

Special Education: Rights & Reality

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Rights

Introduction

Massachusetts has the proud distinction of being the first state in the nation to pass a special education law. Chapter 766 was enacted in 1974, guaranteeing all of our students with disabilities an education to meet their unique needs. Taking its cue from Massachusetts, and modeling its work on Chapter 766, Congress passed the Education of All Handicapped Children Act (EHA) the following year.

Before enactment of these laws, children with disabilities had no right to a public school education. Many were excluded from school entirely. Others were lumped together in generic, segregated classrooms away from the 'normal' children. Often they were taught in basements, trailers, and closets. And it was all perfectly legal.

The advocacy movement that arose to confront these discriminatory practices was closely aligned with the civil rights movement of the 1950s and 60s. The U.S. Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) opened the door with its affirmation that all children, regardless of race, have a legal right to the same education, and that public school segregation violates a student's fundamental civil right to equal treatment.

In 1972, Congress ordered an investigation into the status of our nation's school age children with disabilities and concluded that:

- 1.75 million were not receiving any education at all.
- 200,000 were institutionalized.
- 2.5 million, although attending school, were receiving a substandard education.

In describing the social and economic ramifications of failing to educate students with disabilities, Congress stated:

The long-range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens.

Parents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives ... It should not ... be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy.¹

On November 19, 1975 the EHA was signed into law so that all children with disabilities would “have a right to education, and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children.”

The EHA has since been reauthorized several times. During its 1990 reauthorization it was renamed the Individuals with Disabilities Education Act² (IDEA,) and is our current federal law governing the provision of special education services to the nation’s eligible students.

The Special Education Entitlement

Exactly what are eligible students with disabilities entitled to? Congress has stated that the purpose of the IDEA is to:

ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and, to ensure that the rights of children with disabilities and parents of such children are protected.³

The term Free Appropriate Public Education (FAPE) refers to the federal standard of services that a public school district must provide for an eligible student with a disability. FAPE is defined in the IDEA regulations as:

Free appropriate public education or FAPE means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA⁴, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) ...^{5,6}

In addition to a FAPE, eligible Massachusetts students are entitled to services and instruction that allows them to make Effective Progress, defined as:

¹ From the legislative history of special education law published in the *United States Code Congressional and Administrative News 1975*, beginning on page 1425.

² Statute at USC 20 §1400. Regulations at 34 CFR Part 300.

³ 34 CFR 300.1

⁴ The standards of the SEA (state educational agency, in this case the Massachusetts Department of Elementary and Secondary Education) is the content of the Massachusetts Curriculum Frameworks.

⁵ 34 CFR 300.17.

⁶ An individualized education program (IEP) is a written document that describes in detail the content of a student's educational plan. The IEP is described in more detail on page 4 of this report.

Progress effectively in the general education program shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to the chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district. The general education program includes preschool and early childhood programs offered by the district, academic and non-academic offerings of the district, and vocational programs and activities.⁷

Together, the FAPE and Effective Progress standards establish an eligible student's legal right to the specialized instruction and services necessary for them to be as successful as they can be -- not only in school, but in life.

The Special Education System

The Massachusetts special education system is complex, governed by federal and state special education statutes and regulations, related laws, and many policies and procedures. The following is a brief overview of how the system is meant to operate.

Determining Eligibility

The process begins when a student is referred for a school district evaluation to determine if he or she is eligible to receive special education services. School staff and the student's parent(s) discuss the evaluation results and determine if the student meets Massachusetts' special education eligibility criteria.⁸ Not all students with disabilities will qualify for special education. Eligibility requires that all four of the following criteria be met:

1. The student fits into one or more of the following disability categories defined in special education regulations:

Autism	Developmental Delay (used for ages 3-9 only)
Intellectual Impairment	Hearing Impairment
Vision Impairment	Deaf-Blind
Neurological Impairment	Emotional Impairment
Communication Impairment	Physical Impairment
Health Impairment	Specific Learning Disability
2. The student is not making effective progress (see page 3.)
3. The student's lack of effective progress is due to one or more disabilities and not some other factor.
4. The student needs specialized instruction or a related service (such as speech, physical, or occupational therapy) in order to make effective progress.

⁷ 603 CMR 28.02(17)

⁸ 603 CMR 28.05(a)

The Individualized Education Program (IEP)

If the student is found eligible for special education, an Individualized Education Program⁹ (IEP) is developed by the student's IEP Team, which is comprised of the parents and select school staff. The IEP is a written document specific to an individual student that details the content of the student's educational program, including but not limited to information about:

- How the student's disability affects their participation in all aspects of life (academic and non-academic activities, community involvement, etc.)
- The accommodations, modifications, specially designed instruction, and related services that will be provided for the student, or on behalf of the student.
- Goals that the student is expected to meet by the end of the school year.

The IEP is a legally binding document. All services, instruction, modifications and accommodations described therein must be provided. Alternatively, if something is not documented within the IEP, the school has no obligation to provide it.

Progress Reporting

Parents of students who receive special education support through an IEP must be given periodic reports of their child's progress toward meeting each goal in his or her IEP. In Massachusetts, this progress must be reported at least as frequently as parents are informed of their non-disabled child's progress.

Annual IEP Review

The IEP Team must meet at least once a year to review and update the student's IEP goals and services, as needed. This ensures that the student's educational programming keeps pace with their progress and changing needs.

Three-Year Reevaluation

Finally, students must be reevaluated by their school district at least once every three years to determine if they are still eligible to receive special education services. If the student remains eligible, the cycle of IEPs, Progress Reporting, and Annual IEP Reviews repeats until the next Three-Year Reevaluation occurs.

⁹ See 34 CFR 300.320 for the regulation that delineates the entire content required in an IEP.

Reality

Monitoring and Enforcement

The laws that protect a child's special education rights are only as strong as the government's will to enforce them. Unfortunately, government efforts to enforce special education requirements have been alarmingly lax throughout the law's 35 year history. School districts across Massachusetts, and the nation, routinely deny students with disabilities the services to which they are legally entitled, and the penalties imposed for noncompliance have no deterrent value.

Noncompliance in Massachusetts

Massachusetts has been cited 12 times in the last 20 years by the United States Department of Education Office of Special Education Programs (the federal agency that monitors and enforces state compliance with special education law) for failing to fully meet its legal obligations to its students with special needs. The most recent citation was issued on June 3, 2010. The Massachusetts Department of Elementary and Secondary Education, meanwhile, documents an average of 110 violations of special education law in our public schools every month.¹⁰

Failed Federal Enforcement

In January 2000 the National Council on Disability (NCD)¹¹ released its report, *Back to School on Civil Rights*,¹² which analyzed the effectiveness of federal monitoring and enforcement of the IDEA over its then 30 year history. NCD's major findings confirmed what parents of students with disabilities have long known:

- *Federal efforts to enforce the law over several Administrations have been inconsistent, ineffective and lacking any real teeth.*
- *Pervasive noncompliance ... is a complex problem with often dramatic implications for children with disabilities and their families.*
- *Parents and students across the country expressed a high level of frustration with the continued barriers they face to full participation and effective instruction.*
- *Too many parents continue to expend endless resources in confronting obstacles to their child's most basic right to an appropriate education, often at the expense of their personal lives, their financial livelihoods and their careers.*

¹⁰ Source: Massachusetts Department of Elementary and Secondary Education.

¹¹ The National Council on Disability (NCD) is an independent federal agency charged with making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families. NCD's overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

¹² Read the entire report at http://www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm

- *Enforcement of the law is the burden of parents who too often must invoke formal complaint procedures and due process hearings ... including expensive and time consuming litigation to obtain the appropriate services and supports to which their children are entitled under the law.*
- *Lack of accountability, poor enforcement, and systemic barriers have robbed too many students of their educational rights and opportunities... and have produced a separate system of education for students with disabilities rather than one unified system that ensures full and equal ... access for all students.”*

Thus, at both the state and local level, noncompliance is permitted to continue unchecked.

Consequences for Students

Many people incorrectly assume that all students with disabilities are, by definition, cognitively impaired. In fact, students with disabilities simply have neurological profiles that cause them to learn in a different manner than do their “typically developing” peers. Nationally, approximately 15-20 percent of these students are cognitively impaired and may not reach academic proficiency even with the best instruction.¹³ The rest, approximately 80-85 percent, are as intellectually capable of achieving academic proficiency as their non-disabled peers, *if* they receive appropriate special education services. But because students with disabilities are routinely denied the services they need in order to learn, they are failing in overwhelming numbers (as measured by results of the Massachusetts Comprehensive Assessment System, or MCAS). The achievement gap between students with and without special needs is significant and grows wider every year (see Table 1). These students are denied equal access to many merit-based benefits (see Table 2), and are left to contend with the lifelong consequences of school failure.

TABLE 1
MCAS Statewide Aggregate Results
Percent of Students Scoring Proficient or Advanced

Year/Exam	Students without Disabilities	Students with Disabilities	Achievement Gap
2009 English Language Arts	75.0%	28.0%	47.0 points
2008 English Language Arts	73.1%	26.3%	46.8
2007 English Language Arts	74.1%	27.3%	46.8
2006 English Language Arts	70.7%	26.1%	44.6
2005 English Language Arts	67.9%	24.4%	43.5
2004 English Language Arts	69.4%	25.4%	44.0
2003 English Language Arts	67.8%	25.2%	42.6
2009 Mathematics	64.0%	20.0%	44.0 points
2008 Mathematics	63.0%	19.3%	43.7
2007 Mathematics	60.5%	18.3%	42.2
2006 Mathematics	53.1%	15.5%	37.6
2005 Mathematics	53.2%	14.5%	38.7
2004 Mathematics	51.1%	13.0%	38.1
2003 Mathematics	48.2%	12.4%	35.8

Source: Massachusetts Dept. of Elementary and Secondary Education: Student Assessment Services. Students with Disabilities are defined as only those with IEPs.

¹³ Testimony of Martha L. Thurlow, Ph.D., Director of the National Center on Educational Outcomes before the Health, Education, Labor and Pensions Committee, U.S. Senate. April 28, 2010.

TABLE 2
Adams Scholarship Recipients

The Adams Scholarship provides a tuition waiver for eight semesters of undergraduate education at a Massachusetts state college or university for students who score at the *Advanced* and *Proficient* levels on grade 10 MCAS tests in ELA and Math, and whose combined score places them in the top 25% of the graduating class in their district.

<u>Class of</u>	<u>Total Recipients</u>	<u>Recipients with Disabilities</u>	<u>Percentage with* Disabilities</u>
2005	13,252	122	0.92 %
2006	14,558	110	0.76 %
2007	16,176	164	1.01 %
2008	16,976	208	1.23 %
2009	17,884	192	1.07 %
2010	17,592	195	1.11 %

Source: Massachusetts Department of Elementary and Secondary Education.

* Students with Disabilities represent 17% of the PK-12 Massachusetts public school population.

Special Education Advocates

Faced with struggling students, recalcitrant school districts, and inadequate enforcement efforts, families often hire Special Education Advocates to help them secure the special education services to which their children are legally entitled. Advocates are individuals who apply their knowledge of special education law and process in pursuit of those services.

It is important for families to understand that there is no formal certification, licensing process, or regulatory oversight of advocates at this time. The knowledge and skills that advocates possess, and the fees they charge, vary widely. Families are advised to keep this in mind when shopping for an advocate and to take the time to locate one in whom they have confidence. Referrals from family, friends, and professionals are often very helpful in this regard.