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Educational Policy Analysis: A Free and Appropriate Public Education in the Least Restrictive Environment

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Introduction

Note: I favor "she" when writing about any teacher and "he" as the pronoun for any Special Education (SpEd) student. My rationale is that these pronoun choices when applied to the two populations concerned are gender-accurate well more than half of the time.

Following a thorough definition of a "free, appropriate public education" (FAPE) in the "least restrictive environment" (LRE), background on how this policy was born will be provided. Those critical to FAPE in the LRE—from the students themselves to the taxpayers supporting them—will be covered next. I will then detail the development, implementation, and everyday use of the policy, followed by a discussion of the policy's effects on educational organizations and individuals. These parts use a lot of the bills passed and the case law resulting from them to highlight the winners and losers at FAPE in the LRE. At the close of each subsection, tie ins to the four-dimensional framework will be made as a way of wrapping up that subsection and linking it to broader educational policy development and implementation issues. This policy analysis closes with some discussion of the No Child Left Behind Act of 2001 as the primary policy in conflict with FAPE in the LRE for SpEd students.

Definitions

What is a "free, appropriate public education" (FAPE) in the "least restrictive environment"? Before getting to the latter description of "least restrictive environment" (LRE), with the reader's indulgence I want to track down a thorough definition of FAPE first, fully detailing all of the supplemental

definitions this term makes necessary. These definitions are further expanded in Appendix A. Section 602(8)(a-d) of the Individuals with Disabilities Education Act reauthorization of 1997 (IDEA 97) says that FAPE refers to special education and related services that have been provided at public expense and under public supervision. It applies to preschool through secondary school education that allows a SpEd student—regardless of his or her disabilities—to access to the same educational opportunities available to nondisabled peers.

IDEA 97 defines publicly available "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of the child with a disability, including instruction conducted in the classroom. . .and in other settings" [IDEA 97, §602(25)]. The "other settings" addition is no small matter, applied as it is locally to everything from subjects such as Art and Music, to extracurricular activities. NICHCY, the National Information Center for Handicapped Children and Youth (1997), describes "appropriate" education as having any special education students who are capable of participating in general education (GenEd) do so, with or without modifications, to the maximum extent. NICHCY further defines appropriate evaluation as gathering accurate information about students' strengths and needs. The maximum extent of GenEd that is appropriate is based mainly on what the Individual Educational Program (IEP) planning team describes as right for the student (CASE and PAI, 2003). However, it also depends on the situation and is often decided, unfortunately, by case law (Kraft, 2003).

"Appropriate progress" (Wright & Wright, 2002, p. 319) was defined by legal precedent in the *Rowley* case of 1982. Even as the U. S. Supreme Court admitted that defining "meaningful" and "appropriate" education were daunting tasks (Wright & Wright, p. 319), they also decided that receiving specialized instruction and being promoted from grade to grade year to year did not

necessarily make the education appropriate. Siegel (2003) adds that the *Rowley* case clarified that an educational benefit produces progress, avoids regression, and provides an educational advancement that is "more than trivial" (p. 1). For special education students, the gain does not have to be one year for each year of schooling, but it cannot be "insignificant" either (Siegel, p. 1). The yearly gain and the appropriateness of the education need to be based on the child's potential, or at least based on how peers with the same disability or disability level tend to progress. (More on the chronology of laws impacting FAPE in the LRE is at Appendix B. Key case law is described in greater detail at Appendix C.)

Gorn (1997) adds that the right to receive FAPE may be waived, but the right to an appropriate education cannot be. By this she means that parents can waive procedural safeguards and decide to enroll their children in a private school, or even to home-school them. Gorn also clarifies that the "free" education means only without direct charge to the parents. Obviously, part of what all taxpayers fund (whether or not they are SpEd parents) is public Special Education. The Office of Civil Rights (1997) further clarifies "free" to say that if the local school system cannot provide a program, the system (not the family) must pay to enroll the child in an appropriate private placement.

Wisconsin's policy (2000) clarifies that what the child should be learning and where he should be learning it are separate decisions. Taken together, these two considerations make up the least restrictive environment (LRE). Kraft (2003) adds that Maryland's LRE policy acknowledges that while the student's level of disability does not matter for right-to-appropriate-education issues, if the student is so behaviorally disruptive that they disturb the education of others then a more segregated placement is appropriate. New York state's LRE policy (1998) covers the same ground, though not so pointedly. This

policy holds that providing for the SpEd student's needs is considered first, then providing for their placement with students without disabilities is factored in, followed by providing an education as close as possible to the student's home.

Depending on what New York means by considering the needs of the SpEd student first, they could be in violation of federal LRE laws that stipulate school systems have to start with a placement that is regular, general education in the home district school to the greatest extent possible, then back away from this and toward more segregated environments only as is appropriate (decided student by student) (Gorn, 1997). Local policies supply conflicting information on whether the child must be placed in the general education environment and be unsuccessful there before being moved to a more restrictive placement, or allow for the assessment team to use its judgment about the appropriateness of the setting and opt for a more restrictive placement immediately (New Jersey LRE Policy, 2003). They are consistent, however, in stating that the placement and the services offered have to approximate the general education grade levels and curriculum (Siegel, 2003; NICHCY, 1997).

The LRE Coalition (2001) describes the least restrictive environment as the educational setting where children with disabilities can receive FAPE, but are taught with nondisabled peers to the maximum extent appropriate. By maximum extent appropriate, the Individuals with Disabilities Education Act of 1997 means that separation from the general school population occurs only when the "nature and severity of the disability" is such that education in regular classroom settings cannot be achieved satisfactorily, even with supplemental aids and services to the SpEd student (LRE Coalition, p. 2). "Cannot be achieved" means that there is no substantive educational progress for the SpEd student, or for the other students in the class because of the SpEd student.

While LRE is a setting or placement, SpEd itself is a set of services.

However, the continuum of SpEd services is a spectrum of options, not an *ala carte* menu. The point is individualization, tailoring the education to the student's needs. Lauer and Bright (1990) shed some light on the distinctions among service options on this continuum. "Integration" usually means only that the SpEd students are in the same building as GenEd students, making interaction possible. SpEd students thought of as having an "inclusive" schedule are those in many GenEd classes (or in regular education for many hours each day), but assigned to a SpEd teacher. "Mainstreamed" students are mostly GenEd, but may be pulled out for limited Speech or other services (Lauer & Bright, p. 28). Another way to think of it is that inclusion is like mainstreaming, but with tighter, closer supports (LRE Coalition, 2001). Lauer and Bright was written thirteen years ago. Since then "inclusion" tends to be used for both mainstream and inclusive placements, meaning the placement of SpEd students in GenEd classrooms. The term "reverse mainstreaming" is still used, however, although not widely. This refers to bringing nonSpEd students to an isolated or SpEd-only site, such as a hospital or institution. The CASE and PAI (2003) article did not view the similar idea of bringing the Beta Club or Student Council representatives into the self-contained SpEd class, calling this "artificial integration" (p. 2). The bottom line is that with inclusion or mainstreaming, the child could by all appearances be GenEd, only he has an IEP and a SpEd case manager.

Setting the Stage for the Policy

As recently as 1972, when there were 8 million children with disabilities in the United States, only slightly more than 4 million were in the nation's public schools (ERIC/CEC Clearinghouse, 2003). Private schools accounted for about a million of these students, but more than 3 million stayed at home or in institutions. Making matters worse was that half of those in school were not

receiving an appropriate education as schools either did evaluations without parental consent (ERIC/CEC Clearinghouse) or provided no services beyond a place to be (NICHCY, 1997). Lawyer Reed Martin echoes this sentiment on his website (reedmartin.com, 2003), noting that historically, being in a special education class meant lower expectations.

Fowler (2004) points out that although federal laws concerning special education were limited in the early 1970s, individual states initiated 899 bills on the rights of handicapped children and more than 200 of these became state laws. While these laws were being enacted, the civil rights movement tested the U. S. Constitution's promise of equal protection and due process applying to all citizens (Lauer and Bright, 1990). For adults with mental disabilities, institutionalization went from commonplace to anathema. Meanwhile medical and technological advances made correcting for some disabilities not much different from wearing glasses.

The Texas School for the Blind and Visually Impaired (1999) website acknowledges that even now not all processes are perfect and smooth. Students are still wrongly placed in unduly restrictive environments and students who should have a more restrictive environment are still wrongly placed in general education classes. Placements are still decided unilaterally, before the educational team meets to formally weight all factors and decide. However, local, state, and federal policies are in place now to mitigate these instances and provide redress for any harm done. For example, the New York state policy on least restrictive environment (1998) starts with the belief that SpEd and related services are offered "in addition to" the GenEd curriculum, "not separate from it" (p. 2). The Nebraska Policy on Least Restrictive Environment (2003) adds that LRE is not related to funding issues; that is, a school system cannot refuse a service that the IEP team deems necessary merely because the system does not

have the money. (The detailed list of IDEA-qualifying disabilities is at Appendix D.)

What Triggered Creation of FAPE in the LRE

Gorn (1997) reminds us that the right to a FAPE in the LRE is the student's right, not the schools' or even the parents'. Of course, the case law is parent-heavy because K-12 students are almost all minors. Gorn also reminds us that case law to date has defined "gain" as more than *de minimis*: it has to be measurable, tangible (p. 8). Even so, "adequate" has been interpreted as meeting the student's needs, not necessarily providing the best education possible, only "an equal educational opportunity" to that of students without disabilities (Wright & Wright, 2002, p. 314). Progress observed in school settings only is good enough to meet the "gain" requirement. These gains do not necessarily have to carry over to the student's out-of-school settings.

The Normative Dimension

American society's values and the goals of the U. S. Constitution are clear in this attempt at FAPE in the LRE for all. The belief in public education not only assumes that access to educational opportunity for all is the government's responsibility, it hints at an ideology that such education matters because it has a lasting impact and value for the individual educated and the government that makes such education available.

Key Actors for This Policy

These are the main roles involved in FAPE in the LRE:

- IEP Teams
  - Students (birth to 22 years old)
  - Parents
  - SpEd Teachers
  - GenEd Teachers
  - Related Service Providers
  - School Nurses
- School Administrators

    - Local Educational Agencies (LEAs), that is school systems
    - State Educational Agencies (SEAs), that is state education departments
- Interest/Advocacy Groups (Teacher unions, Parent advocates)
- Lawyers (for parents/for school systems)
- Taxpayers

The individual members of the child's educational planning team constitute the first set of key actors in FAPE in the LRE policy, especially implementation and use of the policy. The IEP team—which must include the child once he or she is 14 and can include them earlier—is an obvious set of players. In its "common translation" of the LRE legal requirements, the PACER Center (2000) observes that the IEP team must start with the thought that all children's education starts with their home (that is, neighborhood or geographically closest) public school and the general education classrooms in that school. To put it another way (as the Nebraska Policy on LRE [2003] does), one purpose of the IEP is to document the time the student does *not* spend in general education. The IEP team must therefore ask: "What can we provide so this child can stay in the regular education classroom" (p. 1). The school is then "required to make the appropriate options available, based on the child's individual needs and the services required to meet those needs" (PACER, p. 1). To this Wright and Wright (2002) add that the services needed are those required to ensure that the child benefits from the education received. Many states have broadened the use of LRE beyond the services needed for educational benefit, adding supports and interventions for the student's nonacademic or extracurricular involvement in the life of the school as well (Texas School for the Blind and Visually impaired, 1999).

Conversely, the Wisconsin LRE Policy (2000) highlights one limitation in the laws: districts without preschool programs do not have to provide LRE to SpEd students of preschool age. The New York Policy on LRE (1998) further

clarifies: Part H of IDEA, Infants and Toddlers Programs, was fully phased in by 1991 with goals of reducing Special Education costs and reducing costs for institutionalization by providing early intervention. Special Education for 3 to 5 year olds became a requirement during the 1991-1992 school year (Lauer & Bright, 1990), and education of birth to 3 year olds as well, where applicable. Transition planning for 2 year olds within 90 days of turning 3 became a requirement at this time (NICHCY, 1997).

Lauer and Bright (1990) acknowledge that early intervention has a great impact on improving school careers over the long term, especially for students at risk for developmental delays. In addition to the transition planning mentioned, therefore, the authors note that the law also requires flexible, "sufficient" funding, transportation, research on "successful practices," and provision of training to parents and staff (p. 10). Since a 1983 study by Brinker indicated a positive correlation between the degree of interaction with nondisabled peers and social gains for disabled students, the social benefits of inclusive education have been gaining influence (Lauer & Bright). Although the academic benefits are still the primary consideration, Brinker's work provided a strong case for ending the practice of having older SpEd students in primary schools. The thinking early on was that the mental age would be on par, but it became obvious later that the chronological age has to be factored in as well.

An even tougher attitudinal change has been the requirement since IDEA 97 that a GenEd teacher attend the IEP meeting. Coming as this rule did close on the heels of a SpEd "protection" that many in education view as too protective of SpEd, namely that if the behavior is a manifestation of the handicapping condition, then the discipline the SpEd student can receive is more limited than the punishment a GenEd student would get for a similar offense (Gorn, 1997). The rationale behind this rule is that no individual can be denied participation

in any program that receives federal assistance solely because of a disability (Office of Civil Rights on FAPE, 1999). Therefore, for a principal to suspend a student for more than ten days constitutes a change of placement that the student's IEP team did not agree to.

Another aspect of involving SpEd students in the general curriculum is the requirement that the state assess them annually, as it does for GenEd student. This was written into IDEA 97 and became effective with the 2000-20001 school year (NICHCY, 1997). For SpEd students working far below grade level, alternative assessment must be made available. For less than one percent of a district's population, portfolio assessment or testing on grade-appropriate content at the student's instructional reading level may be recommended by the IEP Team.

Although parents are just two members of the IEP team, their thoughts, and plans and wishes tend to carry the most weight since they are the only ones tracking the child all the way through his school career and because they have the most influence over placement decisions. As one of the procedural safeguards to ensure parental participation, the school system must document the ways and number of times attempts were made to get a parent to participate in the educational planning. In the rare event that the school wishes deliver special education services to a student without parental consent, the school can request a hearing to present its case in the presence of one or both parents and the hearing officer (Gorn, 1997). Generally what goes on at due process hearing is the opposite event, however; that is, the parents bringing forward the case that the school system is not providing adequate SpEd services. Also more often than not, the judgment concerning the appropriateness and benefit of an educational placement is an IEP team decision (PACER Center, 2000). In fact, the IEP team determines for each SpEd student individually the

appropriateness of special education, then the progress in that education, and the appropriateness of the evaluation as well (NICHCY, 1997), though some placement compromises are worked out in the courts (Kraft, 2003). For example, in a case that went all the way to the U. S. Supreme Court, the court upheld the state's ruling that the school district must reimburse the parents' tuition costs—even when the parents unilaterally withdraw their child—if they withdrew the student because the public school system was providing inappropriate service (Wright & Wright, 2002).

Another key actor in the placement process was hinted at in the paragraph above. The states, specifically the State Educational Agencies (SEAs), have considerable latitude in policy implementation. The federal government requires of each state a State Improvement Plan (SIP) to compete for federal funding. For states with staff shortages, 75% of the funding the SIP requires must go toward ensuring sufficient personnel are available "with the skills and knowledge necessary to meet the needs of children with disabilities" (NICHCY, 1997, p. 11). Tennessee works this by offering two 12-credit summer institutes for GenEd teachers to acquire a modified and/or comprehensive SpEd certification. The state pays the local university that conducts these hands on educational blocks of instruction. Following the course work and the Praxis examination, the teacher will have endorsements for 460 (teaching of higher functioning SpEd students) and/or 461 (teaching the lower functioning or self-contained SpEd students). For states still experiencing SpEd teacher shortages even with such programs available, IDEA 97 allows hiring of "the most qualified" people, with the understanding that they will become SpEd-qualified within three years (NICHCY, 1997, p. 10). Such waivers and exemptions are troublesome for all sides. The federal Department of Education has to track the numbers. The school system has to track the personnel to satisfy the state

requirements. It weakens the teacher unions to have less than fully qualified personnel in professional slots. And the individuals themselves have more schooling and testing to get through. The Consolidated System of Personnel Development (CSPD) also covers paraprofessional training, capacity building, and some grant funding for specific projects/time spans (NICHCY, 1997).

Screening, referral, early intervention, and public awareness are all part of the school system's role. The SpEd Department must work liaison with private schools, contracted services, etc. (Washington DC FAPE Policy, 2001). The LEA must attempt to track the number of SpEd students in private schools in their jurisdiction and get public participation each time they update their SpEd placement policies. In addition to the LEA, the individual school has to count as a key player in its own right. SpEd students' placements are impacted most at the building level. The school is the public agency that makes the appropriate education happen for SpEd students.

Other school personnel supporting SpEd get in the middle of union, parent, and school system legal battles as well. The services of school nurses, for example, have become a collective bargaining chip as litigation determines what teachers cannot or will not do concerning feeding tubes, catheters, etc. (Wright & Wright, 2002).

The Constituentive Dimension

The interactions of the key players falls under the constituentive dimension of policy administration. The numbers involved can be staggering: from the general, tax paying public, through the distinct groups (advocates for families; advocates for schools), to the SpEd student being served. It is a balancing act of support and neglect that impacts who benefits and who loses.

The Development, Implementation, and Use of FAPE in the LRE Policy

Each of these three components is addressed individually in this

subsection.

Development

Each state's obligation to make FAPE in the LRE available is tied to the federal mandate that each state make appropriate public education available to all children with disabilities (either birth or 3 to 21 years old) residing in that state, including those who have been suspended or expelled from school [IDEA 97, Section 612(a)(1)]. (Wording for either birth or three as the start is added because the early childhood amendments of IDEA 97 were contingent upon what that state offered to infants and toddlers without disabilities, NICHCY, 1997, p. 1). Even now, IDEA 97's call for continuing the educational plan of SpEd students suspended or expelled is considered favoritism more so than a legal requirement among those outside of SpEd (Department of Energy's 20th Annual Report to Congress on IDEA, 1998).

IDEA 97 was not the first mention of FAPE in the LRE of course, but the clearest articulation that SpEd is a set of services and LRE is a setting or placement (LRE Coalition, 2001). The first bill called "IDEA" in 1991 included language to guarantee that disabled children have equal opportunities to participate in all school-sponsored activities (IDEA, Section 300.553).

LRE is probably the clearer and more positive development. Gorn (1997) points out that FAPE offers the same kind of equal access to public education, but does not guarantee a certain level of academic achievement. Only the continuum of options is required and must start from the child's regular classroom in his neighborhood-assigned public school (reedmartin.com, 2003). Any placement other than this has to be explained and documented year to year (Lauer & Bright, 1990). This documentation includes not only IEP statements, but also "prior written notice" to the parents/primary care givers on the other placements considered and why these were rejected (CASE & PAI, 2003).

Implementation

The continuum from least restrictive to most restrictive—from generalized education to specialized education—was implemented to promote "natural" over "segregated" settings and also for the "normalizing effect" of being with nondisabled same-age peers (Brinker, 1983, as cited in Lauer & Bright, 1990, p. 5). This "normalizing" effect cuts both ways, of course, just as it does for gender in coeducational classrooms. At the time, however, the implementers meant only the effect that "normal" students would have on the disabled students. However, the broader point from an implementation perspective is that the default placement is general education and the onus for specialized education is to explain instances during which the child will not be included in the general curriculum and life of the school (LRE Coalition, 2001). Even a pull out resource placement is generally limited to a maximum of half of the student's school week (CASE & PAI, 2003).

The main change called for in the teaching methods used is a more collaborative approach than most autonomous teachers are accustomed to. The SpEd teacher must work closely with not only the GenEd teachers, but also with those providing special services such as hearing, vision, or speech education (LRE Coalition, 2001). When a child cannot be placed in a GenEd classroom, those crafting the educational plan have to consider modifications to the content or its delivery that might allow the child to participate before they decide to place the student in a more restrictive environment. Any needed training for these certified personnel and the paraprofessionals they supervise must be addressed in state and local school improvement plans as well (NICHCY, 1997). The coordination among SpEd services and between SpEd and GenEd services impacts not only the day to day teaching, but also the transition planning at all levels (intake for early childhood, school to school during the K to 12 years, and

school to work for students graduating or aging out). That these placement decisions must be readdressed annually helps avoid the assumption of continuing in a certain way just because it has always been that way (New Jersey Placement in LRE Policy, 2003).

Use

The child's placement needs to be fully described on the IEP prior to services commencing. Even for students in restrictive placements, their curriculum must be as grade appropriate as possible and mirror the general curriculum (NICHCY, 1997). Unusual wording from chapter 7 of the CASE and PAI (2003) report is that the IEP is "binding on the school district" (p. 23) without any mention of the child's obligations, or the family's. Another unusual aspect of this policy in use that the same report covers is that the school system has to try the least restrictive environment, with whatever supplemental aids and services may be appropriate, before deciding that this placement is not right for the child. In practice, if school systems know a child is too violent or too easily distracted, or to be a relentless escape artist, etc., then the IEP team tends to start with a more restrictive placement than the GenEd classroom and does not ever give it much thought again beyond documenting the placement annually on the IEP. Of course, if the parents request trying the GenEd placement, most school system will. This is one good reason for having a GenEd teacher attend the IEP meeting, although this was not a requirement until 1997. The GenEd teacher cannot refuse the child (officially anyway), and GenEd class time (by the hours or as a percentage of the week) has to be included on the IEP. The underlying point of the CASE and PAI report—that a child does not have to earn the right to be in GenEd, does not have to prove he deserves to be in there—is valid. At the same time, neither should the student have to fail first in the GenEd setting to earn more specialized help. On his website, lawyer Reed

Martin (2003) notes that if the school does decide that the child cannot be served in the GenEd setting, it has to supply prior written notice of the intent to change the placement within ten days of the IEP meeting (and before moving the student). One advocate has even drawn up an LRE worksheet to help the IEP team decide what times and activities should be inclusive for a student (http://www.kathyandcalvin.com/forms/lre.htm).

The bottom line for the District of Columbia Public Schools FAPE Policy (2001) is that the special and related services have to be appropriate for the developmental level of the student and meet his educational need. Lauer and Bright (1990) echo this sentiment in stating that the IEP has to be adapted to fit the need, not adjusted to fit the school's processes. The overall impact of this emphasis on GenEd for all can be seen in the New York Policy on LRE (1998)'s use of statewide statistics for the 1996-1997 school year that only 34% of the SpEd students are spending 60% or more of their day in the segregated setting. This same source also gives the national percentage for the 1994-1995 school year: SpEd students then were spending an average of only 22.5% of their day in separate classes. Following the IDEA 1997 reauthorization and No Child Left Behind these SpEd percentage are getting even smaller. Last year in Sevier County, less than 10% of the SpEd students spent more than 23 hours a week in SpEd settings and 74% spent less than 8 hours a week in SpEd (source: Sevier County Comprehensive Plan for Providing Special Education Services, 2003-2004). The bottom line for the Nebraska Policy on LRE (2003) is that every student should have access to any activity that is supposed to be for the student body.

The Structural Dimension

Of the ten questions Fowler (2004) poses to help us read "between the lines of educational policy" (p. 76), those having to do with the shifting costs

between the federal and state/local levels impact FAPE in the LRE most. (This point is more fully addressed in the next subsection.) Second most is that SpEd tends to impact the poor more so than the affluent. Although certain disabilities like autism and downs syndrome are spread proportionately across populations, emotional disturbance diagnoses and even more general developmental delays and learning disabilities tend toward the poor end of the school population. However, the veto/sabotage points that came up in class during our discussion of the structural dimension (October 28, 2003 class notes) are diminishing, not increasing. The public's and the GenEd school population's understanding of the need for SpEd services gets clearer each year. There are still parents who resist SpEd services for their children because they are thinking it will be like it was when they were in school, but a growing number see the value of individualized planning and instruction for their child.

The Effects of the Policy on Educational Organizations

As mention already, the SpEd laws enacted bound states, school systems, schools, and teachers, but not families or the disabled students themselves. For example, the IDEA 97 requirement that the IEP continue in force even after a SpEd student was suspended or expelled was viewed as going too far by many educational organizations. Even so, the IDEA 97 requirements to help SpEd students progress in the general curriculum and to explain when the child will not participate in GenEd were viewed positively (New York Policy on LRE, 1998). In fact, it is a federal requirement that states have in place a statewide policy on LRE (LRE Coalition, 2001).

With the addition of autism in 1980 and traumatic brain injury in 1991 as IDEA-covered disabilities (those with an educational impact), federal education laws seemed to be moving in a good direction (LRE Coalition, 2001). Added to related services for the vision impaired in 1997 was "orientation and mobility" as

an occupational therapy that the schools would fund (NICHCY 1997, p. 6). Where states and school systems began to have a problem with the federal mandates was not in doing the good works required, but in paying for them. Since 1991, the promised federal funding of IDEA was 40% but the U.S. government has never lived up to this well-intentioned goal. In the early years of P.L. 94-142, federal funding as a percentage of the total local school budget was in the single digits. Even now, it hovers at around half of what was promised.

At the same time, the Office of Civil Rights position on FAPE (1999) is that if a student is of age, resides in the public school's zone, that student cannot be denied a public education due to a disability no matter how severe. The New York policy on LRE (1998) adds that only when the nature and severity of the disability are such that the child could not receive a satisfactory general education, even with supplemental aids and services, can a separate, more restrictive environment be considered. The law does allow, however, that a student's disruption of other students' learning is justification for not placing the student in a GenEd setting (34 C.F.R. § 300.552). Even then, however, the student still retains the right to age-appropriate settings, with integrated programs to meet his individual needs (Lauer & Bright, 1990). With wording in the laws even broader than how it is being depicted here, it fell to case law to clarify "freedom from restraint" and equal services in segregated settings (Lauer & Bright, p. 4).

Often what is not covered by the education laws is taken up by Section 504 of the Rehabilitation Act of 1973. Section 504 prohibits discrimination based on handicapping condition and covers disabilities IDEA does not, such as diabetes and attention deficit disorder if these disabilities impact a "major life activity" (such as breathing, walking, seeing, etc.) "Learning" is considered a

"major life activity" as well (LRE Coalition, 2001). Section 504 is also broader than IDEA in that the former applies not only to agencies receiving federal funds, but also to those receiving any Department of Education support (Office of Civil Rights on FAPE, 1999). The Americans with Disabilities Act of 1990 is starting to function in this coverage gap as well, but for school situations, if IDEA applies it takes precedence (Gorn, 1997). Where the IDEA wording is more limited is that after it lists the disabilities that apply the law adds that it is only for students "who, by reason [of having this disability], need special education services" (LRE Coalition, p. 2). IDEA as fleshed out in court cases became even more restrictive, requiring that the FAPE in the LRE show an "educational benefit" for the student (LRE Coalition, p. 2).

The Technical Dimension

Considering that the federal government has poorly funded the SpEd requirements it has mandated since the 1970s, that the states have done as well as they have in implementing SpEd laws at the local level is impressive. At the state-wide level, oversight of the planning, implementation, and evaluation of SpEd services has been rolled into each state's version of what Tennessee calls the Continuous Improvement Monitoring Process (CIMP). CIMP is Tennessee's 3-year cycle of monitoring approximately fifty "indicators," statistics related to comparative GenEd and SpEd dropout rates and graduation rates, rates of inclusion for SpEd students, minority representation in learning disabled programs and in gifted programs, etc. (See the state's site, http://www.state.tn.us/education/speced/semonitor.htm, for more on the CIMP process).

The Effects of the Policy on Individuals

Where the organizational effects and individual ones merge is in the litigation resulting from FAPE in the LRE. Douvanis and Hulsey (2002) try to

clarify that LRE is not the right; inclusive placement is not even the right. Being educated with nondisabled peers is the right, and fulfillment of this right is decided individually.

In the case of *Amy Rowley v. the Board of Education of Hendrick Hudson School District* (New York) in 1982, Rowley's parents held that the goal of the Education of all Handicapped Children Act was to provide "equal opportunity" to a public education (Wright & Wright, 2002). Prior to the *Rowley* case, the precedent had been access to adequate, publicly supported education, not necessarily an education to any specific level. The *Rowley* case outcome was that special education does not mean the maximum education possible, but the most appropriate education for the student engaged in it (Wright & Wright). While this emphasis on the individual sounds excruciatingly specific, what is actually happening is that complex, rare, and unique placements have been dropping as U.S. school systems shift from home, private, institutional, and public special education emphasis to an emphasis on general education for all (Lauer & Bright, 1990).

Douvanis and Hulsey (2002) are the clearest at stating that even the original Public Law 94-142—the law that brought SpEd into its own—did not define "FAPE" or "LRE," or even use the word "mainstreaming;" resulting court cases did (p. 1). Of course, this clarification by case law is not particular to SpEd. Getting specific about how Congress meant what they wrote has always been the judiciary's job and the two sides do not come to court to argue their case until real people are involved in a real conflict. Not surprisingly, SpEd litigation even predates P. L. 94-142. In 1971/1972, the Pennsylvania Association of Retarded Citizens took the State of Pennsylvania to court for the institutional placement of those with mental retardation (CASE & PAI, 2003). The outcome of this case that had the most impact on SpEd was the ruling that "placement in

a regular public school class is preferable" (CASE & PAI, p. 5).

Later courts defined the particulars supporting why this is true. Sometimes single judges did. While "mainstreaming" was defined by an appeals court decision, "inclusion" was a judge-alone definition (Douvanis & Hulsey, 2002, p. 2). The *Rowley* case of 1982 was important for detailing what must be included in the annual Individual Education Plan and for clarifying that FAPE is individually determined (Wright & Wright, 2002). What this case left to later cases to work through was the notion of what an "appropriate" education is, how far the school system's must go to provide this "appropriate education," and if/how this differs from a "meaningful" education or the best possible education (Wright & Wright, p. 319).

The following year (1983), *Roncker v. Walter* took a step in this direction by asking the question: can what makes the segregated setting superior for the student be duplicated in a GenEd setting (with supplemental aids or services)? If so, then the more restrictive placement is inappropriate (Douvanis & Hulsey, 2002). Kraft (2003) calls this the "heart of the *Roncker* case" (p. 1). In this case, the point of clarification became "Is the student being mainstreamed to the maximum extent appropriate?" (Douvanis & Hulsey, p. 1). The 1988/1989 case of *Daniel R. R. v. the State Board of Education* was widely viewed as abandoning *Roncker* (Kraft) because in this case the Circuit Court found that if the child drains too much of the teacher's attention or requires that the curriculum be modified beyond recognition, then the GenEd placement is not appropriate. Even in the *Daniel* case, though, the court acknowledged that the nonacademic, social benefit of mixing with all students matters, but the academic side matters more (Kraft). How intrusive the amount of aids and services needed and added are matters, but getting the disabled child into GenEd settings to the maximum extent is always the goal (Kraft). How much a more restrictive placement allows

for this integration needs to be factored into the placement decision (Douvanis & Hulsey).

What school systems cannot do is decide on a more restrictive placement without considering the less restrictive options (Douvanis & Hulsey, 2002). The 1991 case of *Greer v. Rome* was decided in the student's favor because the Rome City School District started with placing a child in a consolidated developmental classroom (the most restrictive public school environment). The notion of a "continuum of options" resulted from *Rome v. Greer* (Douvanis & Hulsey, p. 2), what in earlier SpEd days was called the "cascade of services" (Reynolds & Birch, 1977, as cited in Lauer & Bright, 1990). Similarly, *Oberti v. Clementon* in 1993, began the shift away from the idea of "mainstreaming" toward the related practice, "inclusion" (Douvanis & Hulsey, p. 2). *Oberti* also initiated the three-pronged test of how appropriate the placement is (New Jersey Placement in LRE Policy, 2003, p. 1):

- To maximum extent, students with disabilities are educated with students without disabilities
- Students are separated from the general student population only when the nature/severity of the handicapping condition is such that education in the regular classroom cannot be satisfactorily achieved, with or without supplementary aids/services
- To the maximum extent appropriate, each child with a disability participates in nonacademic/extracurricular programs and activities (not just the former "has equal access to" these services)

While *McWhirt v. Williamson County Schools* in 1994 found that the educational needs should trump the placement needs (Kraft, 2003), the *Holland* case (also in 1994) finding that "academics is not the only measure of educational benefit" became the de facto placement standard (CASE & PAI, 2003, p. 5).

The *Carter* case in 1993 set the precedent for a situation that has resurfaced frequently in the intervening years: school system payment for

private placement. The *Carter* case went a step further, awarding the parents tuition reimbursement because the school system did not provide an appropriate placement. In the *Carter* case, the parents unilaterally decided to move their daughter to a private placement because they viewed her public school placement as "inadequate" (Office of Civil Rights on FAPE, 1999). The Supreme Court upheld the circuit court's opinion (agreeing with the parents) and the system was required to reimburse the family. The courts have sometimes ruled however that the public program was adequate, and in these cases the parents must pay the tuition if they decide to go private anyway. When the most severely disabled children are institutionalized at school-age, either the school system or the parents pay for this 24-hour-a-day care. Who is responsible for paying hinges on what is "adequate" or "appropriate" education.

Siegel (2003) believes "equal access" to public education has been the heart of the issue since the *Rowley* case in the early 1980s. The lesson New Jersey learned from their most-known case (*Oberti v. the Board of Education of Clementon,* 1993) is that for each SpEd student, the IEP team needs to compare the benefits of the GenEd placement with those of a more restrictive SpEd placement (New Jersey Placement in LRE Policy, 2003). This consideration must weigh the potential benefit against the harm for both the student and his classmates. The educational issues matter most, but the social and safety issues have to be factored in. As Kraft (2003) puts it, LRE is both an educational rights and a human rights issue. Douvanis and Hulsey (2002) add that disruptiveness alone is not reason enough to restrict a student's placement because inclusion in general education is a right, not a privilege. However, the *Light v. Parkway* case in 1994 held that for violent, dangerous, disruptive students, inclusion is not a right (Douvanis & Hulsey).

The *Holland* case in 1994 has been called the "high water mark of the

inclusion movement" (Douvanis & Hulsey, 2002, p. 2) because of the ruling in this case that the non-academic, social side of K to 12 school life matters. It was not until *Hartmann v. Loudoun* in 1997 (and possibly IDEA 97), that academic considerations were more heavily weighted (Douvanis & Hulsey). Also in 1997, the case of *Hudson v. Bloomfield Hills* set a unique precedent in deciding that the purpose of the schooling for the subject of the case (a very low functioning girl), was to give her the "life skills" needed to function independently in society. In other words, a life skills curriculum could trump the usual academic curriculum for some students (Douvanis & Hulsey, p. 2). But the most important ruling stemming from the *Holland* case was that the laws required only a "satisfactory education" from public schooling, not the best education possible in the regular classroom (CASE & PAI, 2003, p. 9).

Not fully resolved by the case law yet is what the law counts as the IEP team's consideration of a less restrictive placement before they decide on a more restrictive one. The Wisconsin Policy on LRE (2000) interprets this consideration as thinking about, not necessarily doing. That is, the student does not have to fail in the regular classroom before the school tries a more restrictive placement. The CASE and PAI guidance (2003) adds that accommodations and services added to help the child succeed in GenEd have to be real, not "token gestures" (p. 8). CASE and PAI also adds guidance that school systems should take as a warning. The system cannot deny services for administrative reasons. That is, a school cannot say is does not have a resource classroom; a district cannot say it does not have the funding. The SpEd programs and services offered have to be based on student need, not placements or money. The New York Policy on LRE (1998) puts the same view in a more positive way in stating that the two-fold purpose of SpEd in school reform is to improve educational results for all disabled students and integrate them with their nondisabled

peers. This is why the first placement is the student's neighborhood public school GenEd classroom and why straying from this placement needs to be justified at each more restrictive step. The CASE and PAI rights note that parents (as part of the IEP team and its most important members) cannot be excluded from placement decisions. Siegel (2003) notes that since passage of the first EHA in 1975 (P. L. 94-142), parents have been "full and equal participants" in development of their child's educational plan (p. 2). Indeed, most school systems consider the parents' say as half of the team's decision, but are clear to point out that fifty percent is not the same as fifty-one percent. So parents cannot be excluded, but neither can they require of the school system a specific service, program, or placement. Unfortunately, this side taking has kept the courts busy with SpEd placement policy. For example, many parents of children with autism demand of their school systems Applied Behavior Analysis, specifically the Lovaas method that is both one-to-one and time intensive. Since 1997, sixteen court cases have focused on this issue alone (Nelson & Huefner, 2003). Only five of these were decided in the parents'/student's favor because as long as a school system can show that it has an appropriate program in place (that the IEP team/parents agreed to) and that the child is progressing, the system will fair well in court if the teacher's documentation is in order.

Alternative or Competing Policies

Section 504 of the Rehabilitation Act of 1973, which covers disabilities not covered by IDEA 97, is the primary alternative policy. There was no competing legislation concerning FAPE in the LRE until No Child Left Behind was signed into law in January of 2002. NCLB appears to be in direct conflict with IDEA 97 (the most recent reauthorization of the Individuals with Disabilities Education Act) in a few key areas. IDEA was due for reauthorization in 2002 but has yet to come before the full U.S. Senate and part of the delay is that policy makers are

having to deconflict IDEA with NCLB. Many ill-advised practices are being floated for the next reauthorization, such as IEPs every three years (rather than every year) and a more general focus for the IEP (rather than the specific goals and benchmarks that are the meat of the IEP now), both as part of paperwork reduction. Another provision that could be weakened with the next reauthorization directly impacts FAPE in the LRE: there is talk of eliminating the current "stay put" provision that requires the school system to keep the student in the current placement while an incident is being investigated or a case is being litigated (*Legislative Monitor*, p. 1). To do so would allow schools to exclude SpEd students from a FAPE in the LRE for weeks or even months.

One of NCLB's key mandates (according to The Business Roundtable's website (2003)—that all major groups make adequate yearly progress toward a goal of being 100% proficient by 2014—is in direct conflict with the individualized descriptions of "meaningful" and "adequate" progress used earlier in this paper. Special education students are one of the "major groups" defined. The tougher NCLB requirement is that all children read at grade level by 2014. There are SpEd students who are not going to ever read, let alone at grade level, no matter what the intensity of instruction or how nice-sounding the program's name is. (Not only is "No Child Left Behind" disingenuous, it includes "Reading First" and "Even Start" literacy programs (Cooper, Fusarelli, & Randall, 2004, p. 298).

As mentioned earlier, assessment for all students has been required since the reauthorization of IDEA 97. However, IDEA 97 allows for alternative assessment (be portfolio or at the student's reading level) for the most severely disabled students. Tennessee has already had to change the reading level alternative this school year because the U.S. Department of Education considered Tennessee's method to be out of grade level testing causing all scores

to automatically be below proficient. The issue of whether a special education teacher needs to be highly qualified in SpEd, in a subject/content area (or both) remains to be settled as well. Requiring two years of college for teaching assistants or national Praxis testing (to check for at least high school level Math, Reading and English competency) is going to be an even tougher requirement to satisfy. It is difficult enough now to get high school graduates for a job that (in Sevier County) starts at $11,700.

Summary

A free appropriate public education in the least restrictive environment has been the right of all students since 1975. Guaranteeing this right has kept legislatures and courts busy ever since. Implementing this right has kept school systems similarly busy. With IDEA 97, the U. S. Congress seems to have reached its peak with support to the FAPE in the LRE requirement for SpEd students. The next reauthorization of IDEA, impacted as it is by budget considerations and No Child Left Behind, can only fare worse. However, the SpEd advocates who see this chipping away at SpEd rights as a return to the pre-1970 days need to let go of this Chicken Little model. The common sense of a free, appropriate public education for all students in the least restrictive environment is too cogent a force. It has and will continue to outlast the temporary insanity of factions on either side of the issue.

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