

AN INCREASINGLY UNEVEN PLAYING FIELD: SUPREME COURT DECISIONS AND IDEA 2004 CONCERNS

MURPHY AND SCHAFFER SHOULD BE REVERSED

The decisions in *Arlington C.S.D. v. Murphy* (2006) and *Schaffer v. Weast* (2005) seriously endanger the ability of parents to enforce the IDEA through due process hearings.¹

- In *Murphy*, the Court refused to consider Congress' clearly stated intent in 1986 that prevailing parents could recover expert fees.² Legislation is necessary to restore that intent.
- While school districts may rely on in-house experts (school psychologists, etc.) or use taxpayer dollars to hire outside experts, parents now have to pay thousands of dollars for their experts even when they prevail. Few parents can afford this expense, putting due process out of reach. As with the ADA and other civil rights laws, parents should be made whole and recover their expert fees when school districts violate the law.
- *Schaffer* worsens matters by requiring parents (who file most hearing requests) to prove that the program offered by the school district is not appropriate. The burden for parents is particularly heavy as hearing officers and judges defer to school personnel expertise. School districts should bear the burden because they have an affirmative obligation to provide FAPE. They also have vastly more resources to prove in a hearing that the IEP or placement they've given to parents meets the child's unique needs.

IDEA 2004: DUE PROCESS CONCERNS

([†]denotes problems caused by IDEA 2004 that may be potential subjects for a GAO study.)

2 year Statute of Limitations Cuts Off Remedy For Ongoing Violations.[†]

- School districts have an affirmative obligation to identify children. The 2-year Statute of Limitations effectively shifts this obligation to parents are not trained experts.
- School districts that illegally deny FAPE to children for several years should not be allowed to use the 2-year statute of limitations to escape liability for their failure to fulfill their duties to identify and provide FAPE to children with disabilities.
- The Senate Report accompanying S. 1248 stated that the 2-year SoL is not intended to bar

¹ As you know, in 2001 the National Commission on Disability found that parents are the primary enforcers of IDEA. Nevertheless, hearings are rare; in 2004-05, the median number of hearings per state was 1.4 per 10,000 students with disabilities. In 2005-06, 35 states had 10 or fewer hearings.

² As Justice Breyer wrote, "By disregarding a clear statement in a legislative report. . . the majority has reached a result no Member of Congress expected or overtly desired. It has adopted an interpretation that undercuts, rather than furthers, the statute's purpose, a 'free' and 'appropriate' public education for 'all' children with disabilities."

relief for continuing violations lasting longer, 108-185 at 40, but hearing officers ignore this intent and often impose a strict 2-year SoL.

School Districts Ignore Prior Written Notice (PWN) Requirements.¹

- School districts must provide PWN to explain their decision when they decline to provide a service or alter the child's IEP or provision of FAPE.
- COPAA has received multiple complaints about inadequate or nonexistent PWN.
- School districts suffer little consequence for this because hearing officers and judges view it as a procedural violation not severe enough to trigger a denial of FAPE under IDEA 2004's new substantive/procedural distinction.

DP Complaints Wrongfully Deemed Insufficient, Forcing Parents to Refile.¹

- Hearing officers are dismissing parents' due process complaints for not being highly-specific, under new dismissal for insufficiency procedures. But IDEA 2004 did not change the elements required in DP complaints or impose specificity requirements. These dismissals contravene Congress' intent that complaints need not "reach the level of specificity and detail of a pleading or complaint filed in a court of law." S. Rep. 108-185 at 34. The dismissal starts all timelines over again, including the resolution session, further delaying justice.

No Remedy if School District Doesn't Respond to Parents' DP Complaint.¹

- School districts repeatedly ignore IDEA 2004's requirement to file adequate responses to Due Process Complaints.
- Virtually all hearing officers have denied relief because IDEA 2004 does not expressly impose penalties for this. The regulations also note a lack of remedy. 71 Fed. Reg. 46699. By contrast, Federal Rule of Civil Procedure 55 allows judges to grant default judgments in civil cases. Without responses, parents cannot adequately prepare for hearings.

Impartial, Fair Mediation Should Replace Resolution Sessions.¹

- Resolution sessions are used to delay hearings rather than resolve cases.
- Only 16% of COPAA members surveyed in 2006 found Resolution Sessions effective
- Reasons Resolution Sessions were deemed ineffective:
 - school district uses the 30 days as a waiting period, making no real attempt at resolution (54%);
 - districts rarely go beyond the solution proposed at final IEP meeting (51%);
 - sessions not run by impartial, trained mediators (46%),
 - absence of required personnel at the meetings (41%);
 - hostile intimidating environments for parents (32.3%),
 - sessions used to discover parents' evidence rather than to work on a real solution (42.4%).
- Mediation, with an impartial mediator, would better serve parents and school districts. The proposed IDEA 2004 had allowed parents to choose mediation over resolution, but this was eliminated in Conference. We respectfully request that it be restored.

Stay-put from Part C to Part B Eliminated by DoED regulations.

- IDEA 2004 made no change to the general stay-put provision, 615(j). In *Pardini v.*

Allegheny Intermediate Unit, 420 F.3d 181 (3d Cir. 2005), the Court held that stay-put applied to young children moving from Part C to Part B.

- But in enacting final regulations in 2006, the Department of Education decreed that stay-put did not apply to these children, 34 C.F.R. §300.518. The regulation appears to contravene 607(a), as it is not “necessary to ensure that there is compliance with the specific requirements of” IDEA. Moreover, it was not among the proposed regulations and was not a “logical outgrowth” of them. It appears inappropriate in that respect, as well.

IEP AND ELIGIBILITY ISSUES

Parents do not receive copies of their IEPs, or receive altered ones.

- Without IEPs, parents cannot be equal partners in process. We have multiple reports that school districts inordinately delay giving parents IEPs, or in some cases, do not provide them at all, and that at times, after the delay, the IEP is not what the parents agreed to. IDEA should require that parents receive IEPs at the meeting, absent exigent circumstances.
- When an IEP is amended, IDEA 2004 §614(d)(3)(F) requires the school district to provide a copy only if the parent affirmatively requests it. Most parents are unaware of this right and this should be removed from the statute.

IDEA 2006 regulations excluding Cochlear Implant Mapping are unfounded.

- The 2006 regulation, 34 C.F.R. § 300.34(b), excludes mapping of cochlear implants as a related service under IDEA. There is no statutory basis for this exclusion, and it appears to contravene IDEA § 607(a), because it is not necessary to ensure compliance with IDEA’s specific requirements, and §607(b) because it is contrary to IDEA.
- When S. 1248 was initially proposed, it excluded cochlear implant mapping. But the Senate eliminated this provision from the final bill and it was not in the final law. Nonetheless, the 2006 regulations excluded mapping, which is inappropriate against this legislative history specifically eliminating the exclusion. Moreover, this was despite a letter from Senator Gregg, then Chair of the Senate Committee, to the contrary.

Response to Intervention is used to delay if not deny children access to needed special education service and IDEA’s protections.

- While RTI may serve useful purposes and allow interventions without placing children in special education, COPAA has received several complaints that RTI is used to deny children access to needed special education service and IDEA’s protections. Some attorneys report children being sent to alternative schools rather than receiving IDEA services. Others report that school districts have refused to evaluate children pending the outcome of a lengthy RTI period, even when there is a clear evidence for suspecting the child has a disability. At times, the failure of school district personnel to submit RTI data is used to refuse to evaluate a child, so the child bears the penalty for school personnel inaction.
- While parents can request IDEA evaluations, school districts may deny them; the federal regulations do not impose any limits or time restrictions on RTI. 71 Fed. Reg. 46658.

Short-term Objectives and Progress Reporting.

- IDEA 2004 eliminated requirements that IEPs contain short-term objectives and parents

receive progress reports at least as often as parents of non-disabled children do.

- But, short-term objectives were part of IDEA since 1975. STOs and regular reporting are necessary to measure progress toward annual goals and allow teachers and parents to quickly identify child's needs and whether he/she is progressing. Waiting until the end of a year is too long in the educational life of a child, who moves to another grade.
- We have also been informed that even in states retaining short-term objectives, some school districts only report on progress for the annual goal, making it more difficult to track the child's progress.
- While STOs are required for children taking alternative assessments, alternative assessments are not required in preschool through 2nd grade, leaving these children without protection.

DISCIPLINE UNDER IDEA 2004

- We have received complaints that school districts are removing more children to alternative settings based on the claim that their misconduct was not a manifestation of their disability. IDEA 2004 eliminated the need to consider, in a manifestation determination, whether the IEP was appropriate and whether the IEP's services and supports had been provided. In its place, the team was permitted to find that the child's conduct was a manifestation if it was a "direct result" of the LEA's "failure to implement the IEP."³ This allows children to be removed, even when they didn't receive FAPE or had inadequate IEPs that did not address their behavioral issues. LEAs have incentives to avoid finding conduct a "direct result" of the failure to implement the IEP as that would expose them to greater IDEA liability for a FAPE violation.
- IDEA 2004 sharply limited the number of situations in which a school district is deemed to have knowledge of a child's disability when the child has not yet been identified.
 - Because of ambiguity in 615(k)(5)(C), if a school district evaluated a child many years ago and found him/her ineligible, this defeats any claim years later that the school district should be deemed to know of the disability.
 - The school district can avoid being deemed to know of the disability if it ignored its child find obligations. IDEA 2004 removed language that a district was deemed to have knowledge if the child's behavior or performance demonstrated the need for special education.
 - Even if school district personnel are actually aware of a disability, the district may avoid being deemed to have knowledge under 615(k)(5)'s very specific wording.
- A series of short-term removals exceeding 10 school days total is change in placement if it is a pattern, under the regulations. Under the old regulations, a pattern was determined from such factors as the length and proximity of removals. The IDEA 2006 regulations, 34 C.F.R. 300.536, decreed that there is no pattern unless the child's behavior is "substantially similar" to behavior that caused previous removals. There is no basis for this requirement in the IDEA 2004 changes. It is also ambiguous. It is too easy to find that behaviors are dissimilar, even if they are all manifestations of the disability.

³ 615(k) has a second prong designating conduct as a manifestation when the conduct "was caused by, or had a direct and substantial relationship to, the child's disability."

CONCLUSION

The *Murphy* and *Schaffer* cases pose particular risks to the ability of parents to exercise their due process rights. We are also concerned that portions of IDEA 2004, or the regulations adopted as a result, have been misused to harm parents and children with disabilities. Some of these issues are also potential issues for GAO examination of IDEA 2004's effects. We are continuing to review IDEA 2004 implementation.

Please feel free to contact us with any questions or if we can provide further information.

Sincerely,

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