

Shannon Carter: A Substantive IDEA
On School Performance and Accountability

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The unanimous decision of the United States Supreme Court in Shannon Carter v. Florence County School District Four, an Opinion of just five, readable pages, was filed within thirty-three days of the argument of the case. In addition to its acute treatment of the Individuals with Disabilities Education Act -- which we write here chiefly to comment preliminarily upon -- and its already much remarked contribution to current debates about accountability in the public schools, the Court's move in Shannon Carter to short, but full-of-resonant-content, entirely readable and promptly formulated dispositions may presage a resumption by the Court of its own teaching and civil conversation functions.

Remember Brown v. Board of Education was only eleven pages. If citizens at large are to participate with the courts in the public conversations about public matters which de Toqueville in 1830 found to be the hallmark of the role of the judiciary in our political system, then Opinions need to be of a size which a citizen can hold in his or her hand and actually read with sense.

In 1985, John Brademas, chief House progenitor of the Education of All Handicapped Children Act of 1975, convened at New York University many of the people who had been present at its creation. Surprising to some of us, a debate ensued about whether the requirements of the Act were exhausted by its procedural provisions -- parental participation, the IEP, the IEP "team" and

due process hearings -- or whether the obligations of the Act are predominantly and essentially substantive in nature, concerned with the substance and content and the actual, real-world effectiveness of the education provided by the schools to children thought to have disabilities.

Those who took the substantive view of the statute saw the overriding substantive nature of the Act in its provisions requiring:

1. an "appropriate ... education" (20 U.S.C. §1412(1);
2. the "adoption of promising educational practices" by states and districts alike (20 U.S.C. §1413(a)(3)(B), §1414(a)(1)(c) and
3. "... the education of handicapped children with children who are not handicapped" (the integration imperative) (§§ 1412(5), 1414(a)(1)).

In many ways those differing emphases recapitulate the practice both of schools people and by advocates which, in our view, has focussed much too much on implementing and protecting procedural niceties provided in the Act and much too little on achieving and enforcing its substantive requirements: the systematic use by the schools of powerful pedagogies, challenging content and other promising practices, in integrated schools, actually accomplishing in outcomes, the effective education of the children.

The Court's decision in Shannon Carter cuts directly into these matters. The Opinion, as we read it, bespeaks three

important propositions and, in further conversation in and out of Courts, may evoke a fourth.

First, the Individuals with Disabilities Education Act is a substantive, not merely a procedural, statute. The Supreme Court adopted and embraced as its own the holding of the district court, saying in its Opinion:

"[A]lthough [Trident Academy] did not comply with all of the procedures outlined in [IDEA], the school provided Shannon an excellent education in substantial compliance with all the substantive requirements of the statute." (emphasis supplied).

Second, the standard for "appropriate" education is "[whether] the education provided ... is reasonably calculated to enable the child to receive educational benefits." That standard was at the core of Rowley, 458 U.S. 176, 207-208 (1982), although it has been widely missed. It is a substantive standard. It was beside the point, Shannon Carter says, that various procedures in her alternate education departed from the statute -- that her alternative school "evaluated Shannon quarterly, not yearly as mandated in [IDEA]," that it "employed at least two faculty members who were not state-certified" and even that "it did not develop [written] IEPs." The dispositive educational fact, Shannon Carter holds, is that Shannon Carter actually got "an education reasonably calculated to enable the child to receive educational benefits."

Third, the "educational benefits" have to be real and substantial, not trivial, not will-of-the-wisp, merely theoretical hopes or insubstantial promises. For Shannon Carter, the three-fold difference was between the school district's educational

program which offered this child with learning disabilities "four months progress [in reading and mathematics] for [an] entire school year", which the parents and the Court rejected as not providing an appropriate education, and the alternate educational program which was calculated to yield a years gain in learning for each year of schooling (as the Court put it, the alternative school "developed a plan which allowed Shannon to achieve passing marks and [to] progress from grade to grade") and which in outcome actually did achieve those educational benefits: for example, "her reading comprehension had risen three grade levels in her three years at the [alternative] school."

In this emphasis upon real and substantial educational benefits, the Shannon Carter Court reached the same conclusion the Third Circuit had reached, following Rowley, in Polk v. Susquehanna I.U. 16, 853 F.2d 171, 180-85 (1988), cert. denied 488 U.S. 1030 (1989). There Judge Edward R. Becker wrote that the statute "requires more than trivial or de minimus educational benefits." See also Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), cert. denied 464 U.S. 864 (1983). Thus, fully articulated as the Shannon Carter Court now informs it, the standard for determining whether education provided to children with disabilities meets the statutory requirement of "appropriate ... education" is: whether the education provided is reasonably calculated to enable the child actually to receive real, palpable and substantial educational benefits.

It was, we have believed, not accidental -- and was, and is now still more clearly, fraught with important possibilities -- that Chief Justice Rehnquist in his opinion for the Court in Rowley so closely conjoined the "appropriateness" and the "promising practices" requirements of the statute. On the same page^s of Rowley where analysis of the "appropriateness" standard is concluded, 458 U.S. at 200-208, and the standard stated, id. at 208, the Chief Justice for the Court immediately juxtaposes the "promising practices" provision, §1413(a)(3), and recites its penetrating charge:

"The Act expressly charges States with the responsibility of 'acquiring and disseminating to teachers and administrators ... significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials.' (emphasis supplied).

Thus, the fourth proposition that further conversation from Shannon Carter, may evoke: that the requirement that promising practices be adopted is crucial among IDEA's substantive requirements and that we -- parents, advocates and school people alike -- should build upon it until it is fully implemented and achieved in fact in the schooling of the nation's children.

As a nation, we know much, much more about teaching and learning than we practice in the schools -- about how effectively to organize schools (early childhood education, small classes and schools, reach to families, cross-agency collaboration to support children and families in learning), and about the effectiveness of a vast and diverse array of systematic pedagogies and disciplines

which have had demonstrated success in effectively teaching the great diversity of children and from among which teachers and principals and families may chose, "replicating" them (a creative, professional act) not merely imitating¹, to the benefit of students, and also to the benefit of teachers, principals and families.²

The promising practices and appropriateness requirements are not unique to IDEA. Similar requirements are set forth in seven additional federal statutes. Chapter One, for example, requires that Chapter One funds may be used "only for programs which are designed to meet the ... educational needs of educationally deprived children" and that "the programs [must be] of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the educational needs of the children." 20 U.S.C. §§2721(a)(1), 2722(c)(1). The Vocational and Technology Education Act, the Bilingual Education Act, the Migrant Education Act, the Headstart Act, and the Early Education of Handicapped Children Act each carry similar requirements.

¹See Seymour Sarason, The Predictable Failure of School Reform: Can We Change Course Before It Is Too Late? (1990).

²Some of these powerful practices are set forth in T.K. Gilhool, "Eight Powerful National Statutes Designed to Evoke Powerful Teaching and Learning: The Uses of the Law in Transforming the Schools," 1 J. of Quality Outcomes-Driven Education, 35, 38-42 (Floyd McDowell, ed., Johnson City, N.Y., 1991); in American Association of Colleges for Teacher Education, Knowledge Base for the Beginning Teacher (Maynard C. Reynolds, ed., Pergamon Press, 1989); and in the Annual Volume of the U. S. Department of Education's National Diffusion Network, Educational Programs That Work: A Collection of Proven Exemplary Educational Programs and Practices.

Indeed, the National Diffusion Network Act, 20 U.S.C. §2962, commands the United States Secretary of Education to "acquaint [all] persons responsible for the operation of elementary, secondary, and post secondary schools with information about exemplary education programs, practices, and services" and to "assist such persons in implementing [them] [in order to] improve the quality of education in the schools for which they are responsible"

Thus, the three substantive requirements of IDEA resonate across all of public education. As the integration imperative of IDEA is implemented and enforced, not only must the IDEA requirements of an appropriate education calculated to yield real and substantial educational benefits and of promising practices go with the child who has disabilities into the "regular" school program, but the non-disabled children whom the child with disabilities will meet there, themselves too often in educational desuetude, have themselves enforceable rights under the several other federal statutes to an education calculated to yield real and substantial educational benefits. Thus may, if the conversation advanced so significantly by Shannon Carter continues urgently and rigorously enough, all of education be made special, for all children. Such has salience in many schools for very many children, none more harmed by current conditions than very many children who are put into programs for the mildly handicapped, African-Americans and Latino-Americans gravely over-represented

among them, and African-American and Latino-American young men even more gravely over-represented.

Finally, Shannon Carter's recognition that IDEA empowers parents to seek and find an effective education for their child "when a public school system has defaulted on its obligations" deserves comment. To readers of IDEA and its predecessor, the Education of All Handicapped Children's Act, it is no surprise that since 1975, the statute has provided among its mechanisms of accountability, "to ensure that children with disabilities [actually] receive [in fact] an education that is appropriate and free," what some now frequently call "school choice." Shannon Carter makes plain how powerful this mechanism can be. "Public educational authorities," Shannon Carter says,

"who want to avoid reimbursing parents for the private education of a disabled child can ... give the child a free appropriate public education in a public setting This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims."

Any public school authorities who do not give the child a free appropriate public education in a public setting, need do more than worry, for as Shannon Carter makes clear, if public school authorities do not, public schools authorities will have to pay others who do. (And those others, let it said, will themselves, given the Shannon Carter Court's seriousness about the substantive requirements of IDEA, have to comply also with the integration imperative of the Act.)

At argument of Shannon Carter. among her first as a Supreme Court Justice, one of Ruth Bader Ginzburg's questions made the point piercingly: "

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What if, following Shannon Carter, there were judicial enforcement of the substantive provisions of all of the eight national education statutes? Another function of the Courts in our society, after all, is by enforcement of the laws, to supply an authoritative will which ultimately brooks no groundless resistance.

In the schools, where nearly everyone has the power to say "no" and no one has the authority to say "yes", such a pervasive will has been a missing ingredient. After ten years, systematic school reform -- particularly delivery of its hard goods -- languishes. Nearly everywhere everyone talks the talk of school reform, but things pretty much just go on as they did before. Nowhere, except in Kentucky, has school reform taken hold across large geographies and reached to nearly every school and all the children in them. And there in Kentucky, it was the courts, Shannon Carter-style, which supplied the authoritative and pervasive will.

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