Major Issues Affecting the Individuals with Disabilities Education Act

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WITH DISABILITIES EDUCATION ACT

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WINTER 2009
Introduction

This article seeks to explore some of the major aspects of the Individuals with Disabilities Education Act through the examination of case law, and gives suggestions which could help remedy some of the troubling situations faced by those affected by the Act. Many of the cases cited are brought by the parents of children suffering from Autism Spectrum Disorder. School districts face enormous challenges in attempting to comply with the Act’s mandates while servicing children and families struggling with the complexities of this disease.

The Act provides that school districts must attempt to provide each child with an appropriate educational plan. Such plans must reconcile an education with the child’s unique needs. This is often an enormous challenge given the complexities of a child’s particular handicap when a student suffers from Autism, of which so much remains unknown. Since the plaintiffs in these cases are nearly always the parents of the special needs children acting on their child’s behalf, litigation can become highly emotional, with the parents feeling as though their children are being victimized by school districts. Many cases involve tragic stories of children with profound problems who are the targets of heinous abuse by their non-disabled peers.

The Act also contains a complex scheme where parents are required to use a state’s administrative process prior to being able to bring a civil action against a school district. Many parents and the attorneys that represent them are seemingly unaware of the act’s procedural requirements, and as a result have their claims blocked at the district court level.
Autism Spectrum Disorder

In February 2007, the Centers for Disease Control and Prevention reported that 1.5 million Americans suffer from autism spectrum disorder, including 1 in every 150 children and nearly 1 in 94 boys.¹ Autism is the most widespread condition in a set of developmental disorders known as the autism spectrum disorders.² It is typified by impaired social interaction, difficulties with “verbal and nonverbal communication, and unusual, repetitive, or severely limited activities and interests.”³

Children with autism may not respond to their name and frequently avoid eye contact with other people.⁴ They have trouble interpreting the thoughts or feelings of others because they are unable interpret social cues, such as tone of voice or facial expressions, and cannot look to the faces of other people for clues about appropriate behavior.⁵ “They lack empathy.”⁶ “Many children with autism engage in repetitive movements such as rocking and twirling, or in self-abusive behavior such as biting or head-banging.”⁷ It can cost about $3.2 million dollars to take care of an autistic person over his or her lifetime.⁸

The IDEA

The Individuals with Disabilities Education Act (IDEA) is a federal law that requires each state to ensure a free appropriate public education (FAPE) to all eligible

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³ Id.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
children with disabilities residing in that state. States must provide “special education and related services designed to meet the unique needs of eligible children, and prepare them for further education, employment, and independent living.” “The IDEA defines related services as those services “required to assist a child with a disability to benefit from special education.” Additionally, the Act is intended to “ensure that the rights of children with disabilities and parents of such children are protected, to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities, and to assess, and ensure the effectiveness of, efforts to educate children with disabilities.” As of 2006, more than 6 million school-age children received special education services.

FAPE does not mean the best possible education, “or most potentially maximizing education available, but rather, an education that is specifically designed to meet the child’s unique needs that will provide a basic floor of opportunity.”

To provide eligible children with a FAPE, schools must first identify children in need of special education services and provide each eligible child with an Individualized Educational Program (IEP). An IEP is “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the

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12 Id.
15 Draper v. Atlanta Independent School System, 518 F. 3d. 1275, 1279 (11th Cir. 2008).
IDEA.\textsuperscript{17} “In general, an IEP is arrived at by a multi-disciplinary team which summarizes the child’s abilities, outlines goals for the child’s education, and specifies services that the child will receive.”\textsuperscript{18} “The IEP must be reasonably calculated to provide some educational benefit to the handicapped child.”\textsuperscript{19} The IDEA also establishes that parents must be involved in the development of their child’s IEP.\textsuperscript{20}

Where a school district determines that it does not have the resources to provide a FAPE to an eligible child, the school district may pay for the child’s placement in a private institution.\textsuperscript{21} In cases in which the school district has offered neither a sufficient special education plan nor an adequate private school placement, the parents may be entitled to tuition reimbursement upon unilaterally placing the child in an appropriate private school.\textsuperscript{22}

The application of the IDEA to autistic children creates enormous challenges for school districts, as well as the families of the afflicted children. Questions have arisen regarding the treatments that may be incorporated within the IEP of an autistic child, and whether such treatments have any educational value.\textsuperscript{23} Often times, school districts contract with specialty schools that cater specifically to autistic children and their

\textsuperscript{17} 20 U.S.C.A. §1401(14).
\textsuperscript{18} 20 U.S.C.A. §1414(A)
\textsuperscript{19} Id.
\textsuperscript{22} Id.
\textsuperscript{23} In L.M.P. ex rel. E.P. v. School Bd. of Broward County, Fla., 516 F.Supp. 2d 1294 (S.Dist. Fla. 2007), the question was whether Applied Behavioral Analysis has educational value warranting placement in an IEP.
families. Many school districts also incorporate programs for autistic children into district schools.

The IDEA requires that school districts place eligible children in the “least restrictive environment” that will provide the child with an appropriate education. There is a preference to “mainstream” an eligible child with his or her non-handicapped peers. A child need not be in the classroom 100% of the time, but may be removed from time to time to receive “supplementary, therapeutic services which cannot be provided in the classroom.” Additionally, the child may be removed from the mainstream setting when the benefits gained from services outside the non-segregated setting far outweigh those provided within it, or where the child is a disruptive force in the mainstream setting.

Applied Behavioral Analysis Treatment

Many cases have been litigated regarding whether Applied Behavioral Analysis (ABA) treatment may be placed in an IEP. ABA is a time-intensive therapy that requires individualized, one-on-one treatment of a child by a therapist. “The child is given a stimulus, such as a request to make eye contact with the therapist or point at some named feature of an object, such as the eye or nose of a doll.” “If the child produces the requested response to the stimulus, the therapist provides a reward to the child, such as a

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24 The Baudhin school contracts with the Broward County School District to provide special education to autistic children under the age of 5 years. See: AutismLink. Service Details. Ralph J. Baudhin Oral School-Nova University. <http://www.autismlink.com/services/view/5476>
25 The following link contains a list of schools with programs for autistic children in Miami Dade County: <http://ese.dadeschools.net/autism/PDF%202007/2007-2008%20Autism%20Program%20Schools.doc>
27 Id.
28 Id.
29 Id. at 1068.
31 Id.
food the child enjoys, or an object the child appears to view as a treat, such as stickers.”

Despite some reports of ABA treatment leading to striking improvements, moderate improvements are more commonly reported.

School districts have been reluctant to incorporate ABA into IEPs because the therapy requires approximately 40 hours per week of treatment, putting it at odds with the “mainstreaming” preference of the IDEA. Additionally, the treatment is expensive, and is not educational in nature. Despite the reluctance, parents of autistic children have been willing to take school districts to court in order to have the therapy incorporated into IEPs. They may be motivated by a dearth of insurance companies that cover the expense of the treatment, or other treatments for autism, and seek public expense for therapy. ABA also gives hope to parents who believe it will improve the quality of their child’s life.

In *D.P. v. Broward County School Board*, the petitioners, autistic triplets, brought an action after the school board moved to have the children placed in a specialty school for autistic children. The petitioners preferred that the children continue to receive ABA treatment at public expense, pursuant to Part B of the IDEA. ABA had been administered prior to the triplets third birthday through Florida’s Early Intervention Program. The parents sought reimbursement from the School Board for the expense of

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32 Id.
33 Id.
34 Id.
38 Id.
39 Id.
unilaterally placing the triplets with therapists who administered ABA treatment to each of them for 30 hours per week.\textsuperscript{40}

The Administrative Law Judge explained that the ABA treatment did not constitute instruction or related services that could provide FAPE under the IDEA, and was therefore not reimbursable:\textsuperscript{41}

The ABA therapy that the triplets have received, first through BAI and later through CPA, was not exceptional student education--indeed was not even "education" as that term is used and understood in the context of the IDEA and corresponding state law. To the point, Mr. Garcia, Dr. Lubin, and their respective associates who gave care to the triplets, did not, in so doing, act as educators, teachers, or instructors in any meaningful sense of those words. That is, while the therapeutic interventions used with the triplets probably entailed the giving of "instructions" in a broad sense, the therapists who treated the triplets were not acting as "instructional personnel" in the relevant, narrower sense, i.e. as persons who impart knowledge to pupils pursuant to an academic curriculum; rather, they served as caregivers--providers of behavioral or psychological therapies meant to treat the triplets, to make them better, perhaps even (hopefully) to cure them.\textsuperscript{42}

In \textit{Deal v. Hamilton County Bd. of Education}, 392 F. 3d 840 (6th Cir. 2004), the Plaintiffs alleged that the School District violated the procedural aspects of the IDEA through its policy of predetermining that ABA treatment would not be a part of any child’s IEP. The parents claimed that the School District predetermined not to offer the services regardless of any evidence concerning their autistic child’s needs and the effectiveness of his private program.\textsuperscript{43} The Court determined that the predetermination amounted to a procedural violation of the IDEA because it deprived the parents of a meaningful opportunity to participate in the IEP process and failed to consider the special needs of the child.\textsuperscript{44}

In \textit{K.S. ex. rel. v. Fremont Unified School Dist.}, 525 F. Supp. 2d 995, 1006-1007 (N.D. Cal. 2008), the parents filed an action claiming that the School District violated

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Id. at ¶¶ 26 – 28.
  \item \textsuperscript{42} Id.
  \item \textsuperscript{43} Id. at 857.
  \item \textsuperscript{44} Id. at 859.
\end{itemize}
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procedural aspects of IDEA by not allowing them meaningful participation in IEP meetings. Specifically, the parents argued that their opinions were not considered in determining the operative portions of the IEP because the District had an unofficial policy of refusing to provide one-on-one ABA treatment. The Judge explained that while the IDEA requires parental involvement in the creation of the IEP, it does not require that the District comply with every parental request. It mandates that districts seriously consider parental requests, and provide the parent with an opportunity to challenge the IEP at a due process hearing if an agreement cannot be made.

**Teacch Therapy**

TEACCH is a “structured technique specialized to the autistic person’s visual processing strengths by organizing the physical structure of the room and providing a visual conduct to supply information about activities.” Structured teaching relies heavily upon teaching through visualization because of difficulties autistic children face in processing verbal information. Visual structure is provided at several different levels such as arranging areas of the classroom, “providing a daily schedule using pictures or written words,” in addition to visual instructions and visual organization identifying the beginning and end of tasks. A key part of the therapy is the parent’s role in

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45 Id. at 1007.
46 Id.
47 Id.
49 Id.
50 Id.
implementing treatment in the home setting.\textsuperscript{51} School districts are generally open to implementing Teacch techniques into IEPs.\textsuperscript{52}

**Administrative Remedies**

The IDEA requires that parents exhaust state administrative remedies prior to filing an action in a circuit court.\textsuperscript{53} The IDEA provides that parents “are entitled to (1) an examination of all relevant records pertaining to evaluation and educational placement of their child, 2) prior written notice whenever the responsible educational agency proposes, or refuses, to change the child's placement, 3) an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education, and 4) an opportunity for an “impartial due process hearing” with respect to any such complaints.”\textsuperscript{54} Where a party is aggrieved by the findings of the due process hearing, they may seek an additional review by the state educational agency.\textsuperscript{55} If they are dissatisfied after the administrative appeal, they may file an action in circuit court.\textsuperscript{56} When challenging the ruling of an administrative law judge, the burden of proof rests with the party who brings suit in circuit court.\textsuperscript{57} It should be noted that a party is not required to exhaust administrative remedies where to do so would be *futile* or *inadequate*.\textsuperscript{58}

\textsuperscript{53} 20 U.S.C.A. §1415.
\textsuperscript{54} N.B. by D.G. v. Alachua County School Bd, 84 F.3d 1376, 1378 (11th Cir. 1996).
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{58} Id. (citing: Smith v. Robinson, 468 U.S. at 1014 n. 17, 1019 n. 22, 104 S.Ct. at 3469 n. 17, 3472 n. 22).
The Court in *Association of Retarded Citizens of Alabama, Inc. v. Teague*, 830 F. 2d 158, 160 (11th Cir. 1987), explained that the exhaustion of administrative remedies serves a number of purposes, “including (1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress; and (4) avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any error.”

In *Teague*, the plaintiffs brought a class action lawsuit claiming that the State was in violation of the Education of the Handicapped Act, the predecessor statute to IDEA, by not providing facilities and programs necessary to educate the State’s handicapped children. The plaintiffs bypassed the State administrative review process, claiming that to do so would be futile because the State administrative process is incompetent and construed to deny an opportunity for a fair hearing.

The Court ruled against the plaintiff’s bypassing of the state administrative process, explaining that “permitting plaintiffs to bypass the Act's detailed administrative procedures would “run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and local education agency work together to formulate an individualized plan for each handicapped child's education,” and that “the courts lack the specialized knowledge and expertise necessary to answer difficult questions of educational policy.”

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59 Id. at 159.
60 Id.
61 Id. at 161.
62 Id.
The courts have stated that plaintiffs requesting relief under the IDEA must use the IDEA’s administrative procedures, even when proceeding under a different statute.\textsuperscript{63} In \textit{M.T.V. v. Dekalb County School Dist.}, 446 F.3d. 1153 (11th Cir. 2006), the parents sued the school district under several different federal statutes, including the IDEA and Section 1983 of the U.S. Code. The suits arose from the parents dissatisfaction with their son’s IEP, which provided only for “speech and language therapy,” but not for treatment for other motor impairments.\textsuperscript{64}

The Plaintiffs brought a Retaliation claim which alleged that the District stopped allowing them to attend IEP meetings, began bringing lawyers to meetings to intimidate them, and required them to attend other meetings which forced them to repeatedly miss work.\textsuperscript{65} Although the parents requested numerous due process hearings regarding their son’s IEP, they did not request a due process hearing regarding their Retaliation claim.\textsuperscript{66} The Court stated that “\textit{any} matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child” is subject to IDEA’s exhaustion requirement.\textsuperscript{67} Because the IDEA allows individuals aggrieved by the decision of an ALJ to bring a civil action with respect to the complaint presented to the ALJ, in order to bring a retaliation claim in a civil court, the plaintiff must have brought a separate administrative complaint addressing those issues.\textsuperscript{68}

A plaintiff is not required to exhaust his or her administrative remedies where to do so would be futile or the available relief is inadequate.\textsuperscript{69}

\textsuperscript{63} \textit{M.T.V. v. Dekalb County School Dist.}, 446 F.3d 1153, 1158 (11th Cir. 2006).
\textsuperscript{64} Id. at 1155.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 1158.
\textsuperscript{67} Id. at 1158, 1159.
\textsuperscript{68} Id. at 1158.
\textsuperscript{69} \textit{Pope ex rel. Pope v. Cherokee County Bd. of Educ.}, 562 F.Supp.2d 1371, 1376 (N.D. GA. 2006).
futility is on the party seeking exemption from the exhaustion requirement.”70 In Pope ex rel. Pope, 562 F.Supp.2d 1371, 1376 (N.D. Ga. 2006), the parents of an autistic child brought an action against the School District in circuit court without first using administrative remedies. Plaintiffs claimed that school personnel were not properly trained in handling autistic children, and that their child suffered injuries when four school employees attempted to restrain him by piling on top of him.71 The plaintiffs asked for monetary damages due to educational setbacks and other costs resulting from the School District’s actions.72

The plaintiffs argued that exhaustion of administrative remedies would be futile because they sought monetary damages for past injuries that are not education based.73 The Court explained that the heart of the claim was their dissatisfaction with their son’s educational plan, and IDEA’s administrative remedies could be used to remedy any of the plan’s defects.74

Compensatory Education

The IDEA provides that a district court may provide “appropriate relief for violations of the Act.”75 This provision has been interpreted as meaning “such relief as is appropriate in light of the purpose of the IDEA.”76 The IDEA authorizes courts to order a school district to reimburse parents who place their children in private school, where the public school cannot provide a FAPE.77 The Act specifies that eligible students must

70 Id.
71 Id. at 1374.
72 Id. at 1375.
73 Id. at 1376.
74 Id.
75 Draper v. Atlanta Independent School System, 518 F.3d 1275, 1285 (11th Cir. 2008)
76 Id.
receive specialized educational program according to their unique needs sufficient to provide a FAPE.  

Where a public school is not able to provide a FAPE, the Act allows a court to direct the school district to pay for the child’s placement at an appropriate private school. Tuition reimbursement is available where a court finds that a school’s proposed education program is procedurally or substantively inadequate and the private school chosen by the parents is appropriate for the child’s needs. The IDEA does not provide for compensatory money damages.

In *L.T. ex rel. B.T. v. Mansfield Tp. School Dist*., 2009 WL 737108 (D.N.J. 2009), it was ruled that the District did not provide a severely disabled child a FAPE where the child missed seventeen days of school. In its ruling, the Court elaborated on the nature of damages available under the IDEA:

> The IDEA provides that in a civil action the court “shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). ...All the district courts within this Circuit to have addressed this issue, as well as the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits, have concluded that only compensatory education, rather than compensatory money damages, is the “appropriate” relief under the IDEA. [Most Courts reason] “that because monetary damages are ‘fundamentally inconsistent’ with the goals of the IDEA, they are not an ‘available’ remedy under the IDEA.”

The Court determined that instead of monetary damages, the child should be awarded educational services equal to the services he was denied for the time missed. It explained that compensatory education is the “replacement of educational services the child should have received in the first place” and “compensatory awards should aim to

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78 Id.
79 Id.at 370 and at 2002. (An *appropriate* private school is one that provides the child FAPE.)
83 Id.
place disabled children in the same position they would have occupied but for the school
district's violations of IDEA.\footnote{84}

the parents challenged the Administrative Law Judge’s finding that the District did not
owe compensatory damages after originally misclassifying their child as “other health
impaired,” as opposed to autistic, which the parents alleged amounted to both a
procedural and substantive violation of the IDEA.\footnote{85} The parents claimed that the
misclassification denied their child assessments and services required to receive a
FAPE\footnote{86} and sought tuition reimbursement and compensatory damages.\footnote{87} Despite
prevailing on their claim for tuition reimbursement at the administrative level, the parents
appealed the denial of their request for compensatory damages.\footnote{88}

The Court explained that an award of “compensatory damages are available only
when there is a gross violation of the IDEA resulting in a near total denial of educational
services to an individual who is no longer eligible for public education due to his or her
age.”\footnote{89} “Thus, a student who was excluded from school for a substantial period of time
and has subsequently reached the age of twenty-one would be entitled to compensatory
services” for which the damages would be needed.\footnote{90} Because the child in question was
five years old at the time of the suit, he was not entitled to an award of compensatory
damages.\footnote{91}

\footnote{84} Id.
\footnote{85} Id. at page 3.
\footnote{86} Id.
\footnote{87} Id. at page 1.
\footnote{88} Id. at page 3.
\footnote{89} Id.
\footnote{90} Id.
\footnote{91} Id.
In *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (11th Cir. 2008), the School District was ordered to reimburse the expense of a dyslexic student’s private school placement where the student had been misdiagnosed by the School District and placed in a restrictive environment for six years. 92 The Court stated that under the IDEA, district courts have broad discretion awarding relief, and must take into account equitable considerations in so doing. 93 The School District argued that placement in a public school would be appropriate, and argued that the circuit courts award of placement in a private school was contrary to the Act’s preference. 94 The Court ruled against the district, holding that despite the Act’s “structural preference in favor of providing special education in public schools, when a public school fails to provide an adequate education in a timely manner a placement in a private school may be appropriate.” 95

**Abuse of Disabled Students by Behaviorally Challenged Students**

Children with developmental disorders often face a risk of physical and psychological harm when exposed to children with behavioral problems in the school setting. The two groups of students may come into contact in the regular school setting or in alternative schools where they are not segregated from one another. In such cases, the disabled children become easy targets for abuse. Students with learning disabilities are highly likely to be victimized because they often lack social awareness that makes them susceptible to bullying. 97 IDEA’s mainstreaming preference may contribute to the exposure the two groups of students have with one another. The parents of abused

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92 “Restrictive environment” means a setting that does not provide a FAPE.  
93 Id. at 1285.  
94 Id.  
95 Id.  
97 Id.
children have attempted to bring claims against school districts under various federal statutes, including Section 1983 of the U.S. Code and the IDEA. Because the IDEA does not provide for money damages alone, plaintiffs have sought monetary awards by alleging violations of the IDEA as a basis for Section 1983 actions.98

In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, (1989), the Supreme Court ruled that the state has “no constitutional duty to protect a child unless, by affirmative exercise of its power, it takes the child into full-time physical custody, thereby creating a ‘special relationship’ between the child and the state.” The case involved a child who was brutally beaten while in the custody of his father, and who was allowed to remain with his father despite knowledge of abuse by county social workers.99 DeShaney and subsequent appellate rulings have ruled against expanding the number of possible actions against the state for students victimized by other students while on school grounds.100

In D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992), the plaintiff was a hearing impaired, inarticulate female student who was sexually assaulted over a period of months by multiple behaviorally challenged students on school grounds.101 Plaintiff alleged that on one occasion, an administrator was informed of an attempted sexual assault but took no action to intervene.102 Plaintiff brought action pursuant to Section 1983 of the U.S. Code, claiming that the District acted

99 Id. at 189; Id. at 999.
100 Kathleen Conn, Supra note 95, at 789.
101 Plaintiffs alleged at trial court that behaviorally challenged students should not have been in the same classroom with the special needs students: D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 1991 WL 14082 at 14 (E.D.Pa. 1991).
102 972 F.2d at 1366.
as state actor in the assaults which resulted in a denial of the student’s constitutional rights.\textsuperscript{103}

The Court ruled that “no special relationship” existed between the students and the school officials that would create a deprivation of constitutional rights under Section 1983.\textsuperscript{104} The Trial Court stated that The Education of All Handicapped Act, the predecessor statute to the IDEA, did not provide Plaintiff with a cause of action because the Plaintiff did not allege a denial of public education or special classes.\textsuperscript{105}

In \textit{Hill v. Bradley County Bd. of Educ.}, 2007 WL 4124495 (E.D.Tenn., 2007.), a bipolar, schizophrenic high school student, Rocky, died after jumping out of the window of a moving a school bus. Although the District had a transportation program for special needs students, Rocky had been riding the bus with the non-disabled children.\textsuperscript{106} The District was also aware of student-harassment of Rocky but took no meaningful preventative action.\textsuperscript{107} Prior to jumping from the bus, several students encouraged him by yelling: “Jump! You won’t jump!”\textsuperscript{108}

The Plaintiffs sought damages from the District under Section 1983, claiming the District violated numerous federal rights, including those provided by the IDEA.\textsuperscript{109} Plaintiffs alleged several violations of the IDEA, including the failure to intervene and stop other students from harassing and bullying Rocky, punishing him like a regular student, and the failure to provide him an appropriate transportation plan.\textsuperscript{110}

\begin{flushleft}
\textsuperscript{103} Id. \\
\textsuperscript{104} Id. at 1369-1371. \\
\textsuperscript{106} Id. at 3. \\
\textsuperscript{107} Id. at 9. \\
\textsuperscript{108} Id. at 1. \\
\textsuperscript{109} Id. at 10, and at 13. \\
\textsuperscript{110} Id. at 13. 
\end{flushleft}
The Court explained that in order succeed under Section 1983, a plaintiff must show deprivation “of a right, privilege, or immunity secured to him by the United States Constitution or other federal law and that the defendants caused the deprivation while they were acting under color of state law.”\textsuperscript{111} Additionally, the plaintiff must show that the deprivation is the result of a policy or custom on the part of the governmental entity.\textsuperscript{112} Because there was no evidence that the District’s actions were pursuant to a policy or custom, the Court denied the plaintiff’s Section 1983 claim.\textsuperscript{113} The Court reasoned that the Plaintiffs presented evidence of only two other students who the District failed to properly evaluate under the IDEA.\textsuperscript{114}

In \textit{Emily Z. v. Mt. Lebanon School Dist.}, 2007 WL 3174027 (W.D.Pa., 2007), a student with a non-verbal learning disability was physically and verbally abused by other students while at school. On one occasion, Emily was choked and slammed against the wall of a coatroom by another student. Emily’s IEP was developed to provide a behavior support plan to help prevent and help her cope with bullying.\textsuperscript{115} The School assigned a personal care assistant to Emily’s classroom, and a guidance counselor gave classroom lessons regarding behavior, feelings, and acceptance.\textsuperscript{116} Despite the actions by the District, the parents requested a due process hearing claiming that the IEP had not been implemented properly, and Emily was being denied a FAPE.\textsuperscript{117}

At the administrative level, the District was found to have taken appropriate steps to remedy the bullying and provided Emily, who had made significant academic progress

\textsuperscript{111} Id. at 10.  
\textsuperscript{112} Id. at 11.  
\textsuperscript{113} Id. at 14.  
\textsuperscript{114} Id. at 14.  
\textsuperscript{115} Id.  
\textsuperscript{116} Id.  
\textsuperscript{117} Id.
under the challenged IEPs, with a FAPE. The parents filed an action at the district court level claiming that Emily was denied a FAPE and requested compensatory education. The Judge upheld the hearing officer’s finding that a FAPE was provided. The Judge explained that there was extensive evidence showing that the school district was not indifferent to reports of Emily’s bullying. The District had a guidance counselor provide the class with lessons on social skills, provided an aide to help Emily interact with her peers at the playground and during lunch, and her IEP was modified in a timely manner.

In Smith v. Guilford Bd. of Educ., 226 Fed.Appx. 58 (2nd Cir. 2007), the Plaintiff, Jeremy, was a student suffering from Attention Deficit Hyperactivity Disorder who was unusually small for his age. Jeremy alleged that the School District acquiesced to his persistent harassment and bullying by his classmates, which he claimed forced him to transfer from his high school and attend a school in another town, and therefore violated his due process rights and denied his right to a FAPE under the IDEA. The Court dismissed his substantive due process claim, explaining that an education is not a substantive fundamental right provided under the fourteenth amendment.

Jeremy also claimed that the Board of Education deprived him of procedural due process by unfairly taking away his state right to a public education. The Court stated that such a claim “can lie where a plaintiff is deprived of a property interest without due

\[\text{\footnotesize 118 Id.} \]
\[\text{\footnotesize 119 Id at 2.} \]
\[\text{\footnotesize 120 Id. at 3.} \]
\[\text{\footnotesize 121 Id.} \]
\[\text{\footnotesize 122 Id.} \]
\[\text{\footnotesize 123 226 Fed. Appx. at 58.} \]
\[\text{\footnotesize 124 Id. at 61.} \]
\[\text{\footnotesize 125 Id. at 62.} \]
Property interests can be created “by existing rules or understandings that stem from an independent source such as state law.”127 In order for a benefit to qualify as a property interest, the individual claiming it must have a “legitimate claim of entitlement” to the benefit, rather than a mere “unilateral expectation of it.”128 In order to determine whether a plaintiff has a legitimate claim to a benefit, “courts look to the statutes and regulations governing the distribution of benefits.”129

The plaintiffs claimed that the Board of Education deprived Jeremy of his state right to a public education by forcing him to withdraw from his high school in favor of a specialized program.130 The Appellate Court dismissed his claim, ruling that the complaint did not allege a denial of a property interest in a FAPE.131 The Court upheld his IDEA claim, remanding it to the district court for review.132

Conclusion

The IDEA has constitutional, federal, state, and administrative law aspects. The Spending Clause of the Federal Constitution is implicated because states are required to follow the IDEA in order to receive federal funds under the Act. The Act’s procedural safeguards require use of states administrative law processes in order to comply with the Act’s procedural aspects.

It is a challenge to provide each eligible child with a specialized education program that fits his or her particular challenges. This challenge is enhanced by the complexity of Autism Spectrum Disorder. However, a federal law requiring states to

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126 Id.
127 Id.
128 Id. Citing: Handberry, 436 F.3d at 70 (quoting Roth, 408 U.S. at 577, 92 S.Ct. 2701).
130 Id. at 63.
131 Id.
132 Id. at 65.
provide all disabled children with a FAPE is a mark of a progressive and ambitious society.

It is alarming that children with special needs have such limited means of seeking relief where they are brutalized by their non-disabled peers while under the supposed watchful eye of school officials. The IDEA does not provide for monetary damages and The Supreme Court’s ruling in Deshaney has made it very difficult for plaintiffs to hold school districts liable under Section 1983.133 Additionally, a plaintiff proceeding under the IDEA may not even be entitled to compensatory education unless they may prove that the bullying was the result of a procedural or substantive violation of the Act.

Although some states have passed “anti-bullying” legislation, often as a response to specific horrifying cases of bullying against an individual, such legislation does not provide for legal remedies against school districts where most of the bullying may be taking place.134 Legislation is needed to hold school districts accountable for persistent abuse received by students with special needs by their non-disabled peers while on school grounds. School districts would be required to train their employees to be more vigilant in supervising the conduct of their students, including those with special needs. Such legislation would likely result in fewer tragedies involving disabled children bullied by other children, since lawsuit-minded school districts would take enormous precautions to avoid litigation.

Most civil actions under the IDEA occur because school officials and parents cannot agree on a child’s IEP. During the IEP process school officials may be inclined to

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133 DeShaney, Supra note 99, at 189; at 1000.
give in to the demands of a parent out of fear of litigation. This is not in the best interest of the child. IEP teams are usually composed of mental health professionals and educators who are in a better position to decide what will provide the child with a FAPE. Additionally, in such situations parents may be emotionally volatile and are often unfamiliar with the intricacies of educational and therapeutic concepts of an IEP. While the IDEA mandates parental involvement in the process, it does not require that a school district bend to a parent’s every demand. 135 Thus, a balance must be struck to protect the interests of the child.

135 K.S. ex. rel., Supra, note 46 at 1007.