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The Individuals with Disabilities Education Act

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I. INTRODUCTION

The Individuals With Disabilities Education Act (IDEA), originally enacted in 1975, requires states, through their local school districts, to provide education for children with disabilities. This act was initially necessary because at the time of enactment eight million children were identified as having disabilities, and of those, nearly half a million were not receiving an appropriate education; another million were excluded from school altogether; and an unknown number of children were suspected of having unidentified disabilities due to their lack of success in school. The IDEA requires states, through their school districts, to identify children ages three to twenty-one who have disabilities, develop appropriate individualized educational programs for them, and provide these services in the least restrictive environment, preferably in a public school. Over the last twenty years, the IDEA has resulted in a significant increase in the number of children with disabilities identified and served by public schools.

Although much of the IDEA addresses the financial framework through which states receive federal assistance for educating children with disabilities, it also gives these children the substantive right to a free, appropriate, public education (FAPE). FAPE is achieved through a procedural scheme designed to ensure that, when the IDEA procedures are followed, the result will be a FAPE designed specifically for the individual child. The U.S. Office of Education has promulgated regulations implementing the IDEA and setting forth in detail the procedural requirements of the IDEA. As a condition of the IDEA funding, each state must adopt state procedures that implement the IDEA procedural framework at the state and local levels.

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When the federal regulations are read in conjunction with the state IDEA regulations, they provide local schools with specific guidelines and directions for carrying out the procedural mandates of the IDEA.\(^7\)

The local school districts' compliance with the IDEA's procedural scheme and the assessment of the substantive results in individual cases have given rise to a large body of IDEA case law. The purpose of this article is to give the attorney, who does not practice in this field, a general overview of not only what the IDEA requires of local school districts in relation to children with disabilities, but also what remedies are available to the parents of these children who find the IDEA has not produced the intended result. This information may also be beneficial to attorneys who represent school districts by identifying potential liability risks under the IDEA.

II. THE PROCEDURAL SCHEME.

A. Identification

As a condition of receiving federal funds, the IDEA requires states to ensure that children with disabilities, ages three to twenty-one, are identified, located, and served.\(^8\) Through the State Department of Education, Arkansas requires each local school district to identify, locate, and evaluate all children with disabilities, ages three to twenty-one, within each district's jurisdiction and to assist with identification of the population ages zero through two through activities labeled "child find."\(^9\) The State, through the

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\(^7\) See, e.g., **ARKANSAS DEP'T OF EDUC., REFERRAL, PLACEMENT AND APPEAL PROCEDURES FOR SPECIAL EDUCATION AND RELATED SERVICES (1993)** [hereinafter **ARKANSAS DEP'T OF EDUC., PROCEDURES**]; **ARKANSAS DEP'T OF EDUC., PROGRAM STANDARDS AND ELIGIBILITY CRITERIA FOR SPECIAL EDUCATION (1993)** [hereinafter **ARKANSAS DEP'T OF EDUC., STANDARDS**].

\(^8\) States have the option of serving children ages zero through two with disabilities through a grant program similar to the grants provided under the IDEA. 20 U.S.C. § 1471 (1994); 34 C.F.R. § 303 (1995). Arkansas, through the Arkansas Department of Human Services, has elected to apply for and receive federal funds to serve this age population. As a condition of the "zero through two" or "Part H" grant, the state must identify, locate, and serve children with disabilities in this age group. 34 C.F.R. § 303 (1995). Arkansas meets this obligation through cooperative efforts of the Arkansas Department of Human Services and the Arkansas Department of Education with most of the actual services provided through the cooperative efforts of both departments. Children ages three through five are served in many cases by regional educational cooperatives. Arkansas meets its obligations to children ages five to twelve primarily through the Arkansas Department of Education. The department works with a number of state agencies under interagency agreements to ensure services to children with disabilities in these age populations.

\(^9\) **ARKANSAS DEP'T OF EDUC., PROCEDURES**, *supra* note 7, part I, § 1.
Department of Education, must submit a “State Plan” every three years outlining its compliance with the requirements of the IDEA including the “child find” activity. Each Arkansas school district, in turn, must then submit a plan to the State Department of Education identifying how the district will comply with the “child find” requirements. Districts are also required to maintain records evidencing the activities they carry out in compliance with these “child find” plans.

A school district’s obligation to locate and identify children with disabilities lasts until a child turns twenty-one. Not all disabilities are apparent early on, and many disabilities result from injuries or serious illnesses which can occur in a child’s later years. When a child exhibits characteristics that would raise suspicion of a disability, schools have an obligation to act regardless of the child’s age within the three to twenty-one range.

B. Referral

Children with suspected disabilities are “referred” for consideration of whether the child has a disability requiring services. Anyone with relevant knowledge about a child can refer a child for this consideration. The most common referrals are from teachers and parents, but the district has an obligation to consider a referral from anyone with relevant information. In accordance with state procedure, referrals must be put in writing on an official “referral form” and forwarded to the school’s principal or someone the principal has designated for this purpose. A verbal referral made to school personnel is sufficient, but the school must record it on a referral form and forward it to the appropriate school official. School districts are responsible for interpreting a parent’s request for assistance as a referral.

11. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 1.
12. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 1.
13. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 1.
14. For example learning disabilities are usually diagnosed by determining that a child has a severe ability-achievement discrepancy. This is difficult to demonstrate before a child begins achievement level testing in school and even then it may be several years before the discrepancy reaches the necessary severity to indicate a learning disability. Traumatic brain injury is an acquired disability caused by head injury which may occur at any time.
15. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 1.
16. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 2.
17. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 2.
18. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 2.
19. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 2.
(whether the word "referral" is used or not), when it is coupled with information that raises suspicion of a disability.\textsuperscript{20}

The school has seven days from this referral to meet in a "referral conference" to consider whether the child may have a disability.\textsuperscript{21} The parents must be invited and receive a notice that gives the date, time, and place the conference is to be held, who will be there, what the conference is for, what information will be used to make decisions, and any other relevant information.\textsuperscript{22} These conferences are to be scheduled at mutually agreeable times with enough notice for the parents to make arrangements to be present.\textsuperscript{23} If the parents do not respond to the district's first notice, the school must give them a second opportunity to respond by rescheduling the meeting seven days from the second notice.\textsuperscript{24} The regulations give schools a total of twenty-one days from the referral date to meet in a referral conference.\textsuperscript{25}

Three people must attend a referral conference: the principal, or person he has designated to serve this function; one of the child's teachers (or one who may become his teacher if he is entering school); and one other person, normally the parent. The parent and the district may bring others to the conference, and the child may also attend.\textsuperscript{26} Information about the child is reviewed at the conference, and a decision is made by the group on whether to evaluate the child for special education eligibility.\textsuperscript{27} Parents must consent to the initial evaluation.\textsuperscript{28} Schools must send the parents a written notice of the decision made at the meeting.\textsuperscript{29} If the decision is made to evaluate, the district is responsible for securing an appropriate evaluation.\textsuperscript{30} If the group decides an evaluation is not called for, it may be appropriate to consider the

\textsuperscript{20} ARKANSAS DEP'T OF EDUC., PROCEDURES, supra note 7, part 1, § 2.
\textsuperscript{21} ARKANSAS DEP'T OF EDUC., PROCEDURES, supra note 7, part 1, § 2.
\textsuperscript{22} 34 C.F.R. §§ 300.504-505 (1995).
\textsuperscript{23} Id. §§ 300.345(a)(1)-(2).
\textsuperscript{24} ARKANSAS DEP'T OF EDUC., PROCEDURES, supra note 7, part 1, § 2.
\textsuperscript{25} ARKANSAS DEP'T OF EDUC., PROCEDURES, supra note 7, part 1, § 2.
\textsuperscript{26} ARKANSAS DEP'T OF EDUC., PROCEDURES, supra note 7, part I, § 2. See also 34 C.F.R. § 300.344 (1995) (providing that at each meeting, the following persons must participate: (1) a school representative qualified to provide and/or supervise special education; (2) the child's teacher; (3) one or both parents; (4) the child, if appropriate; (5) others at the discretion of the school and/or parents); Id. § 300.345 (providing that parents are required to be present at the initial meeting only; thereafter, they must be given the opportunity to attend).
\textsuperscript{27} If the parents disagree with the group's decision, they may invoke due process procedures to resolve the disagreement. See infra part I.F.
\textsuperscript{28} 34 C.F.R. § 300.504 (1995); ARKANSAS DEP'T OF EDUC., PROCEDURES, supra note 7, part I, § 2.
\textsuperscript{29} ARKANSAS DEP'T OF EDUC., PROCEDURES, supra note 7, part I, § 2.
\textsuperscript{30} 34 C.F.R. § 300.352 (1995).
student for eligibility under section 504 of the Rehabilitation Act.\textsuperscript{31} If the parents disagree with the decision regarding evaluation, they may invoke the due process procedures to resolve the issue.\textsuperscript{32}

C. Evaluation

If the decision is made to evaluate a child, evaluation procedures must be completed within sixty calendar days from the date the parents receive notice of the decision to evaluate.\textsuperscript{33} The purpose of the evaluation is to establish eligibility for special education, provide the basis for planning the child’s program, determine any necessary related services, and decide the child’s placement. The school district is responsible for obtaining this evaluation.\textsuperscript{34} However, if the parents have had an independent evaluation conducted, the school must consider it, if offered, along with their own information.\textsuperscript{35} If the parents disagree with the school’s evaluation, they may request an independent evaluation. The school district has the option of paying for the independent evaluation or seeking a due process hearing to show that its own evaluation is sufficient.\textsuperscript{36} There are specific requirements and certain components that by regulation must be included in the evaluation. For certain types of disabilities, more specialized tests or activities are required in addition to the standard components of an evaluation.\textsuperscript{37}

D. The Evaluation/Programming Conference

Once the evaluation is complete, an evaluation/programming conference is held. Participants at this meeting are subject to the meeting and notice requirements of 34 C.F.R. § 300.344.\textsuperscript{38} At this evaluation conference, a determination is first made as to whether the child has a disability and whether the child needs special education because of that disability. If the child is determined eligible, an Individualized Education Plan (IEP) is developed which includes any necessary related services and the least

\textsuperscript{31} Id. § 104.35.
\textsuperscript{32} See infra part I.F.
\textsuperscript{33} ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part II.
\textsuperscript{34} 34 C.F.R. § 300.531 (1995).
\textsuperscript{35} Id. § 300.503(c)(1).
\textsuperscript{36} Id. § 300.503(b). ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part II, § 2.
\textsuperscript{37} 34 C.F.R. § 300.352 (1995). ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part I, § 3.
\textsuperscript{38} See supra note 26 for listing of necessary participants.
restrictive environment in which the plan can be implemented.\textsuperscript{39} Parents must consent to the initial placement of the child in special education.\textsuperscript{40} The IEP is implemented immediately following its development, assuming school is in session, with a short delay allowed only to arrange transportation or other related services.\textsuperscript{41}

E. Annual Review

Each year the school is required to conduct a review of the child’s IEP to ascertain the student’s progress and to consider revisions.\textsuperscript{42} Placement in special education must also be reviewed annually.\textsuperscript{43} These reviews are conducted at an “annual review” held toward the end of the school year in some school districts, and at the beginning of the school year in others. The annual review conference must be attended by three persons, one of whom is the child’s teacher, and the parents must be invited and notified as for the other conferences.\textsuperscript{44}

Other reviews may be conducted at any time during the year if the district or the parents feel one is needed.\textsuperscript{45} In Arkansas, these optional meetings are called Separate Programming Conferences.\textsuperscript{46} The participant and notice requirements must also be met for a Separate Programming Conference.\textsuperscript{47} This conference is often held to consider behavioral problems, dismissal from special education, particular problems with the educational program, requests for additional services, and any other individual issues that cannot wait for the annual review.

F. Due Process

When disagreements arise between the parents and the school district about eligibility, evaluation, programming, or placement, a due process hearing procedure may be invoked to resolve disputes.\textsuperscript{48} The Arkansas

\begin{itemize}
\item \textsuperscript{39} 34 C.F.R. § 300.343 (1995).
\item \textsuperscript{40} Id. § 300.504.
\item \textsuperscript{41} Id. § 300.342.
\item \textsuperscript{42} Id. § 300.343(d).
\item \textsuperscript{43} Id. § 300.552(a)(1).
\item \textsuperscript{44} See supra note 26.
\item \textsuperscript{46} ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part III, § 4.
\item \textsuperscript{47} 34 C.F.R. §§ 300.343-.345 (1995).
\item \textsuperscript{48} 20 U.S.C. § 1415 (1994); 34 C.F.R. § 300.500-.515 (1995). ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part V.
\end{itemize}
Department of Education employs hearing officers on a contract basis to hear disputes and issue opinions.\textsuperscript{49} The due process hearing is supposed to be completed within forty-five days of a hearing request.\textsuperscript{50} However, given the complex nature of some of these cases, this is frequently impossible. Either party can request additional time and can waive the time lines, but ultimately, the hearing officer determines whether the forty-five day schedule must be maintained.\textsuperscript{51}

When the school district and a parent disagree about a proposed change in a child’s educational placement, the IDEA provides for the child to remain in her present educational placement until the administrative dispute or subsequent judicial proceeding is resolved.\textsuperscript{52} This “stay put” provision is designed to provide continuity and stability for the child who otherwise might be bounced back and forth between placements during disputes.\textsuperscript{53} The school district and parents can agree to change the child’s placement pending resolution of the dispute.\textsuperscript{54}

The hearing procedure provides for very limited discovery. Each party must exchange the names of witnesses and exhibits five days before the hearing.\textsuperscript{55} No other discovery procedure is provided. Parents have a right to compel the attendance of witnesses,\textsuperscript{56} but in Arkansas this right exists only to the extent the parents’ witnesses are school employees, and to the extent schools can make their employees cooperate. Because there is currently no subpoena power in Arkansas for these hearings, the hearing officer cannot compel attendance of witnesses. Parents have no other subpoena power and frequently have difficulty getting their own physicians and other professionals to appear and testify.\textsuperscript{57}

In Arkansas, only limited procedures exist to guide the attorney in due process proceedings. The State Department of Education publishes very

\textsuperscript{49} Each of the three current hearing officers used by the Department of Education are professionals with full time practices outside their hearing work. All three have some experience in testing and evaluation, one is a psychologist and the other two are attorneys. Additional hearing officers are being trained.


\textsuperscript{54} 34 C.F.R. § 300.513 (1995).

\textsuperscript{55} 20 U.S.C. § 1415(d) (1994); 34 C.F.R. § 300.508(3) (1995); ARKANSAS DEP’T OF EDUC., PROCEDURES, \textit{supra} note 7, part VII, § 3(c).

\textsuperscript{56} 34 C.F.R. § 300.508 (1995).

\textsuperscript{57} The IDEA and the implementing referral regulations provide that parties have the right to compel the attendance of witnesses at hearings. 20 U.S.C. § 1415(d) (1994); 34 C.F.R. § 1415(d) (1995). Arkansas is not in compliance with this provision.
basic guidelines for conducting the due process hearing, and these generally parallel the federal regulations. The Arkansas Department of Education Regulations provide some limitations on how evidence is presented. These regulations also direct the hearing office in how to consider certain evidence. For example, testimony of medical doctors is limited to the child's medical condition unless the doctor holds credentials in another field. In considering the qualifications of witnesses, the regulations attempt to limit considerations to whether or not a teacher is fully or provisionally certified.

Practice before one hearing officer is somewhat different than practice before another. Two of the hearing officers are attorneys and one is not. Evidence rules are different depending upon the hearing officer who hears the case. The hearing officers and the Department of Education have adopted some ad hoc practices that are designed to assist hearing officers. Hearing officers issue prehearing orders requesting information and setting a schedule for submission of the information and the hearing date. Currently a prehearing report or brief to the hearing officer is required along with the names of witnesses and exhibits. Post trial briefs are also usually required. Although these due process hearings are quasi-judicial procedures, the attorney time and effort involved is substantially similar to a non-jury trial.

Which party has the burden of proof in due process hearings has generally been left for the individual states to determine. There is no provision in the IDEA or its implementing regulations allocating the burden of proof. In Arkansas, school districts initially had the burden of proof. When the State Plan was revised in 1993, this burden was shifted to the party requesting the hearing, whether the parents or the school. A few courts have imposed their own views upon the burden of proof issue.

The issues involved in due process hearings run the gamut from narrow and finite, such as whether the district should provide specialized transportation as a related service, to broad and encompassing, such as whether the child has been denied a free appropriate public education and should receive

58. 20 U.S.C. § 1415 (1994); 34 C.F.R. §§ 300.500-.509 (1995); ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part VII.
59. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part VII, § 5(7)-(11).
60. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part VII, § 5(12).
61. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part VII, § 5(12).
62. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part VII, § 5(16).
63. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part VII, § 5(16).
64. ARKANSAS DEP’T OF EDUC., PROCEDURES, supra note 7, part VII, § 5(16).
compensatory services. In the early years of the IDEA, placement was a frequent issue. In recent years, eligibility and programming have become more common issues.

In Arkansas, once a hearing officer issues a decision, the parties have thirty days within which to file an appeal with a court of competent jurisdiction. This short appeal period creates significant problems for the parties in cases where a hearing officer directs the parties to have a conference to develop a program in accordance with his or her opinion. The appeal time may run before the conference is concluded if at the conference it becomes apparent that only an appeal will resolve the issues. The IDEA authorizes a party aggrieved by a due process hearing result to bring a civil action in a state court of competent jurisdiction or in a U.S. District Court without regard to the amount in controversy. In such an action, the record of the proceedings below is received, but the court may also consider additional evidence at the request of a party. A decision at this level is based upon a preponderance of the evidence and the court may grant "such relief as the court determines appropriate." 

III. ELIGIBILITY

There are two components to eligibility under the IDEA. Not all children with disabilities are eligible. First, a student must have one of the following disabilities: mental retardation; hearing impairment including deafness; speech or language impairments; visual impairments including blindness; serious emotional disturbance; orthopedic impairments; autism; traumatic brain injury; other health impairments; a specific learning disability; or a combination of these disabilities. Second, as a result of the disability, the student must need special education and related services.

"Special education" is defined as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability . . . ." While there is no agreed upon definition of "specially designed

66. ARK. CODE ANN. § 6-41-216(e) (Michie Supp. 1995). In some states there is an intermediate appeal to the State Education Agency. This stage has been omitted in Arkansas.

67. Hearing officers are trained by the Arkansas Department of Education which heavily emphasizes the importance of parties following IDEA procedures. Hearing officers frequently order parties to go back through the procedures for developing a program using some guidelines from the hearing officer rather than resolving the parties' dispute. From the author's experience, this prolongs disputes and promotes further litigation.


69. Id.; 34 C.F.R. § 300.7(a)(1) (1995). Three to five year olds with disabilities are those children who are experiencing developmental delays in physical, cognitive, communication, social, emotional, or adaptive development. 34 C.F.R. § 300.7(2)(1) (1995).

instruction,” case law indicates that it is not limited to traditional academic instruction in the classroom, although classroom instruction using the regular curriculum may also be “specially designed instruction” depending upon the specific situation. Specially designed instruction can be vocational instruction, physical education instruction, instruction in daily living skills, adaptive behavior, community living skills, pre-vocational skills, or any other instruction that a particular child may need because of his disability.\textsuperscript{71}

The federal regulations’ definitions of the different categories of disabilities contain language indicating that for the child to be disabled under one of the categories, the disability must adversely affect the child’s educational performance or result in some educational problem.\textsuperscript{72} A child’s eligibility can turn not only upon the interpretation of the “adversely affect” language in the definition of a particular disability but also upon how the “adverse effect” is determined. For example, a child with attention deficit hyperactivity disorder (ADHD) may, on a standardized test, score on the same grade level as his non-disabled peers with subject area achievement scores commensurate with his estimated intelligence level.\textsuperscript{73} Looking at this information, a school district may determine that although the child has ADHD, there is no “adverse affect” on his educational performance caused by the ADHD. However, this same child’s school performance on a daily basis may present an entirely different picture. He may be a poor student because he cannot attend to tasks, is easily distracted, is excessively active, or misses school because of frequent suspensions he receives for fighting. All of these characteristics may be typical of a child with ADHD. ADHD adversely affects daily school performance if the child cannot attend to his work and remain in class or in school. Unfortunately, the tests some school districts use to determine eligibility will not reflect this adverse affect on daily performance. Therefore, it is important to know how a school district interprets the term “adversely affects” and how it is determined. The parents may need to challenge the schools’ definition or method of determining adverse effect.

\textsuperscript{72} 34 C.F.R. § 300.7 (1995).
\textsuperscript{73} Children with attention deficit disorders, with or without hyperactivity, may qualify for special education under the “other health impaired category” if their condition requires special education.
IV. FREE APPROPRIATE PUBLIC EDUCATION

A "free appropriate public education" (FAPE) is defined under the IDEA as special education and related services provided at public expense that meets the state education agency's standards and are provided in conformance with the child's IEP. The United States Supreme Court provided guidance for determining whether a student has received FAPE in Board of Education v. Rowley, the Court's first case involving IDEA. In Rowley, the Court set forth a two fold inquiry for determining FAPE: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" This procedural test was based on Congress's belief that compliance with the requirements of the Act would probably produce substantive compliance. Rowley clearly established that a school district's failure to comply with the Act's procedures constitutes a sufficient basis for determining that a child has been denied a FAPE. Generally, courts only overlook procedural violations when they are technical and no harm has occurred to the student as a result.

The substantive part of the Rowley test requires that a student's IEP be reasonably calculated to provide educational benefits. The Court made it clear that the IDEA does not entitle a child to an IEP designed to enable him to reach his maximum potential. The IDEA ensures an "appropriate" education, not the "best" education. However, courts interpreting Rowley have made it clear that the educational benefit must be "meaningful" and not de minimis. The difficulty in these cases is determining when a child has received sufficient educational benefit. Several factors may prove helpful to a court. The child's past progress or lack of progress may be the strongest indicator. Courts have found that FAPE must produce progress, not regression or de minimis benefit. In Peterson v. Hastings Public School, the Eighth Circuit found that FAPE was generally provided when

75. 458 U.S. 176 (1982).
76. Id. at 206-07 (footnote omitted).
77. See, e.g., Doe v. Alabama Dep't of Educ., 915 F.2d 651 (11th Cir. 1990); Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990); Burke County Bd. of Educ. v. Denton, 895 F.2d 973 (4th Cir. 1990); Evans v. District No. 17, 841 F.2d 824 (8th Cir. 1988).
78. Rowley, 458 U.S. at 201.
80. Hall, 774 F.2d at 629.
81. 31 F.3d 705 (8th Cir. 1994).
a child with a disability received personalized instruction with sufficient support services to permit the child to benefit educationally with instruction that approximated the grade levels in the school’s regular program and allowed the child to meet the state’s educational standards, achieve passing marks, and move forward from grade to grade. 82

To determine if the IEP is reasonably calculated to provide educational benefits, the child’s unique needs must be analyzed. The concept “educational benefit” embraces more than academic subjects. 83 To determine FAPE for a child with a disability, an examination may also have to be made of a child’s progress in socialization, adaptive behavior, daily living, speech or communication, mobility, and other nonacademic areas critical to a disabled child’s education. 84

In Rowley, the Supreme Court made it clear that the IDEA was the “floor” of opportunity for children with disabilities and that states could mandate higher standards. Arkansas initially had a higher standard by providing for an education “sufficient to meet the needs and maximize the capabilities of the disabled child.” 85 In 1989, legislation was passed to reconcile Arkansas’s standard with the federal standard of “appropriate” education. 86 Arguably, since that time, the General Assembly has raised the standard in the case of children with visual impairments. 87 This legislation, in the author’s opinion, does one of two things: (1) it either raises the standard above the “floor” of opportunity under IDEA for students with visual impairments, or (2) it defines, at least in part, what is “appropriate” and thus the “floor” for students with visual impairments.

IV. LEAST RESTRICTIVE ENVIRONMENT

The term “least restrictive environment” (LRE) has been applied to the requirement that in order to receive funding under the IDEA, states must ensure the following:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled and that special classes,

82. Id. at 707.
84. For a child with a disability, education may encompass all areas of need related to his disability. 34 C.F.R. § 300.17, 300.532(f) (1995).
85. ARK. CODE ANN. § 6-41-202 (Michie 1993).
86. Id.
separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 88

This concept of LRE creates a presumption in favor of placing disabled children with their non-disabled peers to the maximum extent possible while still providing the child with an appropriate education.

LRE favors inclusion and mainstreaming for students for whom they are appropriate but also recognizes that for some children to receive a FAPE, they may need to be in a special class, school, residential facility, hospital, or home. However, every step away from the regular class is a more restrictive placement. The LRE requirement dictates that schools place the student in the least restrictive placement (the placement closest to the regular class) in which his educational needs can be met with the support of supplementary aids and services.

Each school district is required to maintain a continuum of alternative placement options to meet the varying needs of disabled children for special education and related services. 89 Courts are often called upon to resolve tension between the FAPE requirement and the LRE requirement. However, FAPE governs both requirements. The difficult issue is that an appropriate education for an individual child may be the need to be with non-disabled peers. In actual practice, a child's placement is often influenced by the parents' and school personnel's philosophical approach to inclusive education as well as the available options within the school district.

Courts have been somewhat inconsistent in their approach of LRE. Several different tests have developed in the different circuits. The Sixth Circuit uses a "replication" test. 90 Under this test, if the services that make the more restrictive environment appropriate can be replicated in the less restrictive environment, then the more restrictive placement is too restrictive. 91 The Fifth Circuit uses what it considers to be a "less intrusive" test. 92 This test first asks whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily for

91. Id.
the child, and if it cannot and the child will be placed in a more restrictive environment, whether the school has mainstreamed the child to the maximum extent appropriate. The Fifth Circuit went further to outline the factors which should be considered in applying the first part of the test. These factors include: whether the school has taken steps to accommodate the child in the regular program; whether the child would receive educational benefit from regular education, considering that educational benefit would include not only academic benefit but other benefits; and the effect of the child’s presence on the education of other students. As for the second part of this test, the court stated that a determination of whether the child was mainstreamed to the maximum extent appropriate would include application of the first part of the test to each succeedingly more restrictive placement.

The Eleventh Circuit generally followed the Fifth Circuit’s approach but with some refinements as in Greer v. Rome City School District. The Eleventh Circuit determined that in assessing educational benefit in the regular placement, a comparison between expected benefits in that placement and other placements may be made with the caveat that more academic educational benefit may not justify the more restrictive placement if there are considerable nonacademic benefits to be gained from the regular classroom placement. A second Eleventh Circuit refinement addressed the effect of the regular placement on the student’s non-disabled peers; specifically, whether the disabled child’s inclusion in the classroom would be so disruptive that the education of other students would be significantly impaired. The Eleventh Circuit also cited cost as a factor if the cost of the regular classroom placement is so great that it would significantly impact the education of the other children in the district.

The Second Circuit uses yet another test which is markedly different from all other circuits. It applies the Rowley procedural test to the LRE issue, deferring to the decision made by the school district if the procedural requirements have been followed and the placement was reasonably calculated to provide educational benefit.

93. Id. at 1048.
94. Id. at 1048-49.
95. Id. at 1050.
96. 950 F.2d 688 (11th Cir. 1991).
97. Id. at 697 (citing Daniel, 874 F.2d at 1049).
98. Id. (citing 34 C.F.R. § 300.552 Comment).
99. Id.
100. See supra note 76 and accompanying text.
The Fifth, Sixth, and Eighth Circuits have found the Rowley test inapplicable to LRE. The Fifth Circuit has noted that the Rowley test assumes that the school district has met the procedural requirements, which includes the LRE requirement, thus application of the Rowley test would assume resolution of the issue before the court.102

The Eighth Circuit has adopted the Fifth Circuit's test and has specifically found the Rowley test inappropriate to the LRE issue because the Supreme Court in Rowley did not intend for the Rowley test to be used to determine mainstreaming issues.103 LRE is evaluated as part of the determination of procedural compliance, under the Fifth and Eighth Circuits' interpretation.

V. RELATED SERVICES

Related services are defined in the IDEA as:

Transportation, and such other developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.104

The IDEA regulations list additional related services including "school health services, social work services in schools, and parent counseling and training."105 Neither list is exhaustive. Related services can be other developmental, corrective, or supportive services that will assist a child to benefit from special education.106 The relationship to special education is essential unless the state defines the particular related service as special education.107 In Arkansas, speech therapy services are defined as special education so that speech therapy might be the extent of the special education

102. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) (citing A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir. 1987); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983)).
105. 34 C.F.R. § 300.16(a) (1995).
106. Id.
107. Id.
the child receives. In other cases, speech therapy might be a related service if the child receives other special education as well as speech therapy.\textsuperscript{108} Related services must be provided at no cost to the parent but must be included in the child's IEP in order to trigger the school district's responsibility to secure and pay for these services.\textsuperscript{109} Many parents do not know what related services are available to assist with their child's education, so they do not request any services. Many districts do not offer certain related services if a parent does not ask for them and the service is thus not included in the IEP. The risk to districts in not informing parents of possible related services is that the parent at some point will raise the issue of the appropriateness of the child's education. Failing to ask for a related service is not relevant in determining whether the service was necessary to provide the child with an appropriate education.

VI. REMEDIES

A. Reimbursement

Parents are entitled to reimbursement for expenses they have accumulated in providing their child with FAPE when the school district has failed to do so. In \textit{School Committee v. Department of Education},\textsuperscript{110} the Supreme Court held that parents were entitled to reimbursement for expenses related to the unilateral placement of their child which was ultimately held to have been necessary to provide the child with FAPE.\textsuperscript{111}

Parents have regularly been reimbursed for a variety of expenses such as expenses, cost of residential placement, and related services.\textsuperscript{112} Occasional reimbursement has been given for such expenses as the cost of travel and lodging, when the private placement is out of town, and for interest paid on a loan to fund the private placement.\textsuperscript{113}

\textsuperscript{108} \textit{ARKANSAS DEP'T OF EDUC., PROCEDURES, supra} note 7; \textit{ARKANSAS DEP'T OF EDUC., STANDARDS, supra} note 7.

\textsuperscript{109} 34 C.F.R. § 300.346(a)(3) (1995).

\textsuperscript{110} 471 U.S. 359 (1985).

\textsuperscript{111} \textit{Id.}


B. Compensatory Services

Compensatory educational services are available to remedy the progress lost by a student due to the denial of a FAPE. The leading case for the majority view on this issue is *Meiner v. Missouri*, an Eighth Circuit case. In *Meiner*, the court likened compensatory services to retroactive reimbursement in *School Committee* and held that imposing liability for compensatory services on a school district merely required the school district to pay what it should have paid all along. Additionally, the court found that such services would be necessary to secure the child's FAPE. A finding that the school district has denied a child FAPE is sufficient to trigger the possibility of compensatory education. It is important to note that bad faith is not necessary to a finding that compensatory services are appropriate.

C. Exhaustion of Administrative Remedy and Judicial Review

The IDEA requires that parties seeking relief pursue their administrative remedies to conclusion before seeking judicial relief. Prior to filing suit under IDEA, parents must exhaust the state's due process procedures. If parents or the school district are aggrieved by a hearing officer's decision, they may seek an appeal of that decision. In Arkansas, such appeals must be filed within thirty days of the date the hearing decision was rendered. Parties seeking to sue under the IDEA generally cannot circumvent the exhaustion requirement by suing under section 504 of the Rehabilitation Act or section 1983 of the Civil Rights Act. Any party dissatisfied with the final administrative decision in a due process proceeding may initiate a state or federal suit.

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114. 800 F.2d 749 (8th Cir. 1986).
115. *Id.* at 755-56.
120. *Id.*
121. *Id.* § 1415(e) (1994); 34 C.F.R. § 300.509 (1995).
D. Scope of Review

The IDEA requires courts to base their decision upon a preponderance of the evidence and provides for courts to hear additional evidence at the request of a party. Many courts interpret this statutory language as requiring a de novo review. The Supreme Court in *Rowley* made reference to Congress's intent that courts were to make independent decisions based on the preponderance of the evidence. Thus, some courts have emphasized the "independent decision" language in supporting their interpretation of a de novo review.

A few courts have limited the role of the court in reviewing administrative decisions by calling for deference to the decision below. These courts essentially place the burden of proof on the party seeking to overturn the decision. Other courts have placed the burden of proof on the party trying to change the status quo. However, when LRE has been the issue, the burden has been placed on the school district. Courts have generally declined to consider issues which could have been raised below but were not.

F. Damages

There has been substantial litigation over the authority of the courts to award monetary damages to plaintiffs who prevail in actions under IDEA. The majority of courts that have considered the issue have held that monetary damages are generally not available. However, a minority of courts have held that such damages are available.

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131. The leading case is Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).
132. *See* Jackson v. Franklin County Sch. Bd., 806 F.2d 623 (5th Cir. 1986).
The Supreme Court, through its opinion in *Franklin v. Gwimmett County Public School*,\(^{133}\) has given new life to this debate. In *Franklin*, a Title IX case, the Court reversed the Eleventh Circuit's decision holding that monetary damages were not available. The Court found that, in a cognizable cause of action brought under a federal statute, all appropriate remedies are available unless Congress had expressly indicated otherwise.\(^{134}\) Since the IDEA expressly authorizes courts to fashion "appropriate relief" and does not expressly prohibit any form of relief, the *Franklin* rationale may be applicable to cases brought under IDEA:

G. Attorney's Fees

In 1986, Congress amended the IDEA to allow recovery of attorney's fees. This amendment was in part a response to *Smith v. Robinson*.\(^{135}\) Hearing officers are not thought to have this authority because the statutory language authorizes "courts" to award attorney's fees and costs.\(^{136}\)

Parents may recover attorney's fees and costs "in any action or proceeding" brought under the IDEA in which they are a "prevailing party."\(^{137}\) "Any action or proceeding" has been determined to include a due process hearing, mediation, settlement of due process disputes, and civil actions. In some cases fee recovery has been allowed for IEP conferences.\(^{138}\) To be a "prevailing party" for attorney's fee purposes, it is sufficient if the parent prevailed on any significant issue that achieved some of the benefits sought.\(^{139}\) "Significant issue" does not require that the parent be successful on a primary issue or that the parent achieve all of the relief requested.\(^{140}\)

Courts have awarded attorney's fees for work performed prior to a due process hearing, time spent in monitoring and enforcing a judgment, and time spent in an action to recover attorney's fees and costs.\(^{141}\) Reasonable

\(^{133}\) 503 U.S. 60 (1992).
\(^{134}\) Id.
\(^{135}\) 468 U.S. 992 (1984). The court determined that the IDEA provides the exclusive remedy and did not permit the awarding of attorney's fees whether within the body of the statute or by recourse to other federal statutes such as § 1988. *Id.* at 1003.
\(^{139}\) See, e.g., Angela L. v. Pasadena Indep. Sch. Dist., 918 F.2d 1188 (5th Cir. 1990).
\(^{140}\) See Phelan v. Bell, 8 F.3d 369 (6th Cir. 1993).
\(^{141}\) See, e.g., Barlow-Gresham Union High Sch. Dist. No. 2 v. Mitchell, 940 F.2d 1280 (9th Cir. 1991); Moore v. Crestwood Local Sch. Dist., 804 F. Supp. 960 (N.D. Ohio 1992);
fees for experts including costs of tests or evaluations performed in preparation for the parents’ case are reimbursed as costs. Work of a paraprofessional, such as law clerks, paralegals, and recent law graduates is also compensable. The standard for calculating attorney’s fees under other attorney fee statutes is generally applicable to fee awards under the IDEA. However, the IDEA prohibits the use of any bonus or multipliers.

Attorney fee actions in IDEA cases may be different from such actions in other litigation. Ordinarily an attorney fee petition will occur in conjunction with the underlying action. In cases where a parent is seeking attorneys fees for representation in a due process proceeding, the court hearing the fee petition will have no underlying suit before it. The cause of action will be exclusively one for fees.

A parent who successfully sues for attorney’s fees for representation in an IDEA proceeding, may also collect attorney’s fees and costs expended for legal representation in the attorney fee action under the IDEA provision that provides fees for the initial proceeding.

VII. CONCLUSION

School districts are obligated to provide parents of children with disabilities or suspected disabilities with a full explanation of the procedural safeguards available to the parent under the IDEA. School districts meet this obligation by providing a prescribed form, setting forth the federal regulatory provisions related to procedural safeguards, developed by the Arkansas Department of Education. This form does a poor job of advising parents of their rights under IDEA although it meets the technical requirement to inform parents. Many school district personnel do not understand parents’ rights under IDEA sufficiently to fully explain the information contained in the parents rights form. Additionally, even if school personnel have an adequate understanding of parents rights under IDEA, they have little incentive to be sure a parent fully understands those rights. A well informed parent who fully understands her rights is likely to place greater demands on a school’s resources than one who believes there are limits to what a school must do for her child unrelated to the child’s

Borengasser v. Arkansas State Bd. of Educ., 996 F.2d 196 (8th Cir. 1993).
144. Arkansas Dep’t of Educ., Procedures, supra note 7, part VIII (addressing parents’ rights under Pub. L. No. 94-142).
145. The language is largely repetitive of the federal regulatory language and is not presented within a context that would allow parents to see how the rights relate to their situation.
FAPE. Thus parents frequently become fully informed only when they have access to legal representation by someone knowledgeable in this area of practice. Once a parent becomes fully informed, resolution of parent/district disputes may be resolved quickly if the district has access to legal representation by someone knowledgeable in the field. Two knowledgeable attorneys can quickly determine the potential outcome of a dispute if it is litigated and can identify those areas in which there is truly a question about the outcome.

It is in a school district's best financial interest to settle quickly disputes that are likely to be resolved in the parent's favor. It not only saves the district the cost of its own legal representation but cuts down on the amount of fees it may owe for the parent's representation. Resolving disputes by settlement is in the parent's best interest so long as the needs of the child are met as a result.

Litigation, even in the form of a due process hearing, should always be the last resort for a parent, after efforts to get a school district to voluntarily meet a child's needs have been exhausted. However, with an uncooperative or uninformed school district, due process should be pursued without hesitation if a child's FAPE is at stake, once efforts at cooperative resolution have failed.