50 years ago, has become almost commonly acknowledged within the United States. While this increase in public awareness is partially due to the increased media focus (especially when celebrities' children are involved), a more academic truth lies at the heart of the matter. Whether grappling with the impact learning challenges have on their children's ability to succeed in school, behavior, and ultimate candidacy for college and the workplace, or the intensive responsibility of preparing their children with developmental disabilities to "simply" function independently, there seems hardly a family these days that is not "faced with the unexpected" when it comes to educating their children.

Over the past three-and-a-half decades, we have seen a dramatic change in society's commitment to children with special needs.[1] Forty years ago, publicly funded residential facilities, like Willowbrook State School on Staten Island, were little more than institutions where the disabled were "warehoused" rather than educated. Public school education for intellectually or physically challenged children within one's home community was not commonplace and it was very difficult for parents with severely disabled children to raise their children at home. Society was still very frightened of people with disabilities, whom they preferred remain invisible. For many families, having a child with severe disabilities was overwhelming and advocating for their rights not even a consideration.

The complexion of things began to change in the late '60s and early '70s (the evolution of which we post-war Baby Boomers are extremely proud). Based on judicial decisions that were outgrowths of the equal rights movement,[2] parent advocates[3,4] began to promote their children with disabilities as important members of society with constitutionally protected rights. Ultimately, legislators[5] took action to safeguard those rights. And while "education" is not formally seen as a Constitutional entitlement, viewed as state rather than federal responsibility,[6] the right to a free and appropriate public education (FAPE) in the least-restricted environment (LRE), similar to that provided to "typical" or "nondisabled" children and adolescents, was seen as guaranteed to disabled children by the Fourteenth and parts of the Fifth Amendments of the Constitution.[7] Over the next several decades, the evolution of that commitment, the Education for All Handicapped Children Act of 1975, the Individual with Disabilities Education Act of 1997, and the Individuals with Disability Education Improvement Act of 2004 (IDEIA), reflects the legislative commitment to "our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[8]

As very comprehensively discussed by our esteemed colleague Adrienne Akrontaky[9] (please reread this seminal ELA article), the IDEIA in its current incarnation is perhaps the most relevant law governing special education today. Since an overview of this statute is available to our readership via Ms. Akrontaky's ELA column, I will not discuss the specific features of the statute here. However, as a clinical consultant and expert witness (as "Dr. Blau") involved in the statute's clinical implementation since its inception as P.L. 94-142 in 1975[10] and as legal consultant (as "Blau Esq.") to attorneys embroiled in special education advocacy (litigation and mediation[11]), perhaps providing a few brief guidelines regarding the complex task of securing appropriate educational services might be useful to our readership.

There are, however, three fundamental issues worthy of note as background to these guidelines.

First, the term "appropriate" has never actually been defined within the federal statute, the Department of Education (DOE) regulations promulgated to direct state implementation, or by the states themselves.[12,13] The four basic features of a "free appropriate public education" are described virtually identically by the statute, the DOE and the state regulations as special education services that have been provided at public expense and supervision, meet the State standards, include appropriate preschool, elementary, or secondary education, and are provided in conformity with the individualized education program (IEP) as mandated.[14,15,16] Yet what is actually educationally appropriate for any individual special needs student has been left vague.[17,18]

Second, education has been acknowledged by the courts[19,20] as under state rather than federal

jurisdiction. States are not required under federal mandate to comply with the IDEIA. However, if the states want to benefit from federal funding under this statute, they must comply with the statute. Virtually all 50 states (and the District of Columbia) apply for funding under this act.[21]

Third, the Supreme Court has granted certiorari for only one case that has challenged the interpretation of the "appropriateness" feature of the IDEIA. In *Board of Education v. Rowley* (1982),[22] services of a sign language interpreter had been denied to a hearing impaired student by her local public school. Justice Rehnquist noted that the statute was grounded, in light of the legislative history, on the provision to handicapped students of a "basic floor of opportunity"[23] for free access to individualized public education in the least restrictive setting. The *Rowley* Court affirmed the state's right to deny the requested services by holding that the student was being educated appropriately as evidenced by the student's earning above average grades.[24] They further held that it was up to the states to decide on the particular methods to educate their students.[25] Justice Rehnquist, however, additionally cautioned against over-inclusiveness in the application of this holding, noting that:

> Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services and is performing above average in the regular classroom of a public school system, we confine our analysis to that situation.[26]

While the current legislative intent, as clearly noted in the preamble cited above, and the stringent accountability measures listed within the reenacted statute, suggest a much higher level of educational outcome than basic opportunity and free access, the courts still largely rely on "The Rowley Standard" to gauge educational appropriateness in compliance with the statute.[27]

From a pragmatic perspective, when advocating for special education services, we as attorneys need to be better versed in what constitutes an "appropriate" education for our clients' particular profiles, despite the vagaries noted above. While some of us would like nothing better than to be part of the "dream team" for whom the Supreme Court grants certiorari to take on the 30-year-old *Rowley* decision, our initial work is far more modest: identifying the specific services needed and assisting our clients in both justifying and securing those services when interacting with their schools. This is needed before deciding whether or how we go into battle.

More practically speaking, we must be knowledgeable about what essential elements need to be incorporated within our client's Individual Education Progam (IEP), pinpointing the specific services and goals that will actually allow our client to be appropriately educated. If the requested services are included on the IEP but are not being provided or the student is not making the requisite documented progress in educational goals, your client has the basic elements with which to challenge the appropriateness of the education being provided and will allow you to move forward with power.

Below are a few important points for us, as attorneys, to keep in mind when advising or representing our clients, whether a parent requesting the addition, change, or removal of special education services or a school district with the same agenda but from a different vantage point!

The IEP is the legal document, the actual blueprint, describing the student's disability, educational needs, goals, and services, including school placement, to be provided at public expense. (Again, I refer our readership to Adrienne Arkontaky's excellent ELA article.[28] For valuable information on the transitional planning aspects of the IEP, please read the article by Patricia Howlett, Maggie Blair, and Charles F. Howlett in the Spring 2011 ELA.[29]) The IEP is generated by a Committee on Special Education (CSE) comprised of mandated members of the school system, the parents of the student with special needs, sometimes the student, and other professionals and advocates that the school and/or parent choose to bring.[30] The IEP, once generated, must be followed as written. The school is held accountable for its implementation.

While an IEP is typically reviewed yearly, IEP meetings may be requested by either the parent or school personnel at any time. If there is consensus among the CSE team, mandated services might relatively quickly be added or modified. If a related service or a specific accommodation is needed for a child to achieve an educational goal, it must appear on the face of the IEP. If not explicitly incorporated into the IEP, even if the service or accommodations are verbally agreed upon at an IEP meeting, holding a school accountable for their provision or for additional compensatory services or reimbursement for services not publicly provided will not be assured.

A collaboratively well-written IEP serves both as the best assurance of appropriate services and as the primary means of dispute prevention in special education.[31] Everyone on the CSE team has the child's best interest in heart, at least at some level. Try to encourage that perspective and, if needed, have the child attend the meeting as his/her own advocate. It will be more difficult for the team to deny services with the student present.

If the provision of services or placement decisions seem likely to be in dispute, encourage your client to bring his/her own assessments with recommendations, doctor's prescriptions, and even draft goals to the IEP meeting. Parents are entitled to have independent evaluations done if they question the assessments made by their school districts. In fact, if they request an assessment and the school does not have the personnel available to complete the assessment in a reasonable period of time, the parents may offer to provide their own assessment which may be used at the IEP meeting as the basis of the IEP or, if proper notice is given, may ask for the school district to fund their independent assessment.

If feasible, never have a client enter an IEP meeting, or a mandatory dispute resolution meeting,[32] unprepared. Your presence, as an attorney, might not always be warranted or welcomed at these meetings. But your role in advising your client how to navigate through the system will provide important support even when you are not sitting by their side. The adversarial stance between parents and school systems has evolved over many years, perhaps deepening despite legislative efforts to lessen the discord.[33] You might not need to prepare your client at the same level as you would should they be providing testimony at an impartial state or federal hearing on the issue, but they do need to be prepared and fully aware of their legal rights when attending an IEP review.

Parents are typically outflanked by the number of school personnel and professionals attending IEP or dispute resolution meetings. Assure your client that they have the right to veto any recommendation made by the CSE. While they do not hold any legal power to mandate that any of the services they are requesting be provided, their input is statutorily protected and they do have authority to veto a recommendation.[34]

Make certain that your client does not feel "pressured" into agreeing to a service or placement about which they are uncertain. Prearrange with your client to ask for a break and have them call you if they are confused. If you are not accessible, make certain your client understands that, while perhaps inconvenient, they would do better to request an adjournment and reconvene the IEP meeting on another date than agree to services (or the non-provision of services) under pressure.

Make certain that your clients are aware of the procedural guidelines and have exhausted all of the administrative remedies as they try to resolve their differences with their school.[35] Did they clearly inform their CSE or appropriate school personnel that a service or assessment was needed? Did they do so in writing? Did they get a written reply? If no reply was given did the parents make a second request? Did they send the request certified return receipt so that there is proof of delivery? While labor intensive, the proper paper trail is extremely important in securing appropriate services.

More special education hearings are perhaps won and lost due to IEP procedural technicality violations than based on the actual merits of the case. This point is relevant to our clients from a range of perspectives. First, even if a hearing officer or judge feels that it is beyond his or her scope of power or jurisdiction to challenge the appropriateness of an IEP based on what the parent claims are substantive issues (e.g., the child not making sufficient progress, or the methodology being employed is in dispute), if a procedural violation is found (e.g., the parent was not given notice prior to a change in the student's level of services), then the IEP may be deemed null and void. This then allows the parent the opportunity to negotiate afresh, with supportive documentation, for the methodologies that he or she may feel are essential to his or her child's educational progress.

On the other hand, and this is very important to attorneys representing school districts as well as parents, the timeliness of a parent's claim, regardless of the substantive issues, may preclude any further action on the parent's part. There are very stringent statutes of limitations regarding when a claim or an appeal may be filed by either side. Parents have only two years from the time they recognize that an IEP is inadequate to file for a hearing. Parents who are new to the IEP process are typically unaware of this strict guideline, even if they are provided with the mandatory list or website by their school district with their rights and procedural safeguards.

The notion of pendency[36] (the Stay-put Rule) is extremely important, especially when a client is about to lose services or a preferred placement. From the time a hearing is filed throughout the appeal process, change in placement or services may not be done without parental consent. Filing for hearings, therefore, serves as a means to ensure that placement or services are maintained until the conflict is resolved or a final determination made.

One of the most important items to note is that even if the actual components of an "appropriate education" are not fully defined by statute or regulations, the terminology "appropriate education" should underlie the theory of your case as well as appear in the reports and services being advocated by your client's team of professionals. All the school is mandated to provide is an appropriate education. A student who is managing fairly well but would do better with a different methodology or additional supports may not prevail in gaining those services at the hearing level or withstand an appeal. The school is only required to provide an "appropriate," not the optimal, education. Make sure that all reports that

your client provides (assessments, recommendations, etc.) state that these services, methods, or technologies are the exclusive means with which the student can be educated appropriately. Promoting the services as necessary to improve or optimize current performance levels will only serve to diminish your case.

The best way to get a specific methodology mandated and implemented is to have that methodology written on the IEP. Schools are often reluctant to make a commitment to a specific methodology, and since the schools are seen as the specialists in making these determinations, getting a particular methodology which a parent might feel is essential to the student's education written on the face of an IEP is often difficult. If the IEP team is unwilling to include the methodology and the parent is convinced that unless mandated it will not be provided, there still may be a way to insure that the methodology is employed. Write the goals in such a way that they can be successfully implemented only if the desired methodology is used. The services of an experienced professional may be needed to craft these goals, but it is well worth the investment.

While the cost of a specific school placement, service, or piece of equipment may be high, that fact alone should not preclude its provision to your client if it is the only appropriate option in meeting your client's educational needs. It is common practice for school systems to do what they may to avoid recommendations that are costly. There simply are never enough funds to meet student needs and the costs involved in special education are particularly high. Parents are often told that special education services are either not needed or not an option simply because of their cost. The IDEIA makes it very clear that in designing a student's IEP the appropriateness and necessity of the service is determinative, not cost. Clients need to be practical in what to expect in today's economic climate and sensitive to budgetary restrictions, but they should not be held hostage by it.

Make certain your client's homework is done prior to entering an IEP meeting. It is not unusual for members of the CSE to attend an IEP meeting ill prepared with one or more of the attendees (including school administrators) unfamiliar with your client's specific needs and the educational options (placement, services) that might best meet them. Often educational goals have not yet been written or large areas have been left for development at the meeting itself. Do your due diligence prior to the meeting. Make certain your client is prepared with specific placement, support services, and educational goals in mind, justifying why any alternatives would not be appropriate. Try to find out who will be attending the review ahead of time. This will often provide your client with clues as to which direction the wind is blowing; that is, if the school is gearing up for a fight or is approaching the meeting in a more collaborative spirit.

If your client is attending an "at risk[37]" IEP meeting, suggest that the meeting be tape-recorded. It is within your client's legal rights to tape-record the meeting, provided ample advanced written notice is given to the school. The school is then also free to record the meeting. If the school balks, suggest to your client to offer the school a copy of the recording. Having the discussion recorded will be quite valuable. It is not unheard of for agreed-upon services or accommodations to be omitted on the final IEP document. While these services may not be authorized until they actually appear on the IEP, if your client files for a hearing, providing transcripts of these discussions may be extremely revealing.

The official IEP document varies in format. New York City has recently adopted a new and rather lengthy form which includes sections devoted to the student's present levels of performance and individual needs, effects of those needs on general education, special factors, measureable annual goals, protocols for reporting to parents, recommended programs and services (including projected initiation dates), testing accommodations, coordinated transition activities, participation in state and district assessments, participation with students without disabilities, special transportation, placement recommendations, summary section with student information and recommendations, promotion criteria, other program concerns and an IEP meeting attendance page. It is essential that your client review each and every line on their child's IEP. Remember this is the document which contains all services for which the school is held accountable. A second scrutiny is in order once the finalized IEP document is sent to the parent (often a few weeks after the meeting). A lack of precision or even inadvertent omissions on the IEP will reduce its effectiveness as well as your client's rights to secure those missing elements that have gone "unnoticed."[38]

In conclusion, we are meeting more and more families in need of appropriate special education services. Hopefully, the above "tips" may prove useful. They are to be viewed as preliminary safeguards and are neither exhaustive nor always plausible.

Ensuring that students with special needs receive a truly appropriate education is extremely complex. The 40-year evolution in securing appropriate educational outcomes for these students, while heavily laced with discord between parents and schools, is also matched by unrivaled collaborative efforts and successes. As long as the best interest of the child remains at the heart of the effort and the legal focus remains on following the procedural protocols while substantively justifying the appropriateness of the educational programs being promoted, the power imbalances between schools and

parents can be effectively neutralized, if not cured. In my own experience, as a professional in this field for 40 years, I have seen hundreds of students with special needs actually lead fuller, productive lives as the result of a truly appropriate education.

Endnotes

1. A.F. Blau & A.L. Allbright, *50-State Roundup: Ensuring Children with Disabilities a Free Appropriate Public Education*, 30 MENTAL & PHYSICAL DISABILITY L. REP. I, 11-19 (2006).
2. Brown v. Bd. Of Educ., 347 U.S. 483 (1954).
3. Pa. Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa 1972).
4. Mills v. Bd. Of Educ. 348 F. Supp. 866 (D.D.C. 1972).
5. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as 20 U.S.C. §§1400-1482).
6. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973).
7. For a brief discussion of this evolution and the judicial standard, see A.F. Blau, *The IDEIA and the Right to an "Appropriate" Education*, B.Y.U. EDUC. & L.J. No.1, 1-23 (2007).
8. 20 U.S.C.A. § 1400(c)(1).
9. A. Arkontaky, Special Needs Forum, NYSBA Elder Law Attorney, Vol. 18, No. 2, 33-36 (Spring 2008).
10. *See supra* note 5.
11. A.F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individual with Disabilities Education Improvement Act (IDEIA) of 2004: Where Do Mediation Principles Fit In?* PEPPERDINE DIS. RES. LAW JOURNAL Vol. 7, No. 1, 65-86 (2007).
12. *See supra* note 1.
13. *See supra* note 7.
14. 20 U.S.C. § 1401(18) (1975).
15. 20 U.S.C.A. § 1401(9) (2004).
16. 34 C.F.R. § 300.13(a)-(d) (2005).
17. Bd. of Educ. v. Rowley, 458 U.S. 176 at 189 (1982) ("noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded to handicapped children").
18. *See supra* note 7.
19. *See supra* note 6.
20. *See supra* note 17 at 208.
21. *See supra* note 11 at 65.
22. *See supra* note 17.
23. *Id* at 201.
24. *Id* at 209-210.
25. *Id* at 210.
26. *Id* at 202.
27. *Id* at 211.
28. *See supra* note 9.
29. P. Howlette, M. Blair, and C. Howlett, *The Least Restrictive Environment: The Tie That Binds Guardianships and Educational Needs*, NYSBA Elder Law Attorney, Vol. 21, No. 2, 4-9 (Spring 2011).
30. For specific information governing the development of an IEP in New York State please refer to the Regulations of the Commissioner of Education-Part 200.
31. *See supra* note 11 at 76.
32. Following the filing of a due process complaint, prior to scheduling an impartial hearing, a dispute resolution session, where parents and school personnel have a final opportunity to air and resolve their disputes, is mandatory unless both parties elect mediation or wave in writing. For a listing and explanation of the various dispute resolution options afforded your clients please refer to *See supra* note 11 at 65-86 and *See supra* note 30.
33. *See supra* note 11 at 66-75.
34. *Id.* at 74.
35. For a very user friendly guidebook on the reauthorized IDEIA of 2004, see R. Chapman, *The Everyday Guide to Special Education Law: A Handbook for Parents, Teachers and Other Professionals*, 2008 edition published by The Legal Center for People with Disabilities and Older People, Denver, CO. www.thelegalcenter.org.
36. 20 U.S.C. §1415(j) and 20 U.S.C. §1439(b).
37. *See supra* note 11 at 79.
38. I recently encountered a client whose daughter was severely physically impaired and could not tolerate being on the lift bus for more than an hour each way. The parent had to literally drive her daughter to school every day for a full academic term, simply because the CSE team did not list the "last on/first off" phrase under the transportation accommodations section on the IEP document when retyping it, despite the agreement, as the client had provided the requisite medical documentation, at the CSE review. The parent, in good faith, did not catch the omission when the completed IEP was mailed to her and despite assurances from her school district that this would not present a problem, the transportation vendor refused to comply without the official mandate which took over six months to secure.

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