

Running head: GENERAL EDUCATION DEFAULT AND STUDENT BENEFIT

**General Education Default and Student Benefit in Inclusive Learning Environments:**

**An Analysis for School Leaders**

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## **General Education Default and Student Benefit**

### **Abstract**

A contextual analysis of the general education default and student benefit is presented from the perspective of school-based compliance with federal mandates from IDEIA of 2004. A goal was to inform school administrators striving to develop and maintain effective, inclusive learning environments and indirectly improve the quality of education for students with disabilities. Topics include a historical overview of special education in the United States, student first language, school postures frequently leading to due process hearings, summaries from court cases across the United States, and professional development resources. Information presented is useful for guiding constructive, practical special education decision-making processes and may help school administrators keep their special education programs out of court.

### General Education Default and Student Benefit in Inclusive Learning Environments: An Analysis for School Leaders

Students with disabilities (SWD) had an early history of exclusion and neglect in the American educational system (Alexander & Alexander, 2005). Historically, from a dependency model perspective, special and general education were criticized for *teaching* SWD they were unable to participate in the American mainstream, were entitled to different treatment, and should expect a lifetime of government assistance (Turnbull, Stowe, & Huerta, 2007). Special education ethicalities were brought to the forefront of the national conscience by disabled World War 1 veterans returning home, inspiring the Soldier's Rehabilitation Act of 1918 (Alexander & Alexander, 2005), as well as the formidable example and advocacy of wounded Vietnam veterans (Turnbull et al., 2007). Disabled soldiers leading independent lives in America's communities, as well as disabled members of America's armed forces remaining on the battlefield (Hull, 2004), challenge practices of low expectations and exclusion for students with similar disabilities. In the arena of special education law, victories supported advocacy to rectify widespread discrimination against people with disabilities:

The reality that people with disabilities were discriminated against in housing, transportation, employment, health care, voting, marriage and reproductive opportunities, and community living—the fact of their unwarranted confinement in institutions or correctional facilities, of their denial of the very basic rights that people without disabilities took for granted—caused disability advocates to launch a multi-pronged frontal attack on those policies and practices and then to use their victories in education as precedents for creating new rights in other arenas (and vice versa). (Turnbull et al., 2007, p. 27)

Four outcomes of disability policy were identified: “(a) Equal opportunities, including those to be educated; (b) Full participation (the right to participate and contribute); (c) Independent living; and (d) Economic self-sufficiency” (Turnbull, et al., 2007, p. 14).

## General Education Default and Student Benefit

Although acts of legislation protecting the rights of SWD were forthcoming, rigorous academic expectations for students with special needs were lacking. The Education for All Handicapped Children Act (P.L. 94-142)—reauthorized and named the Individuals with Disabilities Education Act (IDEA) in 1990—was hindered by “low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities” (20 U.S.C. §1400 [4]). The reauthorization of IDEA as the Individuals with Disabilities Education Improvement Act (IDEIA) of 2004 was better alignment of special education and No Child Left Behind (NCLB, 2002) legislation. Accountability, highly qualified teacher status, scientifically based interventions, local flexibility, safe schools, and parental participation and options (Turnbull, et al., 2007) were elements difficult to ignore within a framework of special education monitoring and the legal power of the Individualized Education Program (IEP). The Individuals with Disabilities Education Improvement Act of 2004 sought, in part, to correct the separation of responsibilities between special and general education, as well as the lack of adequate teacher training—areas of improvement identified by the President’s Commission on Excellence in Education (2002) (Turnbull, et al., 2007). Compliance with IDEIA of 2004 regulations is not possible where research-based instruction and valid measures of academic outcomes are not in place for all students. Special education, as specialization of an effective, comprehensive educational system, was never intended to be the horse pulling the cart of general education— an overwhelming burden. Thus, compliance with IDEIA of 2004 provoked reform in complacent educational environments.

Guiding principles for the education of SWD in America continued through alignment with NCLB of 2001, and the spirit of IDEIA of 2004 will endure though initiatives from Race to the Top Program (U.S. Department of Education, 2009) and Elementary Secondary Education

## General Education Default and Student Benefit

Act Blueprint for Reform (U.S. Department of Education, 2010). As great the potential benefit of legislation for preserving the right of SWD to be educated in inclusive environments holding standards' based academic expectations, court orders demand compliance without capacity for self-execution. Unenforced law is essentially meaningless, and legislation is "truly effective only if the school authorities are willing to carry them out" (Turnbull et al., 2007, p. 319). It appears IDEIA of 2004 presumed to lay conscientious procedures for optimizing individualized education on top of well-managed general education environments, but satisfactory general education with adequate Tier One, universal supports is not a given throughout American schools today (Weber, 2010). Carrying out the spirit and letter of special education law at the school level is now especially complex because the American educational system is dynamically evolving and across America schools are going through their version of reform (especially in response to Race to the Top) (NCLB, 2002; U.S. Department of Education, 2009; U.S. Department of Education, 2010). As support for *individualized* education for students with special needs is overshadowed by the national priorities of improving low-performing schools and regaining America's reputation as the world's "best educated nation" (U.S. Department of Education, 2010, p. 1), school leaders striving to make the best decisions for special education students may face competing agendas.

Compliance with IDEIA of 2004 may depend on the extent to which school administrators recognize the federally mandated shift from a culture of procedural compliance to the post NCLB (2002) culture of outcome-based accountability (Turnbull, et al., 2007). Substantive benefit is a high-litigated area (Alexander & Alexander, 2005). In special education, educators cannot rely on That's The Way We've Always Done It (TTWWATI) (Elliott & Thurlow, 2006) because forms, policies, and procedures change with each *tinkering* of

## General Education Default and Student Benefit

regulations (Bateman, Bright, O'Shea, O'Shea, & Algozzine, 2007). Additionally, appropriateness and student benefit are unlikely to be addressed from a perspective of IDEIA of 2004 and school-based learning environments in educational leadership preparation programs. As a practical implication for the current analysis, compliance and program fidelity are greater when broader structure behind policies and directives are understood. The intent of the current review was to provide a framework for constructive practical special education decision-making processes— rather than direct procedural absolutes with generic applications. To this end, a purpose was to advance the knowledge base of special education administration for educators, school leaders, and policymakers through an informed interpretation of the general education default and substantive student benefit. An overarching purpose was to improve the quality and compliance of inclusive learning environments for students with special needs.

The review begins with a brief overview of student centered communication. Discussions of the general education default and student benefit, from a theoretical perspective of Free Appropriate Public Education (FAPE) within the context of IDEIA of 2004, follow. Discussions of Disputes and Court Cases, Practical Considerations for Preserving General Education Access, and Additional Resources follow the sections of General Education Default and Substantive Educational Benefit. A discussion and conclusion end the review. Supporting tables provide the following:

- Accountability requirements from IDEIA of 2004
- School postures frequently leading to due process hearings (Bateman et al., 2007)
- Court case summaries from across the United States where school districts were determined to have provided FAPE (Kriha,2010)

## General Education Default and Student Benefit

### Student Centered Communication

As visible leaders, school administrators model appropriate disability language for faculty and community. The term *handicapped children* from 1975 legislation has been replaced by *individuals with disabilities* (Bateman et al., 2007). *Students with special needs* is another appropriate term. The change reflects a philosophy of putting the student or individual above the condition—a student with a disability, rather than a disabled student (Bateman et al.). It follows, school leaders may discuss classrooms for students with Autism or Behavioral Disorders (BD), for example, rather than Autistic or BD settings. Similarly, a teacher for students with Moderate or Profound cognitive impairments may be on staff, rather than a Moderate or Profound teacher. While the terms *retarded* is obviously demeaning, more subtle changes in terminology prevents identifying a teacher or classroom as only available for students with particular exceptionalities. According to the *Top Ten List of Ways to Move Closer to (Rather than Away from a Due Process Hearing)*, “Children are to be served, not the disability. Limiting the availability of services to only certain disability classifications is contrary to law” (Bateman et al., 2007, p. 47). Replacing *mainstreaming* with *inclusion* is another change. When once special education students were *mainstreamed* with typical peers after proving themselves capable, today, special education students are placed in the general setting with supports until *inclusion* is shown to be not beneficial (Bateman et al., 2007). Additionally, educators should not use *educationese* or unfamiliar acronyms when communicating with parents. According to Bateman and Bateman (2006), “If you need to use these terms, explain them without being condescending” (59).

### Free Appropriate Public Education

A federal mandate entitling all special education students to FAPE in the Least Restrictive Environment (LRE) is the core of IDEIA of 2004 (20 U.S.C. §1401 [9]). Meeting

## General Education Default and Student Benefit

standards and individualization are two criteria of FAPE (Turnbull et al., 2007). Meeting standards includes: (a) Without charge, at the public's expense; (b) Under public supervision; (c) Adhering to state education standards; and (d) Including appropriate PK, elementary, and secondary education (20 U.S.C. §1401[9]). Without expense and under public supervision are more straightforward requirements than complying with state standards and appropriateness. The individualization criterion includes an IEP tailored to fit the educational needs of the particular student and an educational program delivered in conformity with the IEP (Turnbull et al., 2007). Individualization is a thread woven throughout the IEP process.

### General Education Default

According to a finding from the President's Commission on Excellence in Education (2002), "Children placed in special education are general education children first" (p. 8). Ensuring equal access and equality of opportunity is similar to racial desegregation—allowing non-whites to both enter school and participate fully without discrimination (Turnbull, et al., 2007). Least Restrictive Environment requirements prevent the discrimination of students with special needs and extend the *zero reject* principle (based on the Fourteenth Amendment of equal protection) (Turnbull, et al., 2007). Special education is conceptualized as a service in IDEIA of 2004, rather than a place where SWD are sent. According to Turnbull, et al. (2007), "access must involve participation in the settings, programs, and curricula alongside children without disabilities" (p. 207). In *Curricular LRE: It's More than Attending Class with Nondisabled Peers*, Richards (2010) observed, "The default position is that the student with a disability participates fully in these mainstream pursuits, and any restriction or deviation from the default must be justified" (p. 12). To ensure special education students benefit from educational efforts and LRE placement, policies seeking procedural compliance with IDEIA of 2004 typically



## General Education Default and Student Benefit

require the IEP process to demonstrate the following: (a) Consideration of each less restrictive placement on a LRE continuum; (b) Justifications for the appropriateness of the selected LRE placement and the inappropriateness of less restricting placements, in relation to individual student need; and (c) Documentation of the provision of supplementary aids, accommodations, and services before further restricting access to general education (Turnbull, 2007, pp.213-217).

An important question for IEP committees to answer is why services or accommodations for a special education student cannot be provided by a general education teacher and within a general setting. According to Bateman and Bateman (2006), “Often forgotten is that the law stipulates that services are to follow students; that is, services must be tailored to the unique needs of the individual, and provided in the most appropriate setting” (p. 17). Considering the standard criterion of FAPE, an appropriate individualized education should not require SWD to *give up* Science, PE, electives, or anything else afforded general education students *without reasonable justification*. The LRE principle and equality of opportunity imply special education students should not have to give up any instruction in the regular classroom without justification. In balancing what is missed from general education with what is gained from alternative strategies, curricular adaptations, or a special setting, anything other than what typical students do or get should offer the special education student clear advantages before restrictions or modifications are accepted.

When once an emphasis was placed on what is gained from a special setting, what is missed while away from general education is more likely to be called into question today. The shift in perspective was motivated in no small part by IDEA alignment with NCLB (2002). According to Richards (2010), “The modern duty to leave no child behind can be described in similar shorthand as *maximum exposure to grade level curriculum* with the regular grade-level

## General Education Default and Student Benefit

curriculum obviously serving as the default, hence curricular LRE” (p. 1). Areas of accountability requirements from IDEIA of 2004 are shown on Table One. The issue of mandatory testing of special education students, with either established state standards or alternative standards, continues to be an area of controversy. According to Bateman and Bateman (2006), “Proponents of statewide assessment believe such measures can increase student achievement and participation, while opponents see a negative impact on student achievement and an increase in the rate of school dropouts” p. 27). If proficiency at each grade level is not the expectation for special education students on a standard diploma track, receiving a high school diploma based on state graduation criteria is unlikely.

The only one standard, appropriate thing for *all* special education students to receive is an education in conformity with an IEP tailored to his or her individual needs. A diversity of exceptionalities is protected under IDEIA of 2004 and within these exceptionalities are mosaics of need and vast peaks and valleys of strengths and weaknesses. According to Bateman and Bateman (2006), “It is not acceptable for students to be assigned solely those services that are designated for a particular disability or those programs that are available or convenient” (p. 17). In other words, a student’s strengths and weaknesses should not be seen through a sieve of the student’s disability classification. Additionally, student services should not be determined solely by difficulties or cost involved with the provision of those services. Administrators should be on alert for blanket policies or procedures applicable to *all* special education students or *all* SWD with a certain classification. Such practices must be challenged because services and placement, as well as appropriateness and educational benefit, are determined individually in special education.

Table 1. IDEIA of 2004: IEP Requirements

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Areas of Change
NCLB language
<ul style="list-style-type: none"><li>• Annual yearly progress</li><li>• Graduation and dropout rates</li><li>• Conformity with state standards</li><li>• Performance indicators</li></ul>
Present level of performance
Academic and functional levels
Goals
Measurable academic and functional annual goals
Objectives only mandatory for alternative assessment
Measuring progress
Describe how progress towards goals will be measured
Describe when parents will receive progress notes (i.e., quarterly, concurrent with report cards)
Services and supplementary aids
Based on peer-reviewed research to the extent practical
Assessment
Individualized accommodations for academic and functional areas of state testing
Justification for alternative assessment
Transition
IEP in place at age 16 and updated annually thereafter:
<ul style="list-style-type: none"><li>• Measurable post-secondary goals in areas of training, education, employment, and independent living, based on age-appropriate assessments</li><li>• Services(e.g., course of study) to reach goals</li><li>• Statement of transfer of rights given one year prior to age of majority</li></ul>
Transfers
FAPE consistent with existing IEP until adoption of prior IEP or development of new IEP(in state) or new evaluation and new IEP (out of state)
Promptly requesting and sending records

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Source: Adapted from Bateman et al., 2007, pp.10-12.

## General Education Default and Student Benefit

Understanding the notion of the general education default guides the practical decision-making processes frequently experienced by school leaders in maintaining inclusive learning environments. A typical example of deviation from the general education default with clear student advantages would be a student reading three or more levels below grade level who receives some reading instruction in a resource room because the special education teacher is trained on multi-sensory strategies and the special setting pupil-teacher ratio is lower than that of the regular classroom. An example embodying equality of opportunity for general education and curricular LRE would be the student with a mental handicap, such as a low performing student with Autism, who receives art services because an evaluation process identified a secondary exceptionality of talented. In this situation, student ability was not determined by student disability, and student benefit is clear—the student was in a special setting most of the day already (access to general education was not more limited) and the student received art instruction from a certified service provider.

### Substantive Educational Benefit

As noted in the *Board of Education v. Rowley* (1982), “Implicit in the congressional purpose of providing access to a *free appropriate public education* is the requirement that the education to which access is provided be sufficient to confer some educational benefit” (as cited in Turnbull et al., 2007, p. 156). The *Board of Education v. Rowley*(1982) further noted, “It would do no good for Congress to spend millions of dollars in providing access to public education only to have...the child receive no benefit from that education” ( as cited in Alexander & Alexander, 2005, p. 495). From a procedural compliance perspective, FAPE is “a process to be followed, in belief that a fair process will produce fair and acceptable results” (Turnbull, et al., 2007, p.156). To ensure procedural due process, special education procedures typically

## General Education Default and Student Benefit

require maintaining evidence of parental consents, prior written notice of meetings, notice-of-action, notice of procedural safeguards, confidentiality assurances, and access to records (Turnbull et al., 2007, pp 249-287). However, substantive benefit is more than procedural compliance, and process determined appropriateness is no longer favored in courts (Turnbull et al., 2007). Procedural violations are only likely to affect FAPE if they prevent parental participation or cause significant loss of student benefit (Turnbull et al., 2007). Common school postures leading to mediation and disputes are shown on Table 2.

**Table 2. School Postures Leading to Due Process**

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Ten Ways to Move Closer to Due Process\*

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1. *We don't do it that way here.*
2. *That costs too much money.*
3. *I can take care of that.*
4. *We don't have to give you another IEP meeting since you failed to show up.*
5. *It doesn't matter what services your child received at another school.*
6. *We don't have to provide an Independent Education Evaluation in this situation.*
7. *We only provide that service for children with this other disability.*
8. Repeated documentation on general education records that the student is *lazy* or *doesn't pay attention*, with no evaluation.
9. Documentation on IEP records that the student's *behavior interferes with learning* and/or multiple suspensions, with no behavior objectives or plans.
10. *It's not our fault the child didn't get the education—parents couldn't agree.*

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Source: \*Bateman et al., 2007, p. 47.

Benefit is determined case-by-case (Turnbull et al., 2007), and there is no single test to determine sufficient educational benefit. Educational benefit may be determined by advancing

## General Education Default and Student Benefit

academically, skill acquisition, or passing coursework (Alexander & Alexander, 2005). Courts have held, however, that educational benefit must be more than *de minimus*—the minimum (Kriha, 2010). According to Richards (2010), participation in the general education environment may also be a factor in determining benefit: “The concepts of educational benefit and LRE are at their simplest in the context of a student being educated in the regular classroom successfully and advancing with peers in the grade level curriculum” (p.3).

The classic analogy of substantive educational benefit is the Cadillac versus the Chevrolet. In the *Board of Education v. Rowley* (1982), the *maximal potential* (Cadillac) was rejected in favor of a *floor of opportunity* to access individually designed instruction and related services leading to benefit (Richards, 2010). The question is whether a student received *sufficient* benefit (Richards)—a working Chevrolet. In the Rowley case, meaningful benefit was determined to have been provided because the student received services and achieved satisfactorily in general education (Richards). Although district responsibility for providing an interpreter for the hearing-impaired student to maximize educational benefit was not supported by the court (Turnbull, et al, 2007), Rowley is viewed as a landmark case lifting the floor of opportunity for determining meaningful student benefit (Alexander & Alexander, 2005).

Interpreting appropriateness with greater academic accountability increases the burden of school districts to evidence meaningful educational benefit (Bateman, et al., 2007; Turnbull, et al., 2007). Earlier IDEA regulations did not include “explicit modern emphasis on grade-level curriculum” (Richards, 2010 p. 2). The following areas relating to IDEIA of 2004 and the outcome-based measurement of NCLB are now factors in determining substantive benefit: LRE placement, proficiency on state testing, individualization of appropriate accommodations and instructional strategies, research-based methods, progress monitoring with valid measures,

## General Education Default and Student Benefit

periodic progress reporting to parents, and efforts to obtain parental participation. The Adequately Yearly Progress component of NCLB (2002) reinforces, “the strong presumption of grade-level performance for the IDEA-eligible student. Indeed, under the current regulations, the expectation is that a large majority of IDEA students (as many as 73%) are to be taught and tested on grade-level state-mandated curricula” (Richards, 2010, p. 8). As explained by IDEIA of 2004:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible; (B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.  
(20 U.S.C. §1400[c] [5])

Bateman and Bateman (2006) explained an educational benefit caveat meaningful for educators. Although IEPs are required to hold high standards and schools are required to make *good faith efforts*, progress is not guaranteed:

Some have the impression that when we talk about the IEP as an instrument of accountability that means that the district will be held liable for the student not meeting the goals of the IEP. This is not what the law implies, and should not be inferred. An appropriate IEP is one in which the district has made a good-faith effort to implement the IEP, kept track of their efforts, and when problems occurred, worked to change. If however, the district does not make good-faith efforts to implement the IEP or respond to problems or parental concerns, then the IEP is inappropriate.” (Bateman & Bateman, 2006, p. 54)

### Disputes and Court Cases

When parents refuse to sign an IEP it may be because they question special education’s benefit to the student, or they may believe the student needs additional services or a different placement (Bateman & Bateman, 2006). The school should inform parents of their rights to

## General Education Default and Student Benefit

mediation, and understand district rights are similar (Bateman & Bateman). Even if a mediation process has begun, the school should attempt to develop an IEP for areas of agreement and make a commitment to work on areas of difference. An example of communicating this stance to parents is the following: *Let's see how it goes, I understand and have documented your concerns on the IEP. We can meet again next month, after giving this plan a chance, and change things then, if needed.* When the process reaches such an impasse, it is crucial for the school to follow through with what was communicated to parents. Attempts to reach common ground, as for all parental communication, should be documented. If agreement is not possible, services should continue as delineated in a previously signed IEP (Bateman & Bateman). According to Bateman and Bateman (2006):

If there is an ongoing due process hearing, the old IEP, or the IEP to which they agreed is the IEP that is in place pending the hearing officer's decision. For instance, if the student is placed in the general education classroom and a subsequent disagreement arises over placement, the child remains in the general education classroom until the final decision, unless parties come to some other agreement. (p. 63)

The appropriateness of IEPs and IEP implementation are examined during due process hearings, mediation, and litigation (Bateman & Bateman, 2006; Bateman, et al., 2007; Turnbull et al., 2007). When authorities are *neither willing nor able* to execute compliance, “students and their parents have been compelled to return to court and seek additional relief” (Turnbull et al. 2007, p. 319). The original and foremost impetus for establishing educational rights for individuals with disabilities has been litigation (Turnbull, et al., 2007). Bateman et al. (2007) observed alarmingly high rate of special education disputes and historically high rates of special education litigation. The burden of establishing appropriateness rests with parents or those seeking satisfaction (Bateman, et al., 2007). In other words, districts defend the appropriateness of IEPs.



## General Education Default and Student Benefit

Postures leading to due process (Table 2) reflect procedures and attitudes that may prove difficult to defend. One committee member assuming complete control of the IEP process is a problem—decisions are not to be predetermined and are to be made by IEP team decision (Bateman et al., 2007). Refusing to consider a request because it costs too much is another red flag. There are limits to how weighed funding can be in providing services to SWD (Bateman et al.). Two issues regarding evaluations were identified—refusing to provide an Independent Education Evaluation and not performing an evaluation when cause to suspect a disability was evident (e.g., numerous suspensions, repeated teacher comments regarding inattention, laziness, not trying, or other). Similarly, there should be follow-up to comments (e.g., behavior impedes academic progress). Teachers are required to do more than simply *identify* student deficits. Weaknesses noted in an IEP should be coupled with a goal, attached plan, or accommodation.

Substantive benefit is fertile ground for litigation (Alexander & Alexander, 2005). In *Applying the Core Principle Behind Educating Students with Disabilities*, Kriha (2010) reported 11 out of 12 U.S. Court of Appeals cases regarding FAPE were decided in favor of school districts. These determinations should not be viewed as landmark cases (Kriha), but they give insight into court opinions. Cases across the United States where school districts were found to have provided FAPE are shown on Table 3. The case of *Houston Independent School District v. V.P.* (2009) was the one case identified by Kriha where FAPE was determined to have not been provided, and parents were reimbursed private school tuition largely because of the testimony of the child's teacher. In the Houston case the teacher stated to the following: (a) The student did not progress well academically earlier in the year; (b) Student progress improved late in the year because work began to be modified; and (c) In the opinion of the teacher, despite adequate grades, the student did not master the curriculum well enough to be promoted to the next level

(Kriha). With such assertions from the stakeholder who worked most closely with the student, it is not difficult to understand why student benefit was doubtful.

**Table 3. Post IDEIA Cases Determining Districts Provided FAPE (Kriha, 2010)**

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### Cases in Favor of FAPE

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Tuition reimbursement for a private school, home-based instruction, or specific methodology was denied because the IEP was reasonable and offered sufficient benefit— does not have to be a perfect IEP or maximum benefits. (*Lessdard v. Wilton-Lyndeborough Coop. Sch. Dist*, New Hampshire, 2010; *Souderton Area Sch. Dist. V. J.H.*, Pennsylvania, 2009; *Thompson R2-J Sch. Dist. v. Luke P.*, Colorado, 2008)

Placement in a class with a lower student teacher ratio was denied because placement does not have to be best, only appropriate with meaningful benefits. (*E.H. and K.H v. Board of Educ. of Shenendehowa Cent. Sch. Dist.*, New York, 2009)

Tuition reimbursement for a residential facility was denied because the student earned credits and progressed academically. (*Shaw v. Weast*, Maryland, 2010)

A challenge to a more restrictive district recommended placement was denied because parents participated in the IEP process and the school responded to suggestions— no procedural violations. (*Nack v. Orange City Sch. Dist.*, Ohio, 2006)

Tuition reimbursement for a private residential school was denied because the student's medical diagnoses were complex and the district provided appropriate placement for Autism and Other Health Impairments. (*Hjortness v. Neenah Joint Sch. Dist*, Wisconsin, 2007)

A challenge to more restrictive district recommended placement because of procedural violations was denied because, since a subsequent medication regime significantly improved behaviors, the extent to which IEP deficiencies deprived FAPE was questionable. (*School Bd. Of Lee County, FLA v. M.M.*, 2009)

Compensatory services and tuition reimbursement for a private school were denied because, although the student failed to achieve goals, progress was made. (*M.M. v. Special Sch. Dist. No. 1*, Minnesota, 2008)

A challenge to due process (FAPE was affected by procedural violations) was denied because the initial evaluation process of a cannabis-dependent student with cognitive impairments was determined to be lengthened by truancy, parental refusals to cooperate, and unavoidable disruptions. (*Lesesne v. District of Columbia Pub. Schs*, D.C., 2006)

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Source: Adapted from Kriha, 2010, p. 13-18.

## General Education Default and Student Benefit

The *Houston Independent School District v. V.P.* (2009) may also hold a lesson for teacher monitoring and evaluation. How might the outcome have differed if supervision and evaluation of the teacher documented areas for improvement, monitoring of performance, and provision of professional development in areas of need? If not for an interest in providing a better education for students with special needs, school leaders should ensure staff compliance with special education procedures and policies (as well as document courses of action in improvement plans when performance is not adequate) for sake of the growing threat of litigation.

When sufficient benefit has been determined, whether or not progress was made in accordance with *individual* potential may still be an issue to decide. According to Richards (2010), “There is an important difference between the notion of maximizing potential (which IDEA does not require) and determining whether the progress is meaningful based on an individual analysis of the child’s potential” (p. 3). In *Ridgewood Board of Education v. N.E.* (1999), the intellectual potential of the student was found to not have been given adequate weight by the District Court in a determination of sufficient benefit: “When students display considerable, intellectual potential, idea requires a great deal more than a negligible [benefit]” (*Ridgewood Board of Education v. N.E.*) (as cited in Richards, 2010, p.3).

As disability awareness increase, research and services for the disabled improve, and parents become stronger advocates for their children with disabilities, the concept of substantive educational benefit is relevant to school-based special education administration. From special dietary guidelines for school cafeterias to the latest methodology based on brain research, administrators may be surprised by what parents request in hopes of maximizing their child’s education. The following summary points can guide decision-making processes:

## General Education Default and Student Benefit

1. Parental requests and expectations should be sincerely considered.
2. Decisions should be determined on an individual basis.
3. The student should receive services, accommodations, or supplementary aids grounded in research and selected in consideration of the individual student.
4. Sufficient student benefit from educational efforts, determined from a perspective of individual potential, should be evidenced.

### Practical Considerations for Preserving General Education Access

School administrators may frequently encounter situations of demands from general education teachers for more restrictive placement because appropriate services and supports cannot be provided in the regular classroom. Such requests are typically a version of the following: *I tried everything and progress in my room is impossible when I have 25 other students to teach. The student is special ed. and the resource teacher just has seven— so, the student should go there.* According to IDEIA of 2004, students with special needs should only be removed from the general education environment when “the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily” (20 U.S.C. §1412[a] [5] [A]). Two of the cases cited on Table Three were parental challenges to more restrictive placement by schools. Restricting placement of special education students holds possibilities for noncompliance and disputes when the following are not evidenced:

- Clearly defined, quality instructional strategies, interventions, or accommodation designed to address individual student deficits
- Parental notification of progress and opportunities for collaboration to improve student weaknesses

## General Education Default and Student Benefit

- Justifications for why strategies or interventions cannot be provided in the regular classroom (including a reasonable period of time where they were tried in general education and found unsuccessful with systematic progress monitoring, when possible)

Meeting notifications, excusals, or attendance of general education teachers at IEP meetings are important areas of procedural compliance. As observed in Number Nine in the *Ten Ways to Move Closer to Due Process* (Table 2), teachers have responsibilities towards identifying *and* remediating student deficits. Participation of the general education teacher in this process is federally mandated:

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel. (20 U.S.C. §1414 [d] [1] [c])

Time in the daily schedule where students with special needs interact with typical peers should be preserved. Participation in art, science or computer lab, and PE, for example, as well as access to extracurricular activities, may be more meaningful to special education students because they frequently struggle in core academics. However, practices of remediating during non-core activities may exist. Adjusting strategies or accommodating for individualized learning needs *during* core instructional periods are better solutions than having a special education student sit through regular instruction with limited support or academic benefit, and then going to a special setting for remediation in the content during non-core time when full general environment participation was likely. With IDEIA of 2004's emphasis on inclusive practices to the *maximum extent possible*, opportunities for instruction, transportation, and accommodations

## General Education Default and Student Benefit

in the general education environment, as well as participation in activities and extracurricular activities with typical peers, are considerations of student benefit.

When general education access is restricted for behavior, behavior should be an IEP goal because behavior is what is affecting access to general education instruction. The use of a restricted setting, involved behavioral intervention, and/or maximum accommodations to increase access to general education should be an aim, to the extent possible. Increasing a student's restrictive placement should be viewed as a type of response to intervention process. This process does not apply to situation of drugs, weapons, or seriously bodily injury (20 U.S.C. §1415[k] [1] [G] [i-iii]). General education teachers should attempt to accommodate or intervene for behavior, as for academic needs, in the regular classroom. Interventions should be tried for a period in general education initially, when possible, because students with special needs often have transition difficulties. Providing for a staggered entrance to general education for SWD at the beginning of the year, or perhaps even after holiday breaks, may be a better strategy than waiting for the inappropriateness staff know is likely to come, then increasing LRE placement for a long length of time. For example, students should not be removed from the regular setting for the whole school year because of an outburst or inappropriate behavior months earlier—especially without ongoing attempts to address behavior. General education is the default, and staff should make continued, good faith efforts towards behavioral interventions that will get the student back to the regular classroom, as quickly and to the maximum extent possible. A special setting with supplementary aids (i.e., sensory equipment, a cool down area) may offer more benefit to a student who is unable to maintain appropriate classroom behavior for over 20 minutes, even with an individualized behavior intervention plan. The expectations are (a) general education time is increased systematically from a baseline established with valid measures, (b)

## General Education Default and Student Benefit

the research-based interventions are progress monitored, and (c) parents are kept informed of progress.

A general education setting may continue to be inappropriate for a student when interventions remain unsuccessful. In such cases, it is crucial to document multidisciplinary, ongoing efforts towards developing an effective plan. Documentation of outside factors, such as lack of parent follow-through for referrals, extensive absences, or reasons why the need for outside services may be suspected (i.e., drug abuse, neglect, child abuse) are important protocols. In *Houston Independent School District v. V.P.* (2009), the student's poor academic performance was documented for several months before appropriate modifications were developed. Not developing new strategies when behavioral strategies consistently fail is a similar mistake—which is also similar to Number Nine of Ten Ways to Move Closer to Due Process (Table 2).

Discipline for special education students is a crucial and specific topic of school administration, with important elements of procedural compliance. However, sufficiently covering discipline is beyond the scope of this analysis. Turnbull, et al. (2007, pp. 86-104; 166-169) gives a well-developed perspective on special education discipline.

### Additional Resources

Special education law is a monstrous topic, and the current analysis was intended as background or supplemental information. School administrators are encouraged to contact local special education experts (i.e., supervisors, directors, school attorneys) as primary resources. School personnel should seek clarity from district experts when a course of action is not clear and follow recommendations because district policies and procedures are grounded in state and federal law. Individual liability is another important motivation for following established district policies, procedures, and directives. Section 183 of the Civil Rights Act of 1871 was explained:

## General Education Default and Student Benefit

Under certain circumstances, an employee or an official of a school district may be found individually liable even though a school board may not be. The individual employee or official cannot be liable unless the plaintiff shows that the action violated a clearly established law and that the individual exhibited a *callous indifference* for the rights of the plaintiff. (Mitchell v. Forsyth, 1985) (as cited by Alexander & Alexander, 2005, p. 657)

Three reasons come to mind for school leaders needing direct access to reliable and timely special education resources. First, in financially strapped environment of doing more with less, administrators frequently provide professional development to staff. Second, a school leader may suddenly be required to make a decision regarding an uncommon special education situation. Third, special education law changes, and recommended procedures frequently change following court cases.

Four quality resources specifically useful to school administrators were identified. The State of New Jersey Department of Education (2010) has summarized 16 areas of IDEA of 2004 and made handy *One-Pagers* available free of charge on the World Wide Web. Quickly reading over a topic *One Pager* may help school administrators ask experts the right questions concerning their specific situation. Another resource, the National Dissemination Center for Children with Disabilities (NICHCY, 2010), has developed a training curriculum based on the following five special education themes: Welcome to IDEA, IDEA and General Education, Evaluating Children for Disability, The Individualized Education Program (IEP), and Procedural Safeguards under IDEA 2004. Modules are available free of charge on the World Wide Web and offer a slide show presentation, trainer's guide, and participant handouts (NICHCY, 2010). Another credible resource useful for special education professional development is the IRIS Center at Vanderbilt Peabody College. Modules on special education topics with learning activities and video segments are available free of charge online from the IRIS Center. Conference material from LRP's National Institute on Legal Issues Educating Individuals with



## General Education Default and Student Benefit

Disabilities (2011) is another dependable resource, especially for those seeking clarity on IDEA court interpretations. Program material from the institute's annual conference is available for purchase on the LRP website. While the information is not free, the well-organized binder filled with current information from nationally recognized special education law experts is an economical alternative to attending the annual conference.

### Discussion and Conclusion

Access to knowledgeable and conscientious special education experts is a benefit for school level administrators. When special education procedures are well established and enforced consistently by district level special education staff, oversight burdens are reduced at the school level. The special education expert who firmly blocks decisions and actions leading to due process or mediation should be valued. However, supervisors who give school leaders complete autonomy regarding special education programming and never question decisions may be preferred. School leaders should keep in mind that a *no news is good news* approach can be disastrous in special education and molehills become mountains with neglect.

Six of the cases cited by Kriha (2010) sought reimbursement for the costs of residential facilities or private school tuition on the basis that the school could not or would not provide an appropriate education (Table 3). Even when a private school can offer a *better* education for a student with special needs, districts are unlikely to have to pay private school tuition unless they cannot defend that a *sufficient* educational benefit for the particular student was provided—the working Chevrolet. *Ridgewood Board of Education v. N.E.* (1999) implies consideration of individual potential is necessary when determining goals or benefit. Considering a *continuum of placement*—while a school-based, self-contained setting is more restrictive than regular or resource placement, it is less restrictive than homebound, special school, or residential

## General Education Default and Student Benefit

placement. Thus, school-based placement often offers greater student benefit. Although courts have not demanded a maximum floor of opportunity for substantive educational benefit, schools should consistently document their good faith efforts to provide FAPE. As suggested by *Houston Independent School District v. V.P.* (2009), defending the appropriateness of a student's individualized education can be undermined by teachers who are unwilling to make the effort, perhaps because they doubt the benefit of curricular LRE or believe the SWD should be placed elsewhere.

An observation of this author is that as NCLB (2002) increased academic expectations for all students, the availability and quality of supports for students failing to make adequate progress have improved. Special education students should not be excluded from research based universal interventions or programs that offer a high potential for academic benefit. Parents may become disinclined to continue special education services when special education is a label used to sort their child from appropriate educational services or placement. Imagine the dysfunction of situations where, with all the powerful protections of IDEIA of 2004, revoking special education status is the only option for getting a SWD the most appropriate education. Considering services are to follow the student and individualization a FAPE criterion, policies excluding *all* special education students may be interpreted as obvious and systemic violations of FAPE.

Excluding special education students from charter and other types of specialty educational environments is an evolving area of current interest for special education advocates. The Individuals with Disabilities Education Act of 2004 protects special education students' access "to the general education curriculum in the regular classroom to the maximum extent possible" (20 U.S.C. §1400 [C, 5]). Federal law has a history of directing the instruction of students with disabilities in their local schools, rather than being tolerant of local schools

## General Education Default and Student Benefit

excluding special education students or being exempt from IDEA requirements. Denying access to local schools for all students with IEPs seems especially abhorrent and a backward slide on hard fought disability rights. When it becomes acceptable to view the appropriate education of students with disabilities as something contrary to the academic growth of all students, a return to mandatory schools for the disabled may not be far behind. As noted so eloquently in IDEIA of 2004, “Disability is a natural part of the human existence and in no way diminishes the right of individuals to participate in or contribute to society” (20 U.S.C. §1400 [c] [1]). Every student, then, is a potential student with a disability, and the rights of SWD are potentially the rights of all. The United States Declaration of Independence (1776) upheld a self-evident truth— “all men are created equal” (§1). Yet, parents and teachers of students with disabilities know how evident the inequality of ability among children. Just as the most compliant IEP writers are often the most competent and caring teachers, this author believes schools of excellence and world-class learning environments are effective in meeting the needs of all students as individual learners.

Caring, professional educators may legitimately hold conflicting views regarding the best course of action in particular special education matters. Evolving procedures, varying responsibilities, dynamic school environments, personnel influxes, the individualized nature of special education, and the lack of a shared knowledge base contribute to polarization of viewpoints. Some stakeholders look for immediate solutions, while others weigh long-term benefits, such as remaining on the most rigorous state assessment track to optimize post-secondary outcomes. One perspective should not be allowed to claim moral high ground above another and create false dichotomies— the caring, concerned for a student’s welfare versus the heartless, concerned with compliance and covering rears. Indeed, it is not only possible, but the responsibility of professional school teams to make the best decisions for students with special

## **General Education Default and Student Benefit**

needs *and* fulfill legal responsibilities. Getting to the place where all team members are united in a belief that alternatives were considered, decisions were in the best interest of the student, and district responsibilities were fulfilled can, however, require uncomfortably sincere collaboration.

This author has witnessed school leaders standing up for the rights of SWD; watched them tirelessly put pen to paper to locate a special classroom nearest a restroom or find funds for staff training, such as for Autism or Behavioral Interventions; heard them argue like the best attorney for an air conditioned bus, changing table, or phonics program needed by their students; known school leaders to get on ambulances with students; been with them as they sat through hours of IEP meetings; and watched them assist with special needs in a multitude of ways not in their job descriptions. A hope is this review gives school administrators striving to develop and maintain quality inclusive learning environments information useful for guiding constructive, practical special education decision-making on their campuses.

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