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IDEA'S MEDICAL SERVICES EXEMPTION

Overview

For more than twenty-five years public school systems here in Virginia and across this nation have been working hard to provide access to educational opportunities for students with disabilities. Suffice it to say, one might think that today's courts would see fewer cases taken by parents who claim that their child is not being provided for under either federal or state law. Such is not the case. To understand why, a brief look back at the following interrelated factors is appropriate: (1) the enactment, sustained development, and consistent enforcement of the very comprehensive *Individuals with Disabilities Education Act (IDEA)*, and (2) the rapidly expanding population of school age children with unique *educational needs* (many directly linked to an existing *medical condition*).

The Education for All Handicapped Children Act. Following closely on the heels of the Rehabilitation Act of 1973, Congress passed, and President Gerald Ford signed into law in 1975, the Education for All Handicapped Children Act (EHCA). A comprehensive statute, the new law required that all children with educational disabilities (defined by *specific category*) receive a free appropriate public education (FAPE), including necessary related services, in the least restrictive environment (LRE). Each student covered by the new law would have an individualized educational program (IEP) designed to meet the unique needs of that student. Specified for coverage in the EHCA were children identified as mentally retarded, learning disabled, or emotionally disturbed.

During the late-1970's, the United States Supreme Court and the courts below it were busy as parents sought the law's benefits for their children. In doing so federal judges were placed in the position of legitimizing special education in public education and, at the same time, applying and enforcing EHCA's mandates in the states.

As public education moved through the 1980's and 1990's, the term special education was interpreted as specifically designed instruction to meet the unique needs of a child with a disability. Over time each state adopted this definition and included it in law (see, *e.g.*, *Code of Virginia 22.1-213, et seq.*). In addition, special education was said to include more than the academic aspects (*i.e.*, subjects studied) of an educational program. Nonacademic and extracurricular activities were included as well. School Board of Collier County, FLA. v K.C. (2002). What is more, special education had to be provided at no cost to either the child or the child's parent(s).

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FAPE: What does it mean? The first major issue area emerging from the early application of special education law involved the meaning of the free appropriate public education (FAPE) requirement. In 1982, however, the United States Supreme Court provided some clarification. The spirit of the EHCA was met, opined the Court, when a student receives “some benefit” from his/her educational program. It was the Court’s view that a “free appropriate public education” was not synonymous with the “best education;” rather, the FAPE requirement is solely intended to provide a student with *access to* a “basic floor opportunity.” The intent of the law, said the Supreme Court, is to ensure that each eligible student receive *access to* a “meaningful educational opportunity.” Board of Education v Rowley (1982). Contemporary courts consistently apply Rowley. In doing so, they rule that a special education student’s educational program must be “reasonably calculated to provide educational benefit, and that IDEA does not require maximizing a student’s potential.” Coale v Delaware Dept. of Education (2001), and White v School Board of Henrico County, Va. (2001).

Special Education Law Expands. The EHCA was retitled the Individuals with Disabilities Education Act (IDEA) and its coverage made more comprehensive by Congress, in 1990. IDEA’s guarantees were extended and made available to growing numbers of kids (2 to 21 years old) with special needs (many with related medical conditions) entering the public schools. Covered by the reauthorized IDEA were children identified as dyslexic, autistic, traumatic brain injured, attention deficit disorder, and other health impaired.

In 1997 Congress once again reauthorized IDEA and made it more comprehensive. IDEA was expanded to include the following thirteen categories of disabilities: developmentally handicapped/mental retardation, hearing impairments, speech or language impairment, visual impairments, serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, deaf-blindness, and multiple disabilities. Congress also made it clear that students covered by IDEA were not excluded solely because they were confined to their home, or in an institution (including correctional institutions), or in a hospital setting, or because they are homeless. In addition, the reauthorized IDEA required that eligible students be educated with their general education counterparts in the general curriculum of a regular school to the extent practicable. Popson v West Clark Community Schools (2002) As a general rule this is referred to as the “mainstream presumption.”

IDEA 1997 also required school officials to contemplate an evaluation when it comes to their attention (*i.e.*, receive notice) that a student “might need” special education and related services. Such an evaluation may be triggered when a parent expresses a verbal concern or submits a written request to a school official, or when a student’s school performance or misbehavior indicates this to be the case, or when a school staff member suggests that a student might need special education. S.W. v Holbrook (2002)

Necessary Related Services. Beginning in the mid-1980’s and extending through the decade of the 1990’s, federal and state courts decided a variety of special education cases. One emerging area of controversy among several involved the requirement that the expanding population of children covered by IDEA be provided with *necessary related services*. Arlington County, VA v Smith (2002) Currently, IDEA defines related services as “transportation and such developmental, corrective, and other services necessary to assist a student with a disability to benefit from special education.” 20 U.S.C. 1401(a)(22) Such services, states the law, must be made available “at no cost to parents.”

By the year 2000, the list of necessary related services was very comprehensive. For example, the list included physical and occupational therapy, psychological services, speech and language pathology, social work services, counseling services, school health services, transportation, therapeutic recreation and numerous others. 34 CFR 300.24(a) It is important to note that most controversies involving parental requests for related services

typically are resolved without going to a court of law. Most are settled through the IEP process, or through mediation, or through the due process hearing option of the law.

Emerging Issue:

Excluded from IDEA’s related services requirement are *medical services* (*i.e.*, services solely performed by a licensed physician, and in some states a nurse practitioner also is included), except when necessary for “diagnostic or evaluation purposes.” 20 U.S.C. 1401(17) The need to obtain information from physicians and other outside school system health providers, in an effort to fully evaluate a student’s needs, has been emphasized by the courts. J.S. v Shoreline School District (2002) In this writer’s opinion, however, it is the *medical services exemption* of IDEA that currently holds the most potential for future litigation. The cases presented below illustrate this point.

Case Law Examples:

The leading case to reach the United States Supreme Court involving the *medical services exemption* of IDEA was Irving ISD v Tatro (1984). In Tatro, a Texas public school system already provided special education services to Amber, a female student with spina bifida. Amber’s IEP (Individualized Education Program) provided her with attendance in early childhood development classes and such services as physical and occupational therapy. However, her IEP made no provision for school staff to administer a procedure known as *clean intermittent catheterization (CIC)*, *i.e.*, the insertion of a catheter into the urethra to drain the bladder. Amber needed CIC every three or four hours to avoid damage to her kidneys and also to remain in school. School officials argued that CIC (1) was a “medical service” and not an “education-related service,” and (2) was not needed for either evaluative or diagnostic purposes. The United States Supreme Court disagreed. The Court held that since CIC (a) could be done by someone other than a licensed physician, and (b) enabled Amber to gain access to and remain at school receive the benefits of the school’s educational opportunities, it was both a necessary and related educational service within the meaning of the law. The school system was obligated to provide this related service.

Neely v Rutherford County (1995) is a decision of the United States Court of Appeals for the Sixth Circuit. Samantha Neely was a seven-year-old student in a Tennessee public school system. She suffered from Congenital Control Hypoventilation Syndrome, a rare breathing condition. To assist her breathing a tracheostomy was necessary and had to stay in place at all times. Additionally, Samantha had to be suctioned because she could not expel throat, mouth, and nose secretions. Suctioning also was needed following meals. Unable to care for herself, especially in emergency situations, Samantha needed the constant services of a trained nurse. During her first year of school Samantha’s parents alternatively attended school and cared for their daughter. Not long after, however, they requested that the public school system provide either a full-time nurse or a respiratory care professional. The school system agreed to revise Samantha’s IEP, but hired a person with a nursing assistant certification to provide the care. Subsequently Samantha’s parents filed a lawsuit in federal district court, where the judge ruled that the services requested by the parents were not medical. To the trial judge the requested services were education related; *i.e.*, they were directly related to and supportive of Samantha’s educational program. On appeal the trial court was reversed. In the appeals court’s view, the issue in this case must be decided on the basis of what a state’s substantive law allows. Tennessee law required that the services needed by Samantha must be administered by a physician, registered nurse, licensed practical nurse, respiratory care specialist, or the patient’s relatives. As such, a school nurse or other school system personnel could not administer the care needed. Characterizing the case as involving “private duty,” the appellate court concluded that asking the school system to hire and pay a licensed professional would be “financially burdensome.”

Cedar Rapids Community School District v Garret F. is an Iowa case decided by the United States Supreme Court, in 1999. Garret F. was a fifth-grade, quadriplegic student, confined to a wheelchair, and covered by IDEA. A “responsible person” had to be available to (among other things) catheterize him at least once a day, suction his tracheostomy when needed, monitor his blood pressure and his ventilator, observe him for possible respiratory distress, and reposition him in his wheelchair. Garret’s parents had been paying for the services, but decided to request that the school system provide and pay for the services. Characterizing the request as one involving continuous one-on-one nursing, school officials cited the *medical services exemption* of IDEA and declined the request. Garret’s parents took their case to an administrative judge who saw the services as “health related” and not medical. The school system next went to a federal district court where a judge ordered the school system to provide and pay for the services. On appeal, by school officials, the Eighth Circuit Court of Appeals affirmed the trial judge. Relying on Tatro (1984) the appellate court viewed the services as “supportive and necessary for Garret to benefit from his educational program.” Citing Iowa law the court held that the school system had to hire and pay for a registered nurse to provide Garret’s services. Subsequently, the United States Supreme Court affirmed the Eighth Circuit by a vote of 7 to 2. Specifically citing IDEA, the high court saw Garret’s services as both “necessary and related to assist in his ability to benefit from his educational program.” Moreover, said the court majority, since the requested services did not require administration by a licensed physician the school system has a legal and fiscal responsibility to provide them.

Two dissenting Justices (Clarence Thomas and Anthony Kennedy) focused on the difference between *medical services* and *health services*. Public school officials, said the dissenters, should be obligated to provide students with *health services* only. A “school nurse,” they opined, can deliver such services.

Policy Implications:

Currently, the Individuals with Disabilities Education Act (IDEA) is once again before the United States Congress for reauthorization. It is difficult to predict what changes will be made in its requirements. However, whatever the results of congressional action, one thing is very certain; the population of students with special needs (many of them *medically related*) entering this nation’s public schools in September 2003, will be larger and more diverse. Thus, it behooves public school officials to review system wide policies and procedures involving the implementation of special education law and regulations.

As the above commentary demonstrates, a specific effort must be made to revisit policies that relate to and have a direct bearing on the *medical services exemption* of the *related services requirement* of the IDEA. In addition to stating the school system’s intent to implement the mandates of federal and state special education law and regulations, local school board policy must make it clear that:

- decisions regarding all aspects of a student’s individualized educational program (IEP), including parental requests for *necessary related services*, are made by the IEP team, and not by the school board or any one person in the school system;
- parental requests for *medical services* must be made directly to the specific student’s IEP team and only considered as a part of that team’s official deliberations;
- the school system encourages and supports the gathering of all relevant and up-to-date information concerning a student, including but not limited to *medical and other health-related data*, in an effort to design an appropriate educational program for that student;
- a distinction exists between *school health-related services* and *medical services* (as defined by and in accordance with appropriate state law); and
- in situations where *medical services* are deemed appropriate and necessary to the educational program of a student, and are included in the student’s IEP, the school board reserves the prerogative to (a) contract

out for the services, and/or (b) vigorously explore possible reimbursement for the services through third party payors (e.g., private health insurance providers), and/or public assistance programs such as Medicaid.

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