



SPECIAL EDUCATION LAW

Expert Analysis

Special Education Law And Matrimonial Practice

Matrimonial lawyers and family law practitioners are often asked to navigate complex areas of substantive law, such as tax law, trusts and estates, and the law of corporations, for example, in order to properly represent their clients. We submit that an understanding of the Individuals with Disabilities Education Act (IDEA) (20 USC §1400 et seq.), will facilitate the obligation of all lawyers involved in divorce proceedings to reach the result that is in the best interests of the child.

At its core, the IDEA, a federal civil rights law for children with disabilities, recognizes that “improving educational results for children with disabilities is an essential element of our national policy.”¹ In order to ensure that children with disabilities receive an appropriate education, the IDEA mandates that a child with disabilities receive appropriate educational services entirely paid for by the local school district. Put another way, no matter how rich or poor the parents are, once classified by the school district as having special needs, the child receives all of the related services for free.

A decade and a half before the Americans with Disabilities Act² was signed into law in 1990, Senator Edward M. Kennedy served as an original co-sponsor of the Education for All Handicapped Children Act of 1975, later renamed the Individuals with Disabilities Education Act (IDEA).³ Senator Kennedy, along with disability advocates, was committed to ensuring that people with disabilities would have the opportunity to participate in all aspects of this society; in particular, he called for legal and social reform in areas of education, competitive sports, housing, employment, and health care. And, just months before he passed away in August 2009, the U.S. Supreme Court decided the last of three cases which reaffirmed the IDEA mandate that a state was obligated to pay the tuition for private special education when such schools are the appropriate placement for children with disabilities.⁴

The IDEA is vital, because special education costs can bankrupt a family of even moderate means. In a recent New York Times article, a



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father with twin teenage boys who both suffer from autism, highlighted that autism intervention (as per Harvard School of Public Health) can cost up to \$72,000 annually.⁵ In New York City, tuition for many private special education schools for children with disabilities is over \$50,000.

In furtherance of Senator Kennedy’s effort to advance the rights and legal protection of the disabled, as well as to ensure our ability to protect the interests of our clients, the matrimonial and family law practitioner should become conversant with the procedures and protections of the IDEA, for there is no other area of law where the legal and judicial spotlight is more focused on the best interest of the child than in matrimonial and family law.

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Suppose during divorce negotiations between spouses and counsel, you learn that a couple has twin school age boys both of whom suffer from autism and had never received special education intervention. Or during settlement discussions you learn that the couple’s child is withdrawn, agitated, has wild mood swings, and is seriously delayed in reading and math.⁶ Furthermore, neither the school district nor the parents had the child properly evaluated, and they never initiated the process for seeking special education services. An informed practitioner should be aware of the steps your client should take.

First, it may be useful to know that Congress enacted the IDEA to ensure that all children with education disabilities are provided a “free

appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children are protected.”⁷ Prior to the signing of the IDEA, many individuals with disabilities were denied access to education and opportunities to learn. It is shocking to realize that as recently as 1970, for example, U.S. schools educated only one in five children with disabilities, and many states had laws excluding certain children, such as those who were mentally retarded, emotionally disturbed, or, in some instances, deaf or blind.⁸ Thirty years later, by contrast, early intervention programs were provided to almost 200,000 eligible infants and toddlers, and over six million children and youth received individualized special education services.⁹

Recognizing Unique Needs

The IDEA requires all local schools to provide children who have education disabilities with a “free appropriate public education” (FAPE) that will prepare them for further education, employment, and independent living.¹⁰ The modus operandi of the IDEA is the individualized education program, or IEP. Considered the cornerstone of the disabled student’s educational program, the IEP is a comprehensive statement of the unique educational needs of the child and the specifically designed service and instruction plan to effectuate those needs. An IEP must be designed to meet the unique educational needs of the child in the “least restrictive environment” appropriate to the needs of that child. The program is designed by a team that includes a school official qualified in special education, the child’s teacher, the parents or guardian, and, where appropriate, the child. Based on a full evaluation, this team collaborates to write an IEP that will provide the individual child with the FAPE called for by the IDEA.¹¹

The list of education disabilities includes but is not limited to learning disabilities, neurological impairment, autism, emotional disturbances, and cerebral palsy, etc.¹² The services that can be provided under the IDEA include speech and language therapy, multi-sensory reading remediation therapy, occupational therapy, physical therapy, sensory integration, special education tutors, special education itinerant teachers, hearing therapy, vision therapy, behavior modification therapy, applied behavioral analysis, assistive technology including computers and

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speech output devices, adaptive equipment, and the list goes on.¹³ While some disabilities are obvious, some are not and may be overlooked, such as a learning disability. Since children can exhibit emotional issues when their parents separate or divorce, it may be easy to overlook a chronic and silent condition like a learning disability.

Congress included in the IDEA an elaborate set of procedural due process rights such as the parent's right to examine records and evaluations, to obtain an independent evaluation, and to present complaints concerning placement. They are then entitled to an "impartial due process hearing" to resolve any complaints.¹⁴ The act also provides for judicial review in state or federal court and confers upon the reviewing court the authority to "grant such relief as the court determines is appropriate."¹⁵

Congress contemplated that such education would be provided in regular public schools, with the child being educated alongside non-disabled children as much as possible. At the same time when this is not possible, the act also provides for placement in private school for special needs children at public expense.¹⁶ The Supreme Court has stepped in on several occasions to explain when such private school reimbursements are appropriate under the IDEA.

In 1985, in *School Comm. of Burlington v. Department of Education of Mass.*, the U.S. Supreme Court held that the IDEA empowers a court to "order school authorities to reimburse parents for their expenditures for private special education for a child if the court ultimately determines that such placement, rather than the proposed IEP, is proper under the Act."¹⁷ This decision recognized that parents who disagree with a proposed IEP have a right to unilaterally withdraw their child from public school and place the child in private school, and they may be retroactively reimbursed for the expenditures if the court ultimately determines that the private placement is proper under the IDEA.

Eight years after *Burlington*, the Supreme Court, in *Florence County School Dist. Four v. Carter*,¹⁸ reaffirmed the availability of reimbursements and further held that reimbursements may be appropriate even when a child is placed in private school that has not been approved by the state.¹⁹ Writing for the Court, Justice Sandra Day O'Connor emphasized that it would be inconsistent with the goals of the act to forbid parents from educating their children at an appropriate school "simply because the school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place."²⁰ Following *Carter*, Congress amended the IDEA and codified the entitlement, where appropriate, for a parent to receive tuition reimbursement for private special education schools.²¹

Just recently, in *Forest Grove School District v. T.A.*,²² the U.S. Supreme Court once again weighed in on the subject of tuition reimbursement under the IDEA. In *Forest Grove*, the child had never been previously identified as needing special education services, so there was no IEP at all. Finally, in his junior year, the parents, at their own expense, enrolled him in a special education program school and sued the district for tuition reimbursement. The Court sided with the parents,

holding that regardless of whether the child previously received special education services under the school's authority a parent can receive private school funding.²³ The *Forest Grove* case laid to rest a major legal hurdle facing parents seeking private school tuition reimbursement.

Suggesting Evaluation

Now, a matrimonial lawyer and family law practitioner, armed with a basic understanding and knowledge of the IDEA can assist the client whose child is experiencing learning difficulties and may be entitled to special education services paid for by the school district. Upon hearing that your client has an autistic child or a severely delayed child in school, the matrimonial practitioner should encourage her client to seek a thorough educational evaluation and/or a neuropsychological examination.

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As indicated, this testing can be provided free of charge by the local school district, or, if the parties have sufficient resources, private testing can be obtained. The practitioner should guide the client through the process of identifying educational disabilities and then encourage the client to invoke the IDEA and its protections.

Sometimes it is only the provision of discrete services that can be helpful; other times it may be the invocation of all the IDEA's due process rights with a view toward private special educational placement and tuition reimbursements. Moreover, since the IDEA is a civil rights law, attorney's fees are available to the prevailing party. This fee shifting provision should be a comfort to divorcing parents who are already incurring fees to the matrimonial attorney.²⁴

Of course, the matrimonial practitioner should also be aware that custody determinations may affect their rights under the IDEA. For example, where one parent has sole custody and the sole responsibility for a child's education, the other parent does not have rights to challenge an IEP or even to appear at the meeting to invoke those rights.²⁵

In conclusion, we emphasize what we pointed out at the outset: that knowledge of the IDEA on the part of the matrimonial lawyer will serve the best interests of the child whose parents are going through a divorce.



1. 20 USC §1400(c)(1).
 2. 42 USC §12101 et. seq.
 3. Education of the Handicapped Act, title VI of Pub. L. 91-230, 84 Stat. 175. It was renamed the Individuals with Disabilities Education Act in 1990, see §901(a)(3), Pub. L. 101-476, 104 Stat.

114 as amended 220 USC §1400 et seq. See Marcia Coyle, "Ted Kennedy's Legal Legacy," THE NATIONAL LAW JOURNAL, Aug. 26, 2009. It is not hard to see Senator Kennedy's hand at work ensuring that President Obama made good on his campaign pledge to fund the IDEA—the IDEA recently received \$12.2 billion as part of the American Recovery and Reinvestment Act of 2009. (American Recovery and Reinvestment Act of 2009: IDEA Recovery Fund for Services to Children and Youths with Disabilities, <http://www.ed.gov/policy/gen/leg/recovery/factsheet/idea.html> (April 1, 2009)).

4. *Forest Grove Sch. Dist. v. T.A.*, 577 U.S. ___, 129 S. Ct. 2484 (2009); See also *School Comm. of Burlington v. Department of Education of Mass.*, 471 U.S. 359 (1995); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

5. Walecia Konrad, "Dealing with the Financial Burden of Autism," NEW YORK TIMES, Jan. 23, 2010.

6. See *New Paltz Central School District v. Linda St. Pierre, on behalf of M.S.*, 307 F.Supp.2d 394 (SDNY 2004). There the court approved private school tuition placement for a learning and emotionally challenged youngster where the parents were in the midst of a divorce proceeding when her academic difficulties became manifest.

7. *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 367 (quoting 20 USC §1400(c), now codified as amended at §§1400(d)(1)(A),(b)).

8. United States Department of Education, Office of Special Education and Rehabilitative Services, "History: Twenty-Five Years of Progress in Educating Children with Disabilities through IDEA," available at <http://www.ed.gov/policy/speed/leg/idea/history.pdf>.

9. *Id.*

10. 20 USC §1400 et seq. Section 1401(a)(18) defines "free appropriate public education" as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program...."

11. For discussion of IEP requirements see 20 USC §1414(a)-(f).

12. 20 USC §1401(3)(A)(i).

13. See generally 20 USC §1401(6).

14. See *Burlington*, 471 U.S. at 370.

15. *Id.*

16. *Id.*

17. *Id.*

18. 510 U.S. 7 (1993).

19. *Id.*

20. *Id.*

21. 20 USC §1412(a)(10)(C)(ii).

22. *Forest Grove Sch. Dist. v. T.A.*, 577 U.S. ___, 129 S. Ct. 2484 (2009).

23. *Id.*

24. 20 USC §1415 (2000).

25. See e.g., *Navin v. Park Ridge Sch. Dist.*, No. 64, (N.D.Illinois), 2002 U.S. Dist. LEXIS 7638.