

The following article provides a wealth of information regarding what school board members need to know about special education law and what they should expect in that area as part of their school board service. It was written by David R. Rubin and Ellen S. Bass, both of whom are of counsel to the Busch Law Group in Metuchen, New Jersey. It originally appeared in School Leader magazine, a publication of the New Jersey School Boards Association.

Legally Speaking — Special Education: A Board Member's Role

By David B. Rubin and Ellen S. Bass

Understanding the board's authority in special education matters

As a school board member, you know your job is not to run the schools but to see that they are well run. To do so, you perform critical oversight functions like selecting the superintendent, formulating district policies and adopting an annual school budget.

You have no "executive power" to make administrative decisions but are nevertheless called upon to approve recommendations from the administration on many aspects of day-to-day district operations that, by law, require formal board action. You may not have any special expertise in school finance, curriculum development or human resources, but you trust administrators to provide thorough and sound rationales for their recommendations – ones that reflect your board's goals and the values of the community you serve.

One aspect of district operations that, more than any other, causes confusion and frustration for many board members is special education. At nearly every board meeting, you are asked to approve out-of-district placements or other services for special education students, and naturally want to satisfy yourself that these sizeable expenditures are necessary and appropriate. But when you ask questions, you are rarely given much detail. Even if all you are looking for is a clearer understanding of the administration's thought process, the superintendent often will tell you that they can share only limited information, but items are time-sensitive and must be approved.

The Advent of IDEA

Why is that? To understand the odd position you are often placed in, we need to review some basics of special education law. The legal framework for delivering special education to disabled students is found in the Individuals with Disabilities Education Act, a federal statute originally adopted in the mid-1970s as the Education for All Handicapped Children Act. Congress intended that IDEA offer a "basic floor of opportunity" to disabled students who, until then, were often excluded entirely from our public schools.

The concept was that disabled students should be educated in the "least restrictive environment." This means as normal a setting as possible, and ideally a mainstream placement in their neighborhood school with necessary supports and modifications. If a student's needs cannot be adequately met in a mainstream setting, or even in a more restrictive self-contained class locally, the district is required to consider an appropriate out-of-district day school and, in rare cases, a residential placement out of state.

IDEA entitles all eligible disabled students to a “free appropriate public education.” Sometimes called “FAPE” for short, this is a legal benchmark that need not be the best possible education but must be sufficient to enable a student to make meaningful progress. The U.S. Supreme Court has described FAPE as a program that is “appropriately ambitious in light of the child’s circumstances.”

Interestingly, Congress did not adopt IDEA as an absolute mandate. It was enacted under the authority of the Constitution’s spending clause, under which the federal government offers funds to states willing to agree to IDEA mandates. In theory, a state could reject IDEA funding and avoid these obligations, but it would be unthinkable for a state like New Jersey to do so. Surely in New Jersey, our local school boards, and the communities they represent, are committed to ensuring that all children receive a quality education, and to the fullest extent possible, one that is designed to make them productive adults.

The Importance of a Student’s IEP

All decisions about the elements of FAPE for a particular student are documented in an individualized educational plan, or IEP. The hallmark of the IDEA is collaboration between home and school, and the IEP is thus developed by an IEP team composed of parents and district child study teams.

Your child study teams include learning disabilities teacher consultants, school psychologists, school social workers and teachers who bring specialized expertise in the needs of disabled students to the conversation. The IEP team meets periodically to review the student’s progress and make any adjustments necessary to stay on track. Once a student’s IEP is finalized, it functions as a legally binding contract. And despite the significant budgetary impact of these IEP team decisions, the superintendent and even the director of special services have no legal authority to dictate the team’s decisions in individual cases.

We offer this backdrop to explain why your role as a board member is so limited, notwithstanding your duty to oversee the expenditure of public funds for special education. We can imagine that several aspects of the IEP development process may seem counterintuitive to board members with “day jobs” in the business world. Your legal obligations under the IDEA do not allow you a free hand to make tough decisions about juggling other budgetary constraints or priorities your district may have. If a student requires a six-figure out-of-district placement, the district must allocate the funds necessary to pay for it, even if that means cutting other important expenditures from the budget. Some federal or state aid may be available to cover a portion of these costs, but for the most part the district must use locally raised funds to meet these obligations.

In most private sector organizations, decisions about large expenses are made by boards of directors. Under the IDEA, however, decisions that can cost a district hundreds of thousands of dollars must be made by the educational experts – your frontline employees. Under the IDEA, the programmatic commitments your staff make are memorialized in an IEP. They cannot be modified, absent agreement of the parties or a court order. Thus, unlike most other contracts that require a vote of the school board before they can legally take effect, by the time the invoice for an expensive out-of-district placement reaches the board agenda for approval, in all likelihood it has already been agreed to in an IEP.

Why does IDEA give the IEP team such immense power to make these binding arrangements with virtually no practical oversight from above? The answer is simple and straightforward.

Congress intended these sensitive decisions to be made by experienced and trained professionals, and Congress determined that the level of services required by the IDEA should not be compromised by budget constraints or other district priorities. Even if some board members may be familiar with special education, or perhaps are special education educators themselves, the school board as a body has no institutional expertise in that field. And federal and state student privacy restrictions limit how much information can be shared with board members in any event.

The Role of the Board

Local citizens volunteer their time as board members because they are passionate about children and their educational success. You want to operate high-quality programs for your general education students and meet the needs of your special education students all at the same time. There often feels like there are insufficient funds to do so. The struggle to meet the needs of all your students is real and remains your overarching obligation as a school board.

So, what is the appropriate role of the school board in overseeing the operations of special education? Where can you continue to make a difference and improve the quality of the services your district offers to all its students? Consider the old saying: Be just before you're generous.

Districts often provide services to students beyond what is legally required when the community expects it and finances permit. (Courtesy busing is probably the most familiar example.) But those discretionary services can be curtailed when funding becomes tight or other district priorities take precedence. All districts owe special needs students a moral and legal obligation to ensure they receive at least the services mandated by IDEA. Districts are free to offer more, and nothing in this article should be taken to dissuade districts from doing so if that be their desire. But just as with courtesy busing, school boards have a say in determining, on a policy level, whether child study teams should be empowered to routinely offer more. That is a judgment school boards have the prerogative to make.

Another role for boards that wish to maximize the overall value and efficiency of special education in their districts is supporting new and expanded in-district programs and services. You can give child study teams more local options to propose at the IEP meeting table. There may be a significant upfront investment required but, in the long run, more children will be educated locally in the "least restrictive environment," thereby decreasing the need for some of those expensive out-of-district placements. You may also find, as many districts have, that these new programs attract tuition students from other districts. And you will be allowing your district to do what the IDEA expects: offer special needs students an education with their mainstream peers to the fullest extent possible.

Ensuring the Economical Delivery of Special Ed Services

Providing special education services in the most efficient and economical way possible extends beyond making sure that your educational programming is robust and offers the most in-district options possible. Special education programming is supported by transportation and related service providers; the board has a role to play in ensuring that these services are delivered in a cost-effective manner. For smaller districts, would a shared services agreement with a neighboring district for child study team, or occupational, speech

or physical therapy providers effectuate economies? Your board has an important role to play in this sort of decision-making.

Moreover, you can engage in ongoing conversation with your superintendent of schools and special education director about how to best support their efforts. Encourage the administration's open communication with your special education community. Support them when they share that a particular matter is best resolved amicably; they are likely making a reasoned judgment that a resolution is in the best interest of the district and will, in the end, preserve precious district financial and administrative resources. Are you experiencing an unusual number of legal challenges? Talk through why with the administration and your board attorney and assess what programmatic or other changes the district can make to promote more effective collaboration with parents, teachers and all special education community stakeholders.

Your role as a board member relative to special education is small, but nonetheless mighty. You set the tone for your district, and letting your community know that your board is behind all kids, regardless of their needs, will go a long way toward aligning your special education and general education obligations.

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