26th Annual
Pacific Northwest Institute on Special Education and the Law

October 5–7, 2009
Doubletree Hotel Seattle Airport
Seattle, Washington

sponsored by:

University of Washington
College of Education

www.uwschoollaw.org

Program Overview

Monday, October 5, 2009

Pre-Institute Mini-Courses

8:00 am	Registration desk open
8:00–9:00 am	Coffee and tea service
9:00–11:00 am	Morning mini-courses
11:00 am–12:30 pm	Lunch on your own
12:45–2:45 pm	Early afternoon mini-courses
2:45–3:00 pm	Coffee break
3:00–5:00 pm	Late afternoon mini-courses

Pacific Northwest Institute

7:30–8:30 pm	Dessert reception

Tuesday, October 6, 2009

7:30 am	Registration desk opens
7:30–8:15 am	Coffee and tea service
8:30–10:00 am	First General Session
10:00–10:15 am	Coffee break
10:15–11:45 pm	Morning workshops (1 thru 8)
11:45–12:00 pm	Recess
12:00–1:30 pm	Hosted luncheon/Second General Session
1:45–3:15 pm	Early afternoon workshops (9 thru 16)
3:15–3:30 pm	Coffee break
3:30–5:00 pm	Late afternoon workshops (1 thru 8)

Wednesday, October 7, 2009

7:30 am	Registration desk opens
7:30–8:00 am	Coffee and tea service
8:15–9:45 am	Third General Session
9:45–10:00 am	Coffee break
10:00–11:30 am	Morning workshops (9 thru 16)
11:45-1:15pm	Hosted luncheon/Fourth General Session and Ralph E. Julnes Memorial Keynote Address
1:15 am	Adjourn

26th Annual
Pacific Northwest Institute on
Special Education and the Law

2009 Institute Program Planning Committee

Richard M. Wilson, Director
University of Washington School Law Division

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General Information

First General Session

Year in Review

By:

Art Cernosia

Attorney at Law/Education Consultant

Williston, Vermont

Pacific Northwest Institute on Special Education and the Law

October 5-7, 2009

Seattle, Washington

Special Education Law: A Year in Review

Pacific Northwest Institute on Special Education and the Law

September 2009

Presenter: Art Cernosia, Esq. - LLC
Williston, Vermont
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New IDEA Regulations

I. Final IDEA Regulations (effective December 31,2008) (Federal Register, Volume 73, No.231, December 1, 2008).

A. Revocation of Consent for Continued Special Education Services

1. Right to Revoke Consent

The IDEA has required the Local Education Agency (LEA) to obtain the written consent from the parents of a student with a disability for the initial provision of special education and related services.
The final regulations now permit the parents of a student with a disability to withdraw their consent for continued IEP services for their child at any time subsequent to their initial provision. (34 CFR 300.9 (c)(3) and 300(b)(4)).
Note: If under State law IDEA rights accorded to parents transfers to the student when he/she reaches the age of majority, the right to revoke consent for special education services is also transferred to the adult student.

The new regulation reverses the United States Department of Education's Office of Special Education Programs (OSEP) longstanding interpretation on the issue. OSEP previously issued a policy interpretation which stated, "if a public agency believes that a child continues to be eligible for special education, it cannot simply defer to the parents' request and remove the student from special education services." Letter to Williams 18 IDELR 534 (United States Department of Education, Office of Special Education Programs (1991)).

The Comments to the Regulations highlight the reasons for the Department's change of policy. The Comments state:

> Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the IDEA's emphasis of the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.
> (Federal Register, Volume 73, No. 231, Page 73009).

The Comments to the Regulations also clarify that the parents have the right to revoke special education services in their entirety. The IDEA does not give the parents a right to revoke consent just for a particular service. The parents could use the due process hearing procedures to ask a hearing officer to find that a particular service is not appropriate for their child.
Further, the Department opines that if the parent disagrees with a particular service and the parents and public agency agree that the child would be provided a FAPE without that service, "the public agency should remove the service from the child's IEP…" (Federal Register, Volume 73, No. 231, Page 73011).

2. Revocation not subject to due process hearings

The parents' right to terminate their child's IEP services is not subject to challenge in a due process hearing or mediation. (34 CFR 300.300(b)(4)(ii)).

The Comments to the Regulations allow States to establish additional procedures such as requiring schools to offer to meet with the parents to discuss their concerns. Any additional procedures that a State may establish must be voluntary and must not delay or deny the discontinuation of special education services. (Federal Register, Volume 73, No. 231, Page 73008)

3. Written Revocation

The parent must provide the school with a written revocation to discontinue special education services. (34 CFR 300.300(b)(4))

The Comments to the Regulations clarify that although a public agency may inquire why a parent is revoking consent for special education services, the parent is not required to provide an explanation. (Federal Register, Volume 73, No. 231, Page 73008)

4. Prior Written Notice

The school must respond to the parents' revocation with a prior written notice (meeting the requirements of 34 CFR 300.503) to the parent before ceasing the provision of special education and related services. (34 CFR 300.300(b)(4)(i)). Note: Even if the right to revoke consent for services is transferred to the adult student, as provided under State law, the written notice must be sent to both the adult student and parents.

The Comments to the Regulations state that the prior written notice must inform the parent, in language understandable to the general public, regarding the change in educational placement and services that will result from the parents' revocation of consent. Although there is no specific timeline from revocation of consent to the discontinuation of services, it is expected that discontinuation occurs in a timely manner. In addition, the notice must include information on sources for parents in understanding the requirements of Part B of IDEA. (Federal Register, Volume 73, No. 231, Page 73008).

Best Practice Recommendation:
The prior written notice should also address the impact of the parents' revocation of consent for services on the child's rights under the disciplinary provisions of the IDEA discussed later in this outline.

5. No FAPE violation

If a parent revokes consent for special education services, the public agency will not be considered to be in violation of the requirement to make a FAPE available to the child because of the failure to provide the child with further special education and related services. (34 CFR 300.300(b)(4)(iii)).

The Comments to the Regulations indicate that the revocation of parental consent for services releases the public agency from liability for providing FAPE from the time the parent revokes consent for services until the time, if any, that the child is evaluated and deemed eligible, once again, for special education services. (Federal Register, Volume 73, No. 231, Page 73010)

6. Parental right to request new evaluations

The Comments to the Regulations note that if a parent revokes consent for special education services, the parent may request at any time that the student be re-enrolled in special education. In such case, the request shall be treated as a request for an initial evaluation. The Comments highlight that the parent may want to consider making an evaluation request when their child has a discipline issue or in meeting graduation requirements. There is no limitation on the number of times a

parent may revoke consent for special education and then subsequently request reinstatement in special education. (Federal Register, Volume 73, No. 231, Page 73014)

If a parent makes a request for a special education evaluation, the student should be treated as any other student in the child find process. Depending on the data available the new evaluation may consist of a review of existing evaluation data. Based on a review of existing data that includes information provided by the parents, current classroom, local and/or State assessments and observations by teachers and related service providers, the IEP Team and other qualified professionals will determine what, if any, evaluation data are needed to determine whether the student qualifies for special education and, if so, the educational needs of the student. (Federal Register, Volume 73, No. 231, Page 73015)

7. IDEA Disciplinary Protections

The Comments to the Regulations provide that if the parent revokes consent for special education, the student is treated as a non-disabled student for disciplinary purposes under the IDEA. The parent is deemed to have refused services if they revoke consent for special education and therefore the public agency is not deemed to have knowledge that the student is a student with a disability. The student may be disciplined as a general education student. (Federal Register, Volume 73, No. 231, Page 73012)

Best Practice Recommendation:
As previously stated in this outline, it is recommended that the prior written notice required to be sent to the parents include the impact of the revocation of consent on IDEA disciplinary protections.

Unresolved Issue:
It should be noted that the regulations themselves do not address the application of the IDEA's disciplinary protections to students whose parents have revoked consent for special education services. The Comments to the Regulations do not have the same legal weight as the statute or regulations themselves.
Previous to these regulations, at least one Court issued a preliminary injunction barring a school board from suspending a student whose special education services were terminated in response to the parents' request to do so. Jeffrey S. v. School Board of Riverdale School District 21 IDELR 1164, 885 F.Supp. 1192 (United States District Court, Western District, Wisconsin (1995)

In addition, the Comments to the Regulations specifically state that the final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the legal protections of the IDEA and Section 504/ADA. (Federal Register, Volume 73, No. 231, Page 73013) Therefore, there

is a compelling argument that Section 504 disciplinary protections apply to students whose parents have revoked consent for IDEA services.

8. Procedural Safeguards Statement

Schools are required to provide parents, at least annually, a statement of procedural safeguards fully explaining the procedural rights that the IDEA provides to parents of students with disabilities.

The statement should include the parental right to revoke consent for services and the right to subsequently request an evaluation for future services.

9. Education Records

If a parent revokes consent for special education services, the public agency is not required to amend the student's educational records to remove any references to the student's receipt of special education and related services because of the revocation of consent. (34 CFR 300.9 (c))

The Comments to the Regulations explain that the parents' revocation of consent is not retroactive. Consequently, the public agency is not required to amend the student's educational records removing references that the student had been in special education. (Federal Register, Volume 73, No. 231, Page 73007)

10. Section 504

The Comments to the Regulations clarify that these are IDEA regulations and do not address the protections and requirements under Section 504 and the Americans With Disabilities Act. (Federal Register, Volume 73, No. 231, Page 73013)

Unresolved Issue:
Can a parent revoke consent for IDEA services and then require the public agency to provide services/accommodations under Section 504?
In 1996, the Office for Civil Rights (OCR) issued a letter which stated that if a parent rejects IDEA services, the parent would essentially be rejecting what would be offered under Section 504. See Letter to McKethan 25 IDELR 295 (OCR 1996).
Since the recent IDEA regulations regarding revocation of consent do not impact Section 504 protections, there is a strong argument that the parent may still request Section 504 services. In addition, Section 504 has a child find requirement similar to the IDEA which puts the affirmative responsibility on the public agency if there is a reason to believe the student may qualify as an individual with a disability under Section 504. (34 CFR 104.32)

11. No Child Left Behind---Assessment Accommodations

Once a parent has revoked consent for special education services, the student is deemed a general education student under the No Child Left Behind Act. Therefore, if consent is revoked before the administration of the State's assessment, there is no longer a requirement to provide the assessment accommodations that were previously included in the student's IEP. (Federal Register, Volume 73, No. 231, Page 73011)

Unresolved Issue:
Since Section 504 protections are not impacted by revocation of consent for IDEA services, would the school still be required to offer the assessment accommodations under Section 504?

12. No Child Left Behind—Adequate Yearly Performance

If a parent revokes consent for IDEA services, the student is no longer a member of the subgroup of students with disabilities for NCLB purposes. However, NCLB allows States to include for a period of up to two AYP determination cycles, the scores of students who were previously identified with a disability under the IDEA. (see NCLB Regulation 34 CFR 200.20(f)) Therefore, States may allow scores of students exited from special education due to parents' revocation of consent to be included in the students with disabilities subgroup for calculating AYP for up to two years. The students will not be counted for reporting purposes. (Federal Register, Volume 73, No. 231, Page 73011)

13. State Performance Plans(APP)/Annual Performance Reports (APR)

If a student is removed from special education as a result of the parents' revocation of consent for services, the student is no longer required to be included in calculations under SPP indicators.
States may choose to treat such students in graduation rate calculations for SPP/APR purposes in the same manner they treat other students who exit special education prior to graduation. (Federal Register, Volume 73, No. 231, Page 73016)

14. Supplemental Security Income (SSI)

If a parent revoked consent for the provision of special education and related services, the student's eligibility for other programs such as supplemental security income may be affected. (Federal Register, Volume 73, No. 231, Page 73013)

Best Practice Recommendation:
The school may want to include in its prior written notice sent to the parent, that the revocation of consent may impact their eligibility in other programs. The

parent should be encouraged to seek additional information concerning eligibility requirements from the agency responsible for implementing the program.

15. Abuse and Neglect Reporting

Nothing in these regulations alter responsibilities under State law for mandatory reporting for suspected abuse or neglect. (Federal Register, Volume 73, No. 231, Page 73016)

B. Representation at Due Process Hearings by Non-Attorneys

The United States Department of Education final regulation gives the parties the right to be represented by a non-attorney in a due process hearing as determined under State law. (34 CFR 300.512(a)(1)).

The IDEA statute and regulation provide that either party at a due process hearing may be "accompanied and advised" by a non-attorney at the hearing. The IDEA did not address the issue of representation. Therefore, the IDEA regulation regarding representation leaves the matter to each State to decide.

The Comments to the Regulations indicate that if State law is silent on the question of whether a non-attorney advocate can represent parties in a due process hearing, there is no prohibition under the IDEA. (Federal Register, Volume 73, No. 231, Page 73018)

The Comments to the Regulations also clarify that whether a State Educational Agency (SEA) may have a regulation or procedural rule addressing the representation issue or whether a statutory provision is required is a matter determined by State law. (Federal Register, Volume 73, No. 231, Page 73018)

The Comments to the Regulations further provide that the issue of non-attorney representation in other stages of the special education process (such as mediation, etc.) is also a matter of state law. However, parents have the right to invite other individuals who have knowledge or special expertise regarding the student to the IEP Team meeting. In such case, their role is not to "represent" or speak for the parent. (Federal Register, Volume 73, No. 231, Page 73018)

C. State Monitoring and Enforcement

The final regulations provide that the State must ensure that when it identifies noncompliance with the requirements of the IDEA by its LEAs, the noncompliance must be corrected as soon as possible, and in no case, later than one year after the State's identification. Correction of noncompliance means that a State requires a public agency to revise any noncompliant policies, procedures and practices, and verifies through a follow up review of documentation or interviews, or both, that the noncompliance issues are corrected.

If necessary, the State must use appropriate enforcement mechanisms which include the provision of technical assistance, conditions on funding the LEA, a corrective action or improvement plan, and withholding funds, in whole or in part. (34 CFR 300.600 (a) and (e))

D. Annual Performance Reports for each Local Education Agency

The State must annually make a determination about the performance of each LEA under the targets in the State's Performance Plan. The annual report to the public shall be made no later than 120 days after the State's submission of its Annual Performance Report.
The State Performance Plan, the Annual Performance Report and the annual LEP Performance Reports shall be made public by, at a minimum, posting the reports on the SEA's website and distribution of the plan and reports to the media and through public agencies. (34 CFR 300.602(b)(1)(i))

E. Employment and Advancement of Individuals With Disabilities

Each recipient of assistance under Part B of the IDEA must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B. (34 CFR 300.177 (b)).

The Comments to the Regulations indicate that the United States Department of Education will decline to define the term "positive efforts" since such efforts will vary based on the unique and individual needs of a State and those needs may change over time. (Federal Register, Volume 73, No. 231, Page 73016)

F. Subgrants to Local Education Agencies

Each State must distribute both Section 611 funds (Part B grants for students 3-21) and Section 619 funds (Part B grants for students 3-5) to eligible LEAs, including charter schools that operate as an LEA, even if the LEA is not serving any students with disabilities. This requirement starts with Part B funds that become available on July 1, 2009. (34 CFR 300.705(a) and 815)

The Comments to the Regulations clarify that the purpose of this requirement is to ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve students with disabilities who enroll or are identified during the year.
In addition, Part B funds may be used for any permissible activity such as child find, professional development and for coordinated early intervening services. (Federal Register, Volume 73, No. 231, Page 73024)

G. Reallocation of LEA funds

If the State determines that an LEA is adequately providing FAPE to all children with disabilities residing in the LEA with State and local funds, the State may reallocate any portion of the funds not needed to other LEAs in the State. The State may also retain those funds at the State level to the extent that it has not reserved the maximum amount of funds permitted. (34 CFR 300.705(c)).

Pending Federal Legislation

I. IDEA Fairness Restoration Act (H.R. 2740)

The Act would amend the IDEA to permit a parent who is the prevailing party in a due process hearing or judicial action to seek reimbursement for expert witness fees and other expenses necessary for the preparation of the parent/guardian's case. The Act would reverse the impact of the United States Supreme Court decision, Arlington Central School District Board of Education v. Murphy, 126 S.Ct. 2455 (United States Supreme Court (2006).

II. Positive Behavior for Safe and Effective Schools Act (H.R. 2597)

The Act would amend the Elementary and Secondary Education Act to use Title 1 funds to implement school wide positive behavior supports and early intervening services for all students. In addition, funds would be allowed for teacher and principal preparation to improve school climate.

III. Autism Treatment Acceleration Act of 2009 (S. 819)

The Act would provide enhanced treatment, support, services and research for individuals with autism spectrum disorders and their families.

IV. Keep our PACT Act (H.R. 1102)

The Act would require full funding of the Elementary and Secondary Education Act (ESEA) and the Individuals With Disabilities Education Improvement Act (IDEA) by federal Fiscal Year 2117.

IDEA Case Law Up-Date

I. Evaluation Issues

A. The Court found that the school district systematically failed to adhere to its child find efforts under the IDEA. The district failed to refer children with suspected disabilities in a timely fashion and improperly extended the initial evaluation process. The Court found not only that the school district was in violation but that the State Department of Education also violated it's legal responsibility under the IDEA to provide general supervision and to monitor local agencies for compliance. (Jamie S. v. Milwaukee Public Schools, 519 F.Supp.2d 870, 48 IDELR 219 (United States District Court, Eastern District, Wisconsin (2007)). The State Department of Education settled the case with the Plaintiffs, Disability Rights Wisconsin. The settlement includes benchmarks for meeting child find requirements that will be reviewed by a state paid outside authority to monitor the School District, training for school district staff, and a new parent trainer position to support the parents in the school district. The school district objected to the settlement. The Court rejected the school district's objections and found the settlement to be fair, reasonable, and adequate. Jamie S. v. Milwaukee Public Schools 50 IDELR 127 (United States District Court, Eastern District, Wisconsin (2008)).

B. The Court upheld the use of a Child Study Team as part of the regular pre-referral process before a student would be evaluated for special education services. The Court noted that the use of alternative programs is not inconsistent with the IDEA for it is sensible policy for a school to explore options in the regular education environment before designating a child as a special education student.
The Court also noted that the Child Study Team process did not act as a "roadblock" to prevent the parents from requesting an evaluation at any time. In this case, the parents had never submitted a request to have their child evaluated. A.P. v. Woodstock Board of Education, 572 F. Supp. 2d 221, 50 IDELR 275 (United States District Court, Connecticut (2008)).

C. The Court found that the school district failed to adhere to its child find efforts under the IDEA. Based on the student's record of consecutive failures on state assessments, continuing difficulty in multiple subjects and the inability of prior accommodations under Section 504 to improve his performance, the school had reason to suspect the student had a disability.
In addition, the Court found that when a parent requests a special education evaluation, the IDEA gives the parent a right to the evaluation and overrides local district policy which would require a general education intervention team to first consider interventions before conducting the evaluation. In those instances, the required use of the general education intervention team impedes the exercise of rights guaranteed by federal law and would violate the IDEA. El Paso

Independent School District v. Richard R., 567 F. Supp. 2d 918, 50 IDELR 256 (United States District Court, Western District, Texas (2008). On Appeal.

D. Parents of students who they have placed in private non-profit elementary or secondary schools may request a special education evaluation from the district where the private school is located (for the purpose of considering the student for equitable services) and from the district of residence assuming the private school is not located in the district of residence (for the purpose of making a FAPE available). Both districts would be required to conduct an evaluation. The Department of Education noted that although parents have this right, the Department discourages parents from requesting an evaluation from two districts. Letter to Eig 52 IDELR 136 (United States Department of Education, Office of Special Education Programs (2009)).

E. The Court held that the school district could not proceed with an initial special education evaluation when one parent provided written consent for the evaluation and the other parent provided a written refusal to consent to the evaluation. Both parents had equal legal rights in this matter. The parents are free, however, to litigate any dispute regarding their relative educational decision making rights in the family court. In the Matter of J.H. v. Northfield Public School District 52 IDELR 165 (Minnesota Court of Appeals (2009)). Note: This is an unpublished decision.

F. The school, by referring a family to an evaluation center to determine whether the child with a disability was also autistic, violated it's obligation under the IDEA to evaluate the student in all areas of suspected disability. The Court held that a school cannot abdicate its affirmative duties under the IDEA by simply referring the parents to an evaluation center since it would not ensure that the child is assessed. The Court concluded that such procedural deficiency denied the student a FAPE. N.B. v. Hellgate Elementary School District 541 F.3d 1202, 50 IDELR 241 (United States Court of Appeals, 9th Circuit (2008)).

G. The parents were denied reimbursement for private services obtained for their twins with autism. The Court found that the school's evaluation was timely since there was no reason to suspect the twins were autistic until the private service provider contacted the district. However, the parents were reimbursed for the private evaluation due to the delay in sending the parents prior written notice of the school's intent to evaluate along with a copy of the procedural safeguards. J.G. v. Douglas County School District , 552 F.3d 786, 51 IDELR 119 (United States Court of Appeals, 9th Circuit (2008)).

II. Eligibility Issues

A. A student with behavioral problems was not eligible for IEP services as a student with an emotional disturbance. The student's drug use was the root of his problems at school which is more consistent with a diagnosis of social

maladjustment than an emotional disturbance. In addition, the decline in the student's grade point average was attributable to his acknowledged drug use, therefore there was no adverse effect due to a disability. Mr. and Mrs. N.C. v. Bedford Central School District 300 F.Appx. 11, 51 IDELR 149 (United States Court of Appeals, 2nd Circuit (2008)). This is an unpublished opinion.

B. The Court upheld the Team's determination that the student was not eligible for special education services. In so doing, the Court noted that the Hearing Officer appropriately found that the parent's refusal to allow the Team access to the student's current psychiatric treatment records denied the Team information that was essential to determine whether the student suffered from an emotional disturbance.
The parent insisted that the student should receive a new, independent psychiatric examination, apparently without the benefit of his past and current psychiatric records. The Court found that position is inexplicable, as a review of the already-existing records may have been sufficient for the Team to find that the student was emotionally disturbed, or the records may have provided a basis for additional examinations (Richardson v. District of Columbia 541 F.Supp. 2d, 50 IDELR 6 (United States District Court, District of Columbia (2008)).

C. A student with an "other health impairment" was determined by the Team to be no longer eligible for special education since he was demonstrating "age expected success" in the regular education curriculum with modifications and accommodations provided by the regular education staff.
The Court disagreed and found the student eligible for continued special education services. First, the Court noted that the IDEA requires that the disability "adversely affects educational performance" but does not use the qualifier "significant" affect which the Team used. Second, in determining adverse affect, the Team inappropriately assessed the student's performance in light of the modifications and accommodations he was receiving. Considering how a student performs with regular classroom modifications would add an additional hurdle to the eligibility criteria. Marshall Joint School District No.2 v. C.D. 592 F.Supp. 2d 1059, 51 IDELR 242 (United States District Court, Western District, Wisconsin (2009))

D. A student who was on a Section 504 plan to address her diabetic condition and who was also diagnosed as having an adjustment disorder, anxiety and depression was not eligible for IEP services. The parents offered no evidence to show that her diabetes and anxiety were related to her lack of attendance in school or her poor grades. Thus, she was not in need of special education. Loch v. Edwardsville School District 109 LRP 37090 (United States Court of Appeals, 7th Circuit (2009))

E. A student was diagnosed as having ADHD and bipolar disorder. The Court upheld the Team's determination that the student was not eligible for special education. The student's grades and test results demonstrated that she

continuously performed well supporting the conclusion that there was not an adverse impact on her educational performance. C.B. v. Department of Education of the City of New York 52 IDELR 121 (United States Court of Appeals, 2nd Circuit (2009) Note: This is an unpublished decision.

III. IEP/FAPE

A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Procedural Issues

1. Although the school did not fully implement the student's IEP in relation to math instruction, behavior supports and self-contained class work, the student was not entitled to compensatory education. The Court held that they were not material failures to implement the IEP. Minor discrepancies between the services provided and the services called for in the IEP do not give rise to an IDEA violation. A material failure occurs when the services provided fall significantly short of the services in the IEP. The child's educational progress, or lack of it, may be probative of whether there has been a significant shortfall (Van Duyn v. Baker School District, 502 F.3d 811, 47 IDELR 182 (United States Court of Appeals, 9th Circuit (2007)).

2. The Court held, as a matter of law, that in a case where the parents express doubt whether a school can satisfactorily provide IEP services, the IEP must identify a particular school in order to have a proper offering of FAPE. The offer of FAPE is limited to the terms of the IEP itself. Expanding the scope of the offer to include comments made during the IEP process would undermine the importance of the formal written offer. The Court noted that this decision is limited to situations where the parents and school have a dispute about location. The Court's holding should not be read so broadly that a school can never offer a FAPE without identifying a particular location in which IEP services are expected to be provided (A.K. v. Alexandria City School Board, 484 F.3d 672, 47 IDELR 245 (United States Court of Appeals, 4th Circuit (2007)). Petition for rehearing and rehearing en banc denied. Review denied by the United

States Supreme Court.
On remand, the District Court held that the private school where the student was placed by his parents was appropriate. After the Court of Appeals decision, the parties stipulated that the private school was appropriate for the 2004-2005 school year. The Court held that there have been no facts presented to indicate the school was not also appropriate for the 2005-2006 and 2006-2007 school years. The parents were awarded $136,000 in tuition and transportation costs plus attorneys fees. (A.K. v. Alexandria City School Board, 544 F.Supp 2d. 487, 50 IDELR 13 (United States District Court, Eastern District, Virginia (2008))

3. The Court held that the parents were not entitled to be reimbursed for their student's residential school placement even though the IEP developed by the public school was incomplete. The Court found the IEP was not completed due to the parents' lack of cooperation. The Court also stated that it is appropriate to look at the totality of circumstances, including extrinsic evidence not included in the IEP, in determining the appropriateness of the claims. C.G. v. Five Town Community School District, 513 F.3d 279, 49 IDELR 93 (United States Court of Appeals, 1st Circuit (2008)).

4. The lack of a completed IEP did not substantively harm the student since the parents unilaterally terminated the IEP process due to their concerns about the school's proposal. The parents made this decision despite the fact that the IEP had not yet been finalized.
The Court remanded the issue back to the District Court to determine whether the IEP was substantively appropriate. In doing so, the Court clarified that the FAPE analysis is restricted to the written document itself and should not consider proposals made by the school at subsequent meetings. Systema v. Academy School District No. 20 538 F.3d 1306, 50 IDELR 213 (United States Court of Appeals, 10th Circuit (2008)).

5. The parents were not denied a meaningful opportunity to participate at their child's IEP meeting even though the school staff met before the meeting to discuss the student's program. The IDEA allows schools to engage in "preparatory activities" to develop a proposal for the meeting as long as the school has an open mind as to the content of the IEP at the meeting. T.P. v. Mamaroneck Union Free School District, 554 F.3d 247, 51 IDELR 176 (United States Court of Appeals, 2nd Circuit (2009).

6. The IDEA requires public agencies to ensure that IEP meetings are scheduled at a "mutually agreed on time and place". Public agencies should be flexible in scheduling IEP Team meetings to accommodate the reasonable requests from parents. However, the IDEA does not require the public agency to schedule the IEP meeting outside of regular school hours or regular business hours to accommodate the parents or their experts. If

the parent and the public agency cannot schedule meeting to accommodate their respective scheduling needs, the public agency must take other steps to ensure parent participation by offering other means of participation (such as individual or conference telephone calls or videoconferencing) Letter to Thomas 51 IDELR 224 (United States Department of Education, Office of Special Education Programs (2008)).

7. Prior written notice under the IDEA is required a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement or the provision of FAPE. This written notice requirement applies even if the agency agrees with the change being proposed by the parent.

A proposal to change the provision of FAPE requiring written notice involves a change to the type, amount or location of the special education and related services being provided the child under their IEP. Letter to Lieberman 52 IDELR 18 (United States Department of Education, Office of Special Education Programs (2008)).

8. The Court held the participation of the student's former adaptive physical education teacher met the IDEA's requirement that at least one special education teacher or service provider be a member of the IEP Team. The IDEA does not require the participation of the student's current special education teacher or service provider. As long as the special education teacher actually taught the student previously, the IEP Team is valid. A.G. v. Placentia-Yorba Linda Unified School District 320 Fed. Appx. 519, 52 IDELR 63 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished decision.

9. Although there were procedural errors with the development of the IEPs, the Court concluded that the IEPs provided FAPE. The IEP did not include a statement of the supplementary aids and services, program modifications or supports for school personnel. The Court held the deficiency was harmless since previous IEPs included the information and no evidence was presented to show that the student was adversely impacted.

In addition, the school district did not invite the participation of the private school teacher in the development of the IEP. The Court found that the lack of participation did not result in any substantive deficit in the IEP. Lastly, the Court concluded the lack of a timely IEP did not alter the parents' legal obligation to provide the school district with notice of their intent to make a private placement at public expense. S.J. v. Issaquah School District No. 411 52 IDELR 153 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished opinion.

C. Substantive Issues

1. The Court of Appeals overturned the District Court's decision that the FAPE standard, as established by the United States Supreme Court in Rowley, had been superseded by the 1997 Amendments to the IDEA. The Court noted that there was no plausible way to conclude that the addition of post-secondary transition services in the IDEA supported a Congressional intent to change the FAPE standard. Had the Congress intended to change the Rowley standard it would have expressed a clear intent to do so.
The Court also upheld the IEP even though it didn't specify the minutes of service to be provided. The Court held that minutes need not be included in the IEP if the amount of services is "reasonably known" to all involved in the development and implementation of the IEP. J.L. v. Mercer Island School District, __ F.3d ___ , 109 LRP 48649 (United States Court of Appeals, 9th Circuit (2009)).

2. The Court held that the proper standard for determining whether a FAPE has been provided is Rowley as refined by subsequent statutory amendments and judicial decisions. The IEP must be individualized and provide a "meaningful benefit" gauged in relation to the potential of the student. Blake C. v. Hawaii Department of Education 109 LRP 2542 (United States District Court, Hawaii (2009)).

3. The Court held that neither the 1997 or 2004 amendments to the IDEA have changed the FAPE standard in Rowley. Congress did not explicitly articulate disagreement with the decision or amend the statutory definition of FAPE. The Court stated that "given the ubiquity of Rowley in the context of IDEA proceedings, one would expect Congress to speak clearly if the intent were to supersede it". Mr. and Mrs. C. v. Maine School Administrative District No.6, 49 IDELR 281 (United States District Court, Maine (2008)). See also, K.C. v. Mansfield Independent School District, 109 LRP 17367 (United States District Court, Northern District, Texas (2009)).

4. The parents challenged the appropriateness of the student's 8th grade IEP and sought reimbursement for their private school placement. After the Supreme Court remanded the issue back to the District Court after addressing the allocation of the burden of persuasion in IDEA cases, the parents introduced additional evidence before the Court including the IEP which was developed for the student in the 10th grade.

   The parents alleged that since the 10th grade IEP called for a full time special education placement, his 8th grade IEP which provided for placement in an "inclusion model" classroom was inappropriate.
   The Court noted that the parents' position "illustrates well the unfortunate

incentives created by excessive hindsight-based judging of IEPs……. To interpret the tenth-grade IEP as an admission of fault as to the eighth-grade IEP would discourage school systems from reassessing and updating IEPs out of fear that any addition to the IEP would be seen as a concession of liability for an earlier one. And it would thereby prevent students from receiving appropriate services as their profiles changed." The Court ultimately held that the IEP was reasonably calculated to provide the student with educational benefit and thus offered a FAPE. Schaffer v. Weast 554 F.3d 470, 51 IDELR 177 (United States Court of Appeals, 4th Circuit (2009).

5. The Court of Appeals found that a FAPE had been offered a student with multiple disabilities. The lower Court found the IEP did not provide FAPE since the indefinite use of a one on one aide throughout the day failed to address the student's need to increase his independence and added to the pattern of "learned helplessness". On appeal, the Court found that the IEP had several strategies to address the student's independence. A.C. v. Board of Education of the Chappaqua Central School District, 553 F.3d 165, 51 IDELR 147 (United States Court of Appeals, 2nd Circuit (2009)).

6. The Court upheld the IEP for a student with autism even though it did not incorporate ABA services as requested by the parents. The Court found that the requirement in the IDEA 2004 Amendments requiring that special education services be based on "peer reviewed research to the extent practicable" was met since the IEP was based on an eclectic approach. This eclectic approach, while not itself peer-reviewed, was based on peer reviewed research to the extent practicable. The Court noted that it should not decide whether the school made "the best decision or the correct decision" only whether the decision satisfied the requirements of the IDEA. Joshua A. v. Rocklin Unified School District, 52 IDELR 64 15838 (United States Court of Appeals, 9th Circuit (2009)) This is an unpublished decision.

7. The Court affirmed the Administrative Hearing Officer's decision that a student with Asperger's Syndrome received a FAPE.
The Court stated that the appropriateness of an IEP must not be judged in hindsight. In rejecting the parent's claim that the student's Skill Trainer should have had more experience and/or training with students who have Asperger's Syndrome, the Court held that this is a policy question for the Department of Education, not the Courts to decide.
In addition, although the teacher wrote the name of the student on the blackboard every time the student misbehaved, the Court noted that, although unprofessional, one misjudgment does not constitute a denial of

FAPE. (B.V. v. Hawaii Department of Education, 514 F.3d. 1384, 49 IDELR 152 (United States Court of Appeals, 9th Circuit (2008)).

IV. Related Services

A. The United States Supreme Court Decision – Irving Independent School District v. Tatro, 104 S. Ct. 3371, IDELR 555:511 (1984).

1. The United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

a) A child must have a disability so as to require special education under the IDEA;

b) The service must be necessary to aid a child with a disability to benefit from special education; and

c) The service must be able to be performed by a non-physician.

B. A school was ordered to provide a student with individual nursing services as a related service in his IEP. The court followed a "bright line" rule in the Tatro case. Since the services were not required to be administered by a doctor and were supportive services necessary for the student to attend school, they were required related services regardless of the cost (Cedar Rapids Community School District v. Garret F., 25 IDELR 139, United States Supreme Court (1999)).

C. The parents of children with cochlear implants initiated a lawsuit under the IDEA and the Administrative Procedures Act alleging that the 2006 IDEA regulation excluding mapping from the definition of related services contravenes the IDEA, exceeds the U.S. Secretary's rulemaking authority and is arbitrary, capricious and an abuse of discretion. The Court dismissed the lawsuit holding that the IDEA 2006 regulation was a permissible interpretation of the IDEA. Petit v. United States Department of Education 578 F. Supp. 2d 145, 51 IDELR 66 (United States District Court, District of Columbia (2008)).

V. Least Restrictive Environment

A. The Court found that placing a preschooler with disabilities in an integrated public preschool classroom was the Least Restrictive Placement for the student. Even though the private school classroom that the parents desired may have had more nondisabled students in it than the public classroom, the parents did not prove that the public preschool classroom failed to provide him a FAPE. There is

no magic number of nondisabled peers a classroom must have in order to satisfy the IDEA Least Restrictive Environment requirement. R.H. v. Plano Independent School District, 2008 WL 906289, 50 IDELR 41 (United States District Court, Eastern District, Texas (2008)).

B. The Court upheld the placement of a three year old child with autism in a self contained classroom as being the least restrictive environment for the child. In its ruling, the Court found that, although the school did not have a regular education program for three year olds, the school district did offered it's pre-kindergarten students a continuum of services including consultation services, community based programs, collaborative educational settings and direct services classrooms. M.W. v. Clarke County School District, 51 IDELR 63 (United States District Court, Middle District, Georgia (2008)).

C. The parents of a preschooler with a disability enrolled their child in a private preschool. The IEP developed called for the services of a special education teacher and an occupational therapist to be provided in a community based site but did not include a specific location. The Team did not consider other community based locations other than the private preschool where the child was in attendance.

The Court ordered the school to pay for the part-time enrollment in the private preschool. In doing so, the Court held that the actual or particular school or location where a child will receive his/her educational services is a critical element of the overall educational placement determination. Since the IEP did not include an alternative community site, FAPE included the preschool which the Team agreed was an appropriate least restrictive environment. Madison Metropolitan School District v. P.R. 51 IDELR 269 (United States District Court, Western District, Wisconsin (2009))

VI. Unilateral Placements

A. The United States Supreme Court in Burlington, MA v. Department of Education et al., 105 S. Ct. 1996, IDELR 556:389 (United States Supreme Court (1985), held that parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that:

1. The school district's IEP is not appropriate;

2. The parent's placement is appropriate; and

3. Equitable factors may be taken into consideration

B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the

Burlington standard (Florence County School District Four et al. v. Carter, 114 S. Ct. 361, 20 IDELR 532 (United States Supreme Court (1993)).

C. The parents placed a student who was never deemed eligible for special education in a private residential school. The Court held that the fact that the student has never been deemed eligible did not act as a bar to the parents' right to seek a due process hearing for reimbursement.
The Court noted that the school district's argument that the IDEA limits reimbursement to students who have previously received public special education services is unpersuasive for several reasons:
1. It is not supported by the IDEA's statutory text, as the 1997 Amendments to the IDEA do not expressly prohibit reimbursement in this situation:
2. The School District offered no evidence that Congress intended to supersede the *Burlington* and *Carter* decisions;
3.It is at odds with IDEA's remedial purpose of "ensur[ing] that all children with disabilities have available to them a [FAPE] that emphasizes special education ... designed to meet their unique needs,"; and
4. It would produce a rule bordering on the irrational by providing a remedy when a school offers a child inadequate special-education services but leaving parents remediless when the school unreasonably denies access to such services altogether. Forest Grove School District v. T.A., 129 S.Ct. 2484, 52 IDELR 151 (United States Supreme Court (2009)).

D. The parents sought reimbursement for the costs of sending their student to a Lindamood-Bell learning center over a three year period. The District Court, in denying reimbursement, found that both the IEPs offered the student and the Lindamood-Bell placement were inappropriate.
The Court of Appeals held that the lower court erred by failing to evaluate each year of the Lindamood-Bell placement on an independent basis in determining whether full or partial reimbursement should be awarded under the court's equitable authority.. Evaluating both IEPs and parental placements on a yearly basis acknowledges that what is "reasonably calculated" to confer some educational benefit may change over time. In addition, it is proper to consider the restrictive nature of the parent's unilateral placement as one of many factors in determining whether the placement is appropriate. M.S. v. Fairfax County School Board, 553 F.3d 315, 51 IDELR 148 (United States Court of Appeals, 4th Circuit (2009)).

E. The Court, in denying the parents' request for reimbursement of their daughter's private school placement, held that both the IEP and the private school were inappropriate. The private school failed to address the student's behavioral issues of distractability and assignment completion. The Court did award compensatory education for the public school's failure to address her behavior in a consistent behavior plan. Lauren P. v. Wissahickon School District 51 IDELR 206 (United States Court of Appeals, 3rd Circuit (2009). This is an unpublished decision.

VII. Behavior and Discipline

A. The Court held that a Functional Behavioral Assessment (FBA) is an evaluation under the IDEA and therefore parents have the right to request an Independent FBA if they disagree with the school's assessment. The regulations implementing the IDEA nowhere define "educational evaluation," but they do stress the broad scope of evaluations in general, defining "evaluation" as "procedures used ... to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." Evaluations must take into account a holistic perspective of the child's needs, and the evaluating agency accordingly is compelled to "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors." The Court ordered that the school provide the parents an independent FBA since the last FBA was conducted two years ago. Harris v. District of Columbia 108 LRP 37346 (United States District Court, District of Columbia (2008)).

B. The Court held that there is no provision in the IDEA requiring a behavioral intervention plan to be included in the IEP. However, the IEP must include the various interventions, supports and strategies deemed necessary to address the student's behavior that impedes his/her learning or that of other children. Yates v. Washoe County School District, 51 IDELR 7 (United States District Court, Nevada (2008)).

C. A student with autism, who exhibited severe behavioral problems at home and in the community, did not require a residential placement for educational purposes. The Court found that the student was making some progress on his IEP goals and his in school behavior was not as severe as in other settings. In such a case, the Court held that generalization of skills across settings is not required by the IDEA so long as the student is making educational progress at school. Thompson R2-J School District v. Luke P. 540 F.3d. 1143, 50 IDELR 212 (United States Court of Appeals, 10th Circuit (2008)) Review denied by the United States Supreme Court. See also San Rafael Elementary School District v. California Special Education Hearing Office, 482 F. Supp. 2d 1152, 47 IDELR 259 (United States District Court, Northern District, California (2007)).

D. The parent initiated a lawsuit alleging that the repeated use of time out interventions used with their child who is emotionally disturbed violated the child's due process rights under the Fourth and Fourteenth Amendments. The Court held there were no due process violations since the use of time out (which was expressly listed in the IEP) was not the equivalent of an out of school suspension requiring a hearing prior to it's imposition. The Court noted a teacher's ability to manage his/her classroom would be inappropriately undermined by a hearing requirement prior to placing a student in timeout.

Couture v. Board of Education of the Albuquerque Public Schools 535 F.3d 1243, 50 IDELR 183 (United States Court of Appeals, 10th Circuit (2008)).

E. The IDEA states that a manifestation meeting will be conducted " by the LEA, the parent, and relevant members of the IEP Team (to be determined by the parent and the LEA)". (emphasis added) The Court held this language does not mean that the LEA and parent must mutually agree on the membership of the manifestation determination team. The IDEA allows the LEA to determine the school's members and the parents may determine whom they wish to attend. Fitzgerald v. Fairfax County School Board, 556 F.Supp.2d 543, 50 IDELR 165 (United States District Court, Eastern District, Virginia (2008)).

F. The Court held that the IEP for a three year old child with autism was appropriate even though it did not address parent training or include a home behavioral intervention plan in response to reports by his parents of serious behavioral problems at home. Because the child's behavioral issues did not impede his education in school or that of his classmates, the school was not obligated to provide a behavioral plan or at home services. M.W. v. Clarke County School District, 51 IDELR 63 (United States District Court, Middle District, Georgia (2008)).

VIII. Due Process Issues

A. Burden of Proof

1. The Court held that the burden of proof in a due process hearing is on the party challenging the IEP. Note: The Court commented that this decision does not address those states that have a state law which places the burden of proof on the school district in a due process hearing (Weast v. Schaffer, 126 S.Ct. 528, 44 IDELR 150 (United States Supreme Court (2005)).

2. Even though there was a state law placing the burden of persuasion on the school district in a due process hearing, the Court held in light of the Weast decision, it was error to place the burden of persuasion on the school district. The burden of persuasion is on the party seeking relief. School Board of Independent School District No.11 v. Renollett, 440 F.3d 1007, 45 IDELR 117 (United States Court of Appeals, 8th Circuit (2006) and M.M. v. Special School District No.1, 512 F.3d 455, 49 IDELR 61 (United States Court of Appeals, 8th Circuit (2008)). Appeal denied by the United States Supreme Court.

B. Statute of Limitations

1. The Court held that an exception to the two year statute of limitation period applied since the parent never received written notice of the school's

refusal to evaluate in response to several requests from the parents to evaluate their child. Therefore, the school withheld information from the parent that was required to be provided. In addition, there was a continuing practice of refusing to evaluate within the last two years. D.G. v. Somerset Hills School District 559 F.Supp. 2d 484, 50 IDELR 70 (United States District Court, New Jersey (2008)).

2. The Court found an exception to the state's one year statute of limitations since the school district did not provide the parents with a copy of the IDEA procedural safeguards or notice refusing an evaluation in a timely manner. El Paso Independent School District v. Richard R., 567 F. Supp. 2d 918, 50 IDELR 256 (United States District Court, Western District, Texas (2008). On Appeal.

C. Hearing Officer Authority

1. The Court held that compensatory education is an appropriate remedy when a school district does not adhere to the "stay put" requirements in the IDEA. Even though the disputed IEP was found to provide a FAPE by the hearing officer, on appeal to the Court the previous IEP must be implemented unless the parents and school otherwise agree. Mr. and Mrs. C. v. Maine School Administrative District No. 6 49 IDELR 281 (United States District Court, Maine (2008)).

2. The hearing officer's award of compensatory education based on a formula to calculate the amount of the award was overturned by the Court. The Court noted that a compensatory award constructed with the aid of a formula is not per se invalid but it must represent an individually tailored approach to meet the student's unique prospective needs based on a "qualitative fact-intensive inquiry". Friendship Edison Public Charter School Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 49 IDELR 159 (United States District Court, District of Columbia (2008)).

3. The Court upheld a compensatory education award allowing the student to attend a private school at public expense until 2011 or upon receiving a high school diploma, whichever comes first. In so doing, the Court noted that compensatory education is different than a FAPE. A FAPE must provide educational benefit while compensatory awards must do more--- they must compensate. Compensatory awards should place students in the position they would have been in but for the denial of FAPE. Draper v. Atlanta Independent School System, 518 F.3d 1275, 49 IDELR 211 (United States Court of Appeals, 11th Circuit (2008)).

D. Attorney's Fees

1. The Court ordered the parent's attorney to pay the school over $12,000 in attorney's fees since it held the filing of the due process complaint was "frivolous, unreasonable and without legal foundation". At the due process hearing challenging the IEP, there were no witnesses, exhibits, testimony or other evidence to support the allegation that the IEP failed to provide FAPE. Amherst Exempted Village School District v. Calabrese 50 IDELR 218 (United States District Court, Northern District, Ohio (2008)). See also, Parenteau v. Prescott Unified School District 109 LRP 49277 (United States District Court, Arizona (2009)).

2. A student who had been exited from special education two years earlier was expelled for a verbal altercation with another student that included racist voice mails. The student initiated a motion for a temporary restraining order and preliminary injunction alleging the he was covered by the IDEA's stay put provision. The Motions were denied.
The Court found that the parents' attorney continued to litigate the IDEA claim after the litigation had become frivolous, unreasonable and without foundation. As a result, the Court ordered the parents' attorney to pay the school's attorneys fees associated with the school's Motion to Dismiss and Motion for Attorneys Fees. E.K. v. Stamford Board of Education 52 IDELR 133 (United States District Court, Connecticut (2009))

3. The Court refused to consider an offer of settlement made by the school district when it awarded the parents attorney's fees. The offer was made in a mediation session and the IDEA requires that all discussions that occur in a mediation be kept confidential. J.D. v. Kanawha County Board of Education 52 IDELR 182 (United States Court of Appeals, 4th Circuit (2009))

E. Miscellaneous Hearing Issues

1. The Court ruled that the parents were not entitled to receive the diagnoses and services offered to other children with disabilities in the school district as part of their discovery request in an action challenging the appropriateness of their child's IEP. The Court based its ruling on the attenuated relevance of the request coupled with the highly sensitive nature of the information sought. Hupp v. Switzerland of Ohio Local School District 51 IDELR 131 (United States District Court, Southern District, Ohio (2008))

2. The IDEA does not contain a provision keeping the discussions in the resolution session confidential. Therefore, the Court held that the hearing officer erred as a matter of law when he refused to allow testimonial and documentary evidence from a resolution meeting into evidence during the

due process hearing. In so holding, the Court held that the Federal Rules of Evidence are inapplicable to resolution meeting notes as a resolution meeting is not a settlement negotiation. Friendship Edison Public Charter School v. Smith 561 F. Supp. 2d 74, 50 IDELR 192 (United States District Court, District of Columbia (2008)).

3. The Court, in overturning the District Court, held that a hearing officer does not have the authority to enforce a private settlement agreement reached by the parties. The Court found that the settlement agreement is essentially a contract between the parties and a due process hearing is not the proper vehicle to enforce the contract. H.C. v. Colton-Pierrpont Central School District 109 LRP 44855(United States Court of Appeals, 2nd Circuit (2009)).

IX. Miscellaneous Issues

A. A student with a disability alleged he was harassed and bullied by his peers and sued the school for based on discrimination under Section 504. The Court held the following elements must be shown before a school can be held liable for peer harassment based on disability: (1) the student is a student with a disability; (2) that he/she was harassed based on their disability; (3) that the harassment was sufficiently severe or pervasive that it altered his/her education or created an abusive/hostile environment; (4) that the school knew of the harassment; and (5) that the school was deliberately indifferent to the harassment.
In this case, the school investigated the matter, disciplined the students involved, monitored the student with a disability and separated him from his harassers, held mediation sessions, contacted the parents and provided training to the student body. These affirmative steps taken by the school was clear evidence that it was not deliberately indifferent. S.S. v. Eastern Kentucky University 532 F. 3d. 445, 50 IDELR 91 (United States Court of Appeals, 6th Circuit (2008)).

B. The availability of relief under the IDEA does not limit the availability of a damage claim under Section 504. Although both the IDEA and Section 504 have overlapping FAPE requirements, there are some distinctions between the two. The most important difference is that unlike FAPE under the IDEA, FAPE under Section 504 requires a comparison between the manner in which the needs of disabled and non-disabled children are met.
The Court found that there is an implied right of action under Section 504 for claiming damages for a FAPE violation. A public entity can be held liable for damages under Section 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodations to a disabled person. Mark H. v. Lemahieu, 513 F 3d 922, 49 IDELR 91 (United States Court of Appeals, 9th Circuit (2008)).

C. The Office for Civil Rights (OCR) issued guidance regarding report cards and transcripts for students with disabilities. OCR opined that report cards may contain information about a student's disability, special education services received and the student's progress in specific classes, course content or curriculum. Transcripts, however, may not contain information that the student has a disability or was receiving special education services. Transcripts may indicate that a student took classes with a modified or alternate curriculum by using an asterisk or other symbol as long as it does not specifically disclose that the student has a disability. Questions and Answers on Report Cards and Transcripts for Students with Disabilities Attending Public Elementary and Secondary Schools (United States Department of Education, Office for Civil Rights (2008)).

D. The Court dismissed an action filed by two school districts and parents claiming that the No Child Left Behind Act conflicts with the IDEA. In doing so, the Court noted should there be a conflict, the earlier enacted statute (IDEA) must give way to the requirements of NCLBA. Board of Education of Ottawa Township High School District 140 v. Spellings, 517 F.3d 922, 49 IDELR 152 (United States Court of Appeals, 7th Circuit (2008)).

E. The NEA and school districts from three states sued the United States Department of Education alleging that NCLB does not require school districts to comply with its requirements if doing so would require the expenditure of state and local funds to cover the costs of compliance. The Court, in reversing the dismissal of the lawsuit, held that NCLB could reasonably be read to mean that a state need not comply with its requirements if they are "not paid for under the Act" with federal funds. School District of the City of Pontiac v. Spellings, 512 F.3d 252 (United States Court of Appeals, 6th Circuit (2008). Rehearing pending.

F. Parents sued their school district alleging that they were never informed that their children were attending schools in need of improvement, of their right to public school choice and their child's right to receive supplemental educational services. The Court held that parents have no right to sue under the No Child Left Behind Act because Congress designed the law only to regulate school districts and never included any "rights creating" language that would allow individuals to seek enforcement through lawsuits. Newark Parents Association v. Newark Public Schools (United States Court of Appeals, 3rd Circuit (2008)).

G. A school was not liable for injuries a student with fragile bones suffered while walking across an icy playground. The parents initiated a lawsuit alleging violations of the IDEA, ADA and the Due Process clause of the Constitution. The parents claimed that the injury resulted from the student being in an inclusion program. The Court noted that the teacher's decision, in allowing the student to participate outside during recess, involved a balancing of highly delicate factors. On the one hand the school has a duty to protect the safety of the child balanced

with another important duty to keep the student from feeling ostracized and excluded. Edwards v. School District of Baraboo 570 F.Supp. 2d 1077, 50 IDELR 283 (United States District Court, Western District, Wisconsin (2008)).

H. The parents initiated a lawsuit alleging the school district and staff improperly restrained and isolated their student who is autistic. The Court, in refusing to dismiss the civil rights claims against the staff, held that the staff were not protected from individual liability by 11th Amendment immunity. McElroy v. Tracy Unified School District 52 IDELR 187 (United States District Court, Eastern District, California (2009)).

I. The IEP Team placed a student in a private school which terminated the student's enrollment due to his behaviors. In denying the school district's Motion to Dismiss the parents' lawsuit alleging the denial of FAPE, the Court held that the school district is legally obligated to provide FAPE. The school district, as the LEA, cannot avoid its obligations under the IDEA by contracting with a private entity.

Although the Court granted the private school's Motion to Dismiss regarding liability under the IDEA, it refused to dismiss the parent's third party beneficiary claim alleging a breach of contract. Smith v. James C. Hormel School of the Virginia Institute of Autism 52 IDELR 158 (United States District Court, Western District, Virginia (2009).

J. During an abuse and neglect proceeding against the parents, the Court ordered the school district to provide a full time nurse for the student while at school. The school district was not provided a notice of the hearing or given an opportunity to be heard. The Court of Appeals overturned the order since the lower court deprived the school district of fundamental due process and clearly exceeded its powers. State of West Virginia v. Board of Education of the County of Putnam 52 IDELR 199 (West Virginia Supreme Court of Appeals (2009)).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.

Second General Session

Research in Evidence Based Practices at the University of Washington: The Dawgs Are Out and On Point

By:

Doug Cheney
Professor, Special Education
University of Washington
Seattle, Washington

Pacific Northwest Institute on Special Education and the Law
October 5-7, 2009
Seattle, Washington

UNIVERSITY of WASHINGTON

College of Education

PNW Law Institute, October 2009

Research in Evidence Based Practices at the University of Washington:
The Dawgs Are Out and On Point

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College of Education

Dawgs On Point, PNW Law Institute, October, 2009

My Agenda:

- Update on Research at UW/Area of Special Education
- How Research is Applied in Schools
- How Research is Integrated into Teacher Preparation

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Faculty/Research Featured in Session

Primary Areas of Research:

- Early Childhood: Dr. Susan Sandall
- Literacy: Drs. Roxanne Hudson, Joe Jenkins
- Autism: Dr. Ilene Schwartz
- Behavior: Drs. Carol Davis, Doug Cheney

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Early Childhood Special Ed.: Dr. Susan Sandall

- Areas of scholarly interest
  - Effective instructional practices in inclusive natural environments
  - Knowledge utilization
- Current research project
  - Impact of Professional Development on Preschool Teachers' Use of Embedded Instruction Practices

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Early Childhood Special Ed.: Dr. Susan Sandall

- Several published studies document the effectiveness of embedded instruction across a range of target behaviors and using a variety of instructional strategies.
- Studies also report the challenges of:

  a) teaching teachers to use embedded instruction, and

  b) ensuring sustained use of the practice.

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Literacy: Dr. Roxanne Hudson

project word investigating reading fluency

- The purpose of this project was to:
  - examine components of decoding and reading fluency that distinguished poor from good readers and;
  - to identify effective ways to teach those basic elements to students who are non-fluent readers.

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Literacy: Dr. Roxanne Hudson

- 198 second grade readers of varying achievement
- Findings:
  - Phonemic blending predicts letter sound fluency, which predicts automaticity in within-word patterns, which predicts decoding fluency
  - Decoding and single word fluency predict Text Reading Fluency

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Hudson's Findings

- Both interventions improved decoding accuracy
- Practice focused on rate and accuracy resulted in higher decoding fluency
- Both led to increased text reading fluency
- These instructional approaches with struggling early readers lead to improved mid-level skills (decoding fluency) and higher-level skills (text reading fluency).

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Autism: Dr. Ilene Schwartz

- Project DATA: Developmentally Appropriate Treatment for Autism
- Ten years in implementing
- Over 100 schools participated in training and follow-up
- School/center-based program for toddlers & preschoolers with autism
  - Effective, sustainable, and responsive to families and school personnel

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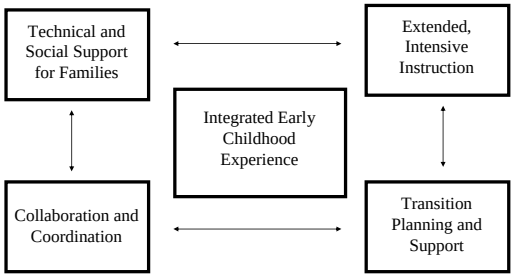
Project Data



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Core Evidence Based Practices in DATA

- Successfully interact with typical peers
  - Peer mediated instruction
- Behavioral strategies
  - Prompting, R+, Task analysis
- Individual curriculum to meet child needs
- Effective instructional strategies
  - Computer aided, Discrete trials, Explicit,
  - Naturalistic, Visual, Generalized
- Family support & involvement
- Transition services from EEU to schools

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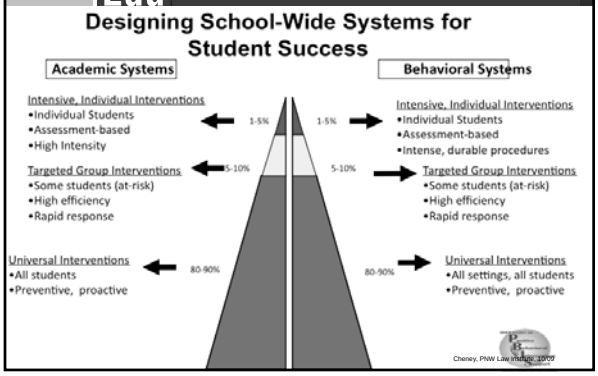
Behavior: Dr. Davis & Cheney



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Coaching Teams to Build Capacity for Students with Challenging Behavior

- Challenging Behavior Persists In Schools
- Schools Can Be Inconsistent And Punitive
- Need To:
  - Develop Schoolwide Behavior Support (PBS)
  - Improve/Enhance Teachers Behavioral Expertise
  - Implement Efficient Function-based Behavior Plans
- Build behavioral capacity within school district staff
  - Decrease reliance on consultants

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Tier 1: School-Wide Behavior Support System

- School-Wide
  - Define and teach expectations
  - Monitor and reward appropriate behavior
  - Clear consequences for problem behavior
  - Information collected and used for decision-making
- Example – The Bee Program
  - Be Responsible
  - Be Respectful
  - Be Prepared to Work
  - Be Safe

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Tier 2: Check, Connect, & Expect (CCE)

- A Tier 2 behavioral intervention based on 15 years of research and practice from:
  - Positive Behavior Support (Horner & Sugai, 2002)
  - Check and Connect (Sinclair et al., 1998), U. Minnesota
  - The Behavior Education Program (Crone, Horner, & Hawken, 2004) U. Oregon/Utah.
- CCE emphasizes these features:
  - a positive caring adult
  - daily positive interactions with teachers & other adults
  - supervision and monitoring of students
  - teaching social skills to students
  - reinforcement/acknowledgement for success

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CCE Outcome Study:

Cheney et al. (in press)
Journal of Emotional and Behavioral Disorders

- 119 students in CCE Intervention (9 schools),
- 86 Comparison Students (9 schools)
  - No differences on behavioral measures at baseline
- 73/119 students (61%) graduate within 2 yrs
  - Another 25% progressing positively
- Screening Measure (SSBD) & Behavioral Measures differentiate graduates, comparisons, non-graduates.
- Graduates lower problem behaviors (SSRS & TRF) & increase social skills (SSRS) in growth curve analyses.

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CCE: Other Key Findings

- Coach-Student Relationship mediates and influences Graduating in CCE Program.
- Teacher-student Relationship predicts outcomes: Social Skills and Problem Behaviors
- Variance in grads is influenced by success on daily report card (a structural part of program).

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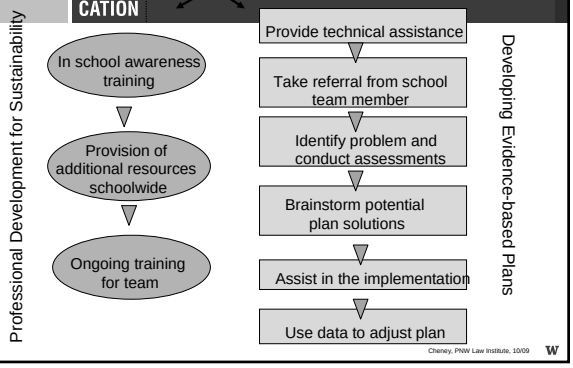
Tier 3: Technical Assistance/Coaching Teams



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Integrating Research into Personnel Preparation

- Faculty involved and knowledgeable
- Content in classes
- Content applied in assignments
- Coordination with cooperating teachers
- Incentives for cooperating teachers
- Application of EBPs in school classroom

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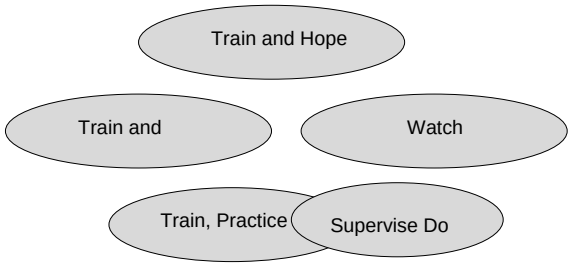

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Example, Integrated Experience of EBP

- Functional Behavior Analysis
- Practice collecting information, developing hypothesis, state function, function driven intervention at UW & in schools
- Apply under supervision in school classroom, same steps,
- Apply in student teaching independently

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Summary

- Faculty engaged in research on EBP
- Faculty conduct applied research in schools
- Numerous inservice programs share research with practicing teachers/admins.
- Preservice training integrates research into UW classes
- Students apply skills in classroom settings
- Looping iterative process

Third General Session

Special Education at the Speed of Sound

By:

Julie Weatherly
Attorney at Law
Resolutions in Special Education, Inc.
Mobile, Alabama

Pacific Northwest Institute on Special Education and the Law
October 5-7, 2009
Seattle, Washington

SPECIAL EDUCATION AT THE SPEED OF SOUND-- STAYING OUT OF SPECIAL EDUCATION LEGAL TROUBLE FROM A-Z: 65 TIPS IN 75 MINUTES

26th Annual Pacific Northwest Institute on Special Education and the Law

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In this necessarily lightning-fast session and in a little more than an hour, 65 practical tips for staying out of special education legal trouble will be highlighted. The tips will start with child find and identification, move to evaluation, IEP development and implementation and incorporate tips with respect to specific issues such as discipline, LRE and ESY.

I. CHILD FIND/IDENTIFICATION

1. **TRAIN** all school personnel to take the Child Study Team process seriously and to understand the role of this Team.

- ❖ To prevent disproportionality/overrepresentation based upon race or ethnicity.
- ❖ To prevent disproportionate representation of students in special education generally and inappropriate identification.
- ❖ To decrease the number of referrals for special education consideration generally.

2. **TRAIN** all school personnel (including, *importantly*, regular education teachers and those who serve on Child Study Teams) on the overall legal requirements applicable to the identification and education of students with disabilities.

- ❖ Individuals with Disabilities Education Act (IDEA)
- ❖ Americans with Disabilities Act (ADA)
- ❖ Section 504 of the Rehabilitation Act of 1973 (Section 504)
- ❖ Family Educational Rights and Privacy Act (FERPA)
- ❖ No Child Left Behind (NCLB)
- ❖ Relevant State Law Requirements that differ from federal

3. **REMEMBER** that the concept of "continuous progress monitoring" is applicable, regardless of whether an overall RTI approach for referral and identification is used in order to ensure that a student's difficulties are not due to lack of appropriate instruction.

   Letter to Zirkel, 50 IDELR 49 (OSEP 2008). When asked to clarify whether an SLD evaluation team must consider continuous progress monitoring, regardless of whether the approach used is RTI, OSEP responded that the eligibility group must consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents, in order to ensure that underachievement in a child suspected of having a SLD is not due to lack of appropriate instruction in reading or math. "The regulation does not use the term 'continuous progress monitoring.'" "'A critical hallmark of appropriate instruction is that data documenting a child's progress are systematically collected and analyzed and that parents are kept informed of the child's progress.' We believe that this information is necessary to ensure that a child's underachievement is not due to lack of appropriate instruction."

4. **STRESS** the importance and affirmative nature of child find requirements.

   - ❖ Action required when there is "reason to suspect" that the student may be a child with a disability.
   - ❖ Action required when there is "reason to believe" the student is a child in need of special education.

   Hawkins v. District of Columbia, 49 IDELR 213, 539 F.Supp.2d 108 (D. D.C. 2008). Where district made no effort to locate a child referred by the Head Start program, even after being ordered to do so by a hearing officer, the district denied FAPE to the child. "The sad truth is that if [the district] had complied with the July 2006 [administrative order] by contacting [the parent's] counsel to coordinate a meeting, it is entirely possible—indeed likely—that [the child] could have been 'located' then." The child find provision applies to all children, regardless of whether they are enrolled in school. The parent's failure to enroll the child in his neighborhood school did not excuse the district's failure to comply with child find obligations.

   Montgomery Co. Bd. of Educ., 51 IDELR 259 (SEA Ala. 2008). School district was not required to refer fourth-grade student for an evaluation where the AAC requires districts to implement "pre-referral" interventions for at least 8 weeks before referring a student for a special education evaluation. Indeed, the district referred the student to her school's student intervention team after she had received an F in math. Because she earned a C in math after receiving interventions, the district did not err in determining that a special education evaluation was not necessary. Although the student had some inappropriate behaviors, it was proper to conclude that they were not severe enough to qualify the student as having ED. Notably, the district developed a positive behavior plan for the student and notified the parent that an FBA would be done when the student started fifth grade.

Stone County (MS) Sch. Dist., 52 IDELR 51 (OCR 2008). Where district placed a 6th-grader with ADHD on academic interventions pursuant to its RTI model in August 2007, district did not err when it refused to conduct an evaluation in October at parent's request. The district based its decision on the fact that the student was already receiving Tier II interventions, that his grades had improved, and that he had done well on standardized tests and on the district's screening tests the prior year. The district was not required to evaluate the student, given its supported belief that he did not need special education services. The information the district reviewed after receiving the parent's request indicated that the student was making academic progress, that his grades improved as a result of interventions, and that he was capable of performing well on tests. Importantly, however, the district *did* violate 504 by neglecting to notify the parent of its decision not to evaluate or to provide notice of the 504 procedural safeguards.

Wilson County (NC) Pub. Schs., 51 IDELR 137 (OCR 2008). District could not avoid liability for its child find violation merely by pointing out that the 7th-grader's parents never requested a special education assessment. The student's poor grades, inappropriate behaviors and ADHD tendencies should have given the district reason to suspect the existence of a disability. Along with poor academic performance, the student was suspended from the school bus on several occasions for offenses that included throwing objects, moving from seat to seat, and hitting fellow classmates. In addition, the student failed math and social studies and will repeat 7th grade. Furthermore, an evaluation conducted in 2005 showed that the student tested in the "at-risk to clinically significant" range for ADHD. All of these factors should have put the district on notice of potential disability.

A.P. v. Woodstock Bd. of Educ., 50 IDELR 275 (D. Conn. 2008). District did not err in failing to refer student for a special education evaluation. Although the student had some difficulties in the classroom, the evidence showed that he responded well to interventions, received As, Bs and Cs on his report card, and performed "on goal" on a statewide assessment without any accommodations. In addition, the teacher had regular contact with the parents about the student's progress. "This is decidedly not a case in which a school turned a blind eye to a child in need….To the contrary, [the teacher] acted conscientiously, communicating regularly with [the mother] and utilizing special strategies to help [the student] succeed." Although the student was ultimately found eligible for services in 6th grade (as a student with a nonverbal LD), the district did not err in failing to evaluate sooner due to the student's response to interventions.

El Paso Indep. Sch. Dist. v. Richard R., 50 IDELR 256, 567 F.Supp.2d 918 (W.D. Tex. 2008). District violated its child find obligations by repeatedly referring a student with ADHD for interventions rather than an evaluation. While the interventions included Section 504 accommodations, additional tutoring, and Saturday tutoring camps, the interventions did not demonstrate positive academic benefits. Not only did the student continue to struggle in reading, math and science, he failed the Texas Assessment of Knowledge and Skills test for three years in a row. "Why [the district's] STAT committee would have suggested these measures, knowing that [the student] had

undertaken each of these steps in the past three years and that hone had helped him achieve passing TAKS scores, simply baffles this court."

Los Angeles Unif. Sch. Dist. v. D.L., 49 IDELR 252, 548 F.Supp.2d 815 (C.D. Ca. 2008). Although the LAUSD did not conduct its own evaluation of the student before he moved to another district and, therefore, was not required to pay for an IEE conducted by the new school district on that basis, LAUSD is still ordered to fund the evaluation conducted by the new school district. This is so based upon the fact that the ALJ found it significant that between October 17 and 25, 2005, the student was disciplined by his teacher on 4 occasions and her notes show that he engaged in significant disruptive behavior, including roaming the playground, falling out of his chair, making noise, failing to follow directions, walking on tables, and tearing up other students' work. Although the court did not reach the legal issue of whether LAUSD was "duty-bound" to assess the student upon the parent's request, the parties have not challenged the factual findings of the ALJ. Based on the facts pertaining to behavior while attending school at LAUSD, the repeated requests of his mother for an assessment, his diagnosis of ADD, and the new school district's determination that the student should be assessed, it appears at least arguable that LAUSD should have performed an assessment while he was a student there. Thus, LAUSD must make arrangements for payment of the assessment done after the student moved to the new school district.

N.G. v. District of Columbia, 50 IDELR 7 (D. D.C. 2008). Where student exhibited at least two of the five characteristics of SED (pervasive depression and inappropriate types of behaviors), her academic performance was adversely affected as a result, and DCPS knew it, the school district should have evaluated her, particularly after being informed of her ADHD diagnosis. In addition, she failed four of her seven classes when she had previously been an A/B student.

5. **REFRAIN** from diagnosing medical conditions or suggesting medication without the credentials for doing so.

Unfortunately, there have been cases where teachers or other school personnel have made their own diagnosis of a particular medical condition without being qualified to do so. A proper referral for an evaluation must be made rather than statements to parents as to what school personnel believe to be a disability. The 2004 IDEA Amendments now provide that the State Educational Agency shall prohibit State and LEA personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services under this title. However, the new Act notes further that nothing in this paragraph "shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services…."

W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995). An action for damages can be brought under IDEA, Section 504 or Section 1983 for failure to timely identify a student as disabled. But see, Barnes v. Gorman, 122 S. Ct. 2097 (2002)(overturning Gorman v. Easley, 257 F.3d 738 (8th Cir. 2001)). Because punitive damages may not be awarded in private suits brought under Title VI of the Civil Rights Act of 1964, such damages are not available under the ADA or Section 504. Title VI and other constitutional Spending Clause legislation (such as ADA and Section 504) is "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions."

Letter to Hoekstra, 34 IDELR 204 (OSERS 2000). It is not the role of educators to diagnose ADD or ADHD or to make recommendations for treatment. That responsibility belongs to physicians and family. School officials may provide input at parents' request and with their consent about a student's behavior that may aid medical professionals in making diagnosis.

6. **RESPOND** appropriately to parents and/or staff referrals or requests for an evaluation.

- ❖ When there's debate, evaluate!

Charlotte-Mecklenburg Bd. of Educ. v. B.H., 51 IDELR 71 (W.D. N.C. 2008). District's alleged failure to identify and evaluate a child ultimately found to have a fatal neurological condition is more than a mere FAPE violation. The parents' complaint suggests that the district acted in bad faith or with gross misjudgment when it failed to take any action in response to the kindergarten teacher's IDEA referral and when he was sent to the kindergarten classroom when unable to complete work in first grade. Thus, the parents have sufficiently stated a claim under Section 504.

7. **SEEK** input from parents, even if they cannot attend appropriate meetings.

8. **DOCUMENT** attempts to include parents in all meetings where educational decisionmaking occurs.

9. **GATHER** additional relevant information at meetings from parents and all team members.

10. **REFER BACK** to the appropriate Child Study Team if ultimate determination is made that the student will not be referred.

11. **GIVE NOTICE** to parents in writing of decisions regarding referral or evaluation for special education services.

II. EVALUATION/REEVALUATION

12. **OBTAIN** written consent prior to initial evaluation or prior to any reevaluations that requires evaluation to be administered.

13. **CONSIDER** conducting evaluations by professionals of the school system's choosing, for purposes of determining eligibility.

Independent Sch. Dist. No. 701 v. J.T., 2006 WL 517648, 45 IDELR 92 (D.C. Minn. 2006). Where district agreed to use former district's evaluation when it prepared IEP, when parent asked for IEE and was able to prove former district's evaluation was inappropriate, new district required to fund IEE.

Fort Atkinson (WI) Sch. Dist., 46 IDELR 142 (OCRV, Chicago (WI) 2006). The Office for Civil Rights (OCR) found that the district did not comply with 504 regulations when it agreed to accommodate a student's SLD with a 504 Plan without first evaluating the student's need for special education services. Although the student objected to a proposed special education evaluation, the district still had an obligation to evaluate the student before providing services. The district improperly allowed the student's preference not to undergo evaluation to trump its obligation to evaluate the student.

Shelby S. v. Kathleen T., 45 IDELR 269 (5th Cir. 2006). School district has justifiable reasons for obtaining a medical evaluation of the student over her guardian's refusal to consent. If the parents of a student with a disability want the student to receive special education services under the IDEA, they are obliged to permit the district to conduct an evaluation.

M.T.V. v. DeKalb County Sch. Dist. , 45 IDELR 177, 446 F.3d 1153 (11th Cir. 2006). Where there is question about continued eligibility and parent asserts claims against District, District has right to conduct reevaluation by expert of its choosing.

Marissa F. v. William Penn Sch Dist., 46 IDELR 154 (3d Cir. 2006). Where parents never consented to a district evaluation and never enrolled LD student in a district school, district was not afforded the opportunity to provide FAPE to the student and, therefore, her parents' claim for tuition reimbursement for private schooling is barred.

14. **REFRAIN** from suggesting to parents that they are responsible for obtaining educationally-relevant evaluations.

N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had once been privately diagnosed with autism, but school district staff suggested that the parents arrange for an autism evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.

15. **UTILIZE** qualified personnel to administer appropriate evaluations.

16. **USE** a variety of assessments when evaluating for the existence of a disability and do not use a single assessment to identify a disability.

Draper v. Atlanta Indep. Sch. Sys., 49 IDELR 211, 518 F.3d 1275 (11th Cir. 2008). Where the district failed to identify the student's SLD for five years and had determined that he was eligible for services as a mildly intellectually disabled student based upon just one assessment, the school district denied FAPE. The district court did not abuse its discretion in ordering the school district to pay up to $38,000 per year until 2011 for private placement as a remedy. The relief awarded was not disproportionate to the IDEA violations, as the district failed to identify the student's SLD for five years and transferred him from a self-contained class to a regular education program without considering his severe reading deficiencies. In addition, the district continued to use an ineffective reading program for three years, despite the student's clear lack of progress.

17. **CONDUCT** comprehensive evaluations and evaluate in ALL suspected areas of disability.

18. **MAKE** appropriate decisions regarding the need to conduct reevaluations.

- When there's debate, re-evaluate!

19. **CONSIDER** results of independent educational evaluations.

T.S. v. Ridgefield Bd. of Educ., 808 F. Supp. 926 (D. Conn. 1992). The requirement for IEP team to take into consideration an IEE presented by the parent was satisfied when a district psychologist read portions of the independent psychological report and summarized it at the IEP meeting.

DiBuo v. Board of Educ. of Worcester County, 309 F.3d 184 (4th Cir. 2002). Even though school district procedurally erred when it failed to consider the evaluations by the child's physician relating to the need for ESY services, this failure did not necessarily deny FAPE to the child. A violation of a procedural requirement of IDEA must actually interfere with the provision of FAPE before the child and/or his parents are entitled to reimbursement for private services. Thus, the district court must determine whether it accepts or rejects the ALJ's finding that the student did not need ESY in order to receive FAPE.

20. **INFORM** parents of their right to request an Independent Educational Evaluation at public expense (IEE) if they disagree with the evaluation completed by and/or obtained by the school system.

21. **TRAIN** school personnel as to how to respond appropriately for a request for an IEE.

22. **REMEMBER** the responsibility to conduct a FAPE evaluation, even of a student placed by the parent in a private school located in another jurisdiction.

Letter to Eig, 52 IDELR 136 (OSEP 2009). The home district must evaluate a parentally placed private school student for FAPE upon parental request. If a parent asks the home district to evaluate a private school student's eligibility for IDEA services (rather than

eligibility for "equitable services"), the home district can not refuse to do so on the grounds that the student attends private school in another LEA.

23. **COMPLY** with applicable timelines and document compliance with them!

- ❖ days to completion of initial evaluation.
- ❖ days from completion of initial evaluation to eligibility determination.
- ❖ days from eligibility determination to IEP development.

J.G. v. Douglas County Sch. Dist., 51 IDELR 119, 552 F.3d 786 (9th Cir. 2008). The school district did not violate the IDEA when it delayed evaluations of two preschoolers but not because it complied with Nevada's evaluation timeline, but because it was not aware that the young twins might have autism. The court was critical of the school system's defense that the evaluation, conducted within 38 days, fell within the state's required evaluation timeline of 45 school days. While the state's timeline is not inconsistent with the former IDEA, it did not provide the district with a "safe harbor" for conducting evaluations. "Regardless of compliance with a state regulatory requirement, [the] IDEA requires that districts act within a reasonable time to evaluate [a student suspected of having a disability]." Whether an evaluation is conducted within a reasonable time depends upon the child's circumstances and not whether the district complies with a state-established timeline. Under the circumstances here, the district conducted the evaluations on a timely basis once it was contacted by the twins' private service provider in July and told that the students might be autistic. Thus, the parents could not recover the cost of private services they obtained while the evaluations were pending. The Court also noted that it "makes sense to allow school districts a degree of leeway during summer vacation."

Integrated Design and Electronics Academy Pub. Charter Sch. v. McKinley, 50 IDELR 244 (D. D.C. 2008). District's failure to comply with D.C.'s 120-day timeline for completing an evaluation amounted to a denial of FAPE. The evidence did not support the school's claim that the parent was uncooperative in providing information and scheduling.

III. ELIGIBILITY

24. **ADHERE** to state definitions, criteria and minimally required evaluations in determining eligibility and accurately document adherence.

25. **CONSIDER** all relevant information when determining eligibility, in addition to the minimum evaluative components set forth under state eligibility criteria.

26. **AVOID** reliance solely upon test scores when determining eligibility/ineligibility.

Jaffess v. Council Rock Sch. Dist., 46 IDELR 246 (E.D. Pa. 2006). In a dispute as to whether a 16 year-old student diagnosed as LD continued to need specially designed instruction (SDI), it is clear that the student did not. Expert witness testimony submitted

by the parents relied heavily on test scores, but neither expert observed the student's in-class performance, which unequivocally demonstrated that the student did not need SDI. In addition, all of the student's teachers and district staff universally agreed that he did not require SDI to meaningfully benefit from his educational program. This conclusion was based upon data collected by classroom teachers, evaluation reports, reports regarding student's writing ability prepared by the State, report card grades, interim reports from teachers and conversations with all team members. In addition, student's chemistry, study skills, French, geometry, English and American Studies teachers all testified that he did not need SDI to succeed in their classrooms.

27. **INCLUDE** more than just academic performance in the definition of "educational performance" when determining whether there is a condition that adversely affects "educational performance."

Mr. I v. Maine Sch. Admin. Dist. No. 55, 47 IDELR 121, 480 F.3d 1 (1st Cir. 2007). In Maine, "educational performance" is more than just academics and there is nothing in IDEA or its legislative history that supports the conclusion that "educational performance" is limited only to performance that is graded. In addition, "adversely affects" does not have any qualifier such as "substantial," "significant," or "marked." Thus, district court's holding that *any* negative impact on educational performance is sufficient is upheld. Student with Asperger's Syndrome who generally had strong grades, had difficulty in "communication," which is an area of educational performance listed in Maine's law. That makes her eligible for special education services.

Board of Educ. of Montgomery County v. S.G., 47 IDELR 285, 230 Fed. Appx. 330 (4th Cir. 2007). 15-year-old student with schizophrenia is eligible for special education services because her emotional disturbance adversely affected her educational performance in a regular classroom. Therefore, school district must fund S.G.'s attendance at a therapeutic school.

Williamson County Bd. of Educ. v. C.K., 52 IDELR 40 (M.D. Tenn. 2009). Gifted student with ADHD should have been made eligible for special education services as Other Health Impaired. "Under the law, it is not enough that C. managed to earn average to above average grades overall by the end of each school year in order to advance to the next grade level. Each state 'must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.'"

28. **REMEMBER** the third prong for determining eligibility: whether the student's (1) condition (2) adversely affects educational performance (3) *to the degree that the student needs special education and related services.*

Alvin Indep. Sch. Dist. v. A.D., 48 IDELR 240 (5th Cir. 2007). Student with ADHD is not a student with a disability because he does not need special education and related services. The "adversely affects a child's educational performance" standard is a subpart

of the definition of "other health impairment" under the IDEA, but the student does not meet the second prong required to be eligible for special education—that is, "by reason thereof, needs special education and related services." The determination of ineligibility was not just based upon academic success and the district court considered a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social, and cultural background.

Hood v. Encinitas Union Sch. Dist., 107 LRP 26108, 486 F.3d 1099 (9th Cir. 2007). Parents' reimbursement claim for placement at a private school for LD students is denied because student is not eligible for special education services. Prior to the student's removal from public school, she was consistently receiving average or above-average grades and she did not, therefore, need special education services to obtain a meaningful educational benefit. The student's 504 Plan (based upon a seizure disorder) included preferential seating, use of a graphic organizer and Alpha Smart keyboard, one-step directions, visual support for instruction and concepts, etc. Because any severe discrepancy reflected in testing could be corrected within the regular instructional program, she was not eligible as SLD or OHI.

M.P. v. North East Indep. Sch. Dist., 107 LRP 68824 (W.D. Tex. 2007). Student with undeniable ADHD is not a child with a disability under the IDEA because student could not prove that he has an educational need for special education services caused by the ADHD. Rather, student's behaviors were voluntary and, as several of his teachers testified, he could control his behavior when he wanted to.

Ashli and Gordon C. v. State of Hawaii, 47 IDELR 65 (D. Haw. 2007). School district's decision that student with ADHD was not eligible for services is upheld. Parent's argument that the school should have considered the effects of ADHD on student's educational performance without taking into consideration the fact that the classroom teacher provided differentiated instruction is rejected. Without a definition of "adversely affects" in state law, it refers to the ability to perform in a regular classroom designed for non-disabled students and if a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services. Adverse means "causing harm" and where a student is able to learn and function at an average level in the regular classroom and experiences only a slight impact on his educational performance, it can not be said that the student is harmed.

29. **TRY** to distinguish between SED and BAD!

Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist., 51 IDELR 149, 300 F. App'x 11 (2d Cir. 2008). Determination that student was not eligible as an SED student is affirmed. Student's inappropriate behavior fell short of qualifying him as SED, as an expert saw his drug use as the root of the student's problems in school. This conclusion is "more consistent with social maladjustment than with emotional disturbance." Parents did not

produce enough evidence of an "accompanying emotional disturbance beyond the bad conduct."

Eschenasy v. New York City Dept. of Educ., 52 IDELR 66 (S.D. N.Y. 2009). Teenager diagnosed with mood disorder, conduct disorder, trichotillomania, borderline personality features and expressive language disorder should have been found eligible for special education services as an SED student. Clearly, the student exhibits inappropriate types of behavior or feelings under normal circumstances and has a generally pervasive mood of unhappiness or depression. Her symptoms clearly adversely affect her educational performance, as she had failing grades, repeated expulsions and suspensions and a need for tutors and summer school. The school district's assertion that her inappropriate behavior is just bad behavior is rejected. While it is undisputed that the student repeatedly misbehaved in school by cutting class, taking drugs and stealing, she also engages in hair pulling and cutting herself, was diagnosed with a mood disorder, diagnosed with personality disorder and attempted to commit suicide. Thus, it is more likely than not that all of the student's problems, not just her misconduct, underlie her erratic grades, expulsions and need for tutoring and summer school. Thus, parents are entitled to reimbursement for placement at the Elan School, which was appropriate for her.

30. **REFRAIN** from reliance solely upon medical diagnoses for determining eligibility.

P.R. v. Woodmore Local Sch. Dist., 46 IDELR 134 (N.D. Ohio 2006). Student diagnosed with ADHD is not eligible as a student with a disability or OHI under IDEA. Student's doctor based her conclusions that student was OHI on the student's mother's observations and never interviewed any of the student's teachers, the student's guidance counselor, or any of the school's special education personnel. District personnel's determination that his difficulties in school were no different than those of many boys in their junior year of high school is upheld.

S. v. Wissahickon Sch. Dist., 50 IDELR 216 (E.D. Pa. 2008). Although the student was diagnosed with ADHD in the second grade, he earned As and Bs throughout elementary school. Though his grades slipped when he entered middle school, his teachers testified that he was attentive in class and performed well on quizzes and tests and that his poor performance stemmed from a lack of motivation rather than ADHD. Importantly, the court observed that the district devised strategies to help the student, which included the use of progress reports, an agenda book, and parent conferences.

M.P. v. Santa Monica-Malibu Unif. Sch. Dist., 50 IDELR 220, 2008 WL 2783194 (C.D. Cal. 2008). Where everyone agreed that the student could perform well academically when motivated, the "Court agrees that the evidence shows that M.P. is capable of completing independent school work when motivated, but the evidence also shows that because of his ADHD he is not capable, without help, of being motivated. This is the very definition of a discrepancy between ability and achievement." Therefore, the student has demonstrated the requisite severe discrepancy in ability and achievement to become eligible for services as an SLD student.

Strock v. Indep. Sch. Dist. No. 281, 49 IDELR 273, 2008 WL 782346 (D. Minn. 2008). The mere existence of ADHD does not demand special education services. When the student actually completed required work, he received average or above-average grades. "Children having ADHD who graduate with no special education or any §504 accommodation are commonplace." The fact that the student was required to take remedial courses when beginning at the community college is "neither unusual or evidence of 'unsuccessful transition,' an entirely undefined term."

Brendan K. v. Easton Area Sch. Dist., 47 IDELR 249, 2007 WL 1160377 (E.D. Pa. 2007). Evidence supports determination that student diagnosed with, among other things, ADHD is not eligible for special education services. Rather, "[t]eenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education."

C.B. v. Department of Educ. of the City of New York, 109 LRP 20457 (2d Cir. 2009). Though there is no dispute that the student has co-morbid bipolar disorder and ADHD, the conditions do not make her eligible as an OHI student because they do not adversely affect her educational performance. The student's grades and test results demonstrate that she continuously performed well both in public school before she was diagnosed, and at the private school thereafter. Relevant evaluations indicate that she tested above grade-level and do not find that her educational performance has suffered. Thus, the evidence is insufficient to show that she has suffered an adverse impact on her educational performance.

31. **SHARE** all relevant School personnel have obtained relevant evaluative information about the child but fail to fully share it with the parents.

Amanda J. v. Clark County Sch. Dist., 160 F.3d 1106 (9th Cir. 2001). Because of the district's "egregious" procedural violations, parents of student with autism are entitled to reimbursement for independent assessments and the cost of an in-home program funded by them between April 1 and July 1, 1996, as well as compensation for inappropriate language services during the student's time within the district. Where the district failed to timely disclose student's records to her parents, including records which indicated that student possibly suffered from autism, parents were not provided sufficient notice of condition and, therefore, were denied meaningful participation in the IEP process. There is no need to address whether the IEPs proposed by the district were reasonably calculated to enable the student to receive educational benefit because the procedural violations themselves were a denial of FAPE.

32. **REFER** the child back to the appropriate Child Study Team when determined ineligible.

IV. THE INDIVIDUALIZED EDUCATION PROGRAM (IEP)/PLACEMENT PROCESS

33. **REFRAIN** from action that appears to reflect a "predetermination of placement" or appears to deny parental input into educational decisionmaking.

A predetermination of placement or making placement decisions without parental input or outside of the IEP/placement process will not only cause a parent to lose trust in school staff, it may very well lead to a finding of a denial of a free appropriate public education (FAPE). "Predetermination of placement" would include action such as fully developing and finalizing an IEP prior to the meeting with the parents and asking them to sign without discussion. Being prepared for an IEP meeting or bringing draft IEPs, however, is not prohibited. Denial of parental participation/input might also be reflected if sufficient notice is not provided to parents of relevant evaluative information, proposed placement, etc.

The 2004 IDEA Amendments address such procedural violations as follows:

> A decision made by a hearing officer "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child's right to a FAPE; 2) **significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE to the child**; or 3) caused a deprivation of educational benefits. However, nothing shall be construed to preclude a hearing officer from ordering an LEA to comply with the procedural requirements.

G.D. v. Westmoreland, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation as long as it is made clear to the parents that drafts are presented for discussion purposes only.

Louisiana Dept. of Educ., 213 EHLR 230 (OSEP 1989). It is permissible for a member of the IEP team to prepare a draft IEP before an IEP meeting as a preliminary assessment of appropriate services for the child, but district must ensure that parents take part in a full discussion of all aspects of the IEP before it is finalized.

Hudson v. Wilson, 558 EHLR 186 (W.D. Va. 1986). School district that designed proposal for IEP before meeting with student's mother and grandmother, but provided extensive involvement for both at subsequent IEP meeting, met statutory requirements for development of IEP set forth in the Act.

Letter to Helmuth, 16 EHLR 503 (OSEP 1990). Prior to an IEP meeting, district may prepare a draft IEP, which does not include all of the required components, but such a document may be used only for purposes of discussion and may not be represented as a completed IEP.

Spielberg v. Henrico County, 853 F.2d 256 (4th Cir. 1988). Placement determined prior to the development of the child's IEP and without parental input was a *per se* violation of the Act.

34. **PREPARE** adequately for IEP meetings, while avoiding predetermination.

Sand v. Milwaukee Pub. Schs., 46 IDELR 161 (E.D. Wis. 2006). The IDEA does not bar professionals from preparing for an IEP meeting and the fact that IEP team members spoke in preparation for the meeting did not deny the parents meaningful participation in the process.

IDEA Regulations: A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. 34 C.F.R. § 300.501(b)(3). See also, N.L. v. Knox County Schools, 315 F.3d 688, 38 IDELR 62 (6th Cir. 2003) (the right of parental participation is ***not*** violated where teachers or staff merely discuss a child or the IEP outside of an IEP meeting, where such discussions are in preparation for IEP meetings and no final placement determinations are made) and Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115 (9th Cir. 2003); Burilovich v. Board of Educ., 208 F.3d 560 (6th Cir. 2000); and Doyle v. Arlington County Sch. Bd., 806 F. Supp. 1253, 19 IDELR 259 (E.D. Va. 1992) (school officials must come to the IEP table with an open mind, but this does not mean they should come to the IEP table with a blank mind).

35. **MAKE** IEP recommendations/decisions based upon the *individual needs of the child*, not upon the availability of services.

LeConte, 211 EHLR 146 (OSEP 1979). Trained personnel "without regard to the availability of services" must write the IEP.

Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004). District denied parents of student with autism the opportunity to meaningfully participate in the IEP process when it placed their child in a program without considering his individual needs. Though parents were present at the IEP meetings, their involvement was merely a matter of form and after the fact, because District had, at that point, pre-decided the student's program and services. Thus, District's predetermination violation caused student substantive harm and therefore denied him FAPE. It appeared that District had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant "school system personnel thus did not have open minds and were not willing to consider the provision of such a program," despite the student's demonstrated success under it.

A.M v. Fairbanks North Star Borough Sch. Dist., 46 IDELR 191 (D. Alaska 2006). Where district coordinator for intensive preschool services told parents that a full day intensive program "was not developmentally appropriate" for preschoolers, with or without autism, this was not considered a "blanket policy" because there was testimony that if a full-day program had been deemed necessary by the IEP Team, it could have been implemented. The parents withdrew the autistic student from the public school program before IEP discussions could be completed.

T.H. v. Board of Educ. of Palantine Community Consolidated Sch. Dist., 30 IDELR 764 (N.D. Ill. 1999). School district required to fund an ABA/DTT in-home program after ALJ determined that district recommended placement based upon availability of services, not the child' needs.

36. **AVOID** making IEP recommendations/decisions based solely upon cost.

Letter to Anonymous, 30 IDELR 705 (OSEP 1998). Lack of sufficient resources and personnel is not a proper justification for the failure to provide FAPE.

Cedar Rapids Community Sch. Dist. v. Garret F., 526 U.S. 66 (29 IDELR 966)(1999). Twelve year-old student who was quadriplegic after a motorcycle accident is entitled to one-to-one nursing care to perform urinary bladder catheterization, tracheotomy suctioning, ventilator setting checks, ambu bag administrations, blood pressure monitoring, observations to determine respiratory distress or autonomic hyperreflexia and disimpation in the event of autonomic hyperreflexia as a related service, because the services of a physician were not necessary.

37. **NOTIFY** parents of their right to challenge IEP recommendations.

The 2004 IDEA Amendments provide that a copy of the procedural safeguards shall be given to the parents only 1 time per year, except that a copy must be provided upon initial referral or parental request for evaluation; upon the first occurrence of filing of a complaint for due process; and upon request by a parent. The final regulations clarify further that a copy of the procedural safeguards must be given to the parents only one time a school year, except that a copy also must be given to the parents--

(1) Upon initial referral or parent request for evaluation;
(2) Upon receipt of the first State complaint; and upon receipt of the first due process complaint in a school year;
(3) In accordance with the discipline procedures in §300.530(h); and
(4) Upon request by a parent.

34 C.F.R. §300.504. In addition, an LEA may place a current copy of the procedural safeguards notice on its Internet website if such website exists. In addition, the new law provides that a parent may elect to receive notices by electronic mail (e-mail) communication, if the agency makes such option available.

Jaynes v. Newport News, 35 IDELR 1, 2001 WL 788643 (4th Cir. 2001). Parents entitled to reimbursement for Lovaas program due to district's repeated failure to notify them of their right to a due process hearing. Where the failure to comply with IDEA's notice requirements led to a finding of denial of FAPE, court may award reimbursement for substantial educational expenses incurred by parents because they were not notified of their right to challenge the appropriateness of the district's program.

38. **USE** a proper process for determining the Least Restrictive Environment (LRE).

Courts and federal agencies are clear that IEPs and/or other relevant documentation should clearly and specifically document options considered on the continuum of alternative placements and why less restrictive options were rejected. This rationale must be clearly and appropriately stated.

Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991), withdrawn, 956 F.2d 1025 (11th Cir. 1992), reinstated, 967 F.2d 470 (11th Cir. 1992). The IEP did not reflect sufficient consideration of less restrictive options than self-contained classroom.

St. Louis Co. Special Sch. Dist., 352 EHLR 156 (OCR 1986). Failure to state in IEPs why students could not be educated in the regular education environment with the use of supplementary aids and services denied them a free appropriate public education.

Brazo Sport Indep. Sch. Dist., 352 EHLR 531 (OCR 1987). Placement at separate facility was not justified and IEPs of all students should bear evidence of individual consideration of ability to benefit from regular education, not identical language for all students in the separate facility.

39. **AVOID** be overly specific and include unnecessary details or "promises" in IEPs.

Virginia Dept. of Educ., 257 EHLR 658 (OCR 1985). IEPs are not expected to be so detailed as to be substitutes for lesson plans.

Paoella v. District of Columbia, 46 IDELR 271 (D.C. Cir. 2006). There is no requirement that the student's precise daily schedule be developed when determining an appropriate placement

Letter to Hall, 21 IDELR 58 (OSERS 1994). Part B does not expressly mandate a particular teacher, materials to be used, or instructional methods to be used in the student's IEP.

Lachman v. Illinois St. Bd. of Educ., 852 F.2d 290 (7th Cir. 1988). Parents, no matter how well-motivated, do not have the right to choose a particular methodology to be used.

Kling v. Mentor Pub. Sch. Dist., 136 F.Supp.2d 744 (N.D. Ohio 2001). Interscholastic sports or other extracurricular activities may be related services under the IDEA, even though not expressly included within the definition of "recreation." District ordered to

revise student's IEP to contain an interscholastic sports component and to place him on the high school track and cross country teams, even though district contended it would risk sanctions from the state athletic association because the 19-year old hearing impaired student with CP was too old. The local and state hearing officers had ruled that it was necessary for the student to participate for the development of his communication skills and to address his social and psychological needs.

40. **ADDRESS** appropriately and annually the issue of Extended School Year (ESY) services.

Although many federal circuit courts had recognized entitlement for some students to extended year services prior to 1999, not all of them had done so. However, the IDEA regulations specifically provide for the consideration of the provision of ESY services to all children with disabilities. 34 C.F.R. § 300.106.

Under the regulations, each public agency must ensure that extended school year services are available as necessary to provide FAPE and extended school year services must be provided only if a child's IEP team determines, on an individual basis that the services are necessary for the provision of FAPE to the child. In implementing these requirements, a public agency may not—

(i) Limit extended school year services to particular categories of disability; or
(ii) Unilaterally limit the type, amount, or duration of those services.

The regulations define "extended school year services" as special education and related services that—

(1) Are provided to a child with a disability--
(i) Beyond the normal school year of the public agency;
(ii) In accordance with the child's IEP; and
(iii) At no cost to the parents of the child; and
(2) Meet the standards of the SEA.

Bend Lapine Sch. Dist. v. K.H., 43 IDELR 191 (D. Ore. 2005). Failure to consider or discuss eligibility for Extended Year Services is an IDEA violation that amounts to a denial of FAPE.

Reinholdson v. School Bd. of Indep. Sch. Dist. No. 11, 46 IDELR 63 (8th Cir. 2006). District court's decision that the school district fully complied with procedural requirements regarding ESY services is upheld. The purpose of ESY services is to prevent regression and recoupment problems, rather than advance the educational goals outlined in the student's IEP. As a result, the services in the ESY program may differ from those provided during the school year. The IEP team's decision in December to defer until spring the specifics of the ESY services necessary to help the Student maintain the skills he learned during the school year was reasonable under the circumstances.

Casey K. v. St. Anne Community High Sch. Dist. No. 302, 46 IDELR 102 (C.D. Ill. 2006). District's proposed ESY program is appropriate. ESY services have "a limited purpose, which is to prevent regression in the summer, not produce significant educational gains."

McQueen v. Colorado Springs Sch. Dist. No. 11, 45 IDELR 157, 419 F.Supp.2d 1303 (D. Colo. 2006), rev'd on other grounds, 47 IDELR 283, 488 F.3d 868 (10th Cir. 2007). School district's policy, based upon Colorado Department of Education guidelines, that requires that ESY services address only maintenance and retention of skills already mastered, rather than acquisition of new skills, is not in violation of the IDEA. Clearly, the relevant case law and OSEP guidance support endorsing the "significant jeopardy" standard as the basis for the content of ESY services.

41. **ENSURE** proper attendance of required school personnel at IEP meetings.

Under the IDEA, the public agency shall ensure that the IEP team for each child with a disability includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child; (4) a representative of the public agency who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; and (iii) is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team already described; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) if appropriate, the child.

The 2004 IDEA now provides that a member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA **agree** that the attendance of such member is not necessary "because the member's area of the curriculum or related services is not being modified or discussed in the meeting." When the meeting involves a modification to or discussion of the member's area of the curriculum or related services, the member may be excused if the parent and LEA **consent** to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent to any excusal must be in writing.

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F.Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was "qualified to provide or supervise the provision of special education" services. The absence of the district representative forced the student's parents to accept whatever information was given to them by the student's teacher. In addition, the parents had no

other individual there who could address any concerns they might have had involving their child's program, including the teacher's style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student "was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.'s skills in the development of her second grade IEP."

Arlington Cent. Sch. Dist. v. D.K. and K.K., 37 IDELR 277 (S.D. N.Y. 2002). The absence of a general education teacher at an IEP meeting for LD student denied him FAPE and supported award of tuition reimbursement for private placement. The presence of the teacher at the meeting might have illuminated the extent to which visual instruction was offered as a part of the district's mainstream curriculum and the likelihood that he could ever be integrated successfully into it general education program.

M.L. v. Federal Way Sch. Dist., 387 F.3d 1101 (9th Cir. 2004). The failure of the school district to have a regular education teacher at the IEP meeting for an autistic and intellectually impaired student was sufficient to find a denial of FAPE. The District's omission was a "critical structural defect" because there was a possibility of placement in an integrated classroom and the IEP recommended might have been different had the general education teacher been involved. When the general education teacher was unable to attend, District should have cancelled the meeting and not proceeded without the benefit of input from the general education teacher regarding curriculum and environment there.

42. **ALLOW** for appropriate participation of persons brought by parents to IEP meetings.

Parents are entitled to bring to the meeting with them "other individuals who have knowledge or special expertise regarding the child." 34 C.F.R. § 300.321. Generally, unless confidentiality is violated, school staff should allow such persons to attend under the IDEA. However, it should be remembered that the IEP process is not a "voting" process. Rather, it is a process by which the entire IEP Team, with the parent, is to attempt to reach a consensus as to the components of a student's IEP and program.

Tokarz, 211 EHLR 316 (OSEP 1983). Individuals who are involved in IEP meeting at discretion of child's parents are participants in meeting and are permitted to actively take part in proceedings.
Chicago Bd. of Educ., 257 EHLR 308 (OCR 1981). School district was justified in terminating IEP meeting where newspaper reporter, present at parents' request, refused to leave conference, as there was insufficient evidence that reporter had special knowledge which would have made his presence necessary.

Monroe Co. Sch. Dist., 352 EHLR 168 (OCR 1985). Parents are entitled to have other persons present at IEP meeting at their discretion and district that asked parents' guest to leave because parents failed to give advance notice of her participation violated IDEA requirements.

Sackets Harbor Cent. Sch. Dist. v. Munoz, 34 IDELR 227 (N.Y. App. Div. 2001). Where the IEP committee chair allowed IEP decision to be "taken to a vote," the court upheld decision requiring a re-vote where child's aide and therapists' votes were not counted.

43. **ADDRESS** transition activities/services and provide summary of performance (SOP).

Beginning not later than the first IEP to be in effect when a student is 16 (and younger in some states), and updated annually thereafter, an IEP must contain "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills" and the transition services (including courses of study) needed by the child to reach those goals.

Letter to Cernosia, 19 IDELR 933 (OSEP 1993). Transition services are defined as a coordinated set of activities in the areas of instruction, community experiences, development of employment and post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluation. If the IEP team determines that services are not needed in one or more of those areas, the IEP must include a statement to that effect and the basis upon which the determination is made.

44. **ADDRESS** behavioral strategies/interventions as part of the IEP when appropriate.

If a student needs a behavior management program, it should be discussed as a support service or intervention at the IEP meeting. The IDEA requires that any time a student exhibits behavior that impedes his or her learning or that of others, the IEP Team must consider appropriate strategies, including positive behavioral interventions, strategies and supports to address the behavior.

45. **STATE** services or amount of services with sufficient clarity in the IEP.

The amount of services offered should be set forth in the IEP in a fashion that is specific enough for parents to have a clear understanding of the level of commitment of services on the part of the school system. This will help to avoid misunderstandings.

Letter to Ackron, 17 EHLR 287 (OSEP 1990). While the regulation does not explicitly require an IEP to state the amount of services with respect to the specific number of hours or minutes, the IEP must indicate the amount of services in a manner appropriate to the types of services and in a manner sufficiently clear to all persons involved in developing and implementing the IEP. The use of a range of times would not be sufficient to indicate the school's commitment of resources.

Letter to Gregory, 17 EHLR 1180 (OSEP 1991). The amount of time for related services must be stated with sufficient clarity to be understood by all persons involved in the development and implementation of the IEP.

46. **INCLUDE** appropriate statements of present levels of performance.

Kirby v. Cabell County Bd. of Educ., 46 IDELR 156 (S.D. W.V. 2006). Hearing officer's decision that IEP was appropriate where it did not document present levels of performance is reversed. "Without a clear identification of [the student's] present levels, the IEP cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed." However, the parents are not entitled to reimbursement for a private evaluation because they had the evaluation done before the hearing officer determined whether the district's evaluation was appropriate.

47. **INCLUDE** measurable goals in IEPs that are linked with present levels of performance.

Quite often, IEPs are attacked because of the lack of measurability of the annual goals (and short-term objectives/benchmarks, if appropriate). School staff should be trained to write appropriate and measurable annual goals.

Penn Trafford Sch. Dist. v. C.F., 45 IDELR 156 (W.D. Penn. 2006). Compensatory education award upheld based upon finding that the IEP's short-term instructional objectives were not sufficiently specific and that the IEP did not provide measurable annual goals. In addition, the IEP failed to provide for a behavior management plan even though the record reflected that the student has behavioral issues. "This is a serious omission."

W.S. v. Rye City Sch. Dist., 46 IDELR 285, 454 F.Supp.2d 134 (S.D. N.Y. 2006). Though the hearing officers found that the goals in the IEP were overly broad, court upheld determination that the objectives were quite specific regarding what the child needed to be able to do and when she needed to be able to do it. "It is, frankly, difficult for the court to imagine how much more specific the District could be concerning its goals and objectives for the student's continued educational progress."

Leticia H. v. Ysleta Indep. Sch. Dist., 47 IDELR 13 (W.D. Tex. 2006). "While one may believe that [the student's] annual goals could have been written with greater clarity, a thorough review of the administrative record indicates that [the parent] was able to participate in the IEP process and that [the student] received educational benefit, despite the procedural irregularities in his IEP."

48. **FINALIZE** placement recommendations!

Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001). Although the district met with the parents on several occasions to review possible placement options for the student, such meetings were not the "equivalent of providing the parents a meaningful role in the process of formulating an IEP." Because the district did not formally offer an IEP/placement prior to placement in a residential program by the parents, parents are entitled to reimbursement. The parents' refusal to agree with the district's placement recommendations did not excuse the district's failure to conduct an IEP conference.

Glendale Unified Sch. Dist. v. Almasi, 122 F.Supp.2d 1093 (C.D. Cal. 2000). Where district offered four possible placements to student, three of which were district programs and one was continued placement at private school at parents' expense, offer of several placements was a procedural violation that denied FAPE. District must make a formal, specific offer of placement.

V. PLACEMENT AND IMPLEMENTATION

49. **DEVELOP** an Action Plan for the implementation of an IEP.

Obviously, the failure to implement a student's IEP is the most serious substantive mistake that can occur. Frequently, failure to implement the IEP results from the IEP Team's failure to appropriately prepare an "action plan" for getting services provided in a timely and appropriate fashion. In the new IDEA regulations, § 300.323(d) was revised to retain 1999 regulation 300.342(b)'s provision to require public agencies to ensure that each regular teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of a child's IEP, is informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the child's IEP.

50. **COLLECT** appropriate data with respect to the appropriate implementation of the IEP and student progress on IEP goals.

J. P. v. County Sch. Bd. of Hanover County, 46 IDELR 133 (E.D. VA. 2006). A district's therapy notes were sporadic and not sufficiently detailed, meaning that the district was unable to demonstrate that a student received a FAPE.

51. **AVOID** over-reliance upon grades to demonstrate progress.

Independent School District No. 701 v. J.T., 45 IDELR (D.C. Minn. 2006). A student's "minimal increase" in his English score from 64 to 67% did not constitute academic progress. The student's goals were also too vague.

T.W. by McCulla, 43 IDELR 187 (10th Cir. 1995). Even though a student with a learning disability was passing from year to year, such did not constitute a FAPE.

Winwood Board of Education v. K.H.G., 49 IDELR 63 (3d Cir. 2007). Student with an above-average IQ made negligible progress in reading, given that he was still one to two years behind his class. Further, since his IEP goals were lowered in subsequent IEPs, it appears as if he regressed. The district's program did not convey "meaningful benefit." The above-average IQ demonstrated that he should have performed at least average in the area of reading.

52. **CALL** for an IEP meeting if there is any doubt about the appropriateness of or ability to implement the provisions of an IEP.

53. **MAINTAIN** clear and compliant discipline procedures and adequately **TRAIN** disciplinarians on the procedures

First and foremost and with respect to discipline, school districts should have clear procedures in place that direct school disciplinarians as to how to handle disciplinary infractions committed by students with disabilities. These should be as clear and concise as possible, so that there is not a lot of room for discretion in terms of the actions that are to be taken.

Assuming good procedures are in place, school disciplinarians must be trained with respect to those procedures. The failure to train can not only leave the disciplinarian in potential legal trouble, but has the strong potential for landing the entire school district in legal hot water.

Under 42 U.S.C. § 1983, there is a good deal of judicial authority that a school district/governmental entity can be held liable for damages if there is a "custom or policy" on the part of the school district of failing to ensure that school disciplinarians are trained properly to address disciplinary infractions committed by students with disabilities. In addition, there is significant judicial authority to support money damages remedies under Section 504/the Americans with Disabilities Act for intentional discrimination, "deliberate indifference to" or "reckless disregard for" discriminatory activity in the context of discipline of students with disabilities.

54. **AVOID** making unilateral "changes in placement" through the use of suspension or other removal for disciplinary reasons.

Suspensions over ten (10) days at a time and, generally, suspensions for more than ten (10) days cumulatively are considered to constitute a "change in placement" for a student with a disability. The IDEA requires that prior to changing the placement of a student with a disability through the use of disciplinary action, the following must occur: (1) a manifestation determination must be made by the student's IEP Team; (2) the IEP Team must plan a functional behavior assessment of behavior and then use assessment results to develop a behavioral intervention plan; and (3) the IEP Team must determine what services are to be provided to the child, for any removal period beyond ten (10) days in a school year, in order that the child may continue to participate in the general curriculum and advance toward achieving his/her IEP goals. Local school districts typically incorporate protections in their procedures so that illegal "changes in placement" do not occur.

School personnel must also keep in mind that action taken that might not be officially **called** a "short-term suspension" still may be counted toward the 10-day change in placement analysis.

55. **KEEP** appropriate and accurate data with respect to the use of suspension or other disciplinary removals from school.

For several reasons, keeping appropriate data with respect to the use of suspension with students with disabilities is vital. First, school districts are required to monitor the extent to which suspension is used with students with disabilities to ensure that school districts are not over-suspending disabled students generally and are not suspending students disproportionately in accordance with race or other discriminatory indicators. That data must be tracked and reported accurately.

Another reason for keeping and tracking appropriate data with respect to the number of suspensions to which a student is subjected is to ensure that illegal "changes of placement" have not occurred. Procedures must be in place for "red-flagging" instances where students are coming close to a "change of placement" due to the use of unilateral suspensions/removals from school for disciplinary reasons.

56. **MAKE** appropriate manifestation determinations.

Perhaps the mistakes that occur in the process of making manifestation determinations lies in the fact that some educators do not understand the purpose of the manifestation determination. Under the 2004 IDEA, the questions to consider changed significantly to require the following:

…[W]ithin 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent and relevant members of the IEP Team (as determined by the parent and local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

(i) If the conduct in question was **caused by, or had a direct and substantial relationship to,** the child's disability; or

(ii) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

If the local educational agency, the parent, and relevant members of the IEP Team determine that either [(i) or (ii) above] is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E). In addition, the IDEA regulations provide that, if the LEA, the parent, and members of the child's IEP Team determine that the child's behavior was the direct result of the LEA's failure to implement the child's IEP, the LEA must take immediate steps to remedy those deficiencies. 34 C.F.R. § 300.530(e)(3).

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall:

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change of placement (one that would exceed 10 days or a 45-day interim alternative placement);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

20 U.S.C. § 1415(k)(1)(F).

The most common mistakes made in the manifestation determination process include 1) the failure to focus upon the student's **IDEA disability** (rather than diagnoses made that were not the basis for finding an IDEA disability); 2) the failure to consider all relevant information in the student's file; and 3) the failure to ensure that the student's IEP/BIP were being implemented at the time of the infraction and, if not, whether the failure directly caused the student's conduct.

57. **USE** the 45-day removal provision correctly.

The 45-day "special circumstance" removal provision in the IDEA is a commonly misunderstood one. Not only do many educators incorrectly interpret the 45-day removal provision as an absolute bar to what can be done, there is much misinterpretation of the circumstances to which it is to be applied.

With respect to certain dangerous students, the IDEA provides that:

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury on another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.
20 U.S.C. § 1415(k)(1)(G).

Perhaps the most common mistake that is made lies within a common misunderstanding that when a student is involved in one of the "special circumstances" (weapon, drug or serious bodily injury), the only action that the school district can take is removal of that student to an alternative setting for up to 45 school days. This is clearly not the case, however. This provision of the law was intended to provide school personnel, in cases involving these special circumstances, up to 45 school days to appropriately address the infraction that occurred. In the meantime, a *unilateral* removal, without regard to manifestation, can be made. However, an IEP Team can convene during that time and propose a more permanent change of placement via the IEP Team process. The 45-day removal provision, therefore, imposes a limitation upon what an *individual disciplinarian* can do alone, but does not limit what an *IEP Team* can determine is appropriate.

Another common mistake made is with respect to an over-interpretation of the special circumstances to which the 45-day removal provision applies. Specifically, the definition of "serious bodily injury" under the IDEA references the definition contained in 18 U.S.C. § 1365(3)(h). There, the term "serious bodily injury" means bodily injury which involves: (a) a **substantial risk of death**; (b) **extreme** physical pain; (c) **protracted and obvious disfigurement**; or (d) **protracted loss or impairment** of the function of a bodily member, organ, or mental faculty. While this language may be somewhat unclear, school personnel should interpret this provision to include only the worst of situations that clearly fall within the restrictive definition. When there is serious question, the school should convene an IEP Team meeting and properly seek a change of placement for the student via the IEP Team process.

58. **REMEMBER** that there are special rules of discipline applicable to students who are disabled only under Section 504 as well.

Essentially, the bulk of the IDEA rules for disciplining students with disabilities have their "roots" in Section 504. This is so because Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability. Thus, in terms of discipline, the general notion is that students with disabilities should not be deprived of educational services if the conduct for which they are being disciplined is "based upon" (a/k/a "a manifestation of") their disabilities. For the most part, the Office for Civil Rights (OCR) applies the same rules of discipline for students under Section 504 that exist for those students who are also disabled under the IDEA, particularly the requirement for making manifestation determinations when a disciplinary change of placement occurs.

59. **KEEP** confidentiality requirements in mind.

All school children are entitled to protection from violations of their privacy by the IDEA and the Family Education Rights and Privacy Act (FERPA). School personnel must be very careful to avoid releasing confidential information about their students to persons who do not have a legitimate educational interest in knowing the information.

School (ME) Administrative Dist. #75, 31 IDELR 221 (FPCO 1998). Eighth grade Math teacher's comments to other students in the class including "I hate that kid…I don't care if he is disabled…it's his problem and not mine, and I don't have to deal with it," violated FERPA because revealing the disability to the class disclosed personally identifiable information from the student's education records.

M.P. v. Independent Sch. Dist. No. 721, 2006 WL 544565, 106 LRP 13273 (8th Cir. 2006) (previous decision: 326 F.3d 925 (8th Cir. 2003). Student has a right of action under Section 504 for damages and does not need to exhaust IDEA administrative remedies before going to court on his claims for discrimination and disability harassment. Where school nurse disclosed to the student body that student was schizophrenic which prompted other students to physically and verbally harass him, student states a claim for disability harassment and discrimination under Section 504. Student has sufficiently pled that school district acted in bad faith or with gross misjudgment because once his condition was disclosed, the district failed to provide him with accommodations in the educational environment; failed to investigate allegations of disability discrimination, student-against-student harassment, hostile education environment and disclosure of personal information; and failed to take appropriate and effective remedial measures once notice of the harassment was provided to school authorities. On remand, the district court is to consider whether the school district acted in bad faith or with gross misjudgment when it failed to protect M.P.'s academic and safety interests after his disability was disclosed to others.

VI. SECTION 504

60. **TRAIN** school personnel on the requirements of Section 504.

Section 504 is misunderstood in terms of its application, its scope and its requirements. Be sure to train all school personnel so that they understand the legal requirements of Section 504 as they relate to the education of children with disabilities.

VII. YOUR HEALTH

61. **USE** an organized and facilitated approach for all meetings.

62. **AVOID** being "Witherish" or engaging in "R.S." behavior.

Although the IDEA provides that student success is not guaranteed, it *is* required that teachers engage in good faith, reasonable efforts to implement the provisions of an IEP.

Willful and intentional violations of the IDEA can lead to the possibility of personal liability. Teachers and other school personnel should be made aware of this potential and trained to avoid such behavior.

Doe v. Withers, 20 IDELR 422 (W. Va. Cir. Ct. 1993). A jury returned a verdict in favor of the parents of an LD student against a high school teacher for $5,000.00 in compensatory damages and $10,000.00 in punitive damages for teacher's refusal to provide their son with oral testing as required by IEP.

63. **AVOID** the temptation to unleash your inner attorney.

64. **BREATHE!**

As human beings, we are inclined to defend ourselves and respond to everything! In many situations, it is prudent to sit back, breathe and decide that no response is more often than not the best response.

65. **REMEMBER** to use your Smile on a Stick!

Fourth General Session
Ralph E. Julnes Memorial Keynote Address

Can't We Just All Get Along

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Can't We All Just Get Along?

Tips for Effective IEP Meetings

26th Annual Pacific Northwest Institute on Special Education and the Law

Wednesday, October 7, 2009

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I. The Top 12 Tips

A. COMMUNICATE, COMMUNICATE, COMMUNICATE

1. Arguably the most important factor in any relationship is communication. When parents and other IEP Team members communicate well, a relationship develops that can better withstand disagreement and discord.

2. Time and time again, parents testify at due process hearings that "no one listened to me." Consider asking one staff member to assume the role of communicator – this person will not deliver bad news to the parents. This person should be a "safe" contact for the parent.

3. Communicate with staff members who know the child, *i.e.*, from the school the student last attended.

4. Learn to communicate more effectively by giving parents real life examples and data.

B. TELL THE TRUTH

1. Ranking equally in importance with communication is trust. A trusting relationship will not develop unless everyone on the IEP Team is honest with each other.

2. Educators are understandably reluctant to tell parents that their child is not reading at grade level, should be retained in a grade, should be placed in a life skills program, is exhibiting characteristics of autism, has no friends at school, is exhibiting bullying behavior, etc. Do not be afraid to discuss difficult issues – parents deserve to know the truth.

3. When IEP Team members are truthful with parents about difficult issues, parents similarly trust that school staff members are truthful about positive news. Parents learn to trust that school staff members will be honest with them, no matter what, good news or bad news.

C. ADMIT MISTAKES

1. Mistakes happen – open the meeting addressing them head on. Don't hide a discussion of mistakes in the middle of the meeting.

2. Make amends.

D. MAKE DECISIONS THAT NEED TO BE MADE

1. Parents often testify in due process hearings that no one at the school ever told them what the final decision was. Think about how frustrating this would be for parents.

2. When IEP meetings turn contentious, the team must not shy away from making a decision.

3. Even though the parent, as a team member, may disagree, it is critical that the parent at least understand what decision is being made and when the decision will be implemented.

4. The consensus of the IEP Team determines the final decision, and the consensus is determined by the case manager or coordinator who facilitates the meeting.

E. AVOID DRAWING LINES IN THE SAND

1. Keep an open mind; ask your team members to do the same.

2. Spend time viewing the situation from the parents' and/or students' perspectives.

F. CREATE A CULTURE OF RESPECT

1. Respect parents – they know their child best.

2. Respect staff – they are highly educated, strive to do what is best for your child and serve many, many different types of students.

3. The building administration must support the IEP Team's decisions, *i.e.*, the Principal will allow the student to participate in extracurricular activities without an aide, as long as that is what the IEP Team has decided.

4. Do not refer to parents and "mom" and "dad."

G. MODEL ACTIVE LISTENING – WATCH BODY LANGUAGE

1. Everybody sits at the table together.

2. Focus on each team member as they talk/make contributions, etc.

H. HELP FAMILIES PRIORITIZE

1. Sometimes the list of concerns seems simply overwhelming. Teams (read: people) shut down when they feel overwhelmed. Ask parents to prioritize their concerns and you keep a numbered list.

2. Sometimes parents want to "fix the system" and spend an inordinate amount of time on systemic issues. Ask parents to re-focus on their child.

I. DON'T PERSONALIZE

1. Personality differences exist on most, if not all, teams. Accept that this is unavoidable.

2. The case manager/person running the meeting must be mindful of this and defuse situations where school staff members (or parents) are taking constructive criticism or suggestions personally.

J. ASSIGN SOMEONE THE "LIGHTNING ROD" ROLE

1. This role is sometimes assumed by the school district's attorney or a high level administrator when the relationship between parents and school staff members disintegrates. This individual ideally delivers bad news and takes charge in difficult situations.

2. The goal here is to protect the individuals who work with the child on a day to day basis -- preserving their relationships with the child/parent is paramount. The parent's anger, mistrust, etc., can then be directed at individuals other than the teacher, aide, related service providers, etc.

K. DO NOT AGREE TO ANYTHING THAT YOU WILL NOT DO OR THAT IS NOT REASONABLE

1. Sounds like common-sense advice, right? Happens all the time.

2. Have a personal script in your head that allows you to say "no."

3. Use a firm, confident tone of voice. Practice.

L. STRIVE TO REDUCE PAPER-WORK MISTAKES

1. Build in time for proofreading; good proofreading takes time.

2. The IEP meeting notes must accurately reflect what was discussed.

II. Before the IEP Meeting

A. The school team members may properly meet in advance of the meeting (discuss issues – don't predetermine). "Meetings" requiring parental participation specifically do not include (1) informal or unscheduled conversations involving school personnel, (2) conversations on issues such as teaching methodology, lesson plans or coordination of services, and (3) preparatory activities that school personnel engage in to develop a proposal or response to a parent's proposal that will be discussed at a later IEP meeting. 34 C.F.R. §300.501(b)(3).

B. Provide parents with copies of new evaluations, functional behavioral assessment, progress reports, etc., in advance of the meeting. Federal law does not require this – it is simply good practice.

C. Send draft goals, behavior plans, etc., to parents for their review. This step alone cuts IEP meeting times in half.

D. Ask parents to share any concerns, issues, etc., in advance of the meeting. Use these concerns to help establish the agenda.

E. Consider drafting an agenda; send to parent in advance.

III. During the Meeting

A. One person needs to run the meeting – know who this person is.

B. Another person needs to take notes – know who this person is.

C. Always ask about the student to begin the meeting, always.

D. Set a reasonable time limit; follow the agenda.

IV. After the Meeting

A. Do what you promised to do.

B. If you are the case manager, double check to make sure that everyone else is doing what they need to do. You are the quarterback of the team.

C. Communicate problems, issues, concerns, to parents immediately. Do not let them build up. Encourage parents to do the same.

D. Keep open lines of communication all year. This takes hard work and patience.

Workshop 1

The IEP Team-Substantive and Procedural Hazards

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THE IEP TEAM –
SUBSTANTIVE AND PROCEDURAL HAZARDS

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I. DEFENSIBLE INDIVIDUALIZED EDUCATION PROGRAMS (IEPs)

A. Standard:

1. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), standard—"If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more":

   a. Has the State [school district/charter school] complied with the procedures set forth in the Act? and

   b. Is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

2. The Ninth Circuit Court of Appeals upheld the *Rowley* standard of the "basic floor of opportunity" and ruled that the lower court erred in applying a self-sufficiency standard. *J.L. Mercer Island Sch. Dist.*, 109 LRP 48649 (9th Cir. 2009).

> Some confusion exists in this circuit [Ninth Circuit] regarding whether the Individuals with Disabilities Education Act requires school districts to provide disabled students with "educational benefit," "some educational benefit" or a "meaningful" educational benefit. [Citation omitted.] As we read the Supreme Court's decision in *Rowley*, all three phrases refer to the same standard. School districts must, to "make such access meaningful," confer at least "some educational benefit" on disabled students. [Citation omitted.] For ease of discussion, we refer to this standard as the "educational benefit" standard.

3. Pursuant to 34 C.F.R. § 300.513, procedural violations are a violation of a free appropriate public education (FAPE) only if the procedural inadequacies:

    a. Impeded the child's right to a FAPE;

    b. Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or

    c. Caused a deprivation of educational benefits.

B. Deadly (or at Least Potentially Expensive) Errors to Avoid in Special Education:

1. Failure to have the required persons present for the IEP meeting.

    a. IDEA 2004—made certain changes. *See* 34 C.F.R. § 300.321.

    b. Excused member "in whole or in part"—written agreement—who has authority? 34 C.F.R. § 300.321(e). It is up to the school district to determine the individual with the authority to make the agreement with the parent to excuse an IEP member from attending the IEP meeting. 71 Fed. Reg. 46676 (Aug. 14, 2006).

    c. Excused member—written summary of input prior to meeting when IEP team member's area is modified or discussed. 34 C.F.R. § 300.321(e)(2).

    d. Review whether parent refusing to attend or requesting different date. Parent always invited—reasonable efforts must be made to encourage parent to attend. 34 C.F.R. § 300.322(d).

        (1) Detailed records of telephone calls made or attempted, and the results of the calls;

        (2) Copies of correspondence sent to the parent and any responses received; and

        (3) Detailed records of visits made to the parent's home or place of employment, and the results of those visits.

    e. Child invited when appropriate—the parent determines when the child's attendance is appropriate.

f. Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment).

(1) Don't need to have all the student's teachers in attendance—can rotate teachers into the meeting. School district determines the specific personnel to fill the roles of the required participants at the IEP team meeting. 71 Fed. Reg. 46674 (Aug. 14, 2006).

(2) In the Ninth Circuit Court of Appeals case, *M.L. v. Federal Way Sch. Dist.*, 387 F.3d 1001 (9th Cir. 2004), the court:

(a) Found that failure to have the regular education teacher created a "critical structural defect" because there existed a possibility the student would be placed in integrated kindergarten classroom.

(b) Ordered the school district to pay $2,400 in reimbursement costs and $94,000 in parent attorney fees.

g. Special education and regular education teacher:

(1) The Ninth Circuit Court of Appeals determined that the regular education and special education teachers do not necessarily have to be the student's current teachers, but must have provided services to the student. *R.B. v. Napa Valley Unified Sch. Dist*., 48 IDELR 60 (9th Cir. 2007).

h. Not less than one special education teacher or, when appropriate, not less than one special education provider of the child.

i. District representative:

(1) Up to school or district to determine who the district representative will be—must meet all 5 criteria:

(a) Be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(b) Be knowledgeable about the general education curriculum;

(c) Be knowledgeable about the availability of resources of the school district;

(d) Have the authority to commit district resources; and

(e) Be able to ensure that whatever services are described in the IEP will actually be provided. 34 C.F.R. § 300.321(a)(4) and 71 Fed. Reg. 46670 (Aug. 14, 2006).

j. An individual who can interpret the instructional implications of evaluation results, who may be another member of the team—a team member can wear several hats.

k. At the discretion of the parent or school district, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate.

2. Failure to evaluate and/or violation of child find.

a. Failure to "find" the child who should be evaluated could result in compensatory education, including private school placement. *Forest Grove Sch. Dist. v. T.A.*, 109 LRP 36046 (Sup. Ct. 2009).

b. Evaluation must be timely—"Regardless of compliance with a state regulatory requirement, [the] IDEA requires that districts act within a reasonable time to evaluate [children suspected of having disabilities]." *J.G. v. Douglas County Sch. Dist.*, 51 IDELR 119 (9th Cir. 2008).

c. Parent request to evaluate—need to timely perform evaluation, or provide written notice of refusal. 34 C.F.R. § 300.503(a)(2).

d. A district could not fulfill its duty to evaluate a preschooler with autism by referring parents to a child development center. *N.B. and C.B. v. Hellgate Elementary School District*, 50 IDELR 241 (9th Cir. 2008).

e. A functional behavioral assessment (FBA) is considered an evaluation; written consent is needed. *Letter to Christiansen*, 48 IDELR 161 (OSEP, Feb. 9, 2007).

f. Carefully "consider" all relevant information, evaluations, and/or assessments provided by parents.

g. Screening for instructional purposes is not an evaluation. 34 C.F.R. § 300.302.

h. Failure to share all evaluation materials received:

(1) *Amanda J. v. Clark County Sch. Dist*., 35 IDELR 65 (9th Cir. 2001):

(a) Because of the district's "egregious" *procedural* violations, parents of student with autism were entitled to reimbursement for independent assessments, cost of in-home program, and compensation of inappropriate language services.

(b) Procedural violations resulted in denial of FAPE.

i. School district has right to conduct its own evaluations. *P.S. v. The Brookfield Board of Education*, 42 IDELR 204 (D. Ct. Conn. 2005).

j. Response to intervention does not override evaluation obligation:

(1) The Office Special Education and Rehabilitative Services (OSERS) has cautioned that response to intervention (RTI) is not intended to be a replacement for a comprehensive special education evaluation. *Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS)*, 47 IDELR 196 (OSERS 2007).

(2) Failure to evaluate could result in a violation of child find obligations. *El Paso Indept. Sch. Dist. v. R.R.*, 50 IDELR 256 (W.D. Tex. 2008).

k. School district has obligation to evaluate a student if it has reason to suspect that the student has a disability that will require special education and related services. 34 C.F.R. § 300.301.

l. Can request hearing if parent denies permission to evaluate (34 C.F.R. § 300.300(b)(3)), but no right to override parent refusal for initial placement in special education (34 C.F.R. § 300.300(c)(1)(ii)).

m. Parent request for independent educational evaluation. 34 C.F.R. § 300.502.

(1) Timely response required.

(a) Provide an independent education evaluation (IEE), or

(b) Request due process.

(2) When does it legally come into play?

(a) Parent disagrees with school district's evaluation.

(3) How else can it be used?

(a) Mutually agreed upon evaluation.

3. Failure of school staff to disagree when they don't agree to something that the parent is requesting.

a. Difficult balancing act.

b. Staff fearful of controversy/confrontation.

c. New rule, effective December 31, 2008: Parent may unilaterally withdraw student from special education. Make sure proper procedure is followed, including written notice.

d. Allowing parent to dictate program versus meaningful parent participation. The IDEA does not require school districts "simply to accede to parents' demands without considering any suitable alternatives." *Blackman v. Springfield R-XII Sch. Dist.*, 31 IDELR 132 (8th Cir. 1999).

e. Allowing parent to oversee program in school setting. The IDEA contemplates that parents are equal participants in developing, reviewing, and revising their child's IEP. "Equal participant" means:

(1) Participating in the discussion of the child's need for special education and related services.

(2) Joining with the other IEP team members to decide what services provide FAPE. *Notice of Interpretation,* Appendix A to 34 C.F.R. part 300, Question 5 (1999 regulations).

f. Utilize pre-team meeting opportunity. An IEP team meeting "does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." 34 C.F.R. § 300.501(a)(30).

g. Parent opting to leave IEP meeting before meeting is finished—Is continuing the meeting an option?

h. Definition of "consensus":

(1) Definition: "Consensus means that all members are in general agreement regarding what is written." IDAHO SPECIAL EDUCATION MANUAL 2007, p. 74.

(2) Process when there is lack of consensus: "If there is a lack of consensus between the parent and/or adult student, district personnel and other IEP team members regarding an IEP decision, then school personnel on the IEP team should seek consensus and make the decision subject to the due process rights of the parent and/or adult student. If there is a lack of consensus among school personnel, then the district representative on the IEP team shall make the decision."

(3) Check individual State's definition of "consensus."

4. Failure to recognize that continuing to do what doesn't work is a bad idea.

a. Continuing to have same IEP year after year with little/no results. Need to address any lack of suspected progress toward the annual goals and in the general education curriculum. 34 C.F.R. § 300.324(b).

b. Failure to individualize IEPs and behavioral intervention plans (BIPs).

c. Failure to have measurable goals. An IEP that adequately describes the student's present levels of performance, including appropriate measurable goals and objectives, and provides for a specific

education program should satisfy the "basic floor of opportunity" standard set forth in *Rowley, Derek B. by Lester B. and Lisa B. v. Donegal Sch. Dist.*, 47 IDELR 34 (E.D. Pa. 2007).

d. Failure to evaluate social/emotional needs, as well as academic needs. 34 C.F.R. § 300.304(c)(4).

e. Possibility of compensatory education award against school district, or payment for private school tuition.

f. Attorney fees. 34 C.F.R. § 300.517.

5. Predetermining or failing to determine IEP services and placement. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified Sch. Dist*., 48 IDELR 31 (9th Cir. 2007).

a. Draft IEP to discuss at IEP meeting.

(1) Draft is truly a draft;

(2) Document will be changed as appropriate following discussion; and

(3) District staff are open to considering revisions to both IEP and placement.

b. Placement: always the last decision made in IEP process.

(1) Public agencies are prohibited from making placement options "based on a public agency's need or available resources, including budgetary considerations and the ability of the public agency to hire or recruit qualified staff." 71 Fed. Reg. 46587 (Aug. 14, 2006).

c. Have proper personnel for placement—private school participation if appropriate.

d. Omitting regular education teacher may be seen as child's placement was predetermined. *M.L. v. Federal Way Sch. Dist*., 387 F.3d 1001 (9th Cir. 2004).

(1) May want to request parent sign excusal for regular education teacher, even though student may not currently have a regular education teacher.

e. Offering options for services and/or placement to the parent, but never making a final offer of one placement with written notice provided. 34 C.F.R. § 300.503.

6. Failing to implement the IEP and/or BIP.

a. IEP legally-binding document for the provision of services to a student, not a list of suggestions that may or may not be followed. *Avjian v. Weast*, 48 IDELR 61 (4th Cir. 2007) (courts generally must limit their consideration to the terms of the IEP).

b. Ensure that parents have meaningful participation and that they are informed of district actions by providing Written Notice and receive the parent right statement as required. 34 C.F.R. §§ 300.503 and 300.504.

(1) Written Notice required whenever the district proposes or refuses to initiate or change a student's identification, evaluation, educational placement, or provision of FAPE. 34 C.F.R. § 300.503.

c. Obligation to consider positive behavioral supports—"In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2)(i).

d. Informing appropriate staff regarding their obligations under the IEP/BIP.

e. Providing too much detail in IEP takes away staff discretion:

(1) Such as methodology, specific staff member, extracurricular activities.

(2) "IEPs are not expected to be so detailed as to be substitutes for lesson plans." *Virginia Dept. of Educ*., 257 IDELR 658 (OCR 1985).

(3) A school district is "entitled to deference in deciding what programming is appropriate as a matter of educational policy." *J.L. v. Mercer Island Sch. Dist.*, 109 LRP 48649 (9th Cir. 2009).

f. Failing to inform transportation, in-school suspension personnel, classroom teacher, playground duties, etc., regarding IEP/BIP.

g. Discipline:

(1) Second question asked in a manifestation determination: Whether the conduct in question was the direct result of the LEA's failure to implement the IEP?

(2) Failure to look at all disabilities a child has when conducting a manifestation determination.

h. Possibility of compensatory education.

i. Need to keep appropriate documentation of services provided/progress made.

j. Keep minutes of IEP team meetings.

k. Hold pre-team meetings, when necessary. 34 C.F.R. § 300.501(a)(3).

7. Failure to think outside the box.

a. Allowing a child's disability category drive the student's educational program—remember the "I" in IEP.

b. Allowing administrative convenience to drive educational programming—Providing a student a shortened school day to accommodate a teacher's schedule was found to be an administrative convenience and was a denial of FAPE. *Webb Consolidated Indep. Sch. Dist.,* 43 IDELR 25 (SEA Tex. 2004).

c. Allowing teacher/service provider/aide preference drive educational programming.

d. Thinking that only one educational program, computer program, etc., can be utilized.

e. Extended school year (ESY) programs:

(1) One size doesn't fit all—failure to look beyond the typical program.

(2) Failure to consider or discuss eligibility for ESY was found to be a denial of FAPE. *Bend Lapine Sch. Dist. v. K.H.*, 43 IDELR 191 (D. Ore. 2005), *affirmed*, 48 IDELR 33, (9th Cir. 2007).

f. Fear of trying something new.

8. Failure to adequately address transition services. 34 C.F.R. § 300.320(b).

a. Prediction—possible up-and-coming area for litigation.

b. First IEP to be in effect when the child turns 16, or younger if determined appropriate by IEP team. 34 C.F.R. § 300.320(b).

c. Updated annually and must include:

(1) Appropriate measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals. 34 C.F.R. § 300.320(b).

d. Invite representative of transition agency—need written permission from the parent or adult student. 34 C.F.R. § 300.321(b)(3).

9. Failure to provide related services.

a. Inability to find service providers not an excuse.

b. Get necessary releases so information can be shared.

c. Get necessary information to the service provider so that the appropriate related services are provided.

d. Documentation by service provider that services have been provided.

e. Service provider absent versus student absent.

f. Need for substitute provider in order to provide the services—properly certified/licensed.

g. Possibility of compensatory education.

10. Failure to recognize it isn't about you – don't take it personally.

a. The position is being targeted, not necessarily the person.

b. School personnel may never be able to satisfy the parent—but that isn't the issue—issue is whether FAPE in LRE is being provided, and school staff can defend the education program.

c. Parent challenging qualification of staff—provide information on qualifications.

d. Remember—no due process hearing can be requested regarding failure to have a highly qualified teacher. 34 C.F.R. §§ 300.18(f) and 300.15(e).

Workshop 2

Unilateral Residential Placements

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UNILATERAL RESIDENTIAL PLACEMENTS OF STUDENTS WITH DISABILITIES

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I. INTRODUCTION

Claims for funding of unilateral residential placements for students with disabilities are very common in IDEA cases. Often, these cases are complex and contentious. This session will explore what the law provides with respect to residential placement, who is entitled to it and who is responsible for funding it. In addition, the general legal history of residential placement cases will be explored as well as current issues and trends in these cases.

II. RELEVANT PROVISIONS UNDER RELEVANT STATUTES AND REGULATIONS

A. Relevant Provisions of the Individuals with Disabilities Education Act (IDEA) and its Regulations

1. Definition of special education

The IDEA defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings…." 20 U.S.C. § 1402(29) and 34 C.F.R. § 300.39.

2. Definition of related services

The IDEA defines "related services" to include:

> transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individual education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, (except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1402(26). The regulations add early identification and assessment of disabilities in children, as well as school health services, school nurse services, social work services in schools, and parent counseling and training to the list of related services. 34 C.F.R. § 300.34.

3. <u>Children placed in or referred to Private Schools by Public Agencies</u>

School agencies must ensure that children with disabilities in private schools and facilities are provided special education and related services, in accordance with an IEP and at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate LEA as the means of providing FAPE. 20 U.S.C. § 1415(a)(10)(B) and 34 C.F.R. § 300.146.

The IDEA regulations specifically contain a provision regarding "residential placement":

> If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. § 300.104.

4. <u>Payment for Education of Children Enrolled in Private Schools without Consent of/Referral by the Public Agency</u>

The IDEA contains provisions that specifically address payment for unilateral private school placements as follows:

> This part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

> REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT.— If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.
>
> LIMITATION ON REIMBURSEMENT.—The cost of reimbursement described [herein] may be reduced or denied if—(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa); (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements [of the IDEA] of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.
>
> EXCEPTION.—Notwithstanding the notice requirement [above], the cost of reimbursement—(I) shall not be reduced or denied for failure to provide such notice if—(aa) the school prevented the parent from providing such notice; (bb) the parents had not received notice, pursuant to [IDEA], of the notice requirement [above]; or (cc) compliance with [the notice requirement] would likely result in physical harm to the child; and (II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if— (aa) the parent is illiterate or cannot write in English; or (bb) compliance with [the notice requirement] would likely result in serious emotional harm to the child.

20 U.S.C. § 1415(a)(10)(C). The regulations add that reimbursement for a unilateral private placement may be obtained if the court or hearing officer finds that the agency did not make FAPE available *and* that the private placement is appropriate. "A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs." 34 C.F.R. § 300.148(c).

5. <u>Least Restrictive Environment</u>

School districts must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of

children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1415(a)(5).

6. Civil actions

In any court action brought under the IDEA, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party and "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i).

B. Relevant Provisions of Section 504 of the Rehabilitation Act of 1973 (Section 504)

Although Section 504 itself provides nothing relative to residential placement, the 504 regulations do. Specifically, 34 C.F.R. § 104.33(c)(3) provides that "[i]f a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian."

III. STATUTORY BARS TO PRIVATE/RESIDENTIAL PLACEMENT CASES

A. Forest Grove Sch. Dist. v. T.A., 52 IDELR 151, 129 S. Ct. 2484 (2009). The prior receipt of special education services from the public school system is not required for parents to bring a lawsuit for private school tuition reimbursement. The language in the 1997 IDEA Amendments does not serve as an absolute bar to such lawsuits. However, parents are not entitled to reimbursement if the district makes FAPE available. Case is remanded to the district court for further proceedings.

IV. THE *BURLINGTON* CASE

The initial question in assessing whether a school district is responsible for funding a unilateral private placement, including residential placement, is whether such funding is an appropriate remedy at all under the IDEA. In 1985, the United States Supreme Court decided the case of *School Comm. of the Town of Burlington v. Department of Educ. of Massachusetts*, 471 U.S. 359 (1985). In *Burlington*, the Court set forth the following standard for determining whether parents are entitled to reimbursement or funding under the IDEA for a unilateral private school placement:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief could include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

Thus, it was held that reimbursement or prospective private school funding is authorized under the Act where the parents can show that the private placement is "proper" and that the school agency's IEP is not appropriate.

Since *Burlington*, hundreds of courts have been asked to resolve questions of reimbursement and prospective funding for private school, including residential placement. In each case, the *Burlington* case has played a significant role in determining whether the parents are entitled to public funding for their unilateral private placement.

V. ***BURLINGTON'S*** **FIRST INQUIRY: WHETHER THE PRIVATE PLACEMENT IS "PROPER"**

As instructed in *Burlington*, courts will generally turn first to the question of whether the parents' chosen residential facility/school was "proper" in determining whether reimbursement at public expense is warranted.

A. "Proper" does not require Full IDEA Compliance, but must meet Student's Needs

1. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). When a parent unilaterally withdraws a child from public school and enrolls the child in a private school, the parent is entitled to reimbursement if a hearing officer or court later determines that the private school education was "otherwise proper under IDEA," even if it did not meet each specific IDEA requirement. IDEA requirements "cannot be read as applying to parental placements." Fourth Circuit's decision is affirmed where it rejected the school district's argument that reimbursement is never proper when the parents choose a private school that is not approved by the State or that does not comply with all the terms of IDEA. According to the Court of Appeals, "neither the text of the Act nor its legislative history imposes a 'requirement that the private school be approved by the state in parent-placement reimbursement cases' [citation omitted]. To the contrary, the Court of Appeals concluded, IDEA's state-approval requirement applies only when a child is placed in a private school by public school officials. Accordingly, 'when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'"

2. Green v. New York City Dept. of Educ., 50 IDELR 40, 2008 WL 919609 (S.D. N.Y. 2008). Parent did not meet the burden of proving that the private placement unilaterally chosen for her daughter, who is SED, is appropriate. Although it was agreed that the student needed a "full-time residential treatment program," the parent's unilateral choice did not specialize in meeting the needs of students with IEPs, did not provide specially-designed instruction or programs and did not provide the student with any clinical or psychological services to address her social and emotional needs.

B. "Proper" Requires Placement to be Necessary for Educational Purposes/Benefit

1. North v. District of Columbia Bd. of Educ., 551 IDELR 157 (D. D.C. 1979). While it may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem, in this case, all of these

needs are so intimately intertwined that realistically it is not possible for the Court to perform the "Solomon-like task of separating them."

2. Kruelle v. New Castle County Sch. Dist., 552 IDELR 350, 642 F.2d 687 (3d Cir. 1981). The analysis "must focus…on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is in response to medical, social or emotional problems that are segregable from the learning process." If the needs are "inextricably intertwined" with the learning process and a court cannot segregate a child's medical, social or emotional problems from the learning process, the school district must reimburse the parents for the private residential placement. "[H]ere, consistency of programming and environment is critical to Paul's ability to learn, for the absence of a structured environment contributes to Paul's choking and vomiting which, in turn interferes fundamentally with his ability to learn."

3. Clovis Unified Sch. Dist. v. California Office of Administrative Hearings, 16 IDELR 944, 903 F.2d 635 (9th Cir. 1990). Hospitalization to treat psychiatric illness is not educational and, therefore, is not a "related service." Medically excluded services are not only those services provided by a physician, but also those services provided in a psychiatric hospital. Thus, the psychotherapeutic services provided by the acute care facility, which were intended to treat the child's current medical crisis, did not become related services simply because the providers were not always licensed physicians. While the child's hospitalization may have been necessary for her continued mental health, such a confinement was not essential for the child to receive an educational benefit. The district, therefore, was not obligated to fund the placement at the acute care facility.

4. Taylor v. Honig, 16 IDELR 1138, 910 F.2d 627 (9th Cir. 1990). Private treatment facility is accredited as an education institution and it operates a full-time school. Thus, it is educational and should be funded by the school district, particularly where the student's IEP called for long-term residential treatment, but the school district had been unable to locate an available, in-state facility.

5. Field v. Haddonfield Bd. of Educ., 18 IDELR 253, 769 F. Supp 1313 (D. N.J. 1991). School district is not responsible for funding placement in drug treatment program. The drug treatment program was designed to cure an illness and not to assist the student in deriving an benefit from his educational program. Thus, therefore, the drug treatment program is excludable as a medical service under the EHA, and the district is not obligated to provide such a program as a related service.

6. Ash v. Lake Oswego Sch. Dist., 19 IDELR 482, 980 F.2d 585 (9th Cir. 1992). District court used correct standard in holding that residential placement was required for an autistic child, where daily living skills such as toileting and dressing could only be taught and reinforced for him in the consistency of a residential setting.

7. Dale M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 33 IDELR 266, 237 F.3d 813 (7th Cir. 2001). The test for determining when private residential placement is required under the IDEA is whether the services are "primarily oriented toward

enabling a disabled child to obtain an education" or whether they are "oriented more toward enabling the child to engage in noneducational activities. The former are 'related services' within the meaning of the statute, the latter are not." Thus, the proper inquiry is whether the residential placement is "primarily educational." Under this inquiry, though the student has "the intelligence to perform well as a student," he suffers from a "lack of socialization," and the purpose of the private treatment is keeping him out of jail, not to educate him. Rather, the placement is simply a "jail substitute."

8. Independent Sch. Dist. No. 284 v. A.C., 35 IDELR 59, 258 F.3d 769 (8th Cir. 2001). The results of an IEE, which concluded that the student could not receive educational benefit until her emotional and behavioral issues were resolved, are accepted. The residential placement offered the high degree of structure and support the student needed, as her previous truancy and disruptiveness prevented her from making progress in the district's self-contained classroom. There was a consensus that the student would be unable to obtain any educational benefit in a setting other than a residential program. However, the case is remanded to the district court for further findings of fact and for an appropriate remedy, as it is unclear whether the student continues to reside in the district and whether the out-of-state facility suggested by her parent is an appropriate residential placement.

9. Kings Local Sch. Dist. Bd. of Educ. v. Zelazny, 38 IDELR 236, 325 F.3d 724 (6th Cir. 2003). Parents are denied residential placement reimbursement for placement of a high-schooler with Tourette's syndrome, Asperger's disorder and ODD because the district offered the child an appropriate program during his freshman year. Although the student exhibited increased behavior problems at home, they did not prevent him from succeeding at school. To assess whether a public funding of a residential placement is appropriate, a court or administrative officer must determine whether the setting is necessary for educational purposes, as opposed to medical, social or emotional problems that can be separated from the learning process. While the student's mother felt her son's behavior at home was making her life "a living hell," she indicated she was satisfied with his school situation.

10. S.C. v. Deptford Township Bd. of Educ., 38 IDELR 212, 248 F.Supp.2d 368 (D. N.J. 2003). Because the child's maladaptive behaviors were increasing and he was regressing academically in his day program, his parents are entitled to funding for a residential placement with appropriate behavioral controls. The student demonstrates potential for academic advancement, but only with full-time behavior modifications, and his behavioral problems in his current setting negatively impact, and in some cases preclude, his ability to participate in activities that are well within his mental and physical capabilities. Testimony indicates that without a residential placement, the child would be "totally uncontrollable in two or three years."

11. Ms. K. v. Maine Sch. Admin. Dist. No. 40, 46 IDELR 247 (D. Me. 2006). In a case seeking, among other things, reimbursement for placement of a student in a residential wilderness camp program, court denied parents' request noting that "a contrary ruling under the circumstances of this case would essentially put the Court in the position of establishing as an education policy that children with depression stemming from family

conflict must be provided an IEP having a residential component whenever a treatment provider identifies a link between clinical depression and the home environment and that child's depression merely has some impact on academic performance." The evidence was clear that the student could receive educational benefit without being in a residential placement.

12. Avjian v. Weast, 48 IDELR 61, 242 F. App'x 77 (4th Cir. 2007) (unpublished). Where parents signed IEP that recommended a private day school placement, the school district is not required to fund the residential component which was needed for non-educational reasons. The student's IEP clearly stated that she did not require a residential placement to receive an educational benefit. Although the district recommended a residential school when the parents expressed interest in a residential program, the court pointed out that the IEP called for the student to be placed in a private day school and the parents consented to the proposed placement when they signed the IEP. Courts must constrain their review to the terms of an IEP when considering whether a district offered FAPE. "Expanding the scope of the offer to include comments made during the IEP process undermines the important policies served by requiring a formal written IEP."

13. P.K. v. Bedford Cent. Sch. Dist., 50 IDELR 251, 569 F. Supp. 2d 371 (S.D.N.Y. 2008). Because teenager can receive FAPE in district's therapeutic program, the district had no obligation to reimburse the parents for the child's unilateral residential placement. Clearly, the student's difficulties in the district's program resulted from substance abuse rather than an inappropriate placement. Where the parents contended that the student's drug and alcohol problems were "inextricably intertwined" with his emotional disturbance and, as such, the IEP team should have offered a placement that addressed the student's emotional needs and his substance abuse issues, such arguments are rejected. The student made significant progress in the district's therapeutic program during the 2004-05 school year, and the IEP team decided to continue that placement for the 2005-06 school year. Clearly, the student's performance deteriorated after he began abusing drugs and alcohol and "[i]t was…reasonable for the district to attribute [the student's] difficulties during the 2005-06 school year to his substance abuse, and not to his disability or any shortcomings of the [therapeutic] program." Districts have no obligation to fund private substance abuse programs and because the therapeutic program met the student's needs when he did not abuse drugs and alcohol, the student does not need a residential placement to receive FAPE.

14. Christopher B. v. Hamamoto, 50 IDELR 195 (D. Haw. 2008). Although the Hawaii ED might have denied FAPE to a student with an undisclosed disability, that did not require it to pay for all of the student's privately obtained services. Thus, $42,564 worth of hospital, pharmaceutical and post-school year expenses will be deducted from the parents' reimbursement request. Although the student is entitled to a residential placement, he does not require a hospital placement. Placement in a mental health center does not qualify as a residential placement and "[b]ecause the [mental health center]…served as a hospital rather than a residential placement, [the parents] cannot recover these costs from [the ED]." Moreover, medical services qualify as related services only to the extent that they are used for diagnostic and evaluation purposes. As

such, the parents can not recover the cost of prescription medications that were part of the student's regular treatment.

15. Richardson Indep. Sch. Dist. v. Michael Z., 109 LRP 52635 (5th Cir. 2009). The following test is applicable in determining whether residential placement is required: "In order for a residential placement to be appropriate under the IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit; and 2) primarily oriented toward enabling the child to obtain an education." Unlike *Kruelle*, "this test does not make the reimbursement determination contingent on a court's ability to conduct the arguably impossible task of segregating a child's medical, social, emotional, and educational problems." "IDEA, though broad in scope, does not require school districts to bear the costs of private residential services that are primarily aimed at treating a child's medical difficulties or enabling the child to participate in non-educational activities….This is made clear in IDEA's definition of 'related services,' which limit reimbursable medical services to those 'for diagnostic and evaluation purposes only.'" While the district court did make the factual finding that residential placement was necessary for this student to receive a meaningful educational benefit and that she could achieve no educational progress short of residential placement, the case is remanded for the district court to make factual findings as to whether treatment at the particular residential facility was primarily designed for, and directed to, enabling her to receive a meaningful educational benefit.

16. Mary Courtney T. v. School Dist. of Philadelphia, 52 IDELR 211, (3d Cir. 2009). Although emotionally disturbed teenager is entitled to services under the IDEA, her parents are not entitled to funding for placement in a psychiatric residential facility. "Only those residential facilities that provide special education…qualify for reimbursement under *Kruelle* and IDEA." Although the court acknowledged that some services received at the facility may have provided educational benefit, they are not "the sort of educational services that are cognizable under *Kruelle*." At the facility, the child "received services that are not unlike programs that teach diabetic children how to manage their blood sugar levels and diets—both sorts of programs teach children to manage their conditions so that they can improve their own health and well being. However, because both programs are an outgrowth of a student's medical needs and necessarily teach the student how to regulate his or her condition, they are neither intended nor designed to be responsive to the child's distinct 'learning needs.'" Clearly, the residential program is designed to address medical, rather than educational, conditions and the child's admission there was necessitated, not by a need for special education, but by a need to address her acute medical condition. The residential placement here is also not a "related service;" rather, it is an excluded medical service. "[W]hile the Supreme Court stated that physician services other than those provided for diagnostic purposes are excluded, it also specifically excluded hospital services." Note: The court also held that the school district acted promptly to propose services to the child (and provide her with tutoring) when notified of her hospitalization and her ability to be evaluated by the school district. On that basis, compensatory education was also denied.

C. Residential Placement not "Proper" if not the Least Restrictive Environment (LRE)

1. Lenn v. Portland Sch. Comm., 20 IDELR 342, 998 F.2d 1083 (1st Cir. 1993). The IDEA's preference for mainstreaming means that a student who would make educational progress in a day school program is not entitled to a residential placement, even if it would more nearly enable the student to reach his/her full potential.

2. Doe v. Tullahoma City Schs., 20 IDELR 617, 9 F.3d 455 (6th Cir. 1993). Parental request for out-of-state private school reimbursement is denied because the district's proposed IEP constitutes a good faith effort to provide an educational environment in a less restrictive public school placement.

3. Board of Educ. of Arlington Heights Sch. Dist. No. 25 v. Illinois State Bd. of Educ., 35 IDELR 6 (N.D. Ill. 2001). Student who was diagnosed as ED could have better resolved her problems by being close to her family rather than in an out-of-state residential placement. In addition, the private school did not individualize its program to students' needs and it did not allow students any contact with their nondisabled peers. While the district's initial IEP was inappropriate, the parent was aware that the IEP team intended to revise the document before the beginning of the school year. Thus, she should have given the district a chance to prove the adequacy of its program before removing the student to the residential school. The district's amended IEP appeared to be responsive to the student's needs and was much less restrictive than the private placement.

4. Corey H. v. Cape Henlopen Sch. Dist., 40 IDELR 37, 286 F.Supp.2d 380 (D. Del. 2003). The parents' preferred 24-hour residential school is not the LRE for the student because it is hours away from his home and does not include nondisabled students. The district developed an appropriate IEP within a reasonable time.

5. Corpus Christi Indep. Sch. Dist. v. Christopher N., 45 IDELR 221 (S.D. Tex. 2006). A district that attempted to address a high school junior's escalating academic difficulties that resulted from his multiple disabilities by adding components to his IEP, such as a more restrictive class setting, a one-to-one aide and counseling acted appropriately, a federal District Court decided. It concluded that an IHO should not have awarded his parents reimbursement for their costs of placing him in a residential treatment center. The court found the district's untested intermediate proposals were the LRE for the student to obtain an appropriate education. And, the residential placement was not appropriate. While the student was making progress in the district's high school, the evidence showed he had experienced limited to marginal academic progress while residentially placed. The court reversed the IHO's order for the district to reimburse the parents their costs in unilaterally placing him in a residential treatment center. Taking the "drastic step" of placing him in involuntary residential treatment was inappropriate.

6. J.E.B. v. Indep. Sch. Dist. No. 720, 48 IDELR 2 (D. Minn. 2007). Residential placement is not proper where district complied with the IDEA by placing a 13-year-old student with an emotional disturbance in a public school program that emphasized both academic instruction and behavior management. The district's program allowed the student to

receive a meaningful educational benefit and residential placements should be regarded as a last resort. "When a student makes educational progress in a day program, removal from the home and placement in a residential facility is neither necessary nor appropriate." The student made varying degrees of progress on each of his academic goals, for example, by scoring an average of 93 percent on his spelling tests, which was a significant change from his previous refusal to work on spelling at all. More importantly, the student's behavior improved during his 15 months in the district program.

VI. ***BURLINGTON'S* SECOND INQUIRY: WHETHER THE SCHOOL DISTRICT'S IEP/PROGRAM IS APPROPRIATE**

In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court set forth the standard for determining the appropriateness of an IEP and whether FAPE was made available by using the following two-pronged test:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

458 U.S. at 207. The *Rowley* Court also made it clear that, in providing FAPE, states must provide a "basic floor of opportunity" to disabled students, not a "potential-maximizing education" and that states must "confer *some* educational benefit upon the handicapped child." 458 U.S. at 197-200.

A. Recent Challenges to the *Rowley* Standard

Recently, several courts have faced arguments challenging the *Rowley* "some educational benefit" standard based upon the theory that post-*Rowley* amendments to the IDEA somehow changed the standard for the provision of FAPE. Thus far, the courts have rejected the notion that Congress meant to change the *Rowley* standard, including courts faced with requests for funding for residential placements.

1. Leighty v. Laurel Sch. Dist., 46 IDELR 214 (W.D. Pa. 2006). Parents' contention that the No Child Left Behind Act changed the way that cases brought under the IDEA should be analyzed is rejected. The FAPE determination under IDEA does not depend on how well a particular student performs on standardized tests administered by a participating State. NCLB contains no specific language that purports to alter the IDEA's FAPE and IEP requirements.

2. School Bd. of Lee County v. M.M., 47 IDELR 220, 2007 WL 983274 (M.D. Fla. 2007). Parent's argument that language in the Florida Constitution referencing "high quality education" elevates the substantive standard for FAPE in Florida is rejected. Given the well-established nature of the federal standard, an intent to impose an enhanced requirement for IDEA purposes would have been more clearly stated. In addition, the

existence of a gifted child program in Florida and the provisions of NCLB do not establish a higher state standard that would require that a child's potential be maximized.

3. Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist., 49 IDELR 180, 518 F.3d 18 (1st Cir. 2008). The parents' assertion that the 1997 IDEA raised the bar for the provision of IEP transition services and directs that those services must result in actual and substantial progress toward integrating disabled children into society is rejected. The Court refused to defenestrate the Rowley standard for FAPE.

4. Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6, 49 IDELR 281, 538 F.Supp.2d 298 (D. Me. 2008). The parents' argument that the 2004 IDEA amendments increased the substantive goals for the education of disabled students (namely in the field of outcome-oriented academic and transition services) so that the goals now go beyond simply opening the door to public education is rejected. Given the ubiquity of Rowley in the context of IDEA proceedings, one would expect Congress (or the Department of Education) to speak clearly if the intent were to supersede it.

5. J.L. v. Mercer Island Sch. Dist., 52 IDELR 241 (9th Cir. 2009). In a case seeking residential placement at the Landmark School in Massachusetts, the argument that Congress sought to supersede *Rowley* or otherwise change the FAPE standard via the 1997 IDEA Amendments is rejected. Had Congress sought to change the FAPE standard—"a standard that courts have followed vis-à-vis *Rowley* since 1982—it would have expressed a clear intent to do so." Thus, the proper standard to determine whether a disabled child has received a FAPE is the "educational benefit" standard set forth in *Rowley*. On remand, the district court must review the ALJ's determination that the District provided a FAPE as required by *Rowley*.

B. *Rowley's* First Prong: Procedural Compliance

1. G.D. v. Westmoreland, 930 F.2d 942 (1st Cir. 1991). Bringing a draft IEP to a meeting is not a procedural violation where it was clear that it was only a draft for discussion purposes. In addition, there is no need to consider the residential option on the continuum when the school district has offered an appropriate less restrictive day program.

2. Seattle Sch. Dist. No. 1 v. B.S., 24 IDELR 168, 82 F.3d 1492 (9th Cir. 1996). Where school district's evaluation of a student with emotional and behavior disabilities was inappropriate because the evaluation team did not include anyone familiar with the student's disorders, and where school personnel failed to consider the recommendations of several of the student's doctors that a residential placement was appropriate, parent is entitled to reimbursement for placement in a residential program. The district's argument that it should not have to pay for the residential program because it is "medical" in nature is rejected, because the program is an accredited educational institution.

3. Knable v. Bexley City Sch. Dist., 34 IDELR 1, 238 F.3d 755 (6th Cir. 2001). Parents are entitled to reimbursement for residential placement costs for student with ADHD due to school district's failure to convene an IEP meeting within the time mandated by the

IDEA and prior to the beginning of the school year. This seriously infringed on the parents' ability to participate in their child's IEP process. Even where the parents fail to cooperate with school officials, the district must adhere to timeline requirements.

4. Brandon H. v. Kennewick Sch. Dist. No. 17, 34 IDELR 145, 82 F.Supp.2d 1174 (D. Wash. 2001). Although the district violated state law by failing to properly sign and distribute the student's summary evaluation analysis, its procedural mistakes did not deny the student FAPE and did not support a private residential placement at public expense. The district's IEP properly addresses the student's social, emotional and vocational needs. Thus, residential placement is not warranted for the student. In addition, the parents were not so opposed to the proposed IEP as to create so much hostility that it would undermine the IEP's value to the student.

5. Lakin v. Birmingham Pub. Schs., 39 IDELR 152, 70 F. App'x 295 (6th Cir. 2003). Parents are entitled to partial reimbursement for the cost of an out-of-state residential educational facility for the period of time there was no appropriate IEP in place and where the district failed to timely provide the parents of notice of their procedural safeguards, as well as the failure to comply with IDEA's child find requirements. However, once the district presented an appropriate IEP, the unilateral placement was no longer justifiable. Although the court is concerned that the student's treating physician was excluded from the IEP conference, especially because it was he who recommended the residential placement, the trial court's finding that the IEP was appropriate and provided FAPE is upheld. "We cannot say under these circumstances that the omission of [the doctor] from the "IEP team' or from the IEP conference was fatal to the adequacy of the plan, especially in light of the educational experts who were involved."

6. New Paltz Cent. Sch. Dist. v. St. Pierre, 40 IDELR 211, 307 F.Supp.2d 394 (N.D. N.Y. 2004). High-schooler suffers from ED, has a disability and the district denied him FAPE. Thus, the district must reimburse the student's parent for tuition, room, board and laptop computer expenses incurred at the private school for the 1999-2000 and 2000-01 school years. The evidence is clear that the student was very successful academically until his parents' divorce, when his grades began to suffer and he began acting out and using drugs. Because the district failed to refer the student for an evaluation once his parent informed it of the difficulties he was experiencing and the school psychologist and principal both recommended that the parent place the student at the private school, the court determined that the district denied the student FAPE. Further, by failing to conduct an observation of the student in the residential school and to conduct a psychiatric evaluation or a functional behavioral assessment, the district failed to conform to the state education regulations.

7. Bend-Lapine Sch. Dist. v. K.H., 43 IDELR 191 (D. Or. 2005), aff'd in unpublished opinion, 48 IDELR 33, 234 F. App'x 508 (9th Cir. 2007). District must reimburse the parents for private residential placement costs, as statements included in the IEP were insufficient to determine an accurate baseline of the behaviors affected by the student's disability, failed to adequately state measurable goals and lacked sufficient specificity to determine what supplementary aids might be required to implement the IEP. In addition,

the student's placement was decided before the IEP was completed and was drafted to support the decision. The residential school is run by qualified personnel, is fully accredited and has a full curriculum in place, offering a small class size, highly structured environment and the assistance of a clinical program to assist the student in meeting her behavioral goals.

8. Hjortness v. Neenah Joint Sch. Dist., 48 IDELR 119, 498 F.3d 655 (7th Cir. 2007), opinion amended, 107 LRP 65900 (7th Cir. 2007). Although the IEP Team discussed only one out of the four IEP goals with the parents, there was no loss of educational opportunity that resulted in a denial of FAPE to the student. At several times during IEP conferences, the Team attempted to set specific goals and objectives, but the parents insisted that the issue on the table was whether the school district would fund a private residential placement. In addition, the school district did not predetermine placement, as the IDEA requires the school district to assume public placement and the school district did not need to consider private placement once it determined that public placement was appropriate.

9. Virginia S. and Milton M. v. Dept. of Educ., State of Hawaii, 47 IDELR 42, 2007 WL 80814 (D. Haw. 2007). Proposed IEP contained measurable goals and objectives. They were specific, capable of measurement, and directly related to the student's areas of weakness identified in the PLEP. Though the student's Transition Plan was not individualized, this procedural error was harmless, as student was entering 10th grade and would receive assistance with the college planning process and opportunities to explore career options. Thus, there was no loss of educational opportunity shown. Finally, the district did not predetermine placement, as it considered the residential placement requested by the parents. That a draft IEP was given to the parents before the meeting, especially when they requested a draft, did not prove that student's placement was "predetermined" before the IEP was completed.

10. A.K. v. Alexandria City Sch. Bd., 50 IDELR 13, 544 F.Supp.2d 487 (E.D. Va. 2008). On remand from the 4th Circuit and with the directive that the school district had violated FAPE by not identifying a specific private residential school in the IEP, the parents' choice was an appropriate placement. Thus, parents are entitled to reimbursement for the cost of the private school for the periods of time that the IEP did not designate the particular private school for the student.

11. Board of Educ. of the New Hartford Cent. Sch. Dist., 52 IDELR 95 (N.D. N.Y. 2009). The absence of a regular education teacher at the IEP Team meeting did not render the IEP inadequate because at least one parent and their attorney were present at every meeting and the evidence is clear that the only IEP proposal the parents would have accepted was placement at a private residential school.

12. J.L. v. Mercer Island Sch. Dist., supra. Although case is remanded for district court to address the issue of substantive compliance with the IDEA, the procedural issues are not remanded because the district court's analysis did not turn on any disputed legal standards. There is no evidence supporting the district court's finding that there was a

predetermination of placement at a "pre-meeting meeting." In addition, the parents actively participated in the IEP formulation process and the district changed various aspects of the program based on the recommendations of the parents and their expert. Nor did the district commit a procedural violation by not specifying teaching methodologies in the IEP or specifying the minutes of instruction to be devoted to each of K.L.'s services in her IEPs.

B. *Rowley's* Second Prong: Substantive/Content Compliance

1. Tucson Unif. Sch. Dist. v. Murray, 33 IDELR 239 (D. Ariz. 2000). A 15-year-old deaf student also classified as LD and ED (and ADHD) needs to be placed at a residential treatment center with an ASL environment, since compelling evidence demonstrates that his 1998-99 IEP can not be properly implemented in the State's designated school for the deaf. The student has made no more than minimal educational progress in the State's school for the deaf and has failed to make progress in academic subjects, communication skills, social skills, counseling and behavioral goals. He has the potential to learn if he receives the services that his needs require, including attention in an "intensive, comprehensive and therapeutic approach" that further offers him "the possibility that he will later be able to successfully reintegrate into his community." The residential placement is required in order for the student to access the learning environment and receive FAPE.

2. A.S. v. Board of Educ. of the Town of West Hartford, 35 IDELR 179 (D. Conn. 2001), aff'd in unpublished opinion, 37 IDELR 246, 47 F. App'x 615 (2d Cir. 2002). Appropriateness of non-special education, all male, college preparatory boarding school need not be addressed where the proposed IEP, which offered the student services at a district high school, was consistent with the IDEA's LRE requirement. The parents' argument that placing their son in public school was inappropriate because, with the freedom available to him, he would self-medicate, not do his homework and not progress academically is rejected. This is particularly the case where the student's public school classes would have been small enough to permit individualized instruction. Additionally, the student would have been taught by certified special education teachers and supported by home tutoring and weekly individual counseling.

3. Lamoine Sch. Comm. v. Ms. Z, 42 IDELR 172, 353 F.Supp.2d 18 (D. Me. 2005). The district failed to provide FAPE to a student diagnosed with reading, writing, language and math learning disabilities, as well as emotional difficulties, because its IEP did not address his attendance problem and did not provide for him to receive academic services or behavioral and emotional supports. Accordingly, the parents are entitled to reimbursement for their unilateral placement of the student at residential facilities. The student's emotional difficulties frequently made him tardy to class and often prevented him from attending school altogether and, although the district was aware of the student's tardiness and attendance issues, it did not make an attempt to remedy or improve them. While the district could not be expected to rouse the student from bed or escort him to school on time, it also could not have provided him with FAPE in his absence.

4. J.A. v. Mountain Lakes Bd. of Educ., 46 IDELR 164 (D. N.J. 2006) (unpublished decision). Parents of high school student with mild LD were not entitled to reimbursement for the cost of unilaterally placing their child at the Forman School, a residential preparatory school in Litchfield, Connecticut. The evidence was uncontroverted that the student made substantial progress in each of his public school classes and was functioning in conformity with the grades he was given—all A's and B's. There was no evidence to support the parents' contention that his grades were inflated.

5. Corpus Christi Indep. Sch. Dist. v. Christopher N., 2006 WL 870739, 45 IDELR 221 (S.D. Tex. 2006). Parents' request for funding for residential placement is rejected where school district's proposed program was the LRE and offered FAPE. Factors indicating that IEP is appropriate were met: 1) the program is individualized based on student's assessment and performance; 2) program is administered in the LRE; 3) services are provided in a coordinated and collaborative manner by the key "stakeholders"; and 4) positive academic and non-academic benefits are demonstrated.

6. Roxanne J. v. Nevada County Human Services Agency, 46 IDELR 280 (E.D. Cal. 2006). Hearing Officer's decision is upheld to award the cost of student's therapy sessions with a private provider, because the district did not provide the counseling services identified in the student's IEP. However, the failure to provide these services was not sufficient reason to award the cost of a residential placement in Utah because none of the numerous experts consulted by the parents deemed a residential placement to be necessary and, importantly, the testimony established that the student made significant gains in the district's program prior to being placed in the residential program.

7. San Rafael Elem. Sch. Dist. v. California Special Educ. Hearing Office, 47 IDELR 259, 482 F.Supp.2d 1152 (N.D. Cal. 2007). Parents of a 13-year-old student with autism who exhibited significant behavioral problems away from school failed to prove that their son required a residential placement in order to receive FAPE. The school district offered the student a meaningful educational benefit when it proposed placing him in a private school for children with behavioral problems, and the IDEA does not require districts to address all of a student's emotional or behavioral problems, regardless of where and when they arise. "The district is not required to ensure that a student takes behavioral skills learned at school into the home." Rather, "[t]he district is only required to ensure that a student's IEP is 'reasonably calculated to provide educational benefits.'" Although the student frequently exhibits defiant and noncompliant behavior at home and in community settings, the student's behavior at school is "much more controlled." Moreover, the student satisfied nine out of twelve of his IEP goals. Because the district has no duty to ensure that the student's classroom behavior carries over to other settings, the ALJ's ruling in favor of residential placement is reversed.

8. A.S. v. Madison Metropolitan Sch. Dist., 47 IDELR 304, 477 F.Supp.2d 969 (W.D. Wis. 2007). District is not required to reimburse the parents of an 18-year-old autistic student for placement in a residential facility, where the district's proposed IEP could be implemented in a public school. The parents' claim that the district predetermined the student's placement in a public high school is rejected where the IEP team spoke with

staff at the student's previous school, considered reports from independent evaluations and conducted its own assessments before it decided on the student's placement. In addition, there was no evidence that the student required a residential placement in order to receive an educational benefit, as there was no connection between the student's aggressive behavior in the home and the services he received at school. "The [IEP team] concluded that the primary reason for the [residential] placement was the parents' previous difficulty in managing his behavior at home." Because there is no evidence that the student's behavioral problems in the home are educationally related, the parents have not established a need for residential placement.

9. Sitka Sch. Dist. v. Parents of C.I.R., 47 IDELR 194 (Alaska Super. Ct. 2007). District is required to pay for the residential placement of an epileptic high schooler in an out-of-state boarding school for children with language-learning disabilities. The district's reliance on the student's alleged academic progress is rejected, and the district's failure to develop an IEP that met the student's educational needs and its apparent inability to do so amounts to a denial of FAPE. Evidence that the student passed all of her academic classes in the second semester in her sophomore year did not invalidate the hearing officer's conclusion that the district denied FAPE, as the student continued to struggle to adapt to school, which overshadowed her limited educational progress. The student's grades were not an accurate measure of her performance, because her teachers often modified or excused assignments to accommodate her disability. Moreover, she had difficulty managing her part-time schedule, which consisted of three academic classes and, at one time, she was failing English. In addition, she continued to experience significant stress during the semester, which was unlikely to lessen. "The district's assertion that [the student] was passing from grade to grade was questionable in light of testimony that graduating on time would require a more demanding schedule than [the student] had managed since the beginning of high school." The district did not provide the small classes or one-to-one instruction that the student's evaluators recommended and because the private program offers the student small, therapeutic classes and around-the-clock assistance, it is appropriate.

10. M.H. v. Monroe-Woodbury Cent. Sch. Dist., 51 IDELR 91, 296 F. App'x 126 (2d Cir. 2008)(unpublished), cert. denied, (Sup. Ct., 03/03/09). Therapeutic day placement proposed by the district is appropriate. As a general rule, a residential placement is not required under the IDEA unless there is objective evidence that the student is regressing in a day program. The student in this case made progress in the therapeutic day program. "Not only do her grades reflect that she was achieving academically, but reports from certified counselors demonstrate that she was making improvements in her social and emotional problems as well." Though the Parents are "understandably worried" about the stability of their daughter's mental health and whether relapses into past emotional difficulties will upset her education in the future, no testimony by certified experts supported their fears.

11. Thompson R2-J Sch. Dist. v. Luke P., 50 IDELR 212, 540 F.3d 1143 (10th Cir. 2008), cert. denied, (Sup. Ct., 2/23/09). As a general rule, generalization of skills across settings is not necessary to establish educational benefit under the IDEA. As long as the student

is making some progress in the classroom, the school district does not need to ensure that the autistic student is able to apply his newly learned skills outside of school. Although the autistic student may have exhibited severe behavioral problems outside of the classroom environment, that does not require the district to pay for the student's residential placement. The parents' reliance on IDEA language regarding the obligation to provide transition services that focus on "improving…independent living or community participation" is misplaced and "[n]o educational value or goal, including generalization, carries special weight under IDEA." "The fact that…the student made some educational progress and had an IEP reasonably calculated to ensure that progress continued is sufficient to indicate compliance, not defiance, of the Act." [Note: See also, Gonzalez v. Puerto Rico Dept. of Educ., 34 IDELR 291, 254 F3d 350 (1st Cir. 2001); Devine v. Indian River Co. Sch. Bd., 34 IDELR 203, 249 F.3d 1289 (11th Cir. 2001); and JSK v. Hendry County Sch. Bd., 18 IDELR 143, 941 F.2d 1563 (11th Cir. 1991)].

12. Ashland Sch. Dist. v. Parents of Student R.J., 52 IDELR 14, 585 F.Supp.2d 1208 (D. Or. 2008). Parent is not entitled to funding for residential placement, as the student did not need a residential placement to receive FAPE. Although the student had some difficulties with focus and concentration, she received good grades when she completed and handed in assignments. Moreover, the district addressed the student's attentional difficulties in her IEPs. In addition, the parent was able to monitor the student's completion of assignments using an online tracking system and she had regular communications with school personnel about missing assignments. The student's main problem was the difficulty she had in her home life. "[The student] was well-regarded by her teachers, able to learn in regular classes, and capable of benefiting from the education provided to her by the school," and "[i]t was mostly her behavior away from school that was at issue." While the court sympathizes with the parent's concerns about the student's behavior, which included defiance and sneaking out of the house, the district is not responsible for addressing such conduct. In addition, the residential placement was not a school, but a behavioral modification facility.

13. Z.D. v. Niskayuna Cent. Sch. Dist., 52 IDELR 250 (N.D. N.Y. 2009). Parent is not entitled to reimbursement for unilateral residential placement because the student made progress academically in the public school program and was able to answer questions and participate in classroom discussions despite his attentional difficulties. Specifically, "[the student] received the same material content and was graded using the same standards as regular education students and, in November 2004, received grades in the B to C range with positive comments." In addition, progress reports evidenced social interaction with his peers and independent use of his locker. Further, his reliance on his one-to-one aide decreased to the point that he was able to work cooperatively in groups. The parent's experts advocating for therapeutic placement focused only upon the benefits of the residential program.

VII. MISCELLENEOUS CASES/ISSUES

A. Opportunity to Try Cases

Often, courts will deny parents funding for residential placement where the parents have not given the school district an "opportunity to try" to educate and implement an IEP for a child with a disability. In such cases, the courts have ruled that the equities require them to deny reimbursement or prospective funding for a unilateral residential placement.

1. Amanda S. v. Green Bay Area Sch. Dist., 33 IDELR 209, 132 F. Supp. 718 (E.D. Wis. 2000). Parents are not entitled to reimbursement for either of the student's two stays in the residential facility, as the parents' failure to cooperate with the district was ultimately the factor that led to the student's first stay in the residential facility. The district regularly communicated with the parents about the student's problems and recommended that the parents consent to an evaluation of the student. Reimbursement for the second of the student's residential placements is denied because the IEP provided by the district upon the student's return to school was appropriate. The parents did not complain about the district's program or placement and never asked the district to revise the student's IEP.

2. T.F. v. Special Sch. Dist. of St. Louis County, 45 IDELR 237, 449 F.3d 816 (8th Cir. 2006). Student with disabling diagnoses, including PDD, ODD, OCD and ADHD, is not entitled to residential placement reimbursement. Where parents rejected the proposed IEP on the basis that only a full-time residential placement would provide FAPE, the school district should have had the opportunity, and to an extent the duty, to try its proposed less restrictive alternatives before recommending a residential placement.

3. C.G. v. Five Town Community Sch. Dist., 49 IDELR 93, 513 F.3d 279 (1st Cir. 2008). Where the parents made a unilateral choice to abandon the collaborative IEP process without allowing the process to run its course and for the school district to finalize a proposed IEP, they are precluded from obtaining reimbursement for the costs of the Chamberlain School placement. The district was continuing its efforts to develop an IEP when the parents filed their due process complaint. In addition, the IEP team was continuing to work with an independent evaluator to develop a crisis plan and other positive behavioral supports for the student.

4. M.V. v. Shenendehowa Cent. Sch. Dist., 49 IDELR 98 (N.D. N.Y. 2008). Because the district conceded that it failed to offer FAPE, the parent only needs to show that the private placement was appropriate and that she conducted herself properly during the IEP process. While the parent failed to attend an interview at one of the district's proposed placements, the parent did not receive notice of it until after she had enrolled her son in the residential facility. The equities weigh in favor of reimbursement.

B. Responsibility if Residential Facility Closes

Alston v. District of Columbia, 46 IDELR 43, 49 F.Supp.2d 86 (D. D.C. 2006). The IDEA's stay-put provision operates as an automatic injunction. Thus, when residential program in which

student was placed via an IEP was closed, the school district was required to find a suitable alternative when the parent invoked the Act's stay-put provision.

C. Transfer Student with a Residential IEP

L.G. v. School Bd. of Palm Beach County, 47 IDELR 64, 512 F.Supp.2d 1240 (S.D. Fla. 2007), aff'd in an unpublished opinion, 48 IDELR 271, 2007 WL 3002331 (11th Cir. 2007). The district did not violate the IDEA when it offered to place an 8-year-old transfer student with a serious emotional disturbance in a therapeutic day school rather than a residential program as recommended in his New York IEP. The residential placement was intended to address the student's violent behavior at home, and not his behavior at school. The goal of the IEP team is to provide the student with an educational benefit through the least restrictive means and "[s]ince placement in a residential facility is more restrictive than placement at a therapeutic day school and since the number and variety of services at [the school] was greater than those offered in New York, [the district] was required to first attempt to implement the IEP without the residential placement." It is also important that the student made progress in his day program in New York, and that the educational component of the student's IEP did not change when his parents rejected the district's proposal and placed him in a residential facility. Because the district could have implemented the student's IEP in the therapeutic day school, the parents are not entitled to reimbursement for the residential placement. As the ALJ determined, although a residential placement may have been the least restrictive environment in New York, it was not in Florida. [Note: The Eleventh Circuit re-emphasized its prior rulings that the standard for appropriate education is whether the student is making "measurable and adequate gains in the classroom," not whether the child's progress in a school setting carried over to the home setting].

D. Students Placed in Residential Facility by another Agency

1. Rieman v. Waynesville R-VI Sch. Dist., 36 IDELR 265 (W.D. Mo. 2002). There is no basis under IDEA to require the district or SEA to fund the residential placement of a student with behavior disorder, OHI, ADHD, ODD/OCD and depression. He was placed in the private psychiatric treatment center by a family court for non-educational reasons and the parents were required to fund $590.00 ordered by the family court. The district's provision of and funding of the educational services at the facility was appropriate and nothing more is required.

2. In re: D.D., 42 IDELR 8, 819 N.E.2d 300 (Ill. 2004). District is not required to pay for the educational portion of a high school student's placement in an out-of-state residential facility because the placement was not for educational purposes. Rather, the placement was to ensure that the student complied with the terms of his probation and the decision to place him at the residential facility was made solely by the juvenile court, without the district's involvement and without first giving the district the opportunity to provide the student with FAPE. Under these circumstances, the district can not be forced to fund the student's placement. The failure of the juvenile court to involve the district in the decision to place the student meant the district was not provided with the opportunity to provide the student with his educational needs, a requirement under the IDEA.

3. Letter to Covall, 48 IDELR 106 (OSEP 2006). Even if a non-educational public agency decides that a student requires placement in a residential facility, the state in which the student/parents resides will remain responsible for ensuring that the student receives the special education and related services that he requires, as the SEA retains responsibility for ensuring the child receives FAPE. OSEP noted that both the IDEA and the Part B regulations require states to provide special education services to all eligible children with disabilities who live within its borders. "This obligation to ensure that FAPE is available encompasses children with disabilities who are placed by a non-educational public agency, such as a mental health, social services or juvenile justice agency." Although the IDEA does not indicate which LEA in the state is responsible for providing FAPE to a student in a non-educational residential placement, the SEA's duty to exercise general supervision over all educational programs for children with disabilities requires it to resolve any disputes between districts. Further, the SEA in which the student resides is responsible for ensuring a timely receipt of special education services. However, the SEA or LEA could seek reimbursement from the non-educational public agency if the agency fails to supply any services that the law obligates it to provide.

4. Orange County Dept. of Educ. v. A.S., 50 IDELR 222, 567 F.Supp.2d 1165 (C.D. Cal. 2008). In a situation where state law does not designate an entity responsible for "parentless dependents" placed in out-of-state residential treatment centers by a local health care agency, the California Department of Education must retain responsibility for implementing and funding the IEP and program for the student.

E. Cooperative Agreements to Cover Residential Placement Costs

Lawrence Township Bd. of Educ. v. State of New Jersey, 43 IDELR 242, 417 F.3d 368 (3d Cir. 2005). Local education agencies do not have standing to sue the state for the funding of a residential placement for a student with autism.

G. Responsibility of State Educational Agency

1. Missouri Dept. of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist., 40 IDELR 204, 358 F.3d 992 (8th Cir. 2004). The Missouri Department of Elementary and Secondary Education (DESE), which operates three state schools for children with disabilities, including the Missouri School for the Blind (MSB), is financially responsible for the majority of the cost of placing a student with multiple severe disabilities in an out-of-state school for the blind. In addition, DESE and the MSB violated the IDEA by failing to provide a person from MSB knowledgeable about its curriculum and financial resources at the student's 2000-01 IEP meeting. This case presents a situation "in which a local education agency is unable to educate a student, and the state education agency then steps in to provide direct services to the student." Under Missouri law, the DESE is the provider of direct services to a "severely handicapped" child to whom a district cannot provide services and is not part of a special school district. Under the IDEA, if the state agency provides direct services, it is responsible for developing and implementing a student's IEP. In addition, one of the persons who must be involved in that process is "a representative of the public agency who (1) can provide or supervise

specially designed instruction to meet the child's needs, (2) is knowledgeable about the general curriculum, and (3) knows the availability of resources of the public agency." Thus, DESE, as the provider of services, was required to provide a representative of MSB at the student's IEP meeting.

2. Todd D. v. Andrews, 17 IDELR 986 (11th Cir. 1991). District denied FAPE to high school SED student by placing him in an out-of-state residential facility when his IEP included a goal of transitioning him back to his neighborhood and home community. The student requires a residential placement close enough to his home community to implementation of his transition goals and the State Education Agency may be responsible for that if the district can not locate a placement within the State of Georgia.

H. Responsibility where Parents have Joint Custody

Cumberland Regional High Sch. Dist. Bd. of Educ. v. Freehold Regional High Sch. Dist. Bd. of Educ., 51 IDELR 62, 293 F. App'x 900 (3d Cir. 2008) (unpublished). Where parents' divorce decree provided them with joint legal and physical custody, school districts of both parents' residence are responsible for equally funding residential placement for disabled student.

I. Lack of Funding to pay for Residential

County of Tuolumne v. Special Education Hearing Office, 45 IDELR 15 (Cal. Ct. App. 2006). Lower court's order requiring a California county to pay for a student's residential placement from the date it withdrew funding forward is affirmed. All of the county's arguments, including that it was not obligated to pay for the student's placement because it was an "unfunded mandate" are rejected. Compliance with the IDEA is a "serious matter," particularly when the student was told his residential placement would be terminated, he attempted suicide twice.

J. Responsibility to Fund Parent Visits to Residential Facility

1. Aaron M. v. Yomtoob, 38 IDELR 122 (N.D. Ill. 2003). Hearing officer's ruling is affirmed that the district can reduce the number of reimbursable parental training trips to the student's out-of-state residential placement from 12 to 6. This is so where the parents have never taken the allotted 12 trips to the facility for purposes of receiving training, they have made significant progress with their son when he returns home for visits, and they have developed skills to generalize the child's improved behavior from his residential placement to his home. In addition, the parents admitted to the hearing officer that they had achieved the necessary skills for successful at-home visits and the residential facility did not include parent training as a goal in the student's IEP.

2. Aaron M. v. Yomtoob, 40 IDELR 65 (N.D. Ill. 2003). The parents of a child with autism placed in an out-of-state residential facility are not required to reimburse the district for trips in excess of the 6 yearly trips the court determined was a reasonable number of publicly-funded parental visits. Approximately three years after the child was placed, the parents challenged the appropriateness of his new IEP, which decreased the number of reimbursable yearly trips from 12 to 6. The challenged reduction in visits was made

because the parents never took more than six yearly round-trips to visit their son, but during the challenge to the IEP, the parents took 12 trips in excess of the six yearly trips ultimately found to be reasonable. After the court affirmed that 6 yearly trips were reasonable, the district sought reimbursement for the parents' travel expenses in excess of that number. The district was required to pay the interim travel expenses for the child's parents under the IDEA's stay-put provision and because the stay-put provision's purpose is to protect parents and their children, "parents who maintain their child's stay-put placement should not be required to reimburse a school district for stay-put expenses even if he proposed IEP is found to be appropriate." It concluded that to hold otherwise would cause parents without financial resources to hesitate to use the stay-put protections.

K. Maintaining "Exit Criteria" for Determining Residential is no longer necessary

Letter to Allen, 23 IDELR 996 (OSEP 1995). State's use of exit criteria as an additional component of IEPs for students with disabilities who are placed at residential facilities furthers, rather than inhibits, compliance with the IDEA. The stated purpose of "exit criteria," defined as the "minimum amount of educational/behavioral progress as specified in the IEP that would indicate when the educational placement of a child shall be reviewed to determine whether the child can be moved to a less restrictive placement," is to ensure that students do not remain in a residential placement any longer than is educationally appropriate or are not prematurely removed from that setting. Additionally, such criteria can not be the sole determinant for a change in placement and serve only as an indicator that a change in placement may be appropriate. See also, Letter to Lund, 23 IDELR 994 (OSEP 1995).

Workshop 3

Students with Allergies and Chemical Sensitivities

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Students with Allergies and Chemical Sensitivities:

On the Cutting Edge of Eligibility and Accommodation

26th Annual Pacific Northwest Institute on Special Education and the Law

Tuesday, October 6, 2009

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I. Introduction

Since the number of school age children with severe, even life-threatening, allergies, asthma and chemical sensitivities has increased, allergies have become an increasingly serious issue for school districts. The challenges school officials face include understanding the legal obligations a student's allergies may trigger and determining the appropriate accommodations to offer to students. This presentation is intended to help school officials provide a safe school environment to students with allergies and reduce the associated legal risks.

II. Allergies

A. Food Allergies

1. A food allergy is a condition in which the immune system mistakenly identifies a food protein as a threat and attempts to protect the body against it by releasing chemicals into the blood. The release of these chemicals results in various symptoms that can be mild or severe. In serious cases, anaphylaxis (a sudden, severe and sometimes fatal allergic reaction in which several problems occur all at once that can involve the skin, breathing, digestion, the heart, and blood vessels), occurs.

2. Eight foods account for 90% of all food-allergic reactions:

    a. Milk
    b. Eggs
    c. Peanuts
    d. Tree nuts (walnut, cashew, etc.)
    e. Fish
    f. Shellfish
    g. Soy
    h. Wheat

B. Other Common Allergies

1. Latex
2. Animal Dander
3. Dust Mites
4. Insect Bites

III. Asthma

Asthma is a chronic condition involving the respiratory system in which the airway occasionally constricts, becomes inflamed, and is lined with excessive amounts of mucus, often in response to one or more triggers. Triggering events include exposure to an environmental stimulant or allergen such as cold air, warm air, moist air, exercise or exertion, or emotional stress. In children, the most common triggers are viral illnesses such as those that cause the common cold.

A. "Breathmobile®' in Los Angeles

Los Angeles Unified School District estimates that asthma affects over 63,000 students in the district; asthma kills approximately two students each year. The school district works closely with about 300 to 400 students from low-income households each year who need the most help by visiting homes and educating parents on home maintenance. A fleet of five Breathmobile® buses — mobile clinics that visit the schools on a regular basis — are dispatched to evaluate and treat students with asthma.[1]

IV. Multiple chemical sensitivity

Multiple chemical sensitivity is characterized by severe reactions to ordinary chemicals commonly found in the home or school environment such as perfume, solvents, cleaners, bug spray, air freshener, deodorant, etc.

V. Eligibility for special education and related services

A. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794 et. seq.) and Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §12101 et. seq.)

1. Section 504 of the Rehabilitation Act of 1973 ("Section 504") prohibits discrimination on the basis of disability among recipients of Federal financial assistance from the U.S. Department of Education.

2. Title II of the Americans with Disabilities Act of 1990 ("ADA") bars discrimination on the basis of disability by public elementary or secondary education systems and institutions.

3. A student is eligible to receive services and/or accommodations under a Section 504 Plan if the student demonstrates:

   a. A mental or physical impairment;

   b. Which substantially limits one or more major life activities, including functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

   c. Having a record of such an impairment; or

   d. Being regarded as having such an impairment.

4. Definition of mental or physical impairment

[1] Special Education Connections, LRP Publications, October 1, 2007

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

B. Individuals with Disabilities Education Act (20 U.S.C. §1400 et. seq.)

5. The Individuals with Disabilities Education Act ("IDEA") requires school districts to provide eligible students with a "free appropriate public education" in the "least restrictive environment."

6. A student is eligible to receive services and/or accommodations under an Individualized Education Plan (IEP) pursuant to IDEA if:

a. The student meets the criteria of one of fourteen specific disabilites; allergies, asthma and chemical sensitivity disorder typically fall under the Other Health Impaired ("OHI") category: Having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (1) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

b. The identified disability adversely affects the student's educational performance.

CHECK STATE LAW The information below applies to Illinois only

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B. Self-Administration of Epinephrine Pen: 105 ILCS 5/22-30

1. Requires a school district, upon receipt of authorization from a student's physician and parents, to allow a student to carry and self-administer an epinephrine pen in the event the student has certain allergies which may require the use of such a device.

C. Illinois Structural Pest Control Act: 225 ILCS 235/10.3

1. Requires that school districts maintain a list of parents and employees who have registered to receive notification prior to application of pesticides to school property or provide written notice to all parents before such pesticide applications.

VI. Common Questions

A. Can we refuse to find a student eligible if the parents do not provide a medical diagnosis?

1. *Baltimore City Public School System*, 106 LRP 22924 (SEA MD 2003)

a. Neither IDEA nor Section 504 requires that a particular type of evaluation be conducted to establish a student's eligibility.

b. If a determination is made that a medical evaluation is required in order to determine whether a student has ADHD and whether, due to that impairment, the student requires special education and related services, such an evaluation must be conducted at no cost to the parents. See *Letter to Williams*, 21 IDELR 73 (OSEP 1994) and *Letter to Harkness*, 35 IDELR 94 (OSEP 2001).

B. Do we need to draft an IEP or Section 504 Plan if the student is otherwise receiving accommodations, *i.e.*, has a health plan?

1. *Pawnee (CO) School District*, 45 IDELR 229, 106 LRP 9770 (OCR Colorado 2005)

a. OCR found that the school district discriminated against a fourth-grade student with asthma by failing to evaluate him for special education or related services and failing to provide the parent with notice of her parental rights.

b. Although the school district was providing informal accommodations to the student, was keeping track of his inhaler use, and was aware that he carried an EpiPen for emergencies, it did not believe he had any substantial limitations.

c. OCR found the district violated Section 504 and the ADA because it did not follow its policies or an appropriate practice for evaluating the student for a disability.

C. What if the parent refuses to give us medical information?

1. *Selma City School Board*, 39 IDELR 115, 103 LRP 25115 (SEA AL 2003)

a. Parents insisted their son was eligible for special education due to his asthma, ADHD, bipolar disorder, depression and LD, but refused to consent to additional evaluations and refused to divulge medical and other outside reports to the school district.

b. The hearing officer indicated that he understood why they did not want to release privileged medical information, he ordered the parents to release the records.

c. If the parents did not release the records, the student could be found ineligible.

D. Can we disclose a student's allergies to parent volunteers who are chaperoning a field trip?

1. Letter to Anonymous, 107 LRP 28330 (FERPA Compliance Office 2007)

a. An inquiry was made whether school employees may disclose a student's medical information to other parents who assisted teachers at YMCA camps.

b. The parents could be required to provide certain emergency medication, including inhalers for students with asthma and epinephrine for students with allergies.

c. The Family Educational Rights Privacy Act (FERPA) allows nonconsensual disclosures of information about a student to appropriately designated school officials with a legitimate educational interest in the records maintained by the district.

d. If the district in this case included parent volunteers in its criteria for determining a school official and determined that those volunteers should be aware of any medical situations related to students for whom they are responsible -- either in the classroom or at a camp -- then a disclosure would be permissible.

VII. Cases

A. *Smith v. Tangipahoa Parish Sch. Bd.*, 46 IDELR 282 (D.Ct. LA 2006)

1. Parents of a student with an allergy to horse dander formally requested that the District provide accommodations to the student pursuant to Section 504 after learning that the student's principal and assistant principal planned to ride horses to school on ride-your-horse-to-school day.

2. The District complied with the parents' request. The District's Section 504 plan included:

a. Holding a faculty meeting regarding disability harassment;

b. Sending notice to all parents that horses and horse equipment should not be brought to school, and to ensure their children's clothes and hands were free of horse dander;

c. Prohibiting horses or horse tack on campus;

d. Training teachers and bus drivers to use an EpiPen;

e. Providing a walkie-talkie to the student and administrators;

f. Giving the bus driver a cell phone programmed with relevant numbers so that the driver could summon medical help and alert the student's parents of an allergic reaction; and

g. Washing down the road that ran in front of the school in the event that a horse walked on the road.

3. A few months after the implementation of the Section 504 plan, the parents filed a lawsuit alleging that the District was not complying with the plan and therefore violated Title II of the ADA and Section 504 of the Rehabilitation Act.

4. The District moved for summary judgment and argued that the student's horse allergy was not a disability under the ADA and Section 504 and that even if the student was disabled the District had provided reasonable accommodations by implementing all of the student's doctor's recommendations.

5. The court found that the student's allergies did not equate to a disability as defined under the ADA and Section 504 since no evidence existed that the allergy substantially limited the student in breathing, school attendance, school performance, or any major life activity.

6. Also, the court concluded that the school provided the student with reasonable accommodations. The court noted that the additional accommodations the parents sought were not recommended by the student's physician and were in some cases impracticable (*i.e.*, attempting to stop horses from proceeding down the road).

7. Because the student was not disabled under the ADA or Section 504 and the District provided reasonable accommodations, the court granted summary judgment in favor of the District.

B. *Land v. Baptist Medical Ctr.*, 4 ECLPR 69 (8th Cir. 1999)

1. The parent of a child with an allergy to peanuts and peanut derivatives alleged a day care center violated the ADA by refusing to provide services to the child after the child had two allergic reactions.

2. The Eighth Circuit found the lower court properly granted summary judgment in favor of the day care center since the child's peanut allergy was not a disability under the ADA as it did not substantially limit her ability to eat or breathe.

3. The court noted that the child was not allergic to any foods other than peanuts and that, other than the two allergic reactions she experienced, she was not generally restricted in her ability to breathe. The court also pointed to statements by the child's doctor that her allergy impacted her life "only a little bit."

4. As this case confirms, it is imperative that districts determine the nature and severity of a student's allergies before drafting a Section 504 plan.

C. *Maine Sch. Administration Dist. #40*, 29 IDELR 624 (OCR 1998)

5. A parent of a student who had a life threatening allergy to bee stings filed a complaint with the Office for Civil Rights (OCR) alleging that the District violated Section 504 and the ADA by discriminating against the student based on the student's disability.

6. Specifically, the parent alleged the District discriminated against the student by failing to inform the student's teachers, substitute teachers, and track coach of the student's life-threatening allergy and by failing to develop an alternative plan for administering an EpiPen shot if the student could not self administer the shot.

7. OCR found that (1) the school nurse had placed the student's name on the school's Confidential Health Alert which was distributed to all teachers; (2) the Alert stated that the student had an allergy to bee stings and carried an EpiPen; (3) the nurse circulated the Alert to the student's teachers; (4) the nurse filled out emergency cards at the beginning of the year for each student and the guidelines for dispensing medication applied to students with known allergic responses to insect bites or stings; (5) the nurse periodically gave an in-service for school personnel on first aid designees and administration of injectable medication and follow up treatment; (6) the nurse maintained an EpiPen in her office; and (7) the student carried an EpiPen at all times.

8. Thus, OCR concluded that the District informed staff of the student's allergy and had proper contingency plans in case of an emergency. Therefore, the District did not violate Section 504 or the ADA.

D. *Mystic Valley Regional Charter School*, 40 IDELR 275 (SEA Mass. 2004)

9. A first grade student had life-threatening allergies to peanuts and tree nut products and asthma (the student could die from even the ingestion of a minute particle of the products). The student's allergic sensitivity and reaction was so severe that the student's allergist stressed that avoidance of peanuts and tree nut products was essential to the student's treatment.

10. The accommodations made by the school included:

    a. Requiring all students to wash their hands before and after snack time and lunch;

    b. Wiping down the desks/tables after snacks and lunch;

    c. Providing the student with a peanut/tree nut free table; and

    d. Sending letters to parents reminding them not to send in items containing peanut/nut tree product (which only referred to the student's allergy as severe, and not life threatening).

11. The parents requested a nut-free environment and that other students in the classroom be prohibited from bringing in or using any peanut/tree nut product. The school district refused and the parents filed a claim with the Massachusetts State Educational Agency alleging that the District's refusal violated Section 504.

12. The District did not dispute that the student had a disability as defined under Section 504. Rather, the District argued that it did provide reasonable accommodations, the accommodation the parents requested would be an undue burden, and that the student could advocate for himself.

13. Based on the evidence and the medical reports, because the student's allergy was life threatening, the hearing officer held that the parent's requested accommodation in conjunction with the school's prior accommodations was warranted.

14. With regard to the issue of whether the accommodation created a hardship or undue burden for the District, the hearing officer held that none of the facts showed that the educational program would be affected by banning the peanut/tree nut products from the classroom.

15. The hearing officer also found that the student's needs were disregarded which resulted in discrimination of the student's access to class activities (his ability to participate in a party serving Asian food) and to an education (the student had to leave the classroom due to allergic conjunctivitis which resulted from the student being exposed when his classmate in the seat next to him ate peanut butter crackers).

E. *West Springfield Schools*, 37 IDELR 147 (SEA Mass. 2002)

1. A fourteen-year-old student had multiple, severe disabilities, profoundly severe aeroallergenic, asthma/dyspnea and IGE syndrome which required a climate controlled environment and frequent health status monitoring.

2. The parents objected to the student's enrollment at a particular high school since the student's classroom was the only air conditioned, climate-controlled area in the high school. Because the entire high school was not air conditioned, the parents claimed the high school could not reasonably accommodate the student to ensure the student had full access to the appropriate special education and therefore violated IDEA.

3. The parents requested the District to place the student in a private day school which offered a fully air conditioned facility.

4. The hearing officer found the School made the appropriate inquiries to determine the student's requisite environmental needs and adhered to them. The recommendations made to address the student's needs, and which the school followed, included the student being in an air conditioned classroom for the bulk of his educational program, limiting trips outside of the air-conditioned classroom, a health monitor, and in-school access to breathing and skin treatments.

5. The hearing officer noted that the evidence showed an improvement in the student's skin condition and a decrease in the student's need for breathing treatments at school.

6. The hearing officer found that the student had "mainstream" contact within her classroom with another special educational program located in the classroom and outside the classroom through attending special classes, lunch, recreational, and community activities. Furthermore, the hearing officer noted that no evidence existed that the student was unable to participate in any scheduled high school activity due to the activity being located in a non-climate controlled area.

7. Therefore, the hearing officer found that the school reasonably accommodated the student's health needs and provided an individually tailored education program in the least restrictive environment.

F. *Saluda School District One*, 47 IDELR 22 (OCR 2006)

1. A student's parent filed a complaint with OCR. The parent alleged that the District failed to provide the student a free and appropriate public education by discriminating against the student based on his disabilities, peanut and tree nut allergies, and therefore violated Section 504.

2. OCR examined the Section 504 plan the District implemented for the student. OCR found several deficiencies with the plan. Specifically, OCR stated that the plan failed to state 1) the specific measures to be taken to protect the student in settings other than his classroom, cafeteria, and during field trips; 2) the procedures concerning the proper handling and administration of epinephrine in the event of an anaphylactic or other serious allergy-related reaction; 3) the staff responsible for emergency responses; 4) the staff who will receive training, the content of the training, who will conduct the training, and where the training will take place; and 5) what sanctions will be applied to individuals who harass students with peanut allergies because of those allergies.

3. Despite the inadequacies with the Section 504 plan, OCR closed the parent's complaint since the District signed a voluntary agreement that addressed the parent's concerns.

G. *South Allegheny (PA) Sch. Dist.*, 31 IDELR 57 (OCR 1998)

1. A parent alleged that the District discriminated against her son on the basis of disability, in violation of Section 504 and the ADA, by not providing him with a qualified person or nurse to administer medication if needed in response to his peanut allergy.

2. OCR held the District was in compliance with Section 504 because it made commitments to resolve the parent's allegations.

3. OCR explained that the District would develop a plan in conjunction with the parent to address the student's needs. The plan was to be based on information provided by the student's physician and the District was required to ensure that all individuals with primary responsibility for the student's education were familiar with the plan and their roles in implementing it.

4. OCR stated that, at a minimum, the plan was to address the following:

a. The specifics of the student's medical needs, so all parties understood the nature and severity of the allergy, the purpose and necessity of medication, and details regarding prescription dosage, frequency of administration, and any known side effects;

b. Procedures for handling medical emergencies involving the student, including immediate assistance and access to his medication, and notice to the principal, nurse and emergency personnel;

c. Staff training for all employees who interacted with the student to ensure they were familiar with the student's allergy and were able to administer an EpiPen in an emergency;

d. A protocol that set an order of responsibility to administer the EpiPen; and

e. Monitoring of the student by a nurse or other designated qualified person during his lunch period.

5. OCR required the district to revise its medical policy that applied to students with allergies who relied on use of an EpiPen to ensure that such students had an equal opportunity to benefit from a public education, as required by Section 504 and the ADA.

6. The District also was required to ensure that its policies, such as those involving administration of medicines or assignment of nurses, did not have the effect of discriminating against individuals with disabilities or limiting their participation in school programs and activities.

7. Finally, OCR directed the district to provide an informational session to the student's classmates to inform them of the student's disability, what was appropriate behavior at lunch time, and to which foods the student was allergic.

H. *Merced City Sch. Dist.*, 31 IDELR 228 (SEA Cal. 1999)

1. The parents of a five-year-old student with spina bifida alleged that the District violated IDEA by failing to provide a safe and sanitary learning environment. Among the allegations that the student was in an unsafe and unsanitary learning environment was that the student had been exposed to latex despite the District's knowledge of the student's allergy.

2. The hearing officer found that the exposure had been an isolated incident and the District had taken reasonable precautions to prevent such exposure.

3. The hearing officer explained that, prior to the student's diagnosis with a latex allergy, the District had taken preventative measures in response to a letter from the student's physician.

4. Thus, the District (1) held an in-service on identifying items made of latex and the signs and symptoms of latex allergy; and (2) eliminated use of latex gloves.

5. After being informed of the particular student's allergy, the District conducted a second in-service which consisted of the following:

   a. Review of information regarding latex allergies;

   b. Instruction to staff on the use of an EpiPen if a student went into epinephrel shock; and

   c. Review of administration of general first aid practices.

6. Further, the District conducted surveys of the student's classroom to determine if it contained any items with latex, and promptly removed those items. The District also obtained benadryl from the student's parent to give to the student in response to an allergic reaction.

7. In light of the District's efforts, the hearing officer held that the District took reasonable affirmative steps to eliminate the possibility of the student being exposed to latex in the classroom, train staff, and address potential medical concerns in case of an allergic reaction. Therefore, despite the isolated latex exposure, the hearing officer found the District did not violate the IDEA.

I. *Kropp v. Maine School Administrative Union #44*, 47 IDELR 131, 107 LRP 8933 (D.Ct. Maine 2007)

1. The school district did not violate Section 504 or the ADA when it declined to implement all of the environmental modifications demanded by the parents of a seventh-grader with asthma, which included removing all chemicals containing phenol and moving the student's Spanish class out of the school basement.

2. The Court concluded that the parents did not have standing to sue under the statutes because their daughter did not have a qualifying disability. The Court explained that an individual seeking the statute's protections must show that she has a mental or physical impairment that "substantially limits" her ability to engage in a "major life activity."

3. Several courts have held that individuals with asthma are not substantially limited in a major life activity if they can alleviate their symptoms with treatment. See *Garcia v. Northside Indep. Sch. Dist.*, 47 IDELR 6 (W.D. Tex. 2007); *Smith v. Tangipahoa Parish Sch. Dist.*, 46 IDELR 282 (E.D. La. 2006).

4. The Court pointed out that each time the student experienced chest tightness in school, she used a nebulizer to administer medication that treated her asthma attack. "The [parents] fail to indicate that any functional limitation remains once [the student] has administered her medication in the nurse's office."

J. *Vineland (CA) Elementary School District*, 49 IDELR 20, 107 LRP 61306 (OSEP 2007)

1. The school district did not discriminate against an eighth-grader with asthma by requiring him to run during his physical education classes.

2. The student never supplied evidence that his disability affected his ability to function in school

3. OCR recognized that the district had notice of the student's asthma as of February 2005, when his mother filed a grievance against the student's PE teacher. The student also submitted a doctor's note in August 2006 stating that he needed to use an inhaler 20 minutes before engaging in physical activity.

4. What the student did not provide, however, was evidence that his asthma and his use of an inhaler substantially limited a major life activity. "There is no evidence that the student's mother either requested an evaluation of the student or provided medical information indicating that he needed special services or accommodations, such as restrictions on PE due to his asthma," OCR wrote. Recognizing that it would have been prudent for the district to evaluate the student's need for accommodations, OCR concluded that its failure to evaluate the student did not amount to discrimination. As a purely advisory matter, however, OCR suggested that the district evaluate the student and determine whether he required a Section 504 Plan.

K. *Walpole Public Schools*, 26 IDELR 976, 26 LRP 4536 (SEA Mass. 1997)

1. A 14-year-old student with a language-based learning disability was diagnosed with chemical sensitivity syndrome during the seventh grade. After his diagnosis, the student was enrolled by his parents in a private school.

2. The accommodations recommended by the school district included: hiring an industrial hygienist to make recommendations; allowing the student to start the school year at other, neighboring school districts if necessary; environmental adjustments; monitoring of the student's condition by the nurse; and home tutoring as needed.

3. The parents requested a due process hearing, arguing the student should attend ninth grade at the private school.

4. The evidence indicated the student would be able to attend the district high school with the proposed accommodations.

5. The district incorporated all of the recommendations of the student's physician into the IEP, and was willing to hire an industrial hygienist to ensure the appropriate accommodations were made. Additionally, the evidence failed to demonstrate the private school could accommodate the student's condition.

VIII. Developing section 504 plans/IEPs

A. DO NOT PROMISE ACCOMMODATIONS UNLESS THEY ARE REASONABLE AND ATTAINABLE

B. The Section 504 Plan/IEP should address:

1. The nature and severity of the student’s condition.

2. The specific substances which the student is allergic/sensitive to.

3. If the substance can be eliminated, specific steps to ensure elimination and periodic checks.

4. If the substance cannot be eliminated, locations where the substance exists/materials that contain the substance, etc.

5. Specific steps to ensure that the student does not come into contact with the substance.

6. How students (peers) and staff (including substitute) will be informed and educated about the student’s allergies.

7. Self-advocacy skills for the student, if appropriate.

8. Steps to take if the substance is found in the building.

9. Steps to take if the student is exposed to the substance.

10. Steps to take in case of an emergency.

C. Physician information

If possible, the school district should incorporate information from the student's physician regarding the nature and severity of his allergies. *See Salem Keizer Sch. Dist.*, 26 IDELR 508 (SEA Oregon 1997) (holding that the district's proposed Section 504 plan addressing student's allergies and multiple chemical sensitivities was appropriate where the district reasonably relied on the best medical evidence it had at the time – from the student's physician).

IX. INTERNET RESOURCES

A. Centers for Disease Control (CDC)

1. Centers for Disease Control and Prevention. Strategies for Addressing Asthma Within a Coordinated School Health Program, With Updated Resources. Atlanta, Georgia: Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, 2006.

2. www.cdc.gov/HealthyYouth/asthma/pdf/strategies.pdf.

B. The Food Allergy & Anaphylaxis Network (FAAN)

1. FAAN is a non-profit dedicated to raising public awareness of food allergies, providing advocacy and education, and advancing food allergy and anaphylaxis research. Its website provides information on common allergens and anaphylaxis, special allergy alerts, allergen-free recipes, and updates on advocacy issues and research initiatives.

2. www.foodallergy.org

C. American Academy of Allergy, Asthma & Immunology (AAAAI)

1. AAAAI provides advocacy and support for patients and the allergy/ immunology specialists who provide their care. Its website provides useful information to people with food and other allergies. It also contains a "school nurse tool kit" for allergy management (http://www.aaaai.org/members/allied_health/tool_kit).

2. www.aaaai.org/patients.stm

D. Kids with Food Allergies (KFA)

1. KFA is a national nonprofit food support group. Its website provides information on food allergies, recipes and cooking help, and peer support.

2. www.kidswithfoodallergies.org

E. American Latex Allergy Association (ALAA)

1. The ALAA is a national non-profit organization that provides through its website and other media educational information about latex allergy and supports latex-allergic individuals.

2. www.latexallergyresources.org

F. Health, Mental Health and Safety Guidelines for Schools

1. Website provides guidelines on varying topics such as minimizing indoor/outdoor allergens and irritants in schools.

2. www.nationalguidelines.org/guideline.cfm?guideNum=6-13

Workshop 4

Ninth Circuit Special Education Decisions

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Pacific Northwest Institute on Special Education and the Law
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Ninth Circuit Special Education Decisions: What You Need to Know

Pacific Northwest Institute on Special Education and the Law

September 2009

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I. Introduction

This session will review and analyze significant judicial decisions issued by the Ninth Circuit Court of Appeals emphasizing the most recent decisions. The Ninth Circuit cases are legally binding in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon and Washington.

II. Evaluation/Eligibility Issues

A. The Court determined that the district complied with the IDEA when it attempted pre-referral intervention before placing a student in special education. Furthermore, state policy expected that general education interventions would be considered before referring a student for a special education evaluation. Johnson v. Upland Unified School District, 36 IDELR 2, 29 Fed. Appx. 689 (United States Court of Appeals, 9th Circuit (2002)). This is an unpublished decision.

B. In an action raising several procedural issues under the IDEA, one claim by the parents of a student with a disability was that the school district failed to assess the student in his primary language, in particular the psychological assessment. A language interpreter was present during the verbal portions of the assessment but direct verbal cues were not given. The hearing officer agreed with the psychologist that verbal cues would have disturbed the validity of the test and therefore native language administration was not feasible. The Court

of Appeals commented that even if they disagreed and found that native language assessment was feasible, there was no evidence in the record that the results of the psychological assessment resulted in the student being denied a suitable educational opportunity. Park v. Anaheim Union High School District, 444. F3d 1149, 45 IDELR 178 (United States Court of Appeals, 9th Circuit (2006)).

C. In a class action lawsuit, the Court held that a student is entitled to a full comprehensive special education evaluation if either the school district or the parents suspect that the student may have a disability. At that point, the IDEA's procedural rights apply. Therefore, if a parent initiates a referral, they must be notified of the school district's response and the procedural rights to challenge the decision. Pastatiempo v. Aizawa et. al., 103 F.3d 796, 25 IDELR 64 (United States Court of Appeals, 9th Circuit (1996)).

D. The Court held that a student diagnosed with ADHD, PTSD, RAD and Intermittent Explosive Disorder was not eligible for special education services and, therefore, her parents were not entitled to reimbursement for their private placement. The Court concluded that the student was not emotionally disturbed since she was able to maintain satisfactory relationships and her inappropriate behavior was not to a marked degree over a long period of time. In addition, there was no adverse impact on her educational performance since her grades, tests, and teachers' reports all indicated she was performing at average or above average levels.

Finally, although the Team that addressed her eligibility was not duly composed since the special educator on the Team never provided services to the student, the Court held it was harmless error since it did not result in a loss of educational opportunity. R.B. v. Napa Valley Unified School District, 496 F.3d. 932, 48 IDELR 60 (United States Court of Appeals, 9th Circuit (2007)).

E. The parent of a student who was diagnosed as having an attachment disorder, oppositional defiant disorder, conduct disorder and histrionic personality, obtained an IEE which concluded that the student required a residential placement. The Court found that the school failed to consider the IEE as the IDEA requires since the team did not have a staff member who had knowledge in the suspected disability. Also, the team failed to reconcile the inconsistent opinions of the IEE's conclusion with the district's position. Seattle School District v. B.S. 24 IDELR 68 (United States Court of Appeals, 9th Circuit (1996)).

F. In finding a student ineligible for special education as learning disabled, the Court held that not only a severe discrepancy between ability and achievement be shown, but that the student be in need of special education. The Court, citing state

code, held that the impairment must require instruction, services, or both which cannot be provided with modification of the regular school program. Norton v. Orinda Union Sch. Dist., 29 IDELR 1068 (United States Court of Appeals, 9th Circuit (1999)). Unpublished decision which may not be cited except as provided by the rules of the 9th Circuit.

G. The Court affirmed the Team's conclusion that the student was not eligible for special education under either the Specific Learning Disability or Other Health Impairment categories. Although there was a severe discrepancy between the student's ability and achievement, the student was performing above grade level based on class work and tests. Therefore, the discrepancy could be addressed without the need for special education services. Hood v. Encinitas Union School District, 486 F.3d 1099, 107 LRP 26108 (United States Court of Appeals, 9th Circuit (2007)).

H. The school, by referring a family to an evaluation center to determine whether the child with a disability was also autistic, violated it's obligation under the IDEA to evaluate the student in all areas of suspected disability. The Court held that a school cannot abdicate its affirmative duties under the IDEA by simply referring the parents to an evaluation center since it would not ensure that the child is assessed. The Court concluded that such procedural deficiency denied the student a FAPE. N.B. v. Hellgate Elementary School District 541 F.3d 1202, 50 IDELR 241 (United States Court of Appeals, 9th Circuit (2008)).

I. The parents were denied reimbursement for private services obtained for their twins with autism. The Court found that the school's evaluation was timely since there was no reason to suspect the twins were autistic until the private service provider contacted the district. However, the parents were reimbursed for the private evaluation due to the delay in sending the parents prior written notice of the school's intent to evaluate along with a copy of the procedural safeguards. J.G. v. Douglas County School District , 552 F.3d 786, 51 IDELR 119 (United States Court of Appeals, 9th Circuit (2008)).

J. A school district limited an independent evaluator's ability to observe the placement proposed by the IEP Team to 20 minutes per observation. The Court held that although it may be a procedural violation there was no evidence presented that the parents' ability to meaningfully participate was significantly impacted. The independent evaluator conceded that she was able to provide the parents with an informed and independent opinion which was introduced as evidence in a due process hearing. L.M. v. Capistrano Unified School District, 538 F.3d 1261, 50 IDELR 181 (United States Court of Appeals, 9th Circuit (2008)).

III. Free Appropriate Public Education (FAPE) Issues

A. The correct standard for measuring educational benefit under the IDEA is not merely whether the placement is reasonably calculated to provide the child with educational benefits, but rather whether the child makes progress toward the goals set forth in her IEP. It must include educational instruction specially designed to meet the unique needs of the child supported by such services as necessary to permit the child to benefit from that instruction. County of San Diego v. California Special Education Hearing Officer, 24 IDELR 756 (United States Court of Appeals, 9th Circuit (1996)).

B. In determining whether educational benefit is being provided the student, one must consider whether the student has made satisfactory progress toward his/her goals and objectives. Although such goals and objectives are not guarantees, they are targets that service providers must strive to assist the student to reach. Ojai Unified School District v. Jackson, 4 F3d 1467, 20 IDELR 354 (United States Court of Appeals, 9th Circuit (1993)).

C. In analyzing the claimed substantive violations in the district IEPs of a student with an unspecified disability, the court concluded the IEPs were designed to provide the student with educational benefit. The goals were appropriate, given the student's ability, and designed to further his academic achievement. The court found no merit to the student's claims that the district failed to provide an appropriate methodology, stating methodology decisions are best left to districts where the district offers a FAPE. Since the district's IEPs offered the student a FAPE, methodology decisions were left to the district's discretion. The fact that the student made limited progress was not enough to invalidate the IEPs, because they were calculated to allow the student to make progress. The amount of time apportioned between regular and special education was appropriate, and the district was willing to adjust the time amounts as necessary. Bend-Lapine Sch. Dist. V. DW, 28 IDELR 734 (United States Court of Appeals, 9th Circuit (1998)).

D. The failure to provide any special education instruction for a significant period of the school year for a student with a disability who was on a home/hospital instruction denied a FAPE justifying compensatory education. Everett v. Santa Barbara High School District, 36 IDELR 35 (United States Court of Appeals, 9th Circuit (2002)).

E. The Court upheld the IEP for a student with autism even though it did not incorporate ABA services as requested by the parents. The Court found that the

requirement in the IDEA 2004 Amendments requiring that special education services be based on "peer reviewed research to the extent practicable" was met since the IEP was based on an eclectic approach. This eclectic approach, while not itself peer-reviewed, was based on peer reviewed research to the extent practicable. The Court noted that it should not decide whether the school made "the best decision or the correct decision" only whether the decision satisfied the requirements of the IDEA. Joshua A. v. Rocklin Unified School District, 52 IDELR 64 (United States Court of Appeals, 9th Circuit (2009)) This is an unpublished decision.

F. The Court affirmed the Administrative Hearing Officer's decision that a student with Asperger's Syndrome received a FAPE.
The Court stated that the appropriateness of an IEP must not be judged in hindsight. In rejecting the parent's claim that the student's Skill Trainer should have had more experience and/or training with students who have Asperger's Syndrome, the Court held that this is a policy question for the Department of Education, not the Courts to decide.
In addition, although the teacher wrote the name of the student on the blackboard every time the student misbehaved, the Court noted that, although unprofessional, one misjudgment does not constitute a denial of FAPE. B.V. v. Hawaii Department of Education, 514 F.3d. 1384, 49 IDELR 152 (United States Court of Appeals, 9th Circuit (2008)).

G. The Court of Appeals overturned the District Court's decision that the FAPE standard, as established by the United States Supreme Court in Rowley, had been superseded by the 1997 Amendments to the IDEA. The Court noted that there was no plausible way to conclude that the addition of post-secondary transition services in the IDEA supported a Congressional intent to change the FAPE standard. Had the Congress intended to change the Rowley standard it would have expressed a clear intent to do so.
The Court also upheld the IEP even though it didn't specify the minutes of service to be provided. The Court held that minutes need not be included in the IEP if the amount of services is "reasonably known" to all involved in the development and implementation of the IEP. J.L. v. Mercer Island School District, __ F.3d ___, 109 LRP 48649 (United States Court of Appeals, 9th Circuit (2009)).

IV. IEP Issues

A. The school district called an IEP meeting to propose a change in placement for a student who is autistic. A regular classroom teacher was invited but did not attend

the meeting. The IEP Team changed the student's placement from a regular kindergarten class to a special education class. The Court overturned the IEP Team decision holding that the lack of a regular class teacher at the meeting, standing alone, is a structural defect prejudicing the right of the student to a FAPE. Therefore, since the procedural deficiency resulted in a denial FAPE, there was no need to analyze whether the IEP would have provided educational benefit to the student. M.L. v. Federal Way School District, 394 F.3d 634 (U.S. Court of Appeals, 9th Circuit (2005)).

B. The parents of a student with a hearing impairment unilaterally placed the student in a private out-of-state school. The Court held that the parents were entitled to reimbursement since the school district denied the student a FAPE.

In particular, the Court held that the school district's failure to include a teacher from the private school as part of the IEP Team and its failure to reschedule the meeting at the parents' request resulted in a denial of FAPE. Shapiro v. Paradise Valley Unified School District, 38 IDELR 91 (United States Court of Appeals, 9th Circuit (2003)).

C. The Court awarded reimbursement to the parents of a child with autism finding that the IEP was inappropriate due to procedural violations of the law. The failure to provide the parents with copies of requested evaluation reports prior to the IEP meeting interfered with parental participation in the IEP formulation process undermining the very essence of the IDEA. Amanda J. v. Clark County School District, 35 IDELR 65 (United States Court of Appeals, 9th Circuit (2001)).

D. Where a school district convened an IEP meeting for a student and failed to ensure the attendance of all requisite participants (i.e., the teacher), the student was effectively denied a free appropriate public education. W.G. v. Target Range School District, 960 F.2d. 1479, 18 IDELR 1019 (United States Court of Appeals, 9th Circuit (1992)).

E. The parents alleged that the student's IEP was procedurally defective because it failed to recognize the student as dyslexic and therefore failed to provide the proper identification and evaluation of his educational needs. The Court concluded that the School District properly identified his disability and designed an IEP, through the efforts of a multi-disciplinary team, which addressed his disability. The IDEA and its implementing regulations contain no procedural provision requiring the use of a specific term, such as dyslexia, provided the IEP properly identifies and addresses the disability. Cronkite v. Long Beach Unified School District, 30 IDELR 510 (United States Court of Appeals, 9th Circuit

(1999)). Unpublished decision, which may not be cited except as provided by the rules of the 9th Circuit.

F. The IDEA does not require a school district to assign staff members the parents desire. Thus, the IEP provided FAPE even though the aide previously working at home with the student was not assigned to be his aide in the classroom. Gellerman v. Calaveras Unified School District, 37 IDELR 125. (United States Court of Appeals, 9th Circuit (2002)). This is an unpublished decision.

G. The parents asserted that their 2-year-old son diagnosed with autism would benefit most from an intensive Lovaas-type method of discrete trial training. Individual family service plan team members maintained that such training would have been too punitive and intense given his age tolerance. The Court held that the IFSP developed by the district, requiring 12 and one-half hours per week of home services by a behavioral associate, was appropriate and reasonably calculated to develop the child and be responsive to his individual needs. The IDEA requires that the program be designed to provide educational benefit not be the best program. Adams by Adams v. State of Oregon, 31 IDELR 130 (United States Court of Appeals, 9th Circuit (1999)).

H. A student who suffers from cystic fibrosis and tracheomalacia requiring speech therapy, periodic medication, suctioning of his lungs and reinsertion of the tracheostomy tube is entitled to those services as related services under the IDEA to benefit from special education in the least restrictive environment. Hawaii Department of Education v. Katherine D., 727 F.2d 809, 555 IDELR 276 (United States Court of Appeals, 9th Circuit (1984)).

I. Although the school did not fully implement the student's IEP in relation to math instruction, behavior supports and self-contained class work, the student was not entitled to compensatory education. The Court held that they were not material failures to implement the IEP. Minor discrepancies between the services provided and the services called for in the IEP do not give rise to an IDEA violation. A material failure occurs when the services provided fall significantly short of the services in the IEP. The child's educational progress, or lack of it, may be probative of whether there has been a significant shortfall. Van Duyn v. Baker School District, 502 F.3d 811, 47 IDELR 182 (United States Court of Appeals, 9th Circuit (2007)).

J. The Court held the participation of the student's former adaptive physical education teacher met the IDEA's requirement that at least one special education teacher or service provider be a member of the IEP Team. The IDEA does not

require the participation of the student's current special education teacher or service provider. As long as the special education teacher actually taught the student previously, the IEP Team is valid. A.G. v. Placentia-Yorba Linda Unified School District 320 Fed. Appx. 519, 52 IDELR 63 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished decision.

K. The Court upheld the appropriateness of the IEP finding that it was reasonably calculated to confer a meaningful educational benefit to the student. The Court noted that the IEP must be judged at the time it was drafted not based on the lens of hindsight. Instead of asking whether the IEP was adequate in light of the student's progress, the pertinent question is whether an IEP was appropriately designed and implemented so as to provide the student with a meaningful benefit. In addition, the Court refused to consider whether the IEP was fully implemented since the issue was not properly raised in the due process hearing. B.S. v. Placentia Yorba-Linda Unified School District 51 IDELR 237 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished decision.

V. Least Restrictive Environment

A. The Court of Appeals affirmed the lower court's decision that the least restrictive educational placement for a student who is classified as "moderately mentally retarded" is a regular classroom setting. The Court adopted a four factor balancing test considering:

1. The educational benefits of placement full-time in a regular class;

2. The non-academic benefits of such placement;

3. The effect of the student on the teacher and children in the regular class; and

4. The costs involved. Sacramento City Unified School District v. Holland, 4 F. 3d 1398, 20 IDELR 812 (United States Court of Appeals, 9th Circuit (1994)). Review denied by the United States Supreme Court.

B. Under the four-part test adopted in Sacramento City Unified School District v. Rachel H., a temporary placement in an off-campus, self-contained program was the least restrictive environment for a 15-year-old student with Tourette

Syndrome and Attention Deficit Hyperactivity Disorder (ADHD). The student was not benefiting academically in his mainstream placement, as evidenced by declining achievement. Moreover, the district had offered him supplementary services and accommodations without success. His non-academic benefits were minimal, since he did not model his behavior on that of his non-disabled peers and he remained socially isolated. Evidence of the students' negative effect on others included violent attacks on two students, assault of a staff member, and disruption of the class by profanity and sexually-explicit remarks. Cost considerations in hiring an aide were irrelevant, in light of the determination that this service would not benefit the student. Clyde K. ex rel. Ryan K. v. Puyallup School District, 35 F. 3d 1396, 21 IDELR 664 (United States Court of Appeals, 9th Circuit (1994)).

C. The Court upheld the residential placement proposed by the district for a student who is profoundly deaf. The Court found that the student's great deficits in communication skills and need for immediate, intensive instruction in American Sign Language strongly outweighed the nonacademic benefits of placement in a regular education environment. Poolaw v. Bishop, 67 F.3d. 820, 23 IDELR 407 (United States Court of Appeals, 9th Circuit (1995)).

D. There is a presumption that students with disabilities will be placed in a regular education environment with peers who are similar in age. This presumption creates the baseline against which the effectiveness of any other placement must be measured. This presumption can be rebutted by a showing that the student's educational needs require removal from the regular education environment. Regan-Adkins v. San Diego Unified School District, 37 IDELR 69 (United States Court of Appeals, 9th Circuit (2002)). Note: This is an unpublished decision.

E. The Court remanded the case for a determination whether the IEP Team violated the IDEA's procedural requirements in making a predetermination of placement. In doing so, the Court stated that the standard for determining whether a predetermination of placement occurs is "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives". H.B. v. Las Virgenes Unified School District, 48 IDELR 31 (United States Court of Appeals, 9th Circuit (2007)). This is an unpublished decision.

VI. Unilateral Placement

A. Due to a district's failure to provide an appropriate placement to a 16-year-old student with a specific learning disability (SLD), attention deficit disorder and a conduct disorder, his parents were entitled to reimbursement for tuition and transportation at the private school where he was unilaterally placed by his parents. The district reduced the amount of time the student spent in special education despite the student's failing grades and other evidence which indicated that the district's educational program was insufficient to meet his needs due to its lack of structure, individualized attention, and behavior management. The student progressed academically at the private school where he received increased attention and a behavior management plan, and thus, it provided an appropriate placement for the student. Capistrano Unified School District v. Wartenburg, 59 F. 3d. 884, 22 IDELR 802 (United States Court of Appeals, 9th Circuit (1995)).

B. The Circuit Court upheld a lower court ruling that the district failed to provide a FAPE to an autistic child. The parents were granted reimbursement for costs of the unilateral placement in a Lovaas clinic, plus costs for transportation and lodging since the clinic was beyond commuting distance. The Court added further that if the school district had offered an appropriate program that was available at another school within the district, the parents would not have received reimbursement. Union School District v. Smith, 15 F.3d 1519, 20 IDELR 987 (United States Court of Appeals, 9th Circuit (1994)).

C. Psychotherapeutic services provided by an acute care facility which were intended to treat the child's current medical crisis were not related services under the IDEA simply because the providers were not always licensed physicians. Clovis Unified School District v. California Office of Administrative Hearings, et al., 903 F.2d. 635, 16 IDELR 944 (United States Court of Appeals, 9th Circuit (1990)).

D. The Court denied reimbursement for a unilateral private placement based on the parents' lack of cooperation during the IEP development process. The school was never given the opportunity to make a formal offer of placement. In addition, the parents were not entitled to be reimbursed for the Independent Educational Evaluation (IEE) since the IEE was obtained before the school's evaluation was complete. C.S. v. Governing Board of the Riverside Unified School District 52 IDELR 122 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished opinion.

E. Although there were procedural errors with the development of the IEPs, the Court concluded that the IEPs provided FAPE therefore denying the parent's reimbursement request for the unilateral private placement of their student. The IEP did not include a statement of the supplementary aids and services, program modifications or supports for school personnel. The Court held the deficiency was harmless since previous IEPs included the information and no evidence was presented to show that the student was adversely impacted.
In addition, the school district did not invite the participation of the private school teacher in the development of the IEP. The Court found that the lack of participation did not result in any substantive deficit in the IEP.
Lastly, the Court concluded the lack of a timely IEP did not alter the parents' legal obligation to provide the school district with notice of their intent to make a private placement at public expense. S.J. v. Issaquah School District No. 411 52 IDELR 153 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished opinion.

VII. Discipline

A. Conduct that is caused by, related to or is a manifestation of the student's disability means conduct:
…that is caused by or has a direct and substantial relationship to the disability of the child. Put another way, the conduct of a child with a disability is covered by this definition only if the disability significantly impairs the child's behavioral controls. Although this definition may, depending on the circumstances, include the conduct of children with disabilities who possess the raw capacity to conform their behavior to prescribed standards, it does not embrace conduct that bears only an attenuated relationship to the child's disability. An example of such attenuated conduct would be a case where a child's physical disability results in the loss of self-esteem and the child consciously misbehaves in order to gain the attention or win the approval of his peers. Although such a scenario may be common among children with disabilities, it is no less common among children suffering from low self-esteem for other, equally tragic reasons.
Doe v. Maher, 793 F.2d 1470, 557 IDELR 353 (United States Court of Appeals, 9th Circuit (1986)).

VIII. Due Process Issues

A. Compensatory Education

1. The Court affirmed the Hearing Officer's conclusion that two of the three IEPs in dispute did not provide the student a FAPE. The Court then affirmed the award of compensatory education which was additional services for the student's teachers addressing the implementation of the IEP's self-help goals. In so doing, the Court noted that the award of compensatory education is a form of equitable relief and the IDEA does not require services be awarded directly to the student. Park v. Anaheim Union School District, 444 F.3d 1149, 45 IDELR 178 (United States Court of Appeals, 9th Circuit (2006)).

2. Although a district was at fault for failing to provide a student with a learning disability in math with special education during a period of his education, the student was not entitled to an award of compensatory education. In compensatory education awards, there is no obligation to provide a day-to-day compensation for time missed. Appropriate relief is relief designed to ensure that a student is properly educated under the IDEA. There was no showing that an award of compensatory education was appropriate, the student was able to graduate with his class without more services than provided for in his annual IEP, and there was evidence that his parents had declined the district's offer of extra tutoring and summer services and that such services would not have been appropriate. Parents of Student W. Ex rel. Student W. v. Puyallup School Dist. No. 3 31 F.3d. 1489, 21 IDELR 723 (United States Court of Appeals, 9th Circuit (1994)).

B. Stay Put

1. When a student moves from one school district to another school district in the same state and requests a due process hearing, under "Stay Put," the new school district must implement the former school district's IEP to the extent possible. "Stay Put" does not require the new district to develop a new program. Ms. S. v. Vashon Island School District, 39 IDELR 154 (U.S. Court of Appeals, 9th Circuit (2003)).

2. The "stay put" placement for a student transitioning from a Part C to Part B placement was the IFSP placement as agreed to by the District. However, the District is not required to provide the exact same program and vendors as the Part C agency. Johnson v. Special Education Hearing

Office. 36 IDELR 207 (United States Court of Appeals, 9th Circuit (2002)). Note: The IDEA 2006 Regulations in effect overturned the holding of this case. The current regulations state if the hearing complaint involves an application for initial services under Part B of the IDEA (ages 3-21) from a child who is transitioning from Part C of the IDEA (ages Birth-3) and the child is no longer eligible for Part C services because the child has turned 3, the public agency under Part B is not required to provide the Part C services that the child had been receiving. If the child is eligible for Part B services and the parent consents to the initial provision of special education services, then the public agency must provide those services not in dispute. (Section 300.518 (c))

3. The school district was ordered to reimburse the parents for an in-home ABA program provided by a non-public agency to their student who is autistic while the matter was being appealed. The last implemented IEP called for the home ABA program. Under the IDEA's "stay put" provision, the student is entitled to remain in the last agreed to placement (unless the parents and school otherwise agree) throughout all judicial appeals including actions brought in the Court of Appeals. Joshua A. v. Rocklin Unified School District 559 F.3d 1036, 52 IDELR 1 (United States Court of Appeals, 9th Circuit (2009)).

C. Attorney's Fees

1. The parties reached a private settlement after the due process hearing was requested. The Court, in denying attorney's fees to the parents, held that since the settlement agreement lacked judicial approval, the parents cannot be deemed to be prevailing parties. P.N. v. Seattle, 458 F.3d. 983, 46 IDELR 61 (United States Court of Appeals, 9th Circuit (2006) Amended Opinion 107 LRP 5909 (2007))

2. The Court applied the standard "degree of success" to determine whether parents who prevail in a due process hearing should be awarded full or partial reimbursement of their attorney's fees. Aguirre v. Los Angeles School District, 461 F3d 1114, 46 IDELR 91 (United States Court of Appeals, 9th Circuit (2006)).

3. The Court held that a parent who is also an attorney is not entitled to be reimbursed attorney's fees for representing their child in an IDEA proceeding. Ford v. Long Beach Unified School District,461 F3d. 1087, 46 IDELR 92 (United States Court of Appeals, 9th Circuit (2006)).

4. The Court, in reversing the District Court's denial of attorney's fees to the parents, held that the hearing officer's decision that the student was denied a FAPE since the Team inappropriately found that student ineligible for special education made the parents prevailing parties. The decision materially altered the legal relationship between the parties. V.S. v. Los Gatos-Saratoga Joint Union High School District, 484 F.3d 1230, 47 IDELR 244 (United States Court of Appeals, 9th Circuit (2007)).

5. Parents who prevail in a state administrative complaint may petition the Court for attorney's fees under the IDEA. Lucht v. Molalla River School District, 33 IDELR 89 (United States Court of Appeals, 9th Circuit (2000)).

6. A parent filed a lawsuit alleging that the State Education Agency (SEA) did not investigate an administrative complaint he filed therefore violating his IDEA and civil rights. The SEA filed a Motion to Dismiss. The parent responded by filing a Motion for Voluntary Dismissal. The District Court dismissed the matter without prejudice and awarded attorney's fees to the SEA. The Court of Appeals overturned the award of attorney's fees holding that a dismissal without prejudice is not a decision on the merits. Therefore, the SEA was not a prevailing party entitled to attorney fees. Oscar v. Alaska Department of Education and Early Development 541 F.3d 978, 50 IDELR 211 (United States Court of Appeals, 9th Circuit (2008)).

D. Miscellaneous Due Process Issues

1. The parents were not denied due process when a hearing officer dismissed a hearing request without prejudice holding that he/she did not have jurisdiction to hear issues related to a previous hearing order directing compliance with a settlement agreement. The proper forum for enforcing a previous hearing order was the State Department of Education. Wyner v. Manhattan Beach Unified School District, 33 IDELR 98 (United States Court of Appeals, 9th Circuit (2000)).

2. The Court found that the parent's due process rights were not violated when the hearing officer formulated the hearing issues in words different from the words the parents used in their request.

Also, The Court affirmed the hearing officer's decision to allow the school district psychologist to testify via television since state law permits witnesses to so testify. Ford v. Long Beach Unified School District, 291 F.3d. 1086, 37 IDELR 1 (United States Court of Appeals, 9th Circuit (2002)).

3. The parents may initiate an action in Court alleging that the District has not implemented a due process hearing decision. There is no requirement that they exhaust administrative remedies by utilizing the state's complaint resolution procedure. Porter v. Board of Trustees of Manhattan Beach Unified School District, 37 IDELR 241 (United States Court of Appeals, 9th Circuit (2002)).

4. The Court dismissed the parents' claim that educational services were not provided consistent with a settlement agreement since they did not exhaust their administrative remedies by first requesting a due process hearing. The Court held that exhaustion would not be futile. Even if the Administrative Law Judge could not provide all the relief the parents were seeking, the ALJ may be able to grant appropriate relief including the revision of the student's educational placement and providing for a more detailed schedule of services. T.L. v. Palm Springs Unified School District 51 IDELR 268 (United States Court of Appeals, 9th Circuit (2009)). Note: This is an unpublished decision.

5. The parents alleged that the school district had a policy or practice of prohibiting the videotaping of IEP Team meetings. The parents filed an administrative complaint with the State Department of Education but never filed a due process hearing request. The Court dismissed the appeal since there was a failure to exhaust administrative remedies. A hearing officer has jurisdiction to determine whether the school's refusal to allow videotaping significantly impeded the parents' right to participate at the IEP meetings as provided under the IDEA. Pedroza v. Los Alamitos Unified School District 302 Fed. Appx. 608, 108 LRP 70901 (United States Court of Appeals, 9th Circuit (2008)). Note: This is an unpublished decision.

IX. Miscellaneous Issues

A. The Court held that a parent seeking damages for her own emotional distress caused by the school district's conduct in providing special education services to

her son was not required to exhaust the administrative remedies under the IDEA before filing a lawsuit. Blanchard v. Morton School District, 420 F. 3d. 918, 44 IDELR 29 (U.S. Court of Appeals, 9th Circuit (2005)). Review denied by the United States Supreme Court.

B. The parents filed a lawsuit on their own behalf and their child who is autistic alleging a "pattern and practice of retaliatory and discriminatory acts". The Court dismissed the lawsuit for the failure to exhaust administrative remedies since a due process hearing was not requested. Exhaustion is required when any of the claimed injuries could be redressed by a hearing officer to any degree. Kutasi v. Las Virgenes Unified School District, 494 F.3d 1162, 48 IDELR 59 (United States Court of Appeals, 9th Circuit (2007)).

C. Individual states have discretion under the IDEA to determine whether home schools are considered private schools. A state's decision not to include home schoolers in IDEA programs does not violate the Constitutional equal protection or due process rights of the student/family. Hooks v. Clark County School District, 33 IDELR 120 (United States Court of Appeals, 9th Circuit (2000)).

D. In seeking only monetary damages as a result of alleged physical and emotional abuse, the parents of a child with a disability were not required to exhaust their administrative remedies. Witte v. Clark County School District, 197 F.3d 1271, 31 IDELR 128 (United States Court of Appeals, 9th Circuit (1999)).

E. Parents cannot avoid exhausting their administrative remedies by requesting a due process hearing merely by limiting the relief they are seeking to monetary damages. One must look to the source and nature of the alleged injuries not the specific remedy requested. Robb v. Bethel School District, 308 F.3d 1047, 37 IDELR 243 (United States Court of Appeals, 9th Circuit (2002)).

F. The availability of relief under the IDEA does not limit the availability of a damage claim under Section 504. Although both the IDEA and Section 504 have overlapping FAPE requirements, there are some distinctions between the two. The most important difference is that unlike FAPE under the IDEA, FAPE under Section 504 requires a comparison between the manner in which the needs of disabled and non-disabled children are met.
The Court found that there is an implied right of action under Section 504 for claiming damages for a FAPE violation. A public entity can be held liable for damages under Section 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodations to a disabled person. Mark H. v. Lemahieu, 513 F 3d 922, 49 IDELR 91 (United States Court of Appeals, 9th Circuit (2008)).

G. The Court held that "for profit" charter schools were not public schools eligible to receive federal funds under either the IDEA or the Elementary and Secondary Education Act. Under both federal statutes, an elementary and secondary school is defined as a "nonprofit" institutional day or residential school, including a public charter school. The Court held that the statutes are plain and unambiguous and therefore are controlling. Arizona State Board for Charter Schools v. United States Department of Education, 464 F.3d 1003, 46 IDELR 153 (United States Court of Appeals, 9th Circuit (2006)).

X. Questions/Comments/Conclusions

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.

Workshop 6

New 2009 FERPA Regulations: Implications for Parents, Students, Schools, and Attorneys

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New 2009 FERPA Regulations: Implications for Parents, Students, Schools and Attorneys

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Introduction

Simply speaking, the Family Educational Rights and Privacy Act (FERPA) is a law requiring any educational institution or agency that receives funds from the U.S. Department of Education to

1. provide all parents (or students when the student reaches age 18) access to their child's education records;

2. protect the privacy of education records by requiring in most cases, prior written parental permission before schools release education records; and

3. provide a process for amendment of education records if the records are inaccurate, misleading or a violation of the child's privacy rights.

The Act has been in existence since 1974 when it was signed into law by President Ford. The intent may be simple, but the definitions, the exceptions, and the procedures give complexity to the law. Every time an educator, administrator, head secretary or clerk handles a student's records or has a request for information from the record, the law and regulations must be applied. It is critical that school employees with responsibility for students' education records understand the regulations. Federal funding could be jeopardized if the law is violated.

FERPA's mandates and guidance come in three forms: as a statute passed by Congress, as a set of regulations from the US Department of Education (USDE), and as a series of interpretive guidance letters from the Family Policy Compliance Office (FPCO), which is the office of the USDE with supervision over FERPA. Technical assistance and enforcement is carried out through the FPCO, which has a reputation of being responsive and helpful. The FPCO has an easily maneuverable website at http://www.ed.gov/policy/gen/guid/fpco and can be reached by telephone at (202) 260-3887. Individuals who use TDD may call the Federal Information Relay Service at 1-800-877-8339.

Part I. of this document covers the basics of FERPA, which have not changed, and Part II. focuses on the new regulations, which became effective January 9, 2009. The 2009 Regulations contain a multitude of changes. Some are critical. Some reflect two Supreme Court decisions. Some are in response to the shooting at Virginia Tech in 2007. Other changes reflect the role of electronic communication in education. Some only apply to institutes of higher education and this document will not address those changes. Still others codify what has been accepted practice and the FPCO's position promulgated through interpretive letters. The new regulations are attached. **(Appendix A)**

I. The Unchanged Basics of FERPA

A. Authority of FERPA

Any institution for which funds have been made available from the US Department of Education, and which provides educational services or instruction or both, or is authorized to direct or control public elementary, secondary, or post-secondary educational institutions must comply with FERPA. Examples of the governed institutions are public schools, school districts, education service districts, charter schools, state departments of education, and offices of state superintendents of education. Institutions of higher education also are governed by FERPA. Post-secondary provisions will not be addressed here except in the context of their effect on and applicability to K-12 schools and school districts. The education entities governed by FERPA will be referred to as schools or school districts, as appropriate, unless the context requires otherwise.

B. Rights of Parents

The parent has the full right to inspect and review all the education records of their student, and the right to make reasonable requests for an explanation and interpretation of the records. 34 CFR § 99.10(c). "Parent" is a broad term including a natural parent, a guardian, and an individual acting as a parent in the absence of a parent of a guardian.

Under certain circumstances, stepparents are treated as "parents." An interpretive letter from FPCO explains the rights of a stepparent.

> The Department has determined that a parent is absent if he or she is not present in the day-to-day home environment of the child. Accordingly, a stepparent has rights under FERPA where the stepparent is present on a day-to-day basis with the natural parent and child and the other parent is absent from that home. In such cases, stepparents have the same rights under FERPA as do natural parents. Conversely, a stepparent who is not present on a day-to-day basis in the home of the child does not have rights under FERPA with respect to such child's education records. *(FPCO Letter to Parent of August. 20, 2004* - **Appendix B**).

In the event of divorce, noncustodial parents are afforded the same rights as custodial parents unless there is a court order to the contrary. The regulations have long been clear. "An educational agency or institution shall give full rights under the Act to either parent unless the school has been provided with evidence that there is a court order, state statute or legally binding document relating to such matters as divorce, separation or that specifically revokes these rights." 34 CFR § 99.4. Schools can and should require verification of the parental relationship before providing access to records if the school does not have knowledge of the relationship.

The school must comply with a request for access to the records within a reasonable time, but not more than 45 days after it has received the request. 34 CFR § 99.10(b).

Parents do not automatically have a right to a copy of the records, unless not receiving a copy would prevent the parents from exercising their rights under FERPA. 34 CFR § 99.10(d).

The school may not charge a fee if that would prevent the parent from exercising their right to inspect and access the education records. 34 CFR § 99.11(a) If a fee is charged, it may only be for copying; no fee for the time to search for and retrieve the records of a student may be charged. 34 CFR § 99.11(b).

If the education records of one student contain information about other students, the parent may only inspect the information about their own child. 34 CFR § 99.12(a).

C. Rights of Students

When a student becomes 18 years of age, the parents' right of access and inspection of the education records transfers to the student. 34 CFR § 99.5(a)(1). The student is referred to as an "eligible student" for FERPA purposes. If a student under the age of 18 is enrolled in a post-secondary institution for a class or program, the education records of the student at that institution will be treated as the records of an "eligible student." This has not changed.

The parent still may have access to the records of an "eligible student" if the student is a dependent of the parent for purposes of the IRS, or in the event of a health or safety emergency. 34 CFR § 99.5(a)(2). This disclosure, however, is within the discretion of the educational institution.

The regulations do not address deceased students. FPCO has stated that under Common Law, privacy rights of individuals expire upon the death of the individual. An interpretive letter, *Letter re Rolla School District No. 31 (FPCO, Jan 14, 2002)*, provides guidance that the FERPA rights of eligible students lapse or expire upon the death of the student. FERPA rights, however, do not lapse or expire upon the death of a non-eligible student, that is, parents' rights to privacy do not terminate solely because their child is deceased.

Schools have authority to give students rights in addition to those given to the parents. 34 CFR § 99.5 (b)

D. Form of Education Record

"Education record" means information memorialized in any way including, but not limited to handwriting, print, computer media, video or audio tape, film, microfilm and microfiche. 34 CFR § 99.3.

FERPA does not require a school to create or maintain education records, or to re-create lost or destroyed records. It also does not require a school to keep education records in any particular form or location. *Letter re Horry County School District, 10 FAB 19 (FPCO 2006).*

E. Contents of Education Record

The regulations define "education records" as those records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. It is only education records that are governed by FERPA, not observations or conversations.

The exclusions to "education records" give the definition clarity. Most of those exclusions have not been changed by the 2009 Regulations:

- Records kept in the sole possession of the maker, used only as a personal memory aid and not accessible or revealed to any other person except a temporary substitute for the maker of the records;

- Records of a law enforcement unit (See G. below Records of Law Enforcement Unit);

- Records of an employee of the educational institution, made in the normal course of doing business, that relate exclusively to that person's capacity as an employee and are not available for any other purpose;

- Treatment records for a student 18 years of age or older that are made, maintained or used only in connection with treatment of the student, and disclosed only to those providing the treatment; and

- Records created or received after a student is no longer in attendance and that are not directly related to the individual's attendance as a student.

F. Contents of Annual Notification

The Act requires each educational institution to give an Annual Notice to parents of their rights under FERPA. 34 CFR § 99.7. This requirement is unchanged. Under 34 CFR § 99.7(a)(2), the Annual Notice must inform the parents they have a right to

- Inspect and review their child's education records;

- Seek amendment of the record if they believe the record to be inaccurate, misleading or otherwise in violation of the student's privacy rights;

- Consent to disclosure to third parties; and

- File a complaint with the US Department of Education.

Additionally, by 34 CFR§ 99.7(a)(3), the Annual Notice must include the following:

- The procedure for exercising the right to inspect and review education records;

- The procedure for requesting the amendment of an education record; and

- If the district has a policy of disclosing records to education officials who have a legitimate educational interest, then who constitutes a school official and what constitutes a legitimate educational interest.

The Annual Notice may also address the required notice to parents of their right to "opt out" of access by military recruiters to identifying information about their child, and to "opt out" of disclosure of Directory Information for their child.

The regulations give educational institutions discretion in the form of the notice so long as the notice is reasonably likely to inform parents and eligible students of their rights. Common forms of providing notice are the school handbook, the newsletter of the school or district, and a newspaper of general circulation in the area.

A copy of the model policy for an Annual Notice provided by the USDE is attached. **(Appendix C)**

Parents and eligible students who are disabled must be effectively notified, as well as parents who have a primary or home language other than English. 34 CFR § 99.7(b).

G. Records of Law Enforcement Units

The regulations neither prohibit nor require the disclosure of records of a law enforcement component of an educational agency. 34 CFR § 99.8(d).

A law enforcement unit is defined as any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized by that agency to enforce laws or to refer matters to appropriate law enforcement agencies, or to maintain the physical security and safety of the agency or institution. 34 CFR § 99.8(a.)(1).

The law enforcement unit does not lose its designation if it also performs other non-law enforcement functions for the school or district, for example, the investigation of incidents that lead to a disciplinary action against the student. 34 CFR § 99.8(a)(2).

The records of a law enforcement unit mean those records that are

- Created by a law enforcement unit;
- Created for a law enforcement purpose; and
- Maintained by the unit. 34 CFR § 99.8(b)(1).

Records of a law enforcement unit do *not* include records made by the law enforcement unit, but maintained by some other component of the district. Also, records created and maintained by a law enforcement unit, but used exclusively for non-law enforcement purposes such as disciplinary action by the district are not "records of a law enforcement unit" for FERPA purposes.

H. Amendment of an Education Record

The process for amendment of an education record has not changed. If a parent or eligible student believes a record to be inaccurate, misleading or in violation of the student's right of privacy, he or she has the right to request an education record be amended. 34 CFR § 99.20. This right is not unlimited, however, and FERPA does not require a school to afford a parent the right to seek to change substantive decisions made by school officials, such as grades or other evaluations of a student. *(FPCO Letter to Parent of August 20, 2004* **- Appendix B**).

The school/district must make a decision whether or not to amend the record as requested. 34 CFR § 99.20(a). There is no specified time for this determination; but it must be within a reasonable time after receiving the request. 34 CFR § 99.20(b). If the decision is not to amend, the school/district must notify the parent or eligible student of the decision and the right to a hearing to challenge the contested record.

The minimum requirements for the hearing are set forth at 34 CFR § 99.21 and include the following:

- The school/district must give the parent or eligible student notice of the date, time, and place of the hearing reasonably in advance of the hearing.
- The hearing must be conducted by a person, including an official of the school/district, who does not have a direct interest in the outcome of the hearing.
- The parent or eligible student must be given a full and fair opportunity to present evidence relevant to the issues.
- The parent or eligible student may be assisted or represented by someone of their own choice and at their own expense, including an attorney.
- The hearing officer must provide the decision in writing and within a reasonable time after the hearing.
- The decision must be based solely on the evidence presented at the hearing, and include a summary of the evidence and the reason for the decision.

If the decision as a result of the hearing is to amend, the school/district will notify the parent or eligible student who requested the hearing and amend the record.

If the decision as a result of the hearing is not to amend, the parent or eligible student must be notified of that decision and of his or her right to place a statement in the record commenting on the contested information, or why he or she disagrees with the decision of the school, or both. If the parent or eligible student gives such a statement to the school/district, then that statement must be maintained with the contested part of the record so long as that record is maintained, and disclosed whenever the contested record is disclosed.

I. Written Consent to Disclose Information

In all cases except the sixteen exceptions specified at 34 CFR § 99.31, the parent must provide prior written, signed and dated consent before the school/district will disclose information from the education records. "Signed and dated" may include a record and signature in an electronic format that identifies and authenticates a particular person as the source of the electronic consent and indicates such person's approval of the information contained in the electronic consent.

The written consent must

- Specify the records to be disclosed;
- State the purpose for the disclosure; and
- Identify the person or group of persons to whom the disclosure is requested to be made.

If the parent of an eligible student requests, the school/district must provide him or her with a copy of the records disclosed.

An example of a request form is attached. **(Appendix D)**

J. Disclosure of Information Without Consent

Most of the exceptions to prior parental consent specified in 34 CFR § 99.31 did not change. All are authorized; none are mandatory, that is, the educational institution can choose not to utilize any of the permitted exceptions. The most common exceptions utilized by schools and districts are:

- Disclosure to school officials, which includes teachers, who have a "legitimate educational interest." This also includes entities to which the school/district has outsourced services or functions that would otherwise be performed by a school/district employee, and the entity is under the direct control of the school/district with regard to the use and maintenance of education records. [Note: If the educational agency has a policy of disclosing education records to school officials with a legitimate educational interest, the specific criteria for determining who constitutes a "school official" and what constitutes a "legitimate educational interest" must be included in the Annual Notice.]

- To parents if their child is not an "eligible student."

- Disclosure of information that the school/district has designated as Directory Information.

- To officials of another educational institution or agency where the student seeks or intends to enroll.

- In conjunction with a health or safety emergency.

- Regarding sex offenders and other individuals required to register under the Violent Crime Control and Law Enforcement Act of 1994, 42 USC § 14071.

- To comply with a lawfully issued subpoena or court order.

- To representatives of the US Comptroller General, US Attorney General, Secretary of USDE, or state and local educational authorities.

- To organizations conducting studies for educational agencies or institutions to develop, validate or administer predictive tests, administer student aid programs or improve instruction if the conditions at 34 CFR § 99.31(6)(ii) are met.

- To parents of a dependent student as that term is defined under 26 U.S.C. § 152 of the IRS Code of 1986.

K. Directory Information

A school/district is authorized to disclose Directory Information, but is not required to do so. Directory Information is defined as including, but not limited to, the student's

> name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status; dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended. 34 CFR § 99.3.

The discretion is with the school or district as to which, if any, of these categories will be designated as Directory Information. Concerns about safety and privacy have lead many districts to not include a student's telephone number, home address and place of birth.

Directory Information about students is frequently used in the school newspaper and yearbook. The media uses Directory Information for coverage of sports events, and announcements of Honor Roll and awards recipients. Parents planning graduation festivities and booster clubs also utilize Directory Information. Some districts differentiate between elementary and secondary schools in the designation of Directory Information to accommodate the greater need for readily available student information at the high school level.

Social Security numbers and student identification numbers are not included as directory information. See II. B. below.

If a school/district chooses to disclose certain categories of information as Directory Information, it must give public notice to parents of students of the types of personally identifiable information that the school or district has designated as Directory Information, and the parent's or eligible student's right to refuse to let the school or district disclose any or all of those types of information about the student as Directory Information. 34 CFR § 99.37(a)(2)

L. Disclosure of Records to Juvenile Justice System

The school or district may disclose education records to the juvenile justice system if such disclosure is permitted by state statute to assist the system to effectively serve, prior to adjudication, the student whose records are being disclosed. 34 CFR § 99.31(a)(5)(i)(B); 34 CFR § 99.38

II. What's New as of 2009

A. Definition of Attendance - 34 CFR § 99.3

The 2009 Regulations expand the definition of "attendance" to include situations where students attend classes, but are not physically present, such as attendance by video conferencing, satellite, Internet or other electronic information and telecommunications technologies. The intent is to ensure that individuals who receive instruction by distance learning and other contemporary means are "students" under FERPA so their education records are protected by FERPA.

B. Limitation of Directory Information - 34 CFR § 99.3

The 2009 Regulations restrict what can be included as Directory Information by prohibiting the inclusion of a student's Social Security number (SSN). Student identification numbers may be disclosed only if they qualify as "electronic identifiers." An electronic identifier functions essentially as a name and cannot be used by itself to gain access to education records. To access records, the electronic identifier must be accompanied by a Personal Identification Number (PIN). The intent is to reduce the risk of unauthorized access to personal information and identity theft.

Teachers still may use class lists with student identification numbers, but cannot make them available to students or parents. If a teacher posts grades publicly, he/she will need to use a code known only to the teacher and the individual student.

C. Redefining Disclosure - 34 CFR § 99.3

In the past returning an education record to the party identified as the provider or creator of the record (usually a school district) was considered a "disclosure," and therefore had to have the parent or eligible student's consent. The 2009 Regulations exclude from the definition of "disclosure" the return of an education record to the provider or creator of that education record.

The intent is to help schools deal with falsified transcripts and letters of recommendation by allowing a person or institution that has received a questionable document to return it to the provider or creator for verification.

D. Meaning of "Post-Enrollment" Records - 34 CFR § 99.3

The 2009 Regulations clarify that records that pertain to an individual while they were a student are education records under FERPA, even if the record was created or received by the district after the student left the school. An example would be a settlement agreement in a lawsuit brought by the student after the student left the school. Such a document could only be released with the requisite consent.

E. Allowance of Peer Grading - 34 CFR § 99.3

Based upon the U.S. Supreme Court decision that allowed "peer grading" *Owasso Independent School District v. Falvo, 534 U.S. 426 (2002)*, schools may allow students to grade each other's papers and then call out the grade or turn in the paper for the teacher to record the grade without violating FERPA. The Court said the grades on the student's papers are not "maintained" by the school until the teacher has collected the papers and recorded them in the teacher's grade book.

Reflecting the Court's decision, the 2009 Regulations create a new exception to the definition of "education records" that excludes grades as peer graded papers before they are corrected and recorded.

This means there is no privacy afforded to a student's work before it is recorded. Neither does the parent have a right of access to the student's prerecordation work. This is consistent with FPCO's past position that FERPA does not intend for parents to have access to all the work of their student. Writing samples, daily work, pre-tests and personal notes are not intended to be included as "education records." *K.C. v. Fulton County School District, 10 FAB 8 (N.D. Ga 2006)*

F. Disclosure to Parents of "Eligible Students"

If a high school student under the age of 18 is enrolled in a post-secondary class or program, the education records related to enrollment in the post-secondary class or program are governed by FERPA provisions relating to post-secondary institution and eligible students.

Regulations prior to 2009 permitted colleges and other post-secondary institutions to disclose education records of a student to their parent under certain circumstances; however, some post-secondary institutions, according to the USDE, did not seem to understand their options.

The 2009 Regulations clarify that disclosure to the parent without the student's consent is permissible

- if the student is a dependent child for federal income tax purposes (34 CFR § 99.31(a)(8)); or

- is in connection with a health or safety emergency (34 CFR § 99.36); or

- for post-secondary students, if the student has violated the law or the institution's policy regarding use or possession of alcohol or drugs and the institution has determined the student committed a disciplinary violation and the student is less than 21 years of age at the time of the disclosure (34 CFR § 99.31(a)(15).)

The institution still may choose to not disclose information to parents of an eligible student, but this would be the school's choice. 34 CFR § 99.31(a)(1)(i)(B)

G. Expansion of the Definition of School Officials

Recognizing that schools frequently outsource functions and services, the 2009 Regulations include under "school officials," the various contractors, consultants, volunteers and other outside service providers used by the school district. 34 CFR § 99.31 (a)(1)(i)(B). Any outside service provider is covered under the exception to recordation requirements, i.e., they may have access to the education records without the consent of the parent or eligible student if they have been determined to have a legitimate educational interest in the information. In this situation, the disclosure does not need to be included in the "Record of Request for Access." 34 CFR § 99.32(d)(2); 34 CFR § 99.31(a)(1)(B)

H. Accountability for "Legitimate Educational Interests" - 34 CFR § 99.31(a)(1)(ii)

In the past there were no specific requirements for school districts to ensure that only school officials with a "legitimate educational interest" had access to a student's records.

The 2009 Regulations require school districts to use reasonable methods to ensure that teachers and other school officials obtain access only to those records in which they have legitimate educational interests. 34 CFR § 99.31(a)(1)(ii). The Preamble to the final regulations explains that methods are considered reasonable if they reduce the risk to a level commensurate with the likely threat and potential harm. For example, Social Security numbers, with their potential for identity theft, should receive greater and more immediate protection than information designated as Directory Information.

A school may use controls that are physical, e.g., locks on filing cabinets; technological, e.g., software applications with role-based security features for access to electronic records; or administrative, e.g., policies. Whether the school uses physical, technological or administration controls, if a parent complains that a school official without a "legitimate educational interest" gained access to the student's records, the burden is on the district to show the official had a "legitimate educational interest".

I. Disclosure to New School - 34 CFR § 99.31(a)(2)

There has been uncertainty as to when a school can send education records to a student's new school without parental consent. The question arises around the "seeks or intends to enroll" language. The 2009 Regulations clarify that the authority to disclose or transfer education records without consent to a student's new school does not stop at the time a student enrolls. The authority continues so long as the disclosure is for purposes related to the student's enrollment or transfer. The previous school can update, supplement or correct any records it has sent in relation to enrollment or transfer.

J. Additional Requirements for Organizations Conducting Studies - 34 CFR § 99.31(a)(6)

Schools have long been permitted to disclose education records without prior parental consent to organizations conducting studies to develop, validate or administer predictive tests, administer student aid programs or improve instruction.

The 2009 Regulations require a school to enter into a written agreement with the organization that specifies the purpose of the study before using this exception to parental consent.

The written agreement must require the organization to conduct the study in a manner that does not permit personal identification of parents and students by anyone other than representatives of the organization with legitimate interests. The final regulations also require that the written agreement must specify the purpose, scope, and duration of the study and the information to be disclosed; require the organization to destroy or return all personally identifiable information when no longer needed for the purposes of the study; and specify the time period during which the organization must either destroy or return the information.

K. Disclosure of Registered Sex Offenders - 34 CFR § 99.31(a)(16)

Although the impetus came from sex offender registration and notification requirements designed specifically for higher education campus communities, the 2009 Regulations have implications for schools and school district operations. The new regulations require school districts to advise the school community where it can obtain information about registered sex offenders, such as a local law enforcement agency or a computer network address.

The 2009 Regulations add a new exception that allows a school district to disclose, without consent, information it has received from the state under the federal Wetterling Act, 42 U.S.C. § 14071, about a student who is required to register as a sex offender in the state. The Wetterling Act requires states to require certain sex offenders to register their name and address with the state authority where the offender lives, works, or is enrolled as a student.

Note: All disclosures under this exception must comply with guidelines issued by the U.S. Attorney General for state community notification programs, published in the *Federal Register* on January 5, 1999 (64 FR 572) and October 25, 2002 (67 FR 65598).

L. Authentication of Identity - 34 CFR § 99.31(c)

The 2009 Regulations require a school to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other party to whom they disclose education records. A simple and reasonable method for authentication of noncustodial parents would be to require the showing of one document as evidence of the parental relationship and one document of government issued identification to verify the requester is who he/she claims to be.

Authentication of identity is more complex for disclosure of electronic records as new methods and technologies are developed. The 2009 Regulations authorize districts to use PIN numbers, personal security questions, biometric indicators or other factors known only by the user.

M. Redisclosure of Records - 34 CFR § 99.33

Until the 2009 Regulations, if an entity received education records, it could not, without prior written consent, redisclose any personally identifiable information from the records unless (1) the district initially disclosing the records did so with the understanding that the recipient may make further disclosures on its behalf under one of the exceptions in § 99.31, and (2) the entity recorded the disclosure.

Federal and state officials who receive education records for audit, evaluation or compliance and enforcement purposes under 34 CFR § 99.31(a)(3) and 34 CFR § 99.35 have not been able to redisclose education records. The 2009 Regulations permit the officials to redisclose the received education records under the same conditions that apply to other recipients of education records.

If the State Education Agency has obtained education records for an audit, evaluation, or compliance and enforcement purposes, it may redisclose the records for purposes under 34 CFR § 99.31, such as forwarding the records to a student's new school. The intended effect is to "facilitate the development of consolidated state data systems used for accountability and research purposes." The redisclosure may also be for other purposes listed in 34 CFR § 99.31, such as health or safety emergency, to an accrediting agency, or in compliance with a court order or subpoena.

The requirement for parent notification before complying with a court order or subpoena remains intact in the 2009 Regulations, so an entity redisclosing in response to a subpoena must provide the notification required under 34 CFR § 99.31(a)(9)(ii). That provision requires a reasonable attempt to notify the parent or eligible student before disclosing the records. If the redisclosing entity does not notify the parent as required, the district may not allow that entity access to education records for at least five years.

The 2009 Regulations ease the record keeping requirements of the district. The regulations require a state or federal official that rediscloses education records to comply with the recordation requirements (which before were solely required of the district) if the district does not do so, and make the record available to the district upon request within 30 days. 34 CFR § 99.32(b)

If a parent or eligible student requests to review the student's record of disclosures, the district must obtain a copy of the state or federal official's record of further disclosures and make it available to the requestor. 34 CFR § 99.32(a)(4)

N. Health and Safety Emergencies - 34 CFR § 99.36

Prior consent by the parent or eligible student has not been required when disclosure is in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. The regulations, however, have stated this provision must be "strictly construed."

The 2009 Regulations removed the strict construction language, substituting language that permits a district to take into account the totality of the circumstances pertaining to a threat to the safety or health of the students or other individuals.

The district must record the "articulable and significant threat" that was the basis for the disclosure and the parties to whom the information was disclosed.

The 2009 Regulations also establish the level of the USDE's scrutiny. If there is a rational basis for the determination, the USDE will not substitute its judgment for that of the district making the determination.

The impetus for this revision to the regulations was the incident at Virginia Tech in 2007. The USDE determined greater flexibility and deference should be afforded to administrators so that they can bring greater resources to bear in circumstances that threaten the health or safety of individuals.

O. Disclosure of Directory Information - 34 CFR § 99.37

The regulations have established in the past that disclosure of information designated as Directory Information may be disclosed without meeting the requirement of prior parental consent. Schools must give parents notice of what has been designated as Directory Information, and provide an opportunity for the parent or student to "opt out" before making a Directory Information disclosure.

The 2009 Regulations provide more specificity regarding Directory Information. Schools must honor a former student's "opt out" request made while the student was in attendance, unless the student has subsequently specifically rescinded the "opt out" request. 34 CFR § 99.37(b). The intent is to clarify that schools cannot release Directory Information of a former student if this would not have been permitted when the student was in attendance.

The 2009 Regulations clarify that opting out of Directory Information does not give a student the right to be anonymous in class. Specifically, the regulations provide that a school may identify a student by name, an electronic identifier, or an institutional e-mail address in class. The intent is to not allow a confidentiality choice to impede routine classroom communication, whether in a physical site or through electronic communications. 34 CFR § 99.37(c)

The 2009 Regulations specifically prohibit the use of Social Security numbers to identify students when disclosing or confirming directory information. Only if a student has provided written consent for disclosure of his or her Social Security number can it be used.

P. Enforcement of Provisions - 34 CFR § 99.62, 34 CFR §§ 99.64-67

FERPA is enforced through the Family Policy Compliance Office (FPCO). The primary charge in the 2009 Regulations strengthen the enforcement responsibility as described in *Gonzaga University v. Doe, 536 U.S. 273 (2002).* The regulations clarify that the FPCO not only may investigate a complaint by the parent or eligible student, but may conduct its own investigation when no compliant has been filed or a complaint has been withdrawn. The intent of this change was to allow an investigation when information has been brought to the attention of FPCO by media reports. 34 CFR § 99.64

Another change is that the complaint does not have to allege that the district has a policy or practice of violating FERPA in order for the USDE to initiate an investigation or find a violation.

Q. Recommendations for Prevention of Unauthorized Disclosures and Responses to Data Breaches

The Preamble to the 2009 Regulations contains non-binding guidance to help schools and school districts safeguard students' education records.

The Preamble raises awareness by addressing potential unauthorized disclosure through inadvertent posting of students' grades or financial information on publicly available web servers, theft or loss of laptops that contain education records, and failure to retrieve education records from officials at termination of employment.

- The guidance also suggests appropriate responses to data breaches including:

- reporting the incident to law enforcement authority;

- taking steps to retrieve data and prevent further disclosures;

- identifying all affected records and students;

- determining how the unauthorized disclosure occurred and whether district policies and procedures were breached; and

- conducting a risk assessment.

Summary

The 2009 Regulations, in the words of FPCO, "Represent an appropriate balance between preserving students' privacy, promoting their safety, and facilitating research and accountability that will help ensure that students receive a quality education." Greater clarification will be welcomed by parents exercising their rights of access and privacy, and to school officials who every day must navigate the delicate balance between the competing privacy rights of individual students with the safety and welfare of all.

APPENDIX A

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Title 34: Education

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

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Authority: 20 U.S.C. 1232g, unless otherwise noted.

Source: 3 FR 11943, Apr. 11, 1988, unless otherwise noted.

Subpart A—General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in §99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000]

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

Note to §99.2: 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of information requirements regarding children and infants and toddlers with disabilities and their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data, information, and records collected or maintained pursuant to Part B of the IDEA.

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 73 FR 74851, Dec. 9, 2008]

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

Attendance includes, but is not limited to—

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

Biometric record, as used in the definition of *personally identifiable information,* means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

Dates of attendance. (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.* , undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this section.

(c) Directory information includes a student ID number, user ID, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

Educational agency or institution means any public or private agency or institution to which this part applies under §99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

Education records. (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of §99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

(Authority: 20 U.S.C. 1232g(a)(4))

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

Party means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

Personally Identifiable Information

The term includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

(Authority: 20 U.S.C. 1232g)

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

[53 FR 11943, Apr. 11, 1988, as amended at 60 FR 3468, Jan. 17, 1995; 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000; 73 FR 74851, Dec. 9, 2008]

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of students?

(a)(1) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in §99.31(a)(8), §99.31(a)(10), §99.31(a)(15), or any other provision in §99.31(a).

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

(Authority: 20 U.S.C. 1232g(d))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3188, Jan. 7, 1993; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008]

§ 99.6 [Reserved]

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and §99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under §99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under §99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g (e) and (f))

[61 FR 59295, Nov. 21, 1996]

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of §99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

[60 FR 3469, Jan. 17, 1995]

Subpart B—What Are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under §99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of *Education records* in §99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

Subpart C—What Are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under §99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by §99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under §99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in §99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(d) "Signed and dated written consent" under this part may include a record and signature in electronic form that—

(1) Identifies and authenticates a particular person as the source of the electronic consent; and

(2) Indicates such person's approval of the information contained in the electronic consent.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 69 FR 21671, Apr. 21, 2004]

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(*1*) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(*2*) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(*3*) Is subject to the requirements of §99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of §99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

Note: Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(3) The disclosure is, subject to the requirements of §99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, *financial aid* means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of §99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) An educational agency or institution may disclose information under paragraph (a)(6)(i) of this section only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution enters into a written agreement with the organization that—

(*1*) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(*2*) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(*3*) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests;

and

(*4*) Requires the organization to destroy or return to the educational agency or institution all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be returned or destroyed.

(iii) An educational agency or institution is not required to initiate a study or agree with or endorse the conclusions or results of the study.

(iv) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(v) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in §99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in §99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in §99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in §99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in §99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by §99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that—

(i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party except for parties under paragraph (a)(12) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j)).

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 61 FR 59296, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec, 9, 2008; 74 FR 401, Jan. 6, 2009]

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in §99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under §99.33(b).

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in §99.31(a)(10) and §99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding authorized under §99.33(b), the record of the disclosure required under this section must include:

(i) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(ii) The legitimate interests under §99.31 which each of the additional parties has in requesting or obtaining the information.

(2)(i) A State or local educational authority or Federal official or agency listed in §99.31(a)(3) that makes further disclosures of information from education records under §99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under §99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

(B) Another State or local educational authority or Federal official or agency listed in §99.31(a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appropriate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in §99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in §99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under §99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving records in accordance with §99.31(a)(9)(ii)(A) through (C).

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74853, Dec. 9, 2008]

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b)(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(i) The disclosures meet the requirements of §99.31; and

(ii)(A) The educational agency or institution has complied with the requirements of §99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in §99.31(a)(3) has complied with the requirements of §99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under §99.31(a)(9) must provide the notification required under §99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(e) If this Office determines that a third party outside the educational agency or institution improperly rediscloses personally identifiable information from education records in violation of this section, or fails to provide the notification required under paragraph (b)(2) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74853, Dec. 9, 2008]

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under §99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under §99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a)(1) Authorized representatives of the officials or agencies headed by officials listed in §99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) Authority for an agency or official listed in §99.31(a)(3) to conduct an audit, evaluation, or compliance or enforcement activity is not conferred by the Act or this part and must be established under other Federal, State, or local authority.

(b) Information that is collected under paragraph (a) of this section must:

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the officials or agencies headed by officials referred to in paragraph (a) of this section, except that those officials and agencies may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of §99.33(b); and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under §99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(3))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008]

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may

disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled.

(d) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in §99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008]

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under §99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g(b)(1)(J))

[61 FR 59297, Nov. 21, 1996]

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson
Assault offenses
Burglary
Criminal homicide—manslaughter by negligence
Criminal homicide—murder and nonnegligent manslaughter
Destruction/damage/vandalism of property
Kidnapping/abduction
Robbery
Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

(Authority: 20 U.S.C. 1232g(b)(6))

[65 FR 41853, July 6, 2000]

Subpart E—What Are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, *Office* means the Family Policy Compliance Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term *applicable program* is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports, information on policies and procedures, annual notifications, training materials, and other information necessary to carry out its enforcement responsibilities under the Act or this part.

(Authority: 20 U.S.C. 1232g(f) and (g))

[73 FR 74854, Dec. 9, 2008]

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

[65 FR 41854, July 6, 2000, as amended at 73 FR 74854, Dec. 9, 2008]

§ 99.64 What is the investigation procedure?

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a violation is based on a policy or practice of the educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

(Authority: 20 U.S.C. 1232g(f))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 65 FR 41854, July 6, 2000; 73 FR 74854, Dec. 9, 2008]

§ 99.65 What is the content of the notice of investigation issued by the Office?

(a) The Office notifies the complainant, if any, and the educational agency or institution in writing if it initiates an investigation under §99.64(b). The notice to the educational agency or institution—

(1) Includes the substance of the allegations against the educational agency or institution; and

(2) Directs the agency or institution to submit a written response and other relevant information, as set forth in §99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notifies the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of §99.64.

(Authority: 20 U.S.C. 1232g(g))

[73 FR 74855, Dec. 9, 2008]

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the agency or institution. A notice of findings issued under paragraph (b) of this section to an educational agency or institution that has not complied with a provision of the Act or this part—

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74855, Dec. 9, 2008]

§ 99.67 How does the Secretary enforce decisions?

(a) If an educational agency or institution does not comply during the period of time set under §99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part E of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a compliant to compel compliance through a cease-and-desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under §99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

(Note: 34 CFR part 78 contains the regulations of the Education Appeal Board)

(Authority: 20 U.S.C. 1232g(f); 20 U.S.C. 1234)

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 73 FR 74855, Dec. 9, 2008]

Appendix A to Part 99—Crimes of Violence Definitions

Arson

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Assault Offenses

An unlawful attack by one person upon another.

Note: By definition there can be no "attempted" assaults, only "completed" assaults.

(a) *Aggravated Assault.* An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) *Simple Assault.* An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) *Intimidation.* To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

Note: This offense includes stalking.

Burglary

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

Criminal Homicide—Manslaughter by Negligence

The killing of another person through gross negligence.

Criminal Homicide—Murder and Nonnegligent Manslaughter

The willful (nonnegligent) killing of one human being by another.

Destruction/Damage/Vandalism of Property

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

Kidnapping/Abduction

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

Note: Kidnapping/Abduction includes hostage taking.

Robbery

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

Note: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.

Sex Offenses, Forcible

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) *Forcible Rape* (Except "Statutory Rape"). The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) *Forcible Sodomy.* Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(c) *Sexual Assault With An Object.* To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

Note: An "object" or "instrument" is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc.

(d) *Forcible Fondling.* The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

Note: Forcible Fondling includes "Indecent Liberties" and "Child Molesting."

Nonforcible Sex Offenses (Except "Prostitution Offenses")

Unlawful, nonforcible sexual intercourse.

(a) *Incest.* Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) *Statutory Rape.* Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C. 1232g(b)(6) and 18 U.S.C. 16)

[65 FR 41854, July 6, 2000

APPENDIX B

August 20, 2004

Dear Parent:

This is in response to a May 5, 2004, letter this Office received from Kay Hastings, Assistant Attorney General, Open Records Division of the Office of the Texas Attorney General. Along with her letter, Ms. Hastings forwarded to us your March 29, 2004, letter to Greg Abbott, the Attorney General of Texas. This Office administers the Family Educational Rights and Privacy Act (FERPA), which addresses issues that relate to students' education records.

In your letter, you raise a number of issues, some of which are addressed by FERPA. For example, it appears that you allege that Irving Independent School District (District) violated FERPA when it did not provide your wife with "Three-Weeks Reports" which you state is required by the State's "No Pass—No Play" law. You also appear to allege that, even though your wife, has provided consent, requesting that the District provide you with access to the records of (Student), that the District has not complied. You enclosed a letter from Mr. Jack Singley, Superintendent, in which he replied to your wife's request by asking that she submit a copy of the most current court degree granting custodianship of her children. It is not clear whether your wife complied with Mr. Singley's request. Some of your other allegations that may relate to FERPA are also not clear. However, we trust that the following guidance regarding FERPA will be of assistance to you. The other issues you raise concerning State law are not addressed by FERPA.

FERPA is a Federal law that gives parents or eligible students the right to have access to a student's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. The term "education records" is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 "Education records."

The term "parent" is defined as including natural parents, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. 34 CFR § 99.3 "Parent." The Department has determined that a parent is absent if he or she is not present in the day-to-day home environment of the child. Accordingly, a stepparent has rights under FERPA where the stepparent is present on a day-to-day basis with the natural parent and child and the other parent is absent from that home. In such cases, stepparents have the same rights under FERPA as do natural parents. Conversely, a stepparent who is not present on a day-to-day basis in the home of the child does not have rights under FERPA with respect to such child's education records.

Under FERPA, a school must provide a parent with an opportunity to inspect and review his or her child's education records within 45 days of the receipt of a request. A school is not, however, required to provide a parent with copies of education records unless a failure to do so would effectively prevent the parent from obtaining access to the records. A case in point would be a situation in which the parent does not live within commuting distance of the school. 34 CFR § 99.10.

While a school is required to comply within 45 days with each individual request for access, a school is not required by FERPA to honor standing requests, to provide immediate access to records, or to send out grades to parents at the end of marking periods. Additionally, FERPA would not require a school to provide parents documents such as school calendars, updates, or notices of parent/teacher conferences because such documents do not generally contain information that is directly related to individual students. Likewise, a school would not be required to notify parents about school plays,

spelling bees, or sporting events in which their children may be participating. Also, schools are not required by FERPA to permit parents to attend parent/teacher conferences — such decisions are made at the discretion of local and State officials.

Although a school district would be required to conduct a reasonable search for education records, it is the responsibility of the parent to clearly specify the records to which he or she is seeking access. If a parent makes a "blanket" request for a large portion of his or her child's education records and the parent believes that he or she was not provided certain records which were encompassed by that request, the parent should submit a follow-up request clarifying the additional records he or she believes exist.

FERPA affords parents the opportunity to seek amendment of their child's education records that they believe contain inaccurate or misleading information. 34 CFR §§ 99.20-22. While a school is not required to amend a record in accordance with a parent's request, it is required to consider the request for amendment of an education record, to inform the parent of its decision, and if the request is denied, to advise the parent of the right to a hearing on the matter. If, as a result of a hearing, a school decides not to amend the record, then the parent has the right to insert a statement in the record setting forth his or her views. That statement must remain with the record for as long as the record is maintained.

This right is not unlimited, however, and FERPA does not require a school to afford a parent the right to seek to change substantive decisions made by school officials, such as grades or other evaluations of a student. Thus, while FERPA affords parents the right to seek to amend education records that contain inaccurate information, this right cannot be used to challenge a grade or an individual's opinion, unless the grade or the opinion has been inaccurately recorded.

The Texas Attorney General provided this Office with copies of letters indicating that in February and March 2004, you and the Parent submitted to the District requests to inspect and review the Student's education records, and requests for copies of the records. The letters also indicate that the Parent informed the District that she authorized you to obtain access to the Student's records on the Parent's behalf. Please note that a school is not required by FERPA to disclose information from a student's education records to a third party, even if the parent has provided consent. Rather, a school is required to provide a "parent" with an opportunity to inspect and review their child's education records. Accordingly, if you are a stepparent who is present on a day-to-day basis with the natural parent and child and the other parent is absent from the home, you would be considered a "parent" under FERPA. As such, the District would be required to provide you with access to your daughter's education records.

With regard to your requests to the District for the records of students who are not your children, with their names and grades redacted, this issue is addressed by the Texas Public Information Act, not by FERPA.

I trust this information is helpful to you.

Sincerely,

/s/LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Ms. Kay Hastings, Assistant Attorney General
Office of Texas Attorney General

APPENDIX C

Model Notification of Rights for Elementary and Secondary Schools

The Family Educational Rights and Privacy Act (FERPA) affords parents and students over 18 years of age ("eligible students") certain rights with respect to the student's education records. These rights are:

The right to inspect and review the student's education records within 45 days of the day the School receives a request for access. Parents or eligible students should submit to the School principal [or appropriate school official] a written request that identifies the record(s) they wish to inspect. The School official will make arrangements for access and notify the parent or eligible student of the time and place where the records may be inspected.

The right to request the amendment of the student's education records that the parent or eligible student believes are inaccurate or misleading. Parents or eligible students may ask the School to amend a record that they believe is inaccurate or misleading. They should write the School principal [or appropriate official], clearly identify the part of the record they want changed, and specify why it is inaccurate or misleading. If the School decides not to amend the record as requested by the parent or eligible student, the School will notify the parent or eligible student of the decision and advise them of their right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the parent or eligible student when notified of the right to a hearing.

The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without con-sent. One exception, which permits disclosure without consent, is disclosure to school officials with legitimate educational interests. A school official is a person employed by the School as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel); a person serving on the School Board; a person or company with whom the School has contracted to perform a special task (such as an attorney, auditor, medical consultant, or therapist); or a parent or student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks. A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility. [Optional] Upon request, the School discloses education records without consent to officials of another school district in which a student seeks or intends to enroll.

[NOTE: FERPA requires a school district to make a reasonable attempt to notify the parent or eligible student of the records re-quest unless it states in its annual notification that it intends to forward records on request.]

The right to file a complaint with the U.S. Department of Education concerning alleged failures by the School to comply with the requirements of FERPA. The name and address of the Office that administers FERPA are:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-5901

[NOTE: In addition, an institution may want to include its directory information public notice, as required by § 99.37 of the regulations, with its annual notification of rights under FERPA.]

APPENDIX D

Request to View Own or Own Child's Education Records

I wish to: ☐ view ☐ have copied* the education records of:

Student (full legal name): _____

Signature _____ Date _____

Printed Name & Relationship to Student _____

_____

Identification Presented:_____ _____

Permission for Disclosure of Education Records to Third Persons

For _____**(Legal Name of Student)**

I (if student is over 18 years of age, this must be the student) give my permission for:

_____

(Name and address of person, organization or agency)

for the purpose of _____.

to have access, either by viewing or having copies made of the following education records:

_____

I also give my permission for teachers and other school staff to orally share the information specified above with the above named person, organization or agency. ☐ Yes ☐ No

This permission form is valid until revoked in writing.

Signature: _____ Date: _____

Printed Name & Relationship to Student: _____

_____

All information must be complete before information can be released. 20 U.S.C. 123g(b)(1) and (b)(2)(A)

*If copies of records are requested, there is a charge of $.05 per page.

Workshop 7

Regular Educators and the Student with Disabilities

By:

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Pacific Northwest Institute on Special Education and the Law
October 5-7, 2009
Seattle, Washington

Regular Educators and the Student with Disabilities?

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I. Introduction

Regular educator is part of the IDEA process. This outline briefly reviews the history of regular education teacher evolution into special education. When can doing too much be a problem? What are the legal underpinnings of the regular educator role in educating children with disabilities (both IDEA and Section 504) in their classroom? Difference between accommodation and modification; attendance and excusal at IEP meeting; delivery of grading, report cards and transcripts, disclosure of personal notes; dealing with forgotten parent, and facilitating collaboration between the special education teacher and the regular education teacher.

A. History and Purpose of IDEA and Disability Law

If a regular education teacher does not understand the historical context of the enactment of Section 504, they will have a difficult time understanding the scope and breathe of disability law in the public school and their important role. Administrators need to take the time to revisit history in the context of the public schools and actively engage in-service for these teachers.

Note: If a regular education teacher does not understand Section 504, he/she will not understand or appreciate IDEA.

Practical tip: Take the time to allow seasoned teachers to share their personal stories of public education in the 1960's, 1970's and 1980's.

Scope
Magnitude
Mandate
Expectations

B. Origins of IDEA So It Makes Sense to a Regular Educator

Pennsylvania Association of Retarded Children v. Pennsylvania 334 F. Supp 1257 (E.D. Pa. 1971).

Mills v. Board of Education, 348 F. Supp. 866 (D. D.C. 1972)

Congressional reaction: Section 504 of the Rehabilitation Act of 1973.

LET'S START WITH SECTION 504

C. Section 504 Understanding both content and process

Question: So what. What is Section 504? Why should a regular education teacher even care about federal law? I practice academic freedom in my classroom.

Answer: Very simple. Section 504 not only protects the students you are entrusted with, it protects you as an employee of the school district. Federal preemption even overcomes the claims of a teacher's academic freedom.

Section 504 is a civil rights law that prohibits discrimination on the basis of a person's disability.

"No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall ***solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity*** *receiving Federal financial assistance or under any program or activity conducted by any execute agency or by the United States Postal Service. "*

D. Questions Posed to the School Administrator:

Question: Does your regular education teacher understand the origins of "free appropriate public education"

Question: Does the regular education teacher understand the origins of "least restrictive environment"?

Question: Can your regular education teacher provide the rudimentary framework explanation of the Section 504 test?

A simple statement that it protects disabled children is a failing grade. Without a basic knowledge of exclusion, federal intervention, civil rights and application to everything in a public school.

Question: Can your regular educator briefly describe the history of disability law protection in the public school system?

Question: Can your regular education teacher explain what Section 504 is and how it applies?

Answer: General framework of Section 504 test: A person is eligible for section 504 protections if the person:

a. Has a physical or mental impairment, which

b. Substantially limits one or more of such person's major life activities.

Question: Can your regular educator identify what a major life activity is?

Major life activates are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 28 CFR section 35.104(2); 34 CFR section 104.3(j) (2) (ii)

Question: What is the definition of a "physical or mental impairment?

Answer: A physical or mental impairment under section 504 means:

a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculosketal; special sense organs; respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary; hemic and lymphatic; skin and endocrine, or
b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 CFR section 104,3(j)(2)(i)

The phrase "physical and mental impairment" includes but is not limited to, such contagious and non-contagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV diseases (whether symptomatic or asymptomatic) tuberculosis, drug addiction and alcoholism. 28 CFR section 35.104(l)(ii)

Question: Can your regular educator identify who your section 504 Building coordinator is?

Answer: If not your district is not compliant with OCR expectations.

Question: Has the regular educator ever seen a section 504 plan? Does the teacher know they exist and how to access the plan?

Answer: If not your district is not compliant with OCR expectations. More importantly, the student which is the subject of the 504 plan may be denied FAPE and entitled to a unilateral placement and reimbursement for private education services.

Question: Can your regular educator identify where the district Section 504 policy is located?

Question: Can your regular educator define or explain "substantial limits"?

Substantially limits is not defined in section 504. The OC leaves that decision to the district.

Here are some guidelines from the Americans with Disabilities Act.

a. Unable to perform a major life activity the average person in the general population can perform; or
b. Significantly restricted as to the conditions, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

Section 504 is simultaneously protecting every IDEA student eligible for services. Additional students not identified as 504 are still protected.

E. **Compliance with Law and Policy and the Regular Educator**

Reaction of a Regular Education teacher----It is Time Out!

Time to express frustration: Compliance, Compliance, Compliance. The Government has taken over my classroom.

Question: Does your regular education teacher know why compliance and knowledge of IDEA and 504 are vital and important?

Answer:

a. It protects the district which is the source of the employment.
b. It is the employee and employer's defense in the event of litigation or appeal.
c. It allows our school to receive monies from federal and state sources consistent with our state plan

d. It is the best created system to assure that a student who has 180 days in each 12 years to achieve a skill level to be able to contribute to our community and support our system.
e. United States Supreme Court is talking to you , the regular education teacher: "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedure giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the remaining IEP against a substantive standard. " Rowley

   This was a direct and first challenge to the independence of a regular education teacher in his/her classroom, academic freedom be damned.
   (Not attributed to the United States supreme Court)

f. Because our special education director is so eccentric that failure to do so would require me to share my lunch with him/her.

LET'S MOVE ON TO Individuals with Disabilities Education Act

II. Inclusion and the History of Recognizing General Education and the Regular Educator. It took twenty years, but they finally got there.

A. Declaration: Inclusion is the lifeline for the child with a disability to the regular education classroom. Inclusion is the professional and ethical challenge for each regular education teacher.

1. Historically and legally we have described it as "Least restrictive environment."
2. The IEP team makes two separate determinations: what the child should be learning and where the child should learn.
3. **If there was a single most important overall provision within IDEA that talks to the regular education teacher it is this**:

B. Listen up Regular Teacher ------ the Supreme Court is talking to you:

" To the **maximum extent appropriate**, **children with disabilities**, including children in public and private institutions or other care facilities, **are educated with children who are not disabled**, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment **occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily**. " 20 USC section 612(a)(5)

Every student with a disability should be given the opportunity to start out in a general education classroom and if that environment does not allow for success and a more restrictive environment is deemed appropriate, then that educators must give good reason as to why the LRE is not working and it should be a main topic of discussion in the IEP meeting.

C. Least Restrictive Environment

Question: Can your regular education teacher explain what least restrictive environment means?

Federal law requires that a full continuum of placement options be available to each special education student and that placement decisions be made by the IEP team based on the student's needs. Congress and the Courts, however, have affirmed the legal right of children with disabilities to be educated in the least restrictive environment possible.

The process is known as inclusion. Regular education teachers play a vital role in determining the extent to which students with disabilities can be successful in the general curriculum because of their expertise in the curriculum area for which they teach.

Question: What is the difference between inclusion and LRE?

Answer: The difference between inclusion and LRE is that inclusion is a philosophy that promotes school options, while LRE is the most appropriate setting for a child with disabilities to be in education.

Mandated by law	Inclusion	LRE
Mandated by law	No	Yes
Concerned with placement		
Options along a continuum	No	Yes
Concerned with appropriate education For all children	Yes	Yes
Must be included in student's IEP	No	Yes
Has procedural guidelines from Implementation	No	Yes

Mainstreaming is the process of placing individuals with disabilities into the general education or community environment. The term is not now recommended because of its association with

the perceived "dumping" of students into general education classes without the support they need. *(See Kasser and Lytle, 2004)*

D. Mainstreaming and Inclusion

The two terms are related, but are quite different. In mainstreaming, as in partial inclusion, an individual with a disability's home classroom is a special education classroom. However, students who are mainstreamed will spend most of their day learning side by side with their general educated peers. In mainstreaming the students are usually expected to keep up with the rest of their peers without significant supplementary aids and support services.

E. Presumption that all disabled children begin in the regular education setting

There is a presumption that the child with a disability will be attending and participating in the regular education classroom.

The full range of supplementary aids and services must be considered before an IEP team determines that special education and related services should be provided outside of the regular education classroom. "Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate.

Question: Does IDEA define what regular classes are?

Answer: Neither the IDEA statute nor its implementing regulations define the term "regular classes." The least restrictive environment provisions of the Federal regulations . . .of IDEA, are set forth at 34 CFR section 300.550-300.556. Under these requirements, each public agency must **ensure that a continuum of alternative placement**s, that includes instruction in regular classes, is available to meet the needs of children with disabilities. The IDEA requires that the placement decision for each child with a disability be based on the child's individualized education program (IEP) and be made at least annually by a group of persons . . .

In addition, children with disabilities must be placed so that they participate with nondisabled students in nonacademic and extracurricular services and activities to the maximum extent appropriate to the needs of the individual child with a disability. . . Finally, **public agencies also must ensure that children with disabilities are not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum**. 34 CFR section 300-552(e).

Thus, the IDEA establishes a presumption that children with disabilities will be educated in classes and settings with their nondisabled peers, unless the education of children with disabilities cannot be satisfactorily achieved in those classes and settings with the use of supplementary aids and services. . . . IDEA does not limit the number, or percentage, of students with disabilities that may be placed into a specific regular classroom in order to provide a free appropriate public education in the least restrictive environment, consistent with the requirements above. (Letter OSERS, Department of education July 23, 2003.)

District must provide special education and related services in addition to, and in conjunction with, the general education curriculum, not separate from it. The general curriculum is defined as the curriculum provided to the same-aged non-disabled children. The IEP team must focus on the accommodations and adjustments necessary to enable the child with a disability to participate in the general curriculum to the maximum extent appropriate.

F. Demise of the segregated setting with the simultaneous rise of the importance of regular education

Question: How did this least restrictive setting evolve to where we are now?

Answer: (In a nutshell)

1. Separate programming
2. Separate programming in same building
3. Participation with regular education students
4. Mainstreaming
5. Integration into the regular educational setting
6. Inclusion---provision that student is entitled to remain in regular education setting, not that they earn their way into regular education.

G. Holland Test and the Regular Educator

Question: Does your regular education teacher know and understand the basis of the "Holland decision?" Do they know it directly affects their classroom and students with disabilities?

Answer: The Holland decision was a federal court case that provided additional guidance in determining whether a student will remain in a regular education classroom. Not understanding the test or its application frustrates the regular education teacher.

In deterring whether education services will be provided in the regular education classroom, the Court requires the IEP team to consider:

a. The educational and non-academic benefits to the child with a disability
b. If applicable, the degree of disruption to the education of other students. In determining this factor, in which a child with behavioral problems will be educated, the IEP team must consider strategies to address the child's behavior including positive behavioral intervention plans and support. If the student with a disability has behavioral problems that are so disruptive in a regular classroom that, even with the use of supplementary aids and services, the education of other students is significantly impaired, the regular education classroom is not appropriate to meet the student's needs.
c. The extent of supplementary aids and services provided;
d. The cost to the district.

III. The IEP and the Regular Educator

A. Understanding the Fundamentals

Administrators need to explain the difference between Procedural Due Process and Substantive Due Process and the importance of the regular educator and the IEP process.

Question: How much of the IEP should I the regular educator be familiar with?

Answer : As a regular educator , you are required by law to have knowledge regarding the contents of an IEP for each special education student enrolled in your classes, and you are legally obligated to implement any portions of an IEP that apply to you.

Question: How do I go about learning about the IEP?

Answer: To successfully meet this obligation, you should read the IEP for each special education student for whom you deliver instruction in order to fully understand the student's education condition, their instructional needs,, any specific activities that have been assigned to you and your classroom, and what, if any, accommodations or modifications you should be implementing.

Question: Does this apply to section 504 students as well?

Answer: Yes. Section 504 requires the teacher to provide reasonable accommodations.

Question: How can a regular educator manage accommodations, modifications and standards?

Answer: IDEA requires regular classroom teachers to implement accommodations and modifications as prescribed by the student's IEP. Many times the regular educator has difficulty understanding the difference.

B. First Let's Explain the Differences Between Modifications and Accommodations.

Accommodations enable the student to access the general curriculum and demonstrate his or her knowledge of course-content by making an adjustment to the way the student shows his or her understanding. Accommodations are designed to reduce the impact of the disability and increase the likelihood that the student's performances accurately reflect their knowledge of the academic material.

Modifications allow students with significant limitations in their academic skills to participate in the general curriculum by altering the course content, assignments, or assessments. Modifications that fundamentally alter or lower the standards for a class are typically reserved for students whose disabilities are so significant that there is no expectation the student will be pursuing a regular high school diploma.

Question: Are regular education teachers mandatory participants in a child's IEP? What about developing functional behavior assessments and behavior intervention plans?

Answer: Yes.

The IEP team for each child with a disability must include at least one regular education teacher of the child if the child is, or may be, participating in the regular education environment. 20 USC section 1414 (d)(l)(B)(ii).

The regulations provide a more specific direction:

The regular education teacher shall, to the extent appropriate, participate in the development of the IEP of the child, including:

a. The determination of appropriate positive behavioral interventions and supports and other strategies; and
b. The determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the child consistent with the IEP content requirements; and
c. The sharing of the child's present level of performance in the teacher's area of curriculum. 20 USC section 1414 (d)(3)(C)

For any review and revision of the IEP, a regular education teacher of the child, as a member of the IEP team, shall participate in the review and revision of the IEP of the child. 20 USC section 1414 (d)(3)(C)

C. Regular Educator Mandatory Attendance At the IEP

Question: If a regular education teacher is required to attend the IEP meeting, and does not attend, can the meeting be challenged as an illegally constituted IEP meeting?

The IEP team for each child with a disability must include at least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment. Section 300.344(a)(2); and

The teacher must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including---

a. The determination of appropriate positive behavioral interventions and strategies for the child, and
b. The determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the child consistent with the IEP content requirement in section 300.347(a)(3).

D. Court Decisions

"The failure of the FWSD (Federal Way school District) to include a regular education teacher on the IEP team **significantly deviated from the procedural requirements** of the Individuals with Disabilities Education Act (IDEA) that at least one regular education teacher be included in the development of an IEP for a student with a disability pursuant to 20 USC section 1414 (d)(l)(B)(ii). **This critical structural defect in the constitution of the IEP team precludes us from considering whether the IEP developed without the inclusion of at least one regular education teacher was reasonably calculated to enable ML to receive a free appropriate public education (FAPE)**. I believe we must vacate the judgment and remand with instructions that the district court enter an order directing the FWSD to select an IEP team that complies with the procedural requirements of the IDEA. Ordered the school district to pay $ 2,400 in reimbursement costs and $ 94,000 in parent's attorney fees. ML v. Federal Way school District, 394 F.3d 634 (9th Cir. 2005).

BV v. Education Dept of the State of Hawaii, 49 IDELR 151, 514 F. 3d 1384 (9th cir. 2008) A teacher's "misjudgment" does not constitute a denial of FAPE or dictate a change in personnel. Although the district Court acknowledged that the teacher was unprofessional when she wrote

the student's name on the blackboard every time he misbehaved, the teacher was fully qualified to implement IEP's for student with Asperger Syndrome and she had an excellent reputation. "The court is unwilling to conclude that one misjudgment on the part of an otherwise outstanding teacher completely undermines an IEP." Thus, the denial of the parent's request for a new teacher was not a denial of FAPE.

Garcia v. Board of Ed of Albuquerque Pub Schs., 49 IDELR 241, 520 F. 3d 1116 (10th cir. 2008). Although the school district committed some procedural violations, including failing to have and implement a current IEP at the beginning of the 2003 school year, student was not denied access to FAPE because the record failed to show that the irregularities would have made any difference to, or imposed any harm on, the student. This is because she was significantly truant from school, often skipped classes and used drugs and alcohol.

S.B. v. Pomona Unified Sch Dist, 50 IDELR 72, 2008 WL 1766953 (C.D. Cal. 2008). The district's failure to include the student's private preschool teacher (the regular education teacher) was a procedural violation that resulted in a loss of educational opportunity for the student. Had the teacher been at the important IEP meeting, she could have shared her observations of the student's abilities and special needs from the year that the student was in her classroom." "At the very least, she could have elaborated on what she had told the transdisciplinary assessment team." A preponderance of the evidence shows that the teacher's participation at the November 2004 IEP meeting, as mandated by the IDEA, "would have assisted the IEP team in devising a program that was better tailored to the student's abilities and special needs. Accordingly, the District's procedural violation of the IDEA resulted in the Student's loss of an educational opportunity and his denial of FAPE."

Unexcused absence of a general education teacher may be a procedural violation that "results in the loss of educational opportunity or seriously infringes the parent's opportunity to participate in the IEP formation process. WG v. Bd of Trustees Target Range Sch. District No. 23, 960 F.2d 1479 (9th Cir. 2006)

E. The IEP Process and the Regular Educator

Question: Can other school staff be substituted for the regular education teacher?

Answer: No. Some commenter's on the NPRM suggested that other school staff (special education teacher or counselor) be substituted for the regular education teacher at the IEP meetings. Adopting that suggestion would be violating the Act, and would undermine the focus of IDEA 2004---on improving the results for children with disabilities through participation in the regular education environment and in the general curriculum. The regular education teacher who serves on the IEP team should be the teacher who is, or may be, responsible for

implementing a portion of the IEP, so that the teacher can participate in discussions about how best to teach the child.

Legally, the district is inviting a claim of serious procedural violation under the Target Range theory that even though the IEP may be appropriate, the process denied the opportunity to participate in the development of the IEP and denied FAPE.

Question: What if the child with a disability has more than one regular education teacher. Must the district provide additional regular education teacher representatives on the IEP team?

Answer: This issue was addressed in the Notice of Interpretation on the IEP's and in the Analysis and Comments of the Department.

A. Only one teacher required on IEP team, but others may attend. If a child with a disability has more than one regular education teacher, only one of the teachers is required to be on the IEP team. However, if the participation of more than one of the teachers would be beneficial to the child's success in school (e.g. in terms of enhancing the child's participation in the general curriculum), it may be appropriate under the Act and regulations for them to be members of the team and participate.
B. The district determines which teacher will serve as the regular education teacher.
C. Input from child's other teachers. In a situation in which the child's regular education teachers are not members of the IEP team, the district is strongly encouraged to seek input from the teachers who will not be attending

Question: How can regular education teacher become influential in the development of an IEP?

Answer:

1. Knowledge
2. Credibility
3. Subject matter content
4. Teachers are a vital participant in the IEP meeting. The regular education teacher has a great deal to share with the team---but needs to speak up!

a. The general curriculum in the regular classroom
b. The aids, services or changes to the educational program that would help the child learn and achieve; and
c. Strategies to help the child with behavior, if behavior is an issue.

The regular education teacher may also discuss with the IEP team the supports for school staff that are needed so that the child can

a. Advance toward his or her annual goal;
b. Be involved and progress in the general curriculum;
c. Participate in extracurricular and other activities; and
d. Be educated with other children, both with or without disabilities,

F. Record Access and Information Sharing

Question: Does the Act expect the child's teacher complete access to the IEP and be informed of their responsibilities?

Answer: In IDEA 1997 (carried forward to 2004) Section 300,342(b)(2) (entitled Implementation of IEP's) specifies that each district must ensure:

a. The IEP of each Child With a Disability Is Accessible to each regular education teacher (as well as each special education teacher, related service provider, and other service provider) who is responsible for implementing the IEP; and
b. Each Teacher and Provider is Informed of ---(A) his or her specific responsibilities related to implementing the IEP, and (B) the specific accommodations, modifications, and supports that must be provided to the child in accordance with the IEP.

Question: Does the Act provide the means or mechanics for informing staff?

Answer: No. This process is left within the discretion of the district.

Question: What notes and documentation must a regular educator maintain?

Answer: Regular education teachers working with special education students should document their efforts to implement the student's IEP. Upon receiving the IEP, regular education teachers should make a list of any goals, accommodations and modifications, behavior intervention plans and supplementary aids and services that apply to the regular education setting. If the student's IEP includes accommodations or modifications of assignments or tests, it is a good idea to keep a copy of those assignments or tests that show the accommodation or modification that have been made to the original assignment.

Likewise, if students in the regular classroom have a behavior intervention plan, it is a good idea to keep a running record of the interventions that have been made based on the plan. Additionally, any discussions with the student's case manager, guidance counselor (and/or special education counselor, if any) school psychologist or other support personnel and parents should be noted and maintained.

Anything written regarding a special education student will, if there is a dispute, become part of the body of evidence in a hearing or legal proceeding.

Question: Can a regular educator call for an IEP meeting?

Answer: Yes.

Question: When should a regular educator call an IEP meeting?

Answer: Regular classroom teacher should request an IEP meeting whenever there are concerns regarding the content or implementation of the IEP, it is important to note that the IEP is a proposed program that can, and should, be modified if there are questions regarding either the meaning or accuracy of the document.

Examples:

1. Truancy or refusal by the student to complete homework or participate in required classroom activities are barriers to the implementation of the IEP. It would be appropriate to ask for an IEP meeting to discuss these problems and develop some strategies to improve cooperation and compliance.
2. If the child's behavior in the regular classroom is creating classroom disturbances that interfere with teaching, it would be appropriate to convene an IEP to determine changes to a behavior intervention plan, possibly conduct of functional behavioral assessment or a change in the current placement.
3. The very presence of the regular education teacher emphasized that the IEP meeting must focus on the regular education environment and what is necessary for the child to make progress in that environment.

Note: Regular education teacher has actually worked with the student, the teacher will add an element of common sense regarding knowledge of how the student is progressing, and whether the IEP being proposed makes sense for practical implementation in the classroom.

Note: When a regular education teacher has participated in the development of the IEP, it will give the procedures credibility to other regular education teachers who are responsible for implementing the IEP, but who did not directly participate in developing the IEP. THE regular education teacher's participation increases the likelihood that other regular education teachers will respect and understand the IEP.

I NEED HELP WITH THIS SPECIAL EDUCATION STUFF

III. Professional Development, Special Circumstances and the Regular Educator

A. Responsibility of the District

Question: If a teacher needs additional training to deal with a difficult or challenging student, is the district obligated to provide that training?

Yes. Under IDEA the district is obligated to secure training necessary for the regular education teacher. Otherwise, there may be an argument that the district is failing to provide FAPE. Professional development and training are important for teachers who must provide services for children with disabilities.

This is especially true in the area of autism.

B. Excusal from IEP Meeting

Question: Can a regular education teacher be excused from attending an IEP meeting?

Answer : Yes, but . . . . .

" . . . while a regular education teacher must be a member of the IEP team if the child is, or may be, participating in the regular education environment, the teacher need not (depending upon the child's needs and the purpose of the specific IEP team meeting) be required to participate in all decisions made a part of the meeting or to be present throughout the entire meeting or attend every meeting. For example, the regular education teacher who is a member of the IEP team must participate in discussions and decisions about how to modify the general curriculum in the regular classroom to ensure the child's involvement and progress in the general curriculum and participation in the regular education environment.

"Depending upon the specific circumstances, however, it may not be necessary for their regular education teacher to participate in discussions and decisions regarding, for example, the physical therapy needs of the child, if the teacher is not responsible for implementing that portion of the child's IEP.

"In determining the extent of the regular education teacher's participation at IEP meetings, public agencies and parents should discuss and try to reach agreement on whether the child's regular education teacher that is a member of the IEP team should be present at a particular IEP meeting and, if so, for what period of time. The extent to which it would be appropriate for the regular education teacher must be decided on a case-by-case basis."

C. Challenges Faced by the Regular Educator

Question: What are a list of challenges to the regular educator in implementing the IEP?

Answer:

a. Lack of knowledge and training
b. Insufficient time to plan or implement
c. Lack of paraprofessional support
d. Alternative curriculum lacking
e. No one talks to me, not the director, not the principal, not the special education teacher

Question: How can the district help the regular educator?

Answer:

a. Ensure access to IEP and understands the differences between modification and accommodation s
b. Provide in-service training on accommodations; legal issues; disciplinary issues; parental lack of interest; confidentiality
c.

IV. Confidentiality/Educational Records/Report Cards/Transcripts

A. Introduction

Letter to Anonymous 107 LRP 47711 (FPCO 2007) FERPA's consent requirements do not apply to a situation where a school official states information that is based upon opinion or hearsay rather than specific information in education records. On the other hand, if the official's knowledge of the information is derived from the student's education records or based upon actions that the official took, then that information would be protected from improper disclosure under FERPA. In addition, the concern that the school includes "mental health records" in the student's education record is not a FERPA concern because a broad range of information may be contained in education records, which "are not required to relate only to academic purpose or be used only for academic concerns . . . . "

B. Grading

The most inclusive situation is one in which the student is graded according to the criteria used for other students and receives the same report cards. It may be more restrictive, but necessary, to modify grading or the type of report cards for students with disabilities.

C. Applicable Laws

Several Federal laws may apply to questions concerning the handling of report cards and transcripts of a child with a disability. Briefly, we discuss the following:

1. **Section 504 of the Rehabilitation Act and Title II (Americans with Disabilities Act)** prohibit discrimination by public entities. Neither has specific provisions addressing report cards or transcripts. The regulations prohibit recipients from treating persons differently on the basis of disability in the provision of aid, benefits or services. However, the district may provide a different aid, benefit or service to persons with disabilities that is as effective as that provided to others. Among the aid, benefits and services provided to students and parents are report cards and transcripts. Section 504 does not contain specific confidentiality requirements, but do not prohibit different treatment on the basis of a disability.

2. **IDEA** does not have a specific provision on student report cards or transcripts, but does require that the individualized education program (IEP) for a child with a disability include a description of how the child's progress toward meeting the annual goals set forth in his or her IEP will be measured and when periodic reports on the child's progress toward meeting the annual goals will be provided. These periodic progress reports may be separate from, or included as part of, the regular report cards or student with disabilities with an IEP.

3. **FERPA (Family Educational Rights and Privacy Act)** protects the privacy interest of parents and students regarding education records and generally prohibit a policy of practice of disclosing personally identifiable information from education records without consent unless it is subject to a specific exception.

Here the regular education teacher needs to pay attention. Disclosure of personally identifiable student information, including disability status, are subject to the protections of FERPA and IDEA. Both student report cards and student transcripts are considered "education records" under FERPA and IDEA.

C. Report Cards and the Regular Educator

Question: May a report card for a student with a disability identify special education or other related services or resources being provided for that student or otherwise indicate that the student has a disability? For instance, may the report card refer to an IEP or a plan providing for services under Section 504?

Answer: Yes. Report cards are provided to parents to indicate the child's progress or level of achievement in specific classes, course content or curriculum. It would be permissible under Section 504 for a report card to indicate that a student is receiving special education or related services, as long as the report card informs parents about the child's progress or level of achievement in specific classes, course content or curriculum.

Example: A report card for a student with a disability may refer to an IEP or a plan for improving services under Section 504 in order to report of the student's progress o the goals in the IEP or Section 504 plan.

Caution: The mere designation that a student has an IEP or is receiving a related service, without any meaningful explanation of the student's progress, such as grade or other evaluative standard established by the district, would be inconsistent with the IDEA's periodic reporting requirements Under both 504 and DA the district must provide report cards that are as informative and effective as the report cards for students without disabilities. Without more meaningful information, a report card that indicates only special education status provides the student with a disability with a benefit or service that is different from and not as informative and effective as the benefit or service that is provided through the report card for students without disabilities.

Question: May a report card for a student with a disability distinguish between special education programs and services and general education curriculum classes through specific notations or the use of asterisks or other symbols?

Answer: In general yes. Districts frequently distinguish between general education curriculum classes and other types of programs and classes, such as advanced placement, honors or remedial classes. Making similar distinctions on report cards would be consistent with the general requirement of Section 504 that individuals with disabilities may not unnecessarily be treated differently than individuals with a disability.

Question: Is this true with a modified or alternate education curriculum?

Answer: Yes. A district may distinguish between special education programs and services provided under a modified or alternate education curriculum and regular education classes under the general education curriculum on the student's report card. For instance, where a student's IEP calls for a modified tenth grade literature curriculum to be provided through the special education program, it would be appropriate for the report card to indicate that the student's progress was measured based on the modified education curriculum. This distinction also may be achieved by using asterisk or other symbol as long as an explanation is provided of the student's progress that is as informative and effective as he explanation provided for students without disabilities.

Question: May special notations, including asterisks or other symbols appear on a report card for a student with a disability who receive accommodations in general education curriculum classes?

Answer: Yes. Accommodations are generally understood to include aids or adjustments that are part of an IEP or plan developed under Section5 04 and that enable the student with a disability to learn and demonstrate what the student knows. Accommodations do not affect course content or curriculum. Examples may include sign language interpreters in the classroom, material sin alternative formats, or extra time on tests. To the extent that the use of notations, asterisks or symbols on a report card to indicate the student with a disability received accommodation is part of the information given to parents about their child's progress or level of achievement in specific classes, course content curriculum, the IEP or the 504 plan.

Question: May a report card for a student with a disability simply refer to another document that more fully describes the student's progress?

Answer: Yes. Nothing in section 504 requires the district use any particular format or method to provide information to parents about their child's progress or level of achievement in specific classes, course content, curriculum, IEP or Section 504 plan. The key is informative.

Question: May report card grades for a student with a disability be based on grade level standards?

Answer: Yes. Assigning grades (i.e. achievement or letter grades) for a child with a disability based on the student's grade level (i.e. year-in-school) standards would not be inconsistent with section 504 or title II. Section 504 would require that students with and without disabilities in the same regular education classes in the general education curriculum be graded using the same standards. That is, if the district assigns grades to nondisabled students participating in regular education classes using grade level standards to reflect progress in the general education curriculum, then the district would also use those standards to assign grades to students with disabilities in those same classes. (see 34 CFR section 104.4(b)(1)(i)-(v) and 28 CFR section 35.130(b)(1)(i)-(v). nothing in Section 504 prohibits a district from deciding how to establish standards to reflect the progress or level of achievement of students with disabilities who are taught using different course content or a modified or alternate education curriculum. To the extent that a student with a disability is not participating in regular education classes, but is receiving modified course content or is being taught a modified or alternate curriculum, it would be up to the district to determine the standards to be sued to measure the student's progress or level of achievement.

D. Transcripts (A different creature----a third party involvement)

Question: May a transcript for a student with a disability indicate that the student has a disability, has been enrolled in a special education program, or has received special education or related services?

Answer: No. A student's transcript generally is intended to inform postsecondary institutions or prospective employers of the student's academic credentials and achievements. Information that a student has a disability, or has received special education or related services due to having a disability does not constitute information about the student's academic credentials and achievements. Under Section 504 districts may not provide different or separate aid, benefits or services to students with disabilities, or to any class of students with disabilities., unless such action is necessary to provide those students with aid, benefit or services that are as effective as those provided to others.

Notations that are used exclusively to identify a student as having a disability or identify education programs for students with disabilities unnecessarily provide these students with different educational benefits or services. Identifying programs as being only for students with disabilities also would be viewed as disclosure of disability status of enrollees and constitutes different treatment on the basis of disability. This would violate Section5 03 for a student's transcript to indicate that a student has received special education or related service or that the student has a disability.

Question: May a transcript for a student with a disability indicate, either through specific notations or the use of asterisks or other symbols, that the student took classes with a modified or alternate education curriculum?

Answer: In general yes. While a transcript may not disclose that a student has a disability or has received special education or related services due to having a disability, a transcript may indicate that a student tool classes with a modified or alternate education curriculum. This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a student's academic credentials and achievements. Notations, asterisks or symbols are permissible when they do not specifically disclose that a student has a disability, are not used for the purpose of identifying programs for students with disabilities, and are consistent with the purpose of the student's transcript.

Questions: What about accommodations?

Answer: No. Because the use of accommodations generally do not reflect a student's academic credentials and achievements, but does identify the student with having a disability, it would be a violation of Section 504 for a student's transcript to indicate that the student received accommodations in any classes.

For example, a notation indicating the use of Braille materials is not related to whether the student mastered all the tenth grade objectives for her literature class.

Question: May a transcript for a student with disability indicate that a student received a certificate of attendance or similar document rather than a regular diploma?

Answer: A transcript for a student with a disability may indicate receipt of a certificate of attendance or a similar document, rather than a regular diploma, under certain circumstances. These circumstances are where this does not disclose that a student has received special education or related services, does not otherwise specifically disclose that a student has a disability (of certificates of attendance are available to both disabled and non disabled students) is not used for the purpose of identifying programs for students with disabilities, and is consistent with the purpose of the student transcript---to inform postsecondary institutions and prospective employers of the student's academic credentials and achievements.

(Resource: Office of Civil Rights, Office of the Assistant Secretary, October 2008; Q and A Report Cards and Transcripts for Students with Disabilities attending Public Elementary and Secondary schools.)

E. <u>Personal notes of a teacher</u>

Question: Are notes created by a regular education teacher considered education records under FERPA and must be disclosed?

Answer: No. Provided the records or notes are kept in the sole possession of the maker, used only as a personal memory aid, and not accessible or revealed to any other person except a temporary substitute for the maker of the record.

FERPA 20 USC section 1232(g)(a)(4)(B); 34 CFR 99.3

And if we have time, let's talk about the :

Student not yet identified and the regular education teacher's "basis of knowledge."

Regular Educators and the Student with Disabilities

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Purpose of IDEA and Disability Law

- **If a regular education teacher does not understand Section 504, he/she will not understand or appreciate IDEA.**
- Scope
- Magnitude
- Mandate
- Expectations

Origins of IDEA

- Pennsylvania Association of Retarded Children v. Pennsylvania 334 F. Supp 1257 (E.D. Pa. 1971).
- Mills v. Board of Education, 348 F. Supp. 866 (D. D.C. 1972)
- Congressional reaction: Section 504 of the Rehabilitation Act of 1973.

LET'S START WITH SECTION 504

- **Section 504 is a civil rights law that prohibits discrimination on the basis of a person's disability.**

504

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall <u>solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity</u> receiving Federal financial assistance or under any program or activity conducted by any execute agency or by the United States Postal Service.

- **Question: Can your regular educator briefly describe the history of disability law protection in the public school system?**
- **Question: Does your regular education teacher understand the origins of "free appropriate public education"**
- **Question: Does the regular education teacher understand the origins of "least restrictive environment"?**
- **Question: Can your regular education teacher provide the rudimentary framework explanation of the Section 504 test?**

General framework of Section 504 test:

- A person is eligible for section 504 protections if the person:
- a. Has a physical or mental impairment, which
- b. Substantially limits one or more of such person's major life activities.

Can your regular educator identify what a major life activity is?

- Major life activates are functions such as caring for one's self, performing manual
- tasks, walking, seeing, hearing, speaking, breathing, learning and working. 28 CFR section 35.104(2); 34 CFR section 104.3(j)(2)(ii)

What is the definition of a "physical or mental impairment?

A physical or mental impairment under section 504 means:

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, muscuskelotal; special sense organs; respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary; hemic and lymphatic; skin and endocrine, or
- Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 CFR section 104,3(j)(2)(i)

Principals and Superintendent's ask yourself:

- **Can your regular educator identify who your section 504 Building coordinator is?**
- **Has the regular educator ever seen a section 504 plan? Does the teacher know they exist and how to access the plan?**
- **Answer:** If not your district is not compliant with OCR expectations. More importantly, the student which is the subject of the 504 plan may be denied FAPE and entitled to a unilateral placement and reimbursement for private education services.
- **Can your regular educator identify where the district Section 504 policy is located?**

Can your regular educator define or explain "substantial limits"?

- Unable to perform a major life activity the average person in the general population can perform; or
- Significantly restricted as to the conditions, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

Does your regular education teacher know why compliance and knowledge of IDEA and 504 are vital and important?

- **It protects the district which is the source of the employment.**
- **It is the employee and employer's defense in the event of litigation or appeal.**

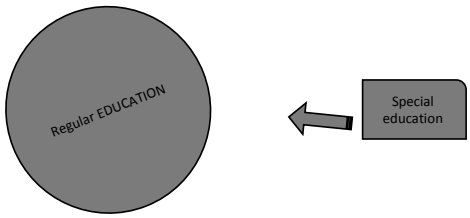
- **It allows our school to receive monies from federal and state sources consistent with our state plan**
- **It is the best created system to assure that a student who has 180 days in each 12 years to achieve a skill level to be able to contribute to our community and support our system.**

United States Supreme Court is talking to you , the <u>regular education teacher:</u>

- "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedure giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the remaining IEP against a substantive standard. " <u>Rowley</u>

Inclusion and the History of Recognizing General Education and the Regular Educator.

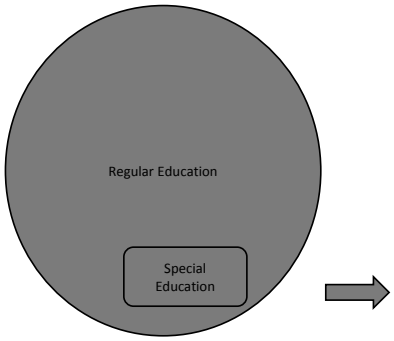
- " To the **maximum extent appropriate**, **children with disabilities**, including children in public and private institutions or other care facilities, **are educated with children who are not disabled**, and special classes, separate schooling, or other <u>removal of children with disabilities from the regular educational environment</u> **occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily**. " 20 USC section 612(a)(5)



Every student with a disability should be given the opportunity to start out in a general education classroom and if that environment does not allow for success and a more restrictive environment is deemed appropriate, then that educators must give good reason as to why the LRE is not working and it should be a main topic of discussion in the IEP meeting.

Presumption that all children are in regular education

- There is a presumption that the child with a disability will be attending and participating in the regular education classroom.
- The full range of supplementary aids and services must be considered before an IEP team determines that special education and related services should be provided outside of the regular education classroom. "Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate.



What is the difference between LRE, inclusion and mainstreaming?

- **Inclusion** is a philosophy that promotes school options,
- **LRE** is the most appropriate setting for a child with disabilities to be in education.
- **Mainstreaming** is the process of placing individuals with disabilities into the general education or community environment. The term is not now recommended because of its association with the perceived "dumping" of students into general education classes without the support they need.

Does IDEA define what regular classes are?

- Neither the IDEA statute nor its implementing regulations define the term "regular classes."
- Under (IDEA) these requirements, each public agency must **ensure that a continuum of alternative placement**s, that includes instruction in regular classes, is available to meet the needs of children with disabilities. The IDEA requires that the placement decision for each child with a disability be based on the child's individualized education program (IEP) and be made at least annually by a group of persons . . .

- In addition, children with disabilities must be placed so that they participate with nondisabled students in nonacademic and extracurricular services and activities to the maximum extent appropriate to the needs of the individual child with a disability. . . Finally, **public agencies also must ensure that children with disabilities are not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum**. 34 CFR section 300-552(e).

- IDEA does not limit the number, or percentage, of students with disabilities that may be placed into a specific regular classroom in order to provide a free appropriate public education in the least restrictive environment, consistent with the requirements above. (Letter OSERS, Department of Education)

What does general curriculum mean?

- District must provide special education and related services in addition to, and in conjunction with, the general education curriculum, not separate from it. The **general curriculum is defined as the curriculum provided to the same-aged non-disabled children.** The IEP team must focus on the accommodations and adjustments necessary to enable the child with a disability to participate in the general curriculum to the maximum extent appropriate.

How did this least restrictive setting evolve to where we are now?

- Separate programming
- Separate programming in same building
- Participation with regular education students
- Mainstreaming
- Integration into the regular educational setting
- Inclusion---provision that student is entitled to remain in regular education setting, not that they earn their way into regular education.

Does your regular education teacher know and understand the basis of the "Holland decision" ? Do they know it directly affects their classroom and students with disabilities?

Holland Test

- The educational and non-academic benefits to the child with a disability
- If applicable, the degree of disruption to the education of other students. In determining this factor, in which a child with behavioral problems will be educated, the IEP team must consider strategies to address the child's behavior including positive behavioral intervention plans and support. If the student with a disability has behavioral problems that are so disruptive in a regular classroom that, even with the use of supplementary aids and services, the education of other students is significantly impaired, the regular education classroom is not appropriate to meet the student's needs.

Holland test continued

- The extent of supplementary aids and services provided;
- The cost to the district.

How much of the IEP should the regular educator be familiar with?

You are required by law to have knowledge regarding the contents of an IEP for each special education student enrolled in your classes, and you are legally obligated to implement any portions of an IEP that apply to you.

How do I go about learning about the IEP?

To successfully meet this obligation, you should read the IEP for each special education student for whom you deliver instruction in order to fully understand the student's education condition, their instructional needs, any specific activities that have been assigned to you and your classroom, and what, if any, accommodations or modifications you should be implementing.

Does this apply to section 504 students as well?

You bet!

Section 504 requires the teacher to provide reasonable accommodations.

How can a regular educator manage accommodations, modifications and standards?

- **Accommodations** enable the student to access the general curriculum and demonstrate his or her knowledge of course-content by making an adjustment to the way the student shows his or her understanding. Accommodations are designed to reduce the impact of the disability and increase the likelihood that the student's performances accurately reflect their knowledge of the academic material.

Modification

- **Modifications** allow students with significant limitations in their academic skills to participate in the general curriculum by altering the course content, assignments, or assessments. Modifications that fundamentally alter or lower the standards for a class are typically reserved for students whose disabilities are so significant that there is no expectation the student will be pursuing a regular high school diploma.

Are regular education teachers mandatory participants in a child's IEP; developing a functional behavior assessments and behavior intervention plans?

- Yes in all three processes.
- Emphasis in IDEA 1997
- Reemphasized in IDEA 2004
- Becomes a procedural due process issue addressed by Courts
- Opportunity for regular educator to address fundamental classroom issues

The regular educator 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 supports for school personnel that will be provided for the child consistent with the IEP content requirements; and
- The sharing of the child's present level of performance in the teacher's area of curriculum.
- For any review and revision of the IEP, a regular education teacher of the child, as a member of the IEP team, shall participate in the review and revision of the IEP of the child.

Question

- **If a regular education teacher is required to attend the IEP meeting, and does not attend, can the meeting be challenged as an illegally constituted IEP meeting?**

Generally yes

"The failure of the FWSD (Federal Way School District) to include a regular education teacher on the IEP team **significantly deviated from the procedural requirements** of the Individuals with Disabilities Education Act (IDEA) that at least one regular education teacher be included in the development of an IEP for a student with a disability pursuant to 20 USC section 1414 (d)(l)(B)(ii).

- **This critical structural defect in the constitution of the IEP team precludes us from considering whether the IEP developed without the inclusion of at least one regular education teacher was reasonably calculated to enable ML to receive a free appropriate public education (FAPE)**. I believe we must vacate the judgment and remand with instructions that the district court enter an order directing the FWSD to select an IEP team that complies with the procedural requirements of the IDEA. Ordered the school district to pay $ 2,400 in reimbursement costs and $ 94,000 in parent's attorney fees.

S.B. v. Pomona Unified Sch Dist, 50 IDELR 72, 2008 WL 1766953 (C.D. Cal. 2008).

- The district's failure to include the student's private preschool teacher (the regular education teacher) was a procedural violation that resulted in a loss of educational opportunity for the student. Had the teacher been at the important IEP meeting, she could have shared her observations of the student's abilities and special needs from the year that the student was in her classroom."

WG v. Target Range (9th Cir)

Unexcused absence of a general education teacher may be a procedural violation that "results in the loss of educational opportunity or seriously infringes the parent's opportunity to participate in the IEP formation process. Cost to district in excess of $ 75,000 attorney fees.

How can regular education teacher become influential in the development of an IEP?

- **Knowledge**
- **Credibility**
- **Subject matter content**
- **Teachers are a vital participant in the IEP meeting. The regular education teacher has a great deal to share with the team---but needs to speak up!**

- **The general curriculum in the regular classroom**
- **The aids, services or changes to the educational program that would help the child learn and achieve; and**
- **Strategies to help the child with behavior, if behavior is an issue.**

Can other school staff be substituted for the regular education teacher?

No

The regular education teacher who serves on the IEP team should be the teacher who is, or may be, responsible for implementing a portion of the IEP, so that the teacher can participate in discussions about how best to teach the child.

What if the child with a disability has more than one regular education teacher. Must the district provide additional regular education teacher representatives on the IEP team?

Generally, no

- Only one teacher required on IEP team, but others may attend. If a child with a disability has more than one regular education teacher, only one of the teachers is required to be on the IEP team.
- However, if the participation of more than one of the teachers would be beneficial to the child's success in school (e.g. in terms of enhancing the child's participation in the general curriculum), it may be appropriate under the Act and regulations for them to be members of the team and participate.

- The district determines which teacher will serve as the regular education teacher.
- Input from child's other teachers. In a situation in which the child's regular education teachers are not members of the IEP team, the district is strongly encouraged to seek input from the teachers who will not be attending

Does the Act expect the child's teacher complete access to the IEP and be informed of their responsibilities?

- **The IEP Is accessible to each regular education teacher (as well as each special education teacher, related service provider, and other service provider) who is responsible for implementing the IEP; and**

- **Each Teacher and Provider is Informed of ---(A) his or her specific responsibilities related to implementing the IEP, and (B) the specific accommodations, modifications, and supports that must be provided to the child in accordance with the IEP.**

What notes and documentation must a regular educator maintain?

- Regular education teachers should document their efforts to implement the student's IEP. Upon receiving the IEP, regular education teachers should make a list of any goals, accommodations and modifications, behavior intervention plans and supplementary aids and services that apply to the regular education setting. If the student's IEP includes accommodations or modifications of assignments or tests, it is a good idea to keep a copy of those assignments or tests that show the accommodation or modification that have been made to the original assignment.

More guidance

- Likewise, if students in the regular classroom have a behavior intervention plan, it is a good idea to keep a running record of the interventions that have been made based on the plan. Additionally, any discussions with the student's case manager, guidance counselor (and/or special education counselor, if any) school psychologist or other support personnel and parents should be noted and maintained.

And still more

- Anything written regarding a special education student will, if there is a dispute, become part of the body of evidence in a hearing or legal proceeding.

Can and when should a regular educator call an IEP meeting?

Whenever there are concerns regarding the content or implementation of the IEP, it is important to note that the IEP is a proposed program that can, and should, be modified if there are questions regarding either the meaning or accuracy of the document.

Examples

- Truancy or refusal by the student to complete homework or participate in required classroom activities are barriers to the implementation of the IEP. It would be appropriate to ask for an IEP meeting to discuss these problems and develop some strategies to improve cooperation and compliance.

More examples

- If the child's behavior in the regular classroom is creating classroom disturbances that interfere with teaching, it would be appropriate to convene an IEP to determine changes to a behavior intervention plan, possibly conduct of functional behavioral assessment or a change in the current placement.
- The very presence of the regular education teacher emphasized that the IEP meeting must focus on the regular education environment and what is necessary for the child to make progress in that environment.

Indirect affect of regular education teacher participation

- **When a regular education teacher has participated in the development of the IEP, it will give the procedures credibility to other regular education teachers who are responsible for implementing the IEP, but who did not directly participate in developing the IEP. The regular education teacher's participation increases the likelihood that other regular education teachers will respect and understand the IEP.**

Question

- **If a teacher needs additional training to deal with a difficult or challenging student, is the district obligated to provide that training?**

Yes

Under IDEA the district is obligated to secure training necessary for the regular education teacher. Otherwise, there may be an argument that the district is failing to provide FAPE. Professional development and training are important for teachers who must provide services for children with disabilities.

Can a regular education teacher be excused from attending an IEP meeting?

- **" . . . while a regular education teacher must be a member of the IEP team if the child is, or may be, participating in the regular education environment, the teacher need not (depending upon the child's needs and the purpose of the specific IEP team meeting) be required to participate in all decisions made a part of the meeting or to be present throughout the entire meeting or attend every meeting.**

For example, the regular education teacher who is a member of the IEP team must participate in discussions and decisions about how to modify the general curriculum in the regular classroom to ensure the child's involvement and progress in the general curriculum and participation in the regular education environment.

However be cautious

- "Depending upon the specific circumstances, however, it may not be necessary for their regular education teacher to participate in discussions and decisions regarding, for example, the physical therapy needs of the child, if the teacher is not responsible for implementing that portion of the child's IEP.

Best practice

- "In determining the extent of the regular education teacher's participation at IEP meetings, public agencies and parents should discuss and try to reach agreement on whether the child's regular education teacher that is a member of the IEP team should be present at a particular IEP meeting and, if so, for what period of time. The extent to which it would be appropriate for the regular education teacher must be decided on a case-by-case basis."

What are challenges to the regular educator in implementing the IEP?

- Lack of knowledge and training
- Insufficient time to plan or implement
- Lack of paraprofessional support
- Alternative curriculum lacking
- No one talks to me, not the director, not the principal, not the special education teacher

Confidentiality of Personal Notes

- FERPA's consent requirements do not apply to a situation where a school official states information that is based upon opinion or hearsay rather than specific information in education records. On the other hand, if the official's knowledge of the information is derived from the student's education records or based upon actions that the official took, then that information would be protected from improper disclosure under FERPA. In addition, the concern that the school includes "mental health records" in the student's education record is not a FERPA concern because a broad range of information may be contained in education records, which "are not required to relate only to academic purpose or be used only for academic concerns . . . . "

Report Cards and Transcripts Applicable Laws

- **Section 504 of the Rehabilitation Act and Title II (Americans with Disabilities Act)** prohibit discrimination by public entities. Neither has specific provisions addressing report cards or transcripts.
- **IDEA** does not have a specific provision on student report cards or transcripts, but does require that the individualized education program (IEP) for a child with a disability include a description of how the child's progress toward meeting the annual goals set forth in his or her IEP will be measured and when periodic reports on the child's progress toward meeting the annual goals will be provided. These periodic progress reports may be separate from, or included as part of, the regular report cards or student with disabilities with an IEP.
- **FERPA (Family Educational Rights and Privacy Act)** protects the privacy interest of parents and students regarding education records and generally prohibit a policy of practice of disclosing personally identifiable information from education records without consent unless it is subject to a specific exception.

Regular educators need guidance

- Here the regular education teacher needs to pay attention. Disclosure of personally identifiable student information, including disability status, are subject to the protections of FERPA and IDEA. Both student report cards and student transcripts are considered "education records" under FERPA and IDEA.

- **Question: May a report card for a student with a disability identify special education or other related services or resources being provided for that student or otherwise indicate that the student has a disability? For instance, may the report card refer to an IEP or a plan providing for services under Section 504?**

Yes

- Report cards are provided to parents to indicate the child's progress or level of achievement in specific classes, course content or curriculum. It would be permissible under Section 504 for a report card to indicate that a student is receiving special education or related services, as long as the report card informs parents about the child's progress or level of achievement in specific classes, course content or curriculum.

Example

- A report card for a student with a disability may refer to an IEP or a plan for improving services under Section 504 in order to report of the student's progress o the goals in the IEP or Section 504 plan.

- The mere designation that a student has an IEP or is receiving a related service, without any meaningful explanation of the student's progress, such as grade or other evaluative standard established by the district, would be inconsistent with IDEA's periodic reporting requirements

Under both 504 and DA the district must provide report cards that are as informative and effective as the report cards for students without disabilities. Without more meaningful information, a report card that indicates only special education status provides the student with a disability with a benefit or service that is different from and not as informative and effective as the benefit or service that is provided through the report card for students without disabilities.

Question

- **May a report card for a student with a disability distinguish between special education programs and services and general education curriculum classes through specific notations or the use of asterisks or other symbols?**

In general, yes

- Districts frequently distinguish between general education curriculum classes and other types of programs and classes, such as advanced placement, honors or remedial classes. Making similar distinctions on report cards would be consistent with the general requirement of Section 504 that individuals with disabilities may not unnecessarily be treated differently than individuals with a disability.

Is this true with a modified or alternate education curriculum?

- **Yes. A district may distinguish between special education programs and services provided under a modified or alternate education curriculum and regular education classes under the general education curriculum on the student's report card.**

Example

- Where a student's IEP calls for a modified tenth grade literature curriculum to be provided through the special education program, it would be appropriate for the report card to indicate that the student's progress was measured based on the modified education curriculum. This distinction also may be achieved by using asterisk or other symbol as long as an explanation is provided of the student's progress that is as informative and effective as he explanation provided for students without disabilities.

May special notations, including asterisks or other symbols appear on a report card for a student with a disability who receive accommodations in general education curriculum classes?

Yes

Accommodations are generally understood to include aids or adjustments that are part of an IEP or plan developed under Section 504 and that enable the student with a disability to learn and demonstrate what the student knows.

Why is this?

Accommodations do not affect course content or curriculum. Examples : sign language interpreters in the classroom, material in alternative formats, or extra time on tests. To the extent that the use of notations, asterisks or symbols on a report card to indicate the student with a disability received accommodation is part of the information given to parents about their child's progress or level of achievement in specific classes, course content curriculum, the IEP or the 504 plan.

Question

May a report card for a student with a disability simply refer to another document that more fully describes the student's progress?

Yes

Nothing in section 504 requires the district use any particular format or method to provide information to parents about their child's progress or level of achievement in specific classes, course content, curriculum, IEP or Section 504 plan. The key is informative.

Question

- **May report card grades for a student with a disability be based on grade level standards?**

Yes

Assigning grades (i.e. achievement or letter grades) for a child with a disability based on the student's grade level (i.e. year-in-school) standards would not be inconsistent with section 504 or Title II. Section 504 would require that students with and without disabilities in the same regular education classes in the general education curriculum be graded using the same standards. That is, if the district assigns grades to nondisabled students participating in regular education classes using grade level standards to reflect progress in the general education curriculum, then the district would also use those standards to assign grades to students with disabilities in those same classes.

- Nothing in Section 504 prohibits a district from deciding how to establish standards to reflect the progress or level of achievement of students with disabilities who are taught using different course content or a modified or alternate education curriculum. To the extent that a student with a disability is not participating in regular education classes, but is receiving modified course content or is being taught a modified or alternate curriculum, it would be up to the district to determine the standards to be used to measure the student's progress or level of achievement.

Transcripts (A different creature)

Third party involvement

Question

May a transcript for a student with a disability indicate that the student has a disability, has been enrolled in a special education program, or has received special education or related services?

- No. A student's transcript generally is intended to inform postsecondary institutions or prospective employers of the student's academic credentials and achievements. Information that a student has a disability, or has received special education or related services due to having a disability does not constitute information about the student's academic credentials and achievements. Under Section 504 districts may not provide different or separate aid, benefits or services to students with disabilities, or to any class of students with disabilities., unless such action is necessary to provide those students with aid, benefit or services that are as effective as those provided to others.

- **N**otations that are used exclusively to identify a student as having a disability or identify education programs for students with disabilities unnecessarily provide these students with different educational benefits or services. Identifying programs as being only for students with disabilities also would be viewed as disclosure of disability status of enrollees and constitutes different treatment on the basis of disability. This would violate Section5 03 for a student's transcript to indicate that a student has received special education or related service or that the student has a disability.

Question

May a transcript for a student with a disability indicate, either through specific notations or the use of asterisks or other symbols, that the student took classes with a modified or alternate education curriculum?

In general yes

- While a transcript may not disclose that a student has a disability or has received special education or related services due to having a disability, a transcript may indicate that a student took classes with a modified or alternate education curriculum. This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a student's academic credentials and achievements. Notations, asterisks or symbols are permissible when they do not specifically disclose that a student has a disability, are not used for the purpose of identifying programs for students with disabilities, and are consistent with the purpose of the student's transcript.

What about accommodations?

- No. Because the use of accommodations generally do not reflect a student's academic credentials and achievements, but does identify the student with having a disability, it would be a violation of Section 504 for a student's transcript to indicate that the student received accommodations in any classes.
- For example, a notation indicating the use of Braille materials is not related to whether the student mastered all the tenth grade objectives for her literature class.

May a transcript for a student with disability indicate that a student received a certificate of attendance or similar document rather than a regular diploma?

- A transcript for a student with a disability may indicate receipt of a certificate of attendance or a similar document, rather than a regular diploma, under certain circumstances. These circumstances are where this does not disclose that a student has received special education or related services, does not otherwise specifically disclose that a student has a disability (of certificates of attendance are available to both disabled and non disabled students) is not used for the purpose of identifying programs for students with disabilities, and is consistent with the purpose of the student transcript---to inform postsecondary institutions and prospective employers of the student's academic credentials and achievements.

Are notes created by a regular education teacher considered education records under FERPA and must be disclosed?

No. Provided the records or notes are kept in the sole possession of the maker, used only as a personal memory aid, and not accessible or revealed to any other person except a temporary substitute for the maker of the record.

Student not yet identified and the regular education teacher

- A "student not yet eligible or identified" for special education may assert the protections under IDEA discipline rules if the district is deemed to have a **"basis of knowledge**" that the student has an unidentified disability.
- This provision was first identified in IDEA 1997.

Basis of knowledge

- **The district will be deemed to have knowledge that the child has a disability if, before the behavior in question:**
- **The parent expressed concern in writing to supervisory or administrative personnel of the district, or a teacher of the student, that the student needs special education and related services;**

Basis of knowledge continued

- **The parent requested an evaluation, to determine if the student has a disability; or**
- **The student's teacher or other district personnel expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education or other supervisory personnel of the district.**

How can regular education teacher become influential in the development of an IEP?

- Knowledge
- Credibility
- Subject matter content
- Teachers are a vital participant in the IEP meeting. The regular education teacher has a great deal to share with the team---but needs to speak up!
- The general curriculum in the regular classroom
- The aids, services or changes to the educational program that would help the child learn and achieve; and
- Strategies to help the child with behavior, if behavior is an issue.

Workshop 8

Response to Intervention: Lessons Learned

By:

Monique Siemerink
Special Education Director
Bethel School District
Eugene, Oregon

And

Dr. Drew Braun
Director of Instruction
Bethel School District
Eugene, Oregon

Pacific Northwest Institute on Special Education and the Law
October 5-7, 2009
Seattle, Washington

BETHEL SCHOOL DISTRICT
Together we will reach, teach and inspire each student to excellence

Response to Intervention: Lessons Learned

October 6, 2009

Bethel School District
Eugene, Oregon

Drew Braun – Director of Instruction
Monique Siemerink – Director of Special Services

BETHEL SCHOOL DISTRICT

(possibly add other demographics)

Eugene, Oregon

5700 students K -12
5 elementary school
2 K – 8 schools
2 middle schools
2 high schools
59 % of our student population is on free/reduced lunch (range 38 – 84%)
180 ELD students
16% of our student population is eligible for special education services

"If you teach the same curriculum, to all students, at the same time, at the same rate, using the same materials, with the same instructional methods, with the same expectations for performance and grade on a curve you have fertile ground for growing special education."

Gary Germann, 2003

Bethel: Late 1990's

- Significant increase in second grade reading referrals and Special Education eligibility
- Great variability among schools in rates of referral and eligiblity
- Questions: Increase in LD?
  Instructional practices?
  - We knew we needed to do something

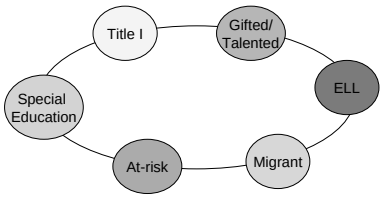
1996 – 2004 *and continuing*

- Collaboration University of Oregon and Bethel SD: Bethel Reading Project
- Analyze current practices
- Involve stakeholders: District administrators, Building Administrators
- Make reading a priority across the primary grades across the district
- Select Core Curriculum
- Educate Staff
- Train staff
- Design Interventions
- Collect data
- Design progress monitoring and data system

What we did: We looked at our system

The Traditional Approach

- The education system has grown through a process of "disjointed incrementalism".



Tilly, W.D., (Aug., 2005). "RtI: New Ways of Thinking about Assessment and Intervention – and Why We're Thinkin' that Way." Bozeman, MT

Unintentional Effects of the Traditional Approach

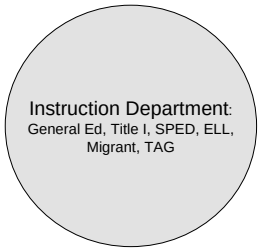
- Conflicting programs and funding streams
- Repetitiveness/Redundancy
- Lack of coordination across programs
- Rules regarding program availability to *all* students
- Complex program administration and implementation

Tilly, W.D., (Aug., 2005). "RtI: New Ways of Thinking About Assessment and Intervention – and Why We're Thinkin' that Way." Bozeman, MT

LESSON 1

We Need to Work Together

Outcome: Realignment in Bethel



SPED — Continuum of Learning Opportunities — General Ed

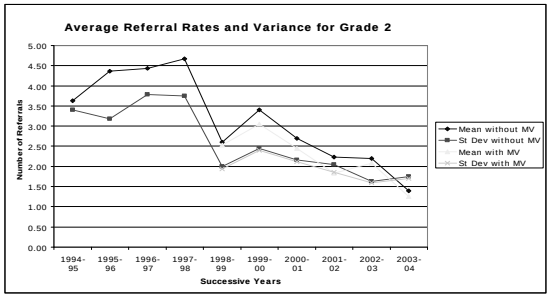
The *SHIFT*

- From factors "outside" our control to factors of "Instruction"
- From "What's wrong with this child?" to "What supports does this child need in order to be successful?"
- From what we need to change in the child to what we need to change in ourselves and our teaching

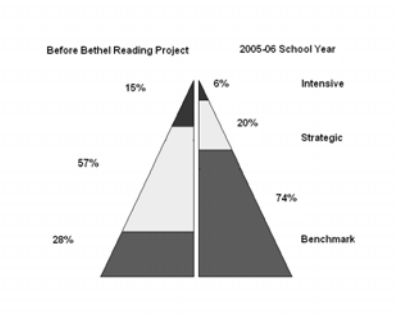
LESSON 2

What We Do Makes a Difference

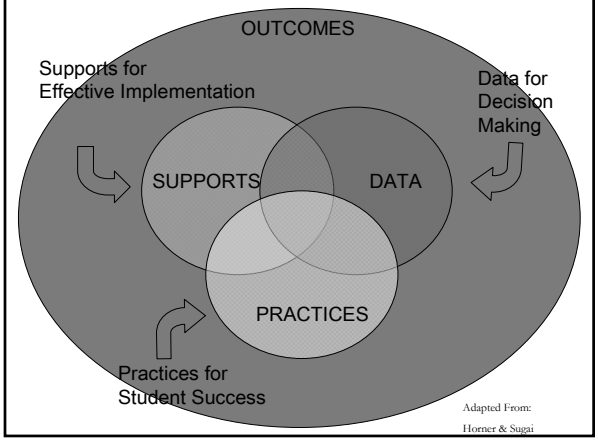
2nd Grade Special Education Referrals Rates



Grade 1



Systems Approach



Outcomes of an Effective Systems Approach:

- **A common vision**

  Embraced by members of the organization and serves as the basis for decision making and action planning.

- **A common language**

  A means for describing its vision, actions and operations so that communications are informative, efficient, effective and relevant.

- **A common experience**

  A set of actions, routines procedures, operations, etc., that are universally practiced and experienced by all members of the organization.

Horner & Sugai

2007/08

Bethel agreed to join the

Oregon Response to Intervention

initiative (**OrRTI**)

Foundation for Implementing RTI

It all begins in general education:

- Students receive high quality instruction in their general education setting
- General education instruction is research-based
- General education instructors and staff assume an active role in students' assessment in that curriculum
- School staff conduct universal screening

OrRTI

Establish the District Team:
GenEd + SpEd

General Education:	Rhonda Wolter
Special Education/teacher:	Erika Case
School Psychology:	Monique Siemerink
Student Achievement:	Lori Smith
Special Education/ELD:	Mindy Horne
Special Education/Instruction:	Ginger Kowalko

LESSON 3

Get the Right People on the Team

(Include a Data Person)

LESSON 4

There are important decisions to be made

1. What is ADEQUATE Response To Intervention?

2. What is the context (model) in which we define Response To Intervention:

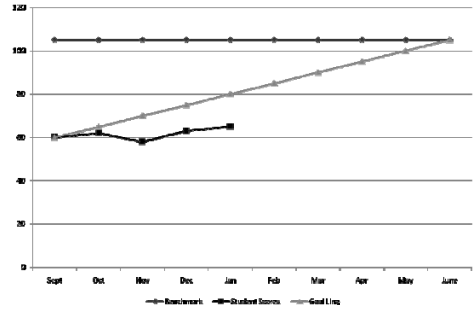
- End of Year Target/Progress Monitoring
- Rate of Growth or Response to Instruction

LESSON 5

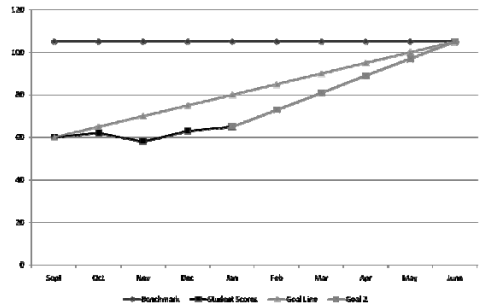
It Takes Time

……and it is worth taking the time to make thoughtful, research-based decisions

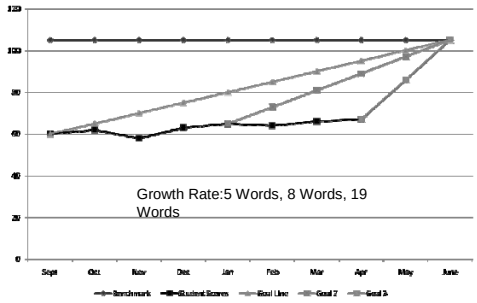
End of Year Progress Monitoring



End of Year Progress Monitoring



End of Year Progress Monitoring



Calculating *Expected Gains/Adequate progress* determined by a combination of:

- **Fuchs, Fuchs, Hamlett, Walz and German (1993)**
- **Deno, Fuchs, Marston and Shin (2001)**
- **Hasbrouck and Tindal National Norms Growth Rate (2005)**
- **Demonstrated Bethel School District Growth Rates (Data 2003 – 2006)**

BETHEL SCHOOL DISTRICT: EXPECTED GROWTH TARGETS FOR INTENSIVE AND LOW FLUENCY READERS

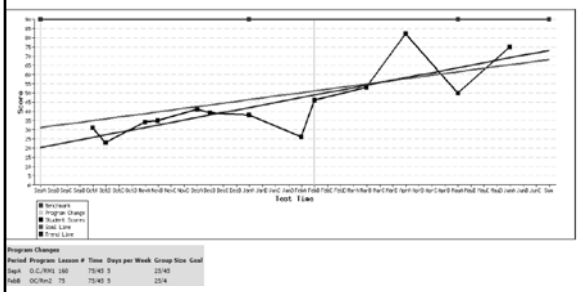
GRADE	ESTABLISHED READER TARGET, WCPM	GRADE LEVEL GAIN	EXPECTED GAIN, WORDS/WEEK	EXPECTED GAIN WORDS/YEAR (# OF INSTRUCTIONAL WEEKS)	TARGET FOR PROGRESS MONITORING	EXPECTED GAIN/YEAR VS. GRADE LEVEL GAIN
1	50*	+50	1.60	27 (17 INSTRUCTIONAL WEEKS)	[Winter ORF + 27] **OR** [Established target] *which ever is less*	0.54 (half year gain)
2	90*	+40	1.50	51 (34 INSTRUCTIONAL WEEKS)	[Fall ORF + 51] **OR** [Established target] *which ever is less*	1.3
3	120*	+30	1.25	42 (34 INSTRUCTIONAL WEEKS)	[Fall ORF + 42] **OR** [Established target] *which ever is less*	1.5
4	135*	+15	1.15	39 (34 INSTRUCTIONAL WEEKS)	[Fall ORF + 39] **OR** [Established target] *which ever is less*	2.7
5	150*	+15	0.90	30 (34 INSTRUCTIONAL WEEKS)	[Fall ORF + 30] **OR** [Established target] *which ever is less*	2.1

The ***Established Reader Targets*** are based on students passing the Oregon Reading Assessment at 97%* rate

Decision Rules

- Collect Progress Monitoring Data:
  - Students receiving Title I services: Every Two Weeks
  - Students receiving very intense instruction: Weekly
- Decision Rules:
  - Four consecutive data points below the goal line
  - Six data points for a trend line

Progress Monitoring



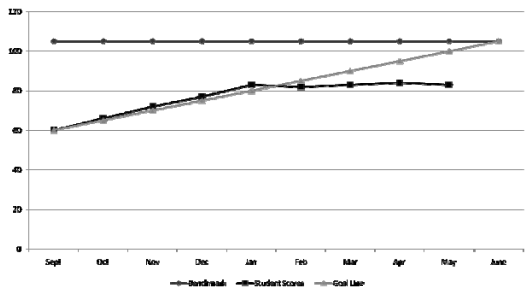
Program Changes						
Period	Program	Lesson #	Time	Days per Week	Group Size	Goal
Sept	O.C./Rhl	160	75/45	5	25/45	
Feb8	OC/Rm2	75	75/45	5	25/4	

30

LESSON 6

Consider the Data WITHIN the Context of the Intervention

Decision Rules



Logic

- In addition to Progress Monitoring Data use:
  - Intervention program assessments
  - Attendance
  - Program changes
  - Check health and vision issues
- Use Logic
  - If a student has been successful in the past and all of a sudden flat lines it does not mean a disability, it usually is something else as they have already demonstrated they have the ability to learn.

… decisions were made…

… now we went to work documenting the process and sharing new procedures

…you can get these online at ODE

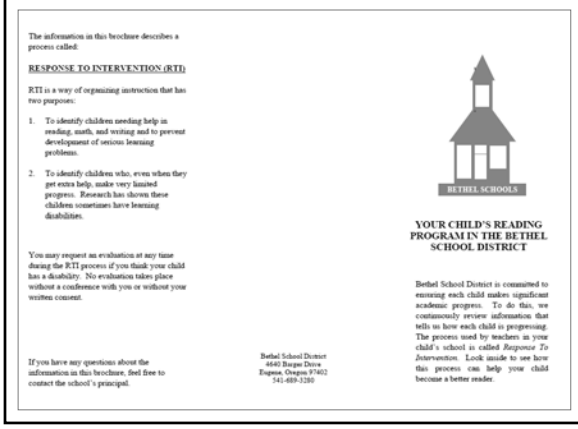
http://www.ode.state.or.us/search/page/?=2225

LESSON 7

Everyone Needs to be Informed

(Communicate Early and Often with Parents and Staff)

Parent Brochure



The information in this brochure describes a process called:

RESPONSE TO INTERVENTION (RTI)

RTI is a way of organizing instruction that has two purposes:

1. To identify children needing help in reading, math, and writing and to prevent development of serious learning problems.
2. To identify children who, even when they get extra help, make very limited progress. Research has shown these children sometimes have learning disabilities.

You may request an evaluation at any time during the RTI process if you think your child has a disability. No evaluation takes place without a conference with you or without your written consent.

If you have any questions about the information in this brochure, feel free to contact the school's principal.

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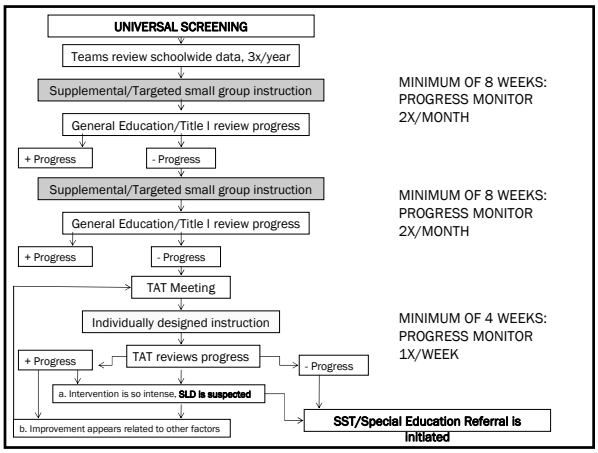
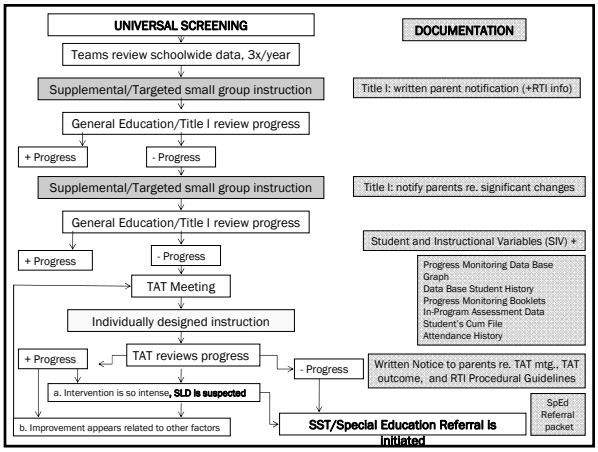
BETHEL SCHOOLS

YOUR CHILD'S READING PROGRAM IN THE BETHEL SCHOOL DISTRICT

Bethel School District is committed to ensuring each child makes significant academic progress. To do this, we continuously review information that tells us how each child is progressing. The process used by teachers in your child's school is called *Response To Intervention*. Look inside to see how this process can help your child become a better reader.


UNIVERSAL SCREENING
Teams review schoolwide data, 3x/year
Supplemental/Targeted small group instruction
General Education/Title I review progress
+ Progress
- Progress
Supplemental/Targeted small group instruction
General Education/Title I review progress
+ Progress
- Progress
TAT Meeting
Individually designed instruction
+ Progress
TAT reviews progress
- Progress
a. Intervention is so intense, SLD is suspected
b. Improvement appears related to other factors
SST/Special Education Referral is initiated
MINIMUM OF 8 WEEKS: PROGRESS MONITOR 2X/MONTH
MINIMUM OF 8 WEEKS: PROGRESS MONITOR 2X/MONTH
MINIMUM OF 4 WEEKS: PROGRESS MONITOR 1X/WEEK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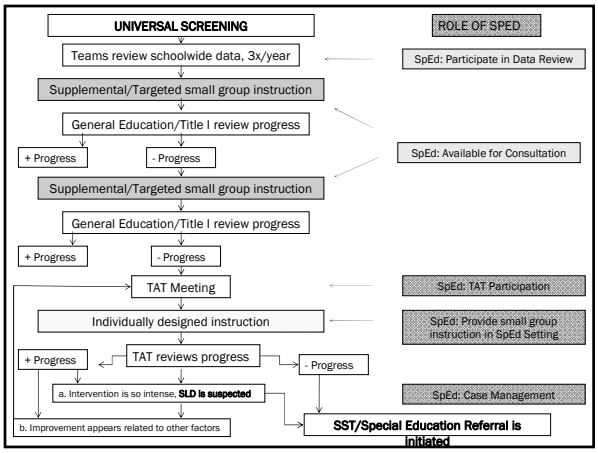
b. Improvement appears related to other factors
SST/Special Education Referral is initiated
DOCUMENTATION
Title I: written parent notification (+RTI info)
Title I: notify parents re. significant changes
Student and Instructional Variables (SIV) +
Progress Monitoring Data Base Graph
Data Base Student History
Progress Monitoring Booklets
In-Program Assessment Data
Student's Cum File
Attendance History
Written Notice to parents re. TAT mtg., TAT outcome, and RTI Procedural Guidelines
SpEd Referral packet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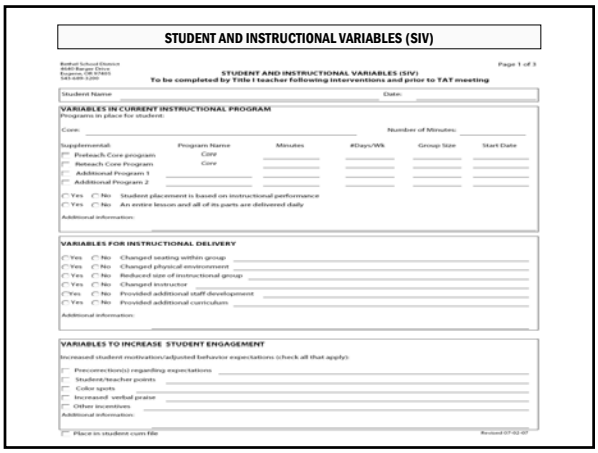
TAT reviews progress
- Progress
a. Intervention is so intense, SLD is suspected
b. Improvement appears related to other factors
SST/Special Education Referral is initiated
ROLE OF SPED
SpEd: Participate in Data Review
SpEd: Available for Consultation
SpEd: TAT Participation
SpEd: Provide small group instruction in SpEd Setting
SpEd: Case Management

STUDENT AND INSTRUCTIONAL VARIABLES (SIV)



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STUDENT AND INSTRUCTIONAL VARIABLES (SIV)
To be completed by Title I teacher following interventions and prior to TAT meeting

Student Name _____ Date: _____

VARIABLES IN CURRENT INSTRUCTIONAL PROGRAM
Programs in place for student:

Core: _____ Number of Minutes: _____

Supplemental:	Program Name	Minutes	#Days/Wk	Group Size	Start Date
☐ Preteach Core program	Core				
☐ Reteach Core Program	Core				
☐ Additional Program 1					
☐ Additional Program 2					

☐ Yes ☐ No Student placement is based on instructional performance
☐ Yes ☐ No An entire lesson and all of its parts are delivered daily

Additional information:

VARIABLES FOR INSTRUCTIONAL DELIVERY

☐ Yes ☐ No Changed seating within group _____
☐ Yes ☐ No Changed physical environment _____
☐ Yes ☐ No Reduced size of instructional group _____
☐ Yes ☐ No Changed instructor _____
☐ Yes ☐ No Provided additional staff development _____
☐ Yes ☐ No Provided additional curriculum _____

Additional information:

VARIABLES TO INCREASE STUDENT ENGAGEMENT

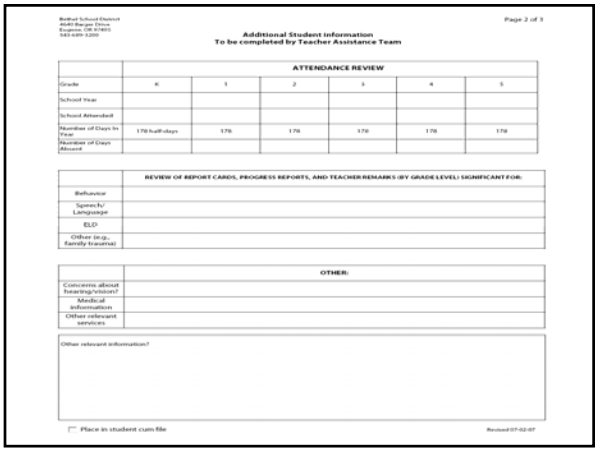
Increased student motivation/adjusted behavior expectations (check all that apply):

☐ Precorrection(s) regarding expectations _____
☐ Student/teacher points _____
☐ Color spots _____
☐ Increased verbal praise _____
☐ Other incentives _____

Additional information:

☐ Place in student cum file

Revised 07-02-07



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Page 2 of 3

Additional Student Information
To be completed by Teacher Assistance Team

	ATTENDANCE REVIEW					
Grade	K	1	2	3	4	5
School Year						
School Attended						
Number of Days In Year	178 half-days	178	178	178	178	178
Number of Days Absent						

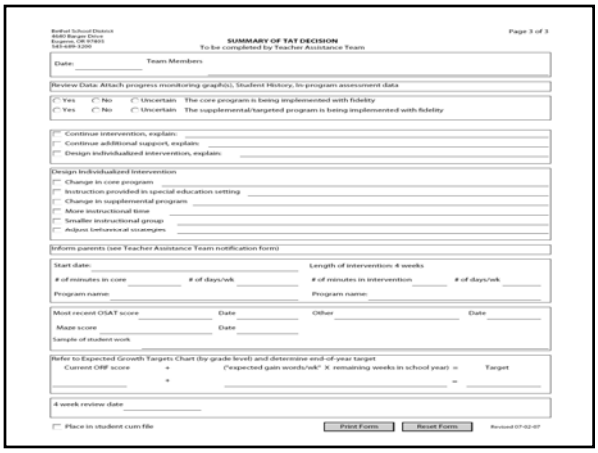
	REVIEW OF REPORT CARDS, PROGRESS REPORTS, AND TEACHER REMARKS (BY GRADE LEVEL) SIGNIFICANT FOR:
Behavior	
Speech/ Language	
ELD	
Other (e.g., family trauma)	

	OTHER:
Concerns about hearing/vision?	
Medical information	
Other relevant services	

Other relevant information?

☐ Place in student cum file

Revised 07-02-07



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SUMMARY OF TAT DECISION
To be completed by Teacher Assistance Team

Date: _____ Team Members _____

Review Data: Attach progress monitoring graph(s), Student History, In-program assessment data

☐ Yes ☐ No ☐ Uncertain The core program is being implemented with fidelity
☐ Yes ☐ No ☐ Uncertain The supplemental/targeted program is being implemented with fidelity

☐ Continue intervention, explain: _____
☐ Continue additional support, explain: _____
☐ Design individualized intervention, explain: _____

Design Individualized Intervention
☐ Change in core program _____
☐ Instruction provided in special education setting _____
☐ Change in supplemental program _____
☐ More instructional time _____
☐ Smaller instructional group _____
☐ Adjust behavioral strategies _____

Inform parents (see Teacher Assistance Team notification form)

Start date: _____ Length of intervention: 4 weeks
# of minutes in core _____ # of days/wk _____ # of minutes in intervention _____ # of days/wk _____
Program name: _____ Program name: _____

Most recent OSAT score _____ Date _____ Other _____ Date _____
Maze score _____ Date _____
Sample of student work _____

Refer to Expected Growth Targets Chart (by grade level) and determine end-of-year target
Current ORF score + ("expected gain words/wk" X remaining weeks in school year) = Target
_____ + _____ = _____

4 week review date _____

☐ Place in student cum file

Print Form Reset Form

Revised 07-02-07

BETHEL SCHOOL DISTRICT

Together we will reach, teach and inspire each student to excellence

Secondary RTI

Bethel

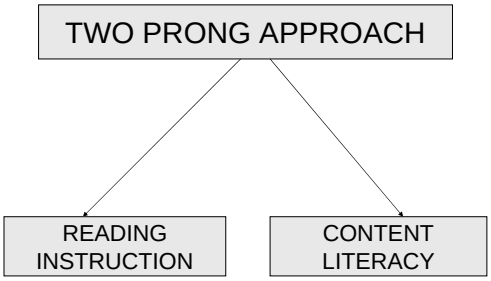
LESSON 8

Response to Intervention Can Extend Beyond Grade 5

Secondary Literacy

Ideally, secondary literacy would focus solely on ". . . the core of reading: comprehension, learning while reading, reading in the content areas, and reading in the service of secondary or higher education, of employability, of citizenship." (Reading Next, p. 1)

". . . as many as one out of every ten adolescents has serious difficulties in identifying words (Curtis and Longo, 1999) ". (Adolescents and Literacy: Reading for the 21st Century, p. 8)



Factors We Can Manipulate

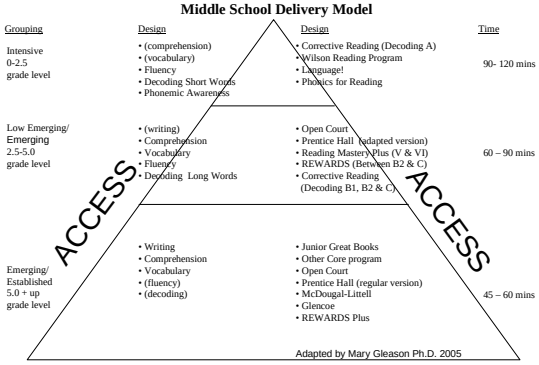
- Grouping
  - Who are your students?
- Design
  - What do they need?
  - Research or evidence-based programs/curricula
- Delivery
  - How do we deliver the needed instruction?
- Time
  - How much time do students need?

LESSON 9

State Test Scores are Too Little Too Late…

Oral Reading Fluency is a sensitive measure that can be used for Universal Screening and Progress Monitoring with Secondary Students

Bethel School District
Middle School Delivery Model

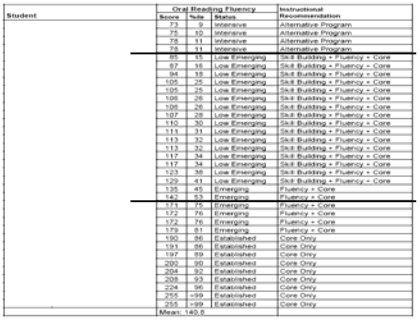


National Reading Norms

Norms Reported by Hasbrouck and Tindal in 2005

Grade:	1	2	3	4	5	6	7	8
Words/Minute	59	89	107	125	138	150	150	150

Grade 7 Class List



Student	Oral Reading Fluency			Instructional Recommendation
	Score	%ile	Status	
	73	9	Intensive	Alternative Program
	75	10	Intensive	Alternative Program
	78	11	Intensive	Alternative Program
	78	11	Intensive	Alternative Program
	85	15	Low Emerging	Skill Building + Fluency + Core
	87	16	Low Emerging	Skill Building + Fluency + Core
	94	18	Low Emerging	Skill Building + Fluency + Core
	105	25	Low Emerging	Skill Building + Fluency + Core
	105	25	Low Emerging	Skill Building + Fluency + Core
	106	26	Low Emerging	Skill Building + Fluency + Core
	106	26	Low Emerging	Skill Building + Fluency + Core
	107	26	Low Emerging	Skill Building + Fluency + Core
	110	30	Low Emerging	Skill Building + Fluency + Core
	111	31	Low Emerging	Skill Building + Fluency + Core
	113	32	Low Emerging	Skill Building + Fluency + Core
	113	32	Low Emerging	Skill Building + Fluency + Core
	117	34	Low Emerging	Skill Building + Fluency + Core
	117	34	Low Emerging	Skill Building + Fluency + Core
	123	36	Low Emerging	Skill Building + Fluency + Core
	129	41	Low Emerging	Skill Building + Fluency + Core
	135	45	Emerging	Fluency + Core
	142	53	Emerging	Fluency + Core
	171	75	Emerging	Fluency + Core
	172	76	Emerging	Fluency + Core
	172	76	Emerging	Fluency + Core
	179	81	Emerging	Fluency + Core
	190	86	Established	Core Only
	191	86	Established	Core Only
	197	89	Established	Core Only
	200	90	Established	Core Only
	204	92	Established	Core Only
	208	93	Established	Core Only
	224	96	Established	Core Only
	255	>99	Established	Core Only
	255	>99	Established	Core Only
	Mean	>40.0		

BETHEL SCHOOL DISTRICT: EXPECTED GROWTH TARGETS FOR INTENSIVE AND LOW FLUENCY READERS

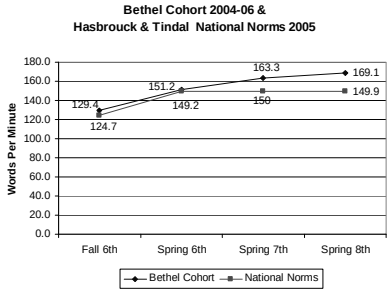
GRADE	ESTABLISHED READER TARGET, WCPM	GRADE LEVEL GAIN	EXPECTED GAIN, WORDS/WEEK	EXPECTED GAIN WORDS/YEAR (# OF INSTRUCTIONAL WEEKS)	TARGET FOR PROGRESS MONITORING	EXPECTED GAIN/YEAR VS. GRADE LEVEL GAIN
1	50*	+50	1.60	27 (17 INSTRUCTIONAL WEEKS)	[Winter ORF + 27] **OR** [Established target] *which ever is less*	0.54 (half year gain)
2	90*	+40	1.50	51 (34 INSTRUCTIONAL WEEKS)	[Fall ORF + 51] **OR** [Established target] *which ever is less*	1.3
3	120*	+30	1.25	42 (34 INSTRUCTIONAL WEEKS)	[Fall ORF + 42] **OR** [Established target] *which ever is less*	1.5
4	135*	+15	1.15	39 (34 INSTRUCTIONAL WEEKS)	[Fall ORF + 39] **OR** [Established target] *which ever is less*	2.7
5	150*	+15	0.90	30 (34 INSTRUCTIONAL WEEKS)	[Fall ORF + 30] OR [Established target] *which ever is less*	2.1

At the secondary level, consider 5th grade targets for progress monitoring

Reading in the Middle Grades

A Video Visit to a School-Wide Reading Period

Changes in ORF Grades 6-8



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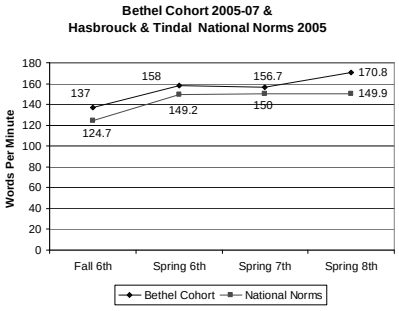
Changes in ORF Grades 6-8



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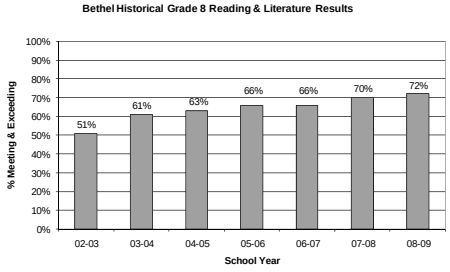
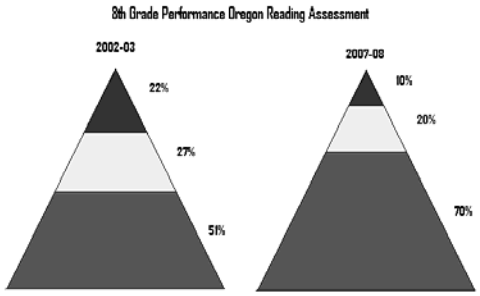
Grade 8 OSAT Reading & Literature Results



Change in Student Performance



TO HOW DO YOU DELIVER INTERVENTION IN SECONDARY?

Delivery Models

Middle School & K-8 Schools

- Daily Reading Class All Students

  AND/OR

- Supplemental Reading Class for Targeted Students
  - Within School Day (i.e. Elective Class, Rotating Semesters/Quarters)
  - Outside School Day (i.e. Before/After School Tutoring, Summer School)

Delivery Models

High School – Targeted Students

- Language Arts Class with Emphasis on Reading Skills (e.g. Language!, Reading Mastery Plus)
- Elective Class Focused on Reading Skills (eg. Decoding and Fluency)
- Elective Class Focused on Strategies (eg. SIM Strategies KU)

Delivery Models

High School – Targeted Students

- Language Arts (A/B Schedule 90 min Blocks)
  - A Day – Language Arts Emphasis on Reading
  - B Day – Focused Reading Skills Linked to Language Arts (Small Group 45 min)
- Trimester Scheduling:
  - One Trimester Focused on Reading
  - Three Trimesters of Language Arts with Emphasis on Reading

Keys to Success

- Developing a supportive infrastructure at district level
  - Continue to build capacity through professional development
- Addressing effective instruction
  - Focus on adult behavior
  - Focus on the Key Variables of Instruction: Grouping, Design, Delivery & Time
- Communication of Progress
  - Recognition & Celebrating Success
  - Reinforces the need for change
- Implement over time
  - Implement what you can do well

Summary of Lessons Learned

1. We need to work together
2. What we do makes a difference
3. Get the right people on the team
4. There are important decisions to be made
5. It takes time
6. Consider your data within the context of the interventions
7. Everyone needs to be informed
8. Response to Intervention can extend beyond grade 5
9. State test scores are too little too late

QUESTIONS??

BETHEL SCHOOL DISTRICT

Together we will reach, teach and inspire each student to excellence

Drew Braun, Director of Instruction, dbraun@bethel.k12.or.us

Monique Siemerink, Director of Special Services, msiemeri@bethel.k12.or.us

Workshop 9

Manifest Determination: In Search of the Holy Grail

By:

Valerie Hughes
Attorney at Law
Perkins Coie LLP
Seattle, Washington

Pacific Northwest Institute on Special Education and the Law
October 5-7, 2009
Seattle, Washington

THE MANIFESTATION DETERMINATION REVIEW: IN SEARCH OF THE HOLY GRAIL

Valerie L. Hughes
Attorney at Law
Perkins Coie LLP
Seattle Washington

I. OVERVIEW

A. Legal Framework

The "manifestation determination" puts educators and parents of students with disabilities at the intersection of special education law and student discipline law. The Individuals with Disabilities Education Act (the "IDEA") uses the term "manifestation determination" to mean the evaluation of the relationship between a student's disability and the student's misconduct that must be undertaken when a school district proposes to take serious disciplinary action.

Only if the school district concludes, after performing a manifestation determination, that the student's misconduct was not related to the student's disability, can it impose a suspension of more than 10 days or an expulsion from school. There are limited exceptions to this principle for drugs, weapons, and the infliction of serious bodily injury.

B. Key Concepts

- **What** is a manifestation determination?
- **Who** makes the determination?
- **When** is it made?
- **Why** is it made?
- **What** are the consequences?
- **How** is the determination challenged?

C. **What** is a manifestation determination?

A manifestation determination for a student with a disability is a review of a student's misconduct, the student's disability, and the services provided to the student to determine:

1. Was the student's misconduct the direct result of the school district's failure to implement the student's IEP?

2. Was the student's misconduct caused by, or did it have a direct and substantial relationship to, the student's disability?

The answers to these two questions determine the latitude a school district has to apply consequences to the student for the student's misconduct. If the answer to either question is "yes," the misconduct is said to be a manifestation of the student's disability and the district's disciplinary options are more limited.

D. **Who** makes the manifestation determination?

The school district, the parent, and "relevant" members of the student's IEP team.

E. **When** is the manifestation determination made?

Within 10 school days of any decision to change the placement of a student eligible for special education because of a violation of a code of student conduct. A change of placement is a suspension from school of more than 10 days or an expulsion from school.

F. **Why** is the manifestation determination made?

If the student's misconduct is determined **not** to be a manifestation of the student's disability, school personnel may apply the same sanctions to special education students as they do to students without disabilities. If the student's misconduct **is** a manifestation of the student's disability, the special education student may not be removed except under special circumstances.

G. **What** are the consequences of the manifestation determination?

1. If the student's misconduct **is** a manifestation of the student's disability, the school district must:

   a. Take immediate steps to remedy any deficiencies in implementation of the IEP.

   b. Conduct a functional behavioral assessment (unless one has already been done) and implement a behavioral intervention plan for the student.

   c. If a behavioral intervention plan has already been developed, review the plan and modify it, as necessary.

   d. Absent special circumstances (weapons, drugs, infliction of serious bodily injury), return the student to the placement from which he/she was removed, unless the parent and the school district agree

to a change of placement as part of the behavioral intervention plan.

2. By contrast, if the student's misconduct is determined not to be a manifestation of the student's disability, school personnel may apply the same disciplinary sanctions to the special education student as they do to a student without disabilities. Educational services for special education students must continue, however, so that the special education student may continue to participate in the general education curriculum (although in another setting) and progress toward meeting the goals in the student's IEP.

H. **How** is the manifestation determination challenged?

The parent of a special education student who disagrees with the manifestation determination may appeal the decision by requesting a due process hearing. A hearing will be held by an administrative law judge ("ALJ") within twenty (20) school days of the date the request is filed and a decision issued within ten (10) school days after the hearing.

A resolution meeting must be held within 7 days of receiving the due process hearing request unless the parents and school district agree in writing to waive it or agree to use mediation.

The ALJ's decision may be challenged in court.

II. LEGAL FOUNDATION

A. The United States Supreme Court held in *Honig v. Doe,* 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988), that suspension of a disabled student for more than 10 consecutive school days is a significant change in placement under Education of the Handicapped Act (now the IDEA), and therefore a school district could not suspend a student for more than 10 consecutive school days unless special education due process procedures were followed. These procedures included a determination of whether the behavior resulting in discipline was a manifestation of the student's disability.

B. In the case of removals of less than 10 consecutive school days, the school district may place the child in an appropriate interim alternative educational setting, another setting, or suspend the child from school without the change being considered a change in placement. 34 C.F.R. § 300.530(b). With these removals, it is not necessary to determine whether the behavior resulting in discipline was a manifestation of the student's disability.

C. The requirement to conduct a manifestation determination is triggered even though the removal is for 10 consecutive school days or less when the removal constitutes a change of placement under 34 C.F.R. § 300.536. That can occur

when the special education student has been subjected to a series of removals that constitute a pattern--

1. Because the series of removals total more than 10 school days in a school year;

2. Because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and

3. Because of such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another.

D. Immediately, if possible, but no later than 10 school days after the decision to change a child's placement, the school must conduct a review of the relationship between the child's disability and the behavior subject to disciplinary action. This is known as a manifestation determination review. The review must be conducted by the school district, the parent, and relevant members of the student's IEP team (as determined by the parent and the school district). 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 530(e).

1. The manifestation determination review

   a. The review team must consider all relevant information, including the student's IEP, any teacher observations, and any relevant information provided by the parents.

   b. The review team must then determine:

      (1) If the conduct in question was the direct result of the school district's failure to implement the IEP; **or**

      (2) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability.

2. Manifestation determination meeting outcomes

   a. The behavior that gave rise to the violation of the student code is determined <u>not</u> to be a manifestation of the child's disability.

   The student may be given the same disciplinary sanction that would have been given to a student without a disability.

   "If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability...the relevant disciplinary procedures applicable to children without disabilities may be applied to the

child in the same manner and for the same duration in which the procedures would be applied to children without disabilities." 20 U.S.C. § 1415(k)(1)(C).

b. The behavior that gave rise to the violation of the student code is determined to be a manifestation of the child's disability.

If the review team finds deficiencies in the implementation of the IEP, the school district must take immediate action to remedy the deficiencies. It must also conduct a functional behavioral assessment and develop/modify and implement a behavioral intervention plan.

Absent special circumstances, the student must be returned to the original placement.

E. Special Circumstances

1. School personnel may remove a special education student from his or her current educational placement and place him or her in an *interim alternative educational setting* for the same amount of time that a student who is not eligible for special education services would be subject to discipline, but not for more than 45 days, when the student's misconduct is related the following:

a. Weapons,

b. Drugs, or

c. Serious bodily injury to the student or others

2. Definitions

a. The student carries or possesses a weapon to or at school, on school premises, or to or at a school function. 20 U.S.C. § 1415(k)(1)(G)(i). "Weapon" means "dangerous weapon" under 18 U.S.C. § 930(g)(2) and includes a weapon, device, instrument, material, or substance that is used for or is readily capable of causing death or serious bodily injury. It does not include a pocket knife with a blade less than 2 and 1/2 inches in length.

b. The student knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function. 20 U.S.C. § 1415(k)(1)(G)(ii). "Illegal drug" means a controlled substance under 21 U.S.C. § 812(c), but does not include a

controlled substance that is legally possessed or used under the supervision of a licensed health-care provider.

c. The student has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function. 20 U.S.C. § 1415(k)(1)(G)(iii). "Serious bodily injury" to the student or others means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of a bodily member, organ, or mental faculty. 18 U.S.C. § 1365.

F. Appeal of the Manifestation Determination

1. Due Process Hearing.

A parent has the right to ask for a hearing if the parent disagrees with any disciplinary placement decisions or if the parent disagrees with a determination that the student's behavior was not a manifestation of his/her disability. The state will provide an expedited due process hearing for appeals of disciplinary actions. In reviewing a decision with respect to the manifestation determination, the ALJ determines whether the student's behavior was or was not a manifestation of his or her disability.

2. Civil Action

Any party aggrieved by the findings and decision made in a due process hearing has the right to bring a civil action in state or federal court without regard to the amount in controversy. In the civil action, the court will have the records of the hearing, will hear additional evidence, if requested, and based on a preponderance of the evidence order the appropriate relief.

III. EXAMPLES OF MANIFEST DETERMINATION HEARING OUTCOMES

A. Cases in which judges have determined that a student's behavior was a manifestation of the student's disability

1. *Swansea Pub. Schs.*, 47 IDELR 278 (2007): Student with ADHD and Oppositional Defiant Disorder.

a. Facts: Teacher sent to the office a 17-year-old student who had threatened to "head-butt" her when she asked him to stop eating in class. The Assistant Principal informed the student he was suspended and tried to reach the student's mother, but was unable to do so. The student was able to reach his mother on his cell phone, and the Assistant Principal asked him to stop his call. The student threw his cell phone on the ground. The student became agitated, screamed obscenities at the Assistant Principal, and cornered her. The Assistant

Principal called for help and police briefly detained student until his mother arrived at the school.

b. Decision: An Impartial Hearing Officer ("IHO") concluded that the student's conduct had a direct and substantial relationship to his disability, and was thus a manifestation of his disability. Although the student had demonstrated his ability to control his behavior in the past, the IHO concluded the student's reaction toward the Assistant Principal was beyond the student's control. According to the IHO, an important factor was that the Assistant Principal's confrontation with the student occurred at a point when the student was already in a hysterical condition.

2. *Manteca Unified Sch. Dist.*, 50 IDELR 298 (2008): Student with Traumatic Brain Injury and Post-Traumatic Stress Disorder.

a. Facts: In 2007, a 17-year-old student was diagnosed with PTSD after she was sexually assaulted. Later, in 2008, when a fellow student sexually harassed her, she kicked him in the groin in response.

b. Decision: The judge determined that the student's conduct was directly related to her disability. The student's personal psychiatrist, who was board certified in child and adolescent psychiatry, offered a detailed and credible explanation of how PTSD influenced the student's actions, whereas the school district's neuropsychologist, who also testified in the student's case, had never assessed, treated, or met the student. The student's psychiatrist had treated her for over a year at the time of the incident. The psychiatrist testified that the student's behavior, hyper-vigilance, was related to PTSD and had likely been triggered by her classmate's comments that were sexual in nature. The judge found the psychiatrist's testimony compelling, and determined the behavior was a manifestation of the student's disability.

3. *South Lyon Community Schs.*, 50 IDELR 237(2008): Student with emotional disturbance and ADHD.

a. Facts: A 14-year-old student was caught passing a note in which she wrote that she had "pills." In her note she listed one non-existent pill and another which she had formerly used to treat her ADHD. After the teacher read the note, the student's locker and belongings were searched for the pills, but none were found. The student confessed that her classmate had asked her for "pills" on two separate occasions, and the student argued she was simply trying to get the classmate to stop bothering her for them.

b. Decision: The judge determined that because the student had a history of impulsive behavior and poor judgment, the student's false claim of possessing drugs was a manifestation of her disability. The judge determined that because she never offered the drugs to her classmate, and she denied the intention to offer them, the student had not violated the school's drug policy. In addition, the judge held that the student had not actually solicited the sale of a controlled substance and therefore the student could not be removed to an interim alternative educational setting for 45 school days. The judge refused, however, to expunge references of the student's expulsion from her file on the grounds that such a remedy exceeded his authority.

B. Cases in which judges have determined that behavior was <u>not</u> a manifestation of the student's disability

1. *In re: Student with a Disability*, 51 IDELR 231 (2008): Student with an emotional disability.

a. Facts: The student's parents agreed to change their son's IEP, and his special education teacher discussed the changes with the 13-year-old student. Later, on the bus ride home, the student kicked another student in the head because the victim "was gay." The surveillance camera on their bus showed that the student had planned the attack because he had discussed it with classmates and struck his classmate at a premeditated point in time. His parents argued that the attack was a manifestation of his disability and the attack had happened because he was frustrated by changes in his IEP and other students encouraged his behavior.

b. Decision: The IHO found that a surveillance video from the school bus demonstrated that student had premeditated his attack. The video showed that the student had planned the attack by discussing it with others and striking his schoolmate as he had planned. The student's planning of the attack persuaded the IHO that the attack was not a manifestation of the student's emotional disability because the student had acted deliberately and with pre-meditation.

2. *Baltimore County Pub. Schs.*, 46 IDELR 179 (2006): Student with emotional disturbance.

a. Facts: An instructional assistant found a 16-year-old student with his head down on his desk. She noticed he was lethargic, his speech was slower than usual, and he was not his normal self. She sent him to the nurse and the student informed the nurse he had smoked marijuana just before attending school. The student was so lethargic that he was sent home with a school resource officer

when his mother could not be reached to pick him up. Afterwards, he received a notice of suspension for using illegal drugs.

The student had a primary diagnosis of bipolar disorder and had been hospitalized five times in the last three years. The IEP team considered the student's IEP, his cognitive skills, his academic levels of performance, the implementation of his goals in the classroom, his assessment accommodations, and the implementation of his behavioral plan.

b. Decision: Although the parents submitted a letter from the student's therapist, the letter did not state that the student's marijuana use was a manifestation of his emotional disturbance. Furthermore, the judge determined that the IEP team had properly considered several factors in making the determination including the student's record, his progress, his referrals, the implementation of his IEP, his achievements and his behavioral assessments. The judge affirmed that the student's behavior was not a manifestation of his behavior.

3. *Torrington Bd. of Educ.*, 44 IDELR 57 (2005): Student with speech and language disabilities and bipolar disorder.

a. Facts: When a teacher confronted a student because she was wearing outer clothing in school in violation of the school code of conduct, the student pushed the teacher. The school's police officer witnessed the event.

b. Decision: The IHO determined that pushing a teacher was not a manifestation of the student's disability. The IHO made this determination because the student had never posed behavioral problems at school before and her therapist's report showed no nexus between her behavior and the disability.

IV. THEMES FROM THE REPORTED DECISIONS

A. Judges and hearing officers often find a student's history of misbehavior persuasive when determining whether current misbehavior is related to the student's disability.

B. A manifestation determination review will not be conducted if the student's parent does not ask the school to evaluate the student or fails to inform the school that the student has a disability. Parents must be proactive to make sure their children receive the appropriate consideration.

C. Evidence, such as a surveillance video, which shows that a student's conduct was premeditated has persuaded judges that the student did not act in an impulsive

manner. Such evidence is particularly important in cases of students with disabilities, such as ADHD, where the student's behavior is often impulsive.

D. It is typically necessary to have an expert testify on behalf of the student in order to establish that the misconduct was a manifestation of the student's disability.

E. The cases are not clear on who has the burden of proof in a hearing to challenge the manifestation determination. Under *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the burden of proof is borne by the party initiating and seeking relief.

F. Flaws in a school's manifestation determination meeting will require the district to take remedial action. For example, the Office of Civil Rights stepped in and ordered the school district to take remedial measures when a charter school failed to conduct an appropriate manifestation determination review. The school had only considered whether the student with a disability knew the difference between right and wrong, therefore applying the wrong standard, in its determination of whether the misbehavior was a manifestation of the student's disability. The student had brought alcohol on campus in violation of school rules. The Office of Civil Rights determined that the district bore ultimate responsibility for the charter school's non-compliance. The Office of Civil Rights found that the district could resolve the matter by training school staff in the proper standard to apply in manifestation determination reviews. Redlands (CA) Unified Sch. Dist., 51 IDELR 287 (2008).

V. PRACTICAL CONSIDERATIONS

A. The manifest determination review should be held as soon as possible once the serious disciplinary incident occurs. The student may need to be emergency expelled pending completion of the manifestation determination review.

B. The school district should endeavor to obtain for the manifestation determination review any information the parent wishes to submit from the student's physician, therapist, or counselor and any information or opinion from any expert consulted by the parent. The parent may also be advantaged by providing such information and opinion for the manifestation determination review so that it can be considered at that time, rather than waiting to provide such information at a hearing.

C. If the review team's decision that the student's misconduct is not a manifestation of the student's disability is overturned, the student will typically be returned to his or her pre-discipline placement. The school district may also face liability for attorneys' fees and/or compensatory education.

Manifestation Determination Hearing Outcomes

Case	Disability	Misconduct	Manifestation?	Reason for decision	Court
Elk Grove Unified Sch. Dist., 52 IDELR 60 (2009)	ADHD and auditory processing disorder	Cursing and threatening football coaches	Not manifestation of disability	Expert testified that student's statements were planned, not impulsive, and that student understood coaches' instructions	ALJ
Student with a Disability, 52 IDELR 118 (2008)	ADHD	Hitting a school employee	Not manifestation of disability	Determined event was premeditated because it happened when student was calm and adults were not watching	IHO
Student with a Disability, 51 IDELR 231 (2008)	Emotional disability	Student kicked classmate's head on school bus ride home	Not manifestation of disability	Surveillance video of student showed premeditation of attack	IHO
Lancaster Elementary Sch. Dist., 49 IDELR 53 (2007)	SLD	Student brought marijuana and tobacco to school	Not manifestation of disability	Offense bore no relationship to disability and IEP was properly implemented	ALJ

Case	Disability	Misconduct	Manifestation?	Reason for decision	Court
MaST Community Charter Sch., 47 IDELR 23 (2006)	ADHD	Student brought knife to school	Not manifestation of disability	Student stated he deliberately carried knife to school every day, which undermined impulsivity argument	Appellate panel
Madison City Bd. of Educ., 47 IDELR 59 (2006)	SLD	Student brought gun to school after being attacked by youths	Not manifestation of his disability	Student had made progress under his IEP and no evidence weapons violation related to SLD	IHO
Baltimore County Pub. Schs., 46 IDELR 179 (2006)	Emotional disturbance	Student smoked marijuana just before coming to school	Not a manifestation of disability	Therapist's letter did not indicate connection between behavior and disability; IEP team had conducted meeting properly	ALJ

Case	Disability	Misconduct	Manifestation?	Reason for decision	Court
Omak Sch. Dist., 45 IDELR 54 (2005)	ADHD	Student smoked marijuana on campus	Not a manifestation of disability	IEP and BIP were implemented properly, student had ability to control his actions and understand the consequences of his behavior	ALJ
Muskegon Pub. Schs., 45 IDELR 261 (2006)	Learning disability in written expression and reading	Jumped on back of school administrator	Not a manifestation of disability	Had no prior discipline problems and had not attended school on day of attack, and no evidence his disability was related to the misconduct	IHO
Okemos Pub. Schs., 45 IDELR 115 (2006)	ADHD	Student traded marijuana for food or cash with other students	Not a manifestation of disability	Teachers and administrators had never complained of any impulsive behaviors	IHO

Case	Disability	Misconduct	Manifestation?	Reason for decision	Court
Traverse City Area Pub. Schs., 45 IDELR 47 (2005)	OHI and learning disability	Student wrote classmates names on wall stating they would die three days later	Not a manifestation of disability	Student obtained pass to go to bathroom and wrote his own name on wall to prevent suspicion, thus demonstrating he knew consequences	IHO
Selma City Bd. of Educ., 44 IDELR 105 (2005)	Emotional disorder	Fought with a student after school	Not a manifestation of disability	Student had not engaged in any fights since being placed in the alternative school and acknowledged he had actively chosen whom to fight	IHO
Torrington Bd. of Educ., 44 IDELR 57 (2005)	Bipolar disorder, speech and language disabilities	Student pushed a teacher after being confronted by her	Not a manifestation of disability	Student had never posed behavioral problems at school and therapist's report showed no nexus between behavior and disability	IHO

Case	Disability	Misconduct	Manifestation?	Reason for decision	Court
Miami-Dade County Sch. Bd., 44 IDELR 292 (2005)	Learning disability	Student responded in a defiant and disruptive manner when directed to stop passionately kissing a girl in the parking lot	Not a manifestation of disability	Hearing was proper	IHO
Tuscaloosa City Bd. of Educ., 43 IDELR 81 (2005)	ADHD	Student started a fire in his classroom by spraying air freshener onto an open lighter	Not a manifestation of disability	IEP placement and behavior intervention strategies were appropriate	IHO
Board of Educ. of the Schodack Cent. Sch. Dist., 43 IDELR 128 (2005)	ADHD	Bad behavior-not specified	Not a manifestation of disability	IEP and placement were appropriate; testimony at hearing indicated that student could distinguish right from wrong, but chose to act improperly	State Review Officer

Case	Disability	Misconduct	Manifestation?	Reason for decision	Court
South Lyon Community Schs., 50 IDELR 237 (2008)	Emotional disturbance and ADHD	Passing a note to another student that stated "I have pills." Student did not have any drugs.	Manifestation of disability	Student had a history of impulsive behavior and poor judgment	ALJ
Manteca Unified Sch. Dist., 50 IDELR 298 (2008)	Traumatic Brain Injury and PTSD	Kicking a male schoolmate in the groin	Manifestation of disability	Psychiatrist was able to offer a detailed and credible explanation of how PTSD influenced student's actions	ALJ
Swansea Pub. Schs., 47 IDELR 278 (2007)	ADHD and Oppositional Defiant Disorder	Teacher sent student to Principal's office for eating in class and threatening to "head-butt" the teacher. Afterwards, student lunged and screamed obscenities at Assistant Principal who tried to suspend him.	Manifestation of disability	Although student had been able to control his behavior in the past, this event was deemed out of his control because Assistant Principal's confrontation with student occurred during student's hysterical condition.	IHO

Workshop 10

Tragedy in the Time-Out Room: Isolation and Other Aversive Techniques

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Tragedy in the Time-Out Room: Isolation and Other Aversive Interventions

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I. Introduction

The term "aversive interventions" generally refers to negative reinforcement or punishment intended to change behavior. The term is also sometimes used (rightly or wrongly) to refer to crisis intervention techniques used to de-escalate students during behavioral incidents or to prevent students from harming themselves or others. Some types of aversive interventions (e.g. corporal punishment) are generally outlawed. Other types may be used only under limited circumstances.

The use of two types of aversive interventions, isolation and physical restraint, became the focus of increased public attention in 2009 due to high-profile news stories by national media outlets, the release of reports by national disability rights organizations advocating increased regulation, and testimony at Congressional hearings. These reports documented horribly abusive behaviors or tragic consequences involved in a few specific cases (e.g., 10 cases in public or private schools over the last 17 years described in a report compiled by the Government Accountability Office (GAO)) and referenced "hundreds" of additional undocumented allegations of abuse or misuse of aversive interventions. *See, e.g.*, Government Accountability Office, *Seclusion and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, GAO-09-719T (May 19, 2009).

The following information describes the legal restrictions and conditions that apply to aversive interventions in the context of educating students with disabilities. This information will be focused primarily on Washington regulations and decisions. Oregon regulations also contain restrictions on corporal punishment and on "restraint and seclusion" at Oregon Administrative Code 581-021-0061 and -0062. Idaho regulations do not directly address the topic of physical restraint and isolation.

II. Sources of Law

A. Federal IDEA/Section 504

Neither IDEA nor Section 504 specifically address the use of aversive interventions. But these laws contain several provisions that may be interpreted to impose limitations on use of some aversives. These include, but are not limited to the following:

1. The requirement that students must be educated in the least restrictive environment may apply to many aversive interventions, especially those involving isolation, restraint or holds.

2. Such interventions are subject to all the procedural protections of the IEP process. *See Letter to Trader*, 48 IDELR 47 (OSEP 2006) (noting IDEA does not contain any per se prohibition on use of aversives but they should be in the IEP).

3. IDEA requires consideration of positive behavioral supports where a child's behavior is impacting his or her learning. 20 U.S.C. 1414(d)(B)(i) and (C); *Letter to Trader, supra*. Thus, aversive therapy should only be used when positive supports have been specifically considered but determined not to be effective.

B. United States Constitution

1. Fourteenth Amendment (substantive due process)

Although the issue has not been directly considered by the Supreme Court, the Due Process clause of the Fourteenth Amendment may be interpreted to impose at least some limitations on the right of public schools to use aversive interventions with students, especially those involving bodily restraint. *See, e.g. Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996) (holding school districts to the substantive due process standard applicable to involuntarily committed mental patients set forth in *Youngberg v. Romeo*, 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982)). In *Youngberg* the Court recognized that professional judgment and safety concerns may justify restraint, but also noted that "liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." 457 U.S. at 316. Under these cases, therefore, there may be a separate constitutional cause of action for conduct that is "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323.

The *Youngberg* case basically sets forth a standard of reasonableness. This is a much more deferential standard than is generally imposed under the IDEA, and frequently due process challenges to aversive interventions are rejected if the techniques are deemed to be reasonable or routine. For example, in *Heidemann* the application of this standard resulted in a ruling that use of a "blanket wrapping" technique on a student was not a violation of due process. *See also Wallace b. Wallace v. Bryant Sch. Dist.*, 46 F. Supp. 2d 863 (E.D. Ark. 1999) (holding that isolation in a music room for three periods was not a violation); *Dickens v. Johnson Cy. Bd. of Educ.*, 661 F. Supp 155 (E.D. Tenn. 1987) (holding that a brief timeout was not unduly harsh or grossly disproportionate). *But see Orange v. County of Grundy*, 950 S. Supp. 1365 (E.D. Tenn. 1996) (refusing to dismiss substantive due process claim where children were placed in a storage closet for an entire day without access to lunch or toilet facilities).

2. Fourth Amendment (search and seizure)

Like the substantive due process claims discussed above, Fourth Amendment claims that a particular use of restraint or isolation amount to an unlawful seizure are also subject to a reasonableness standard. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In one case, a court refused to dismiss a Fourth Amendment claim where a student alleged that his brief seclusion in a locked closet violated fire codes and behavior management guidelines. *Rasmus v. Arizona*, 939 F. Supp. 709 (D. Ariz. 1996). In another case, a court rejected a Fourth Amendment claim regarding supervised timeouts for a student who engaged in disruptive and threatening behavior, finding the practice reasonable in light of its inclusion on the student's IEP. *Couture v. Bd. of Educ. of the Albuquerque Public Schools*, 535 F.3d 1243 (10th Cir. 2008).

3. Eighth Amendment (cruel and unusual punishment)

The Supreme Court has held that the Eighth Amendment's prohibition against cruel and unusual punishment does not apply to corporal punishment because public schools are not a part of the criminal justice system. *Ingraham v. Wright*, 430 U.S. 651 (1977). The same rationale would exclude aversive interventions from the scope of the Eighth Amendment.

C. State law

States vary widely in their regulation of aversive interventions. Some have passed statutes or promulgated regulations prohibiting certain types of aversives and/or limiting the use of such techniques. Other states have enacted reporting schemes to collect data on the use of physical restraint or isolation. A summary of state laws was published by the GAO in its May 2009 report. *Seclusion and Restraints, supra*, Appendix I. Both Washington and Oregon have administrative regulations specifically limiting the use of aversive interventions, including physical restraints and isolation/seclusion. Idaho does not. Washington law is described in greater detail below.

III. Washington Law on Aversive Interventions

A. Definition of Aversive Intervention

WAC 392-172A-03120 defines aversive interventions as "the systematic use of stimuli or other treatment which a student is known to find unpleasant for the purpose of discouraging undesirable behavior on the part of the student." Some behavioral interventions will fall outside this definition because they are either not systematic or not unpleasant. For example, an ALJ dismissed a parent's complaint regarding the use of a timeout chair without restraints because the student did not find it to be unpleasant. *In re Student with a Disability*, 2002-SE-0144, 106 LRP 2714 (Shave, 2002).

B. Exclusion for Emergencies

Under Washington law the definition of aversive interventions specifically excludes the use of *reasonable* force, restraint, or other treatment to control *unpredicted spontaneous* behavior which poses a *clear and present danger* of (1) serious harm to the student or another person; (2) serious harm to property; or (3) seriously disrupting the educational process.

1. "Reasonable" force

The reasonableness of a use of force will always depend on the circumstances, but certain types of force will be presumed to be unreasonable and unlawful. *See* RCW 9A.16.100 and WAC 392-172A-03125(3)(a), discussed below. Unfortunately for school personnel, courts and hearing officers have the benefit of sober reflection and hindsight, while school staff are often required assess the seriousness of a situation in a split second. For this reason, proper training in crisis response is important to decrease potential liability in this area.

2. "Unpredicted" and "spontaneous" behavior

Evidence that a staff member took a student to the ground on one occasion to prevent further harm to others did not establish a violation of the WAC. No aversive plan was in place at the time, but the Student had a BIP and had acted out violently in the past. *Eatonville Sch. Dist.*, 2001-SE-0094, 103 LRP 27269 (Wang, 2002). Likewise, in *In re Student with a Disability*, *supra*, the ALJ ruled that physically restraining the student during a violent incident in the classroom did not constitute an aversive intervention because the student's behavior was unpredicted and spontaneous, the use of force was not systematic and the force was necessary to protect the student and others from harm.

3. "Clear and present danger" of harm

The ALJs in the above two cases appeared to defer to school staff who perceived danger was "clear and present," as long as the degree of force used was reasonable.

C. Prohibitions

The following types of aversive interventions are specifically and absolutely prohibited by WAC 392-172A-03125:

1. Electric current.

2. Denial of food.

   A delay in meal times is not necessarily a denial of food. In *In re Student with a Disability*, *supra*, the ALJ found that keeping the student in the classroom for a few

minutes while other students went out for lunch after he had lost control was not a unreasonable withholding of food.

3. "Unreasonable" force or restraint, including, but not limited to:

   a. Throwing, kicking, burning, or cutting a student.
   b. Striking a student with a closed fist.
   c. Shaking a student under age three.
   d. Interfering with a student's breathing.
   e. Threatening a student with a deadly weapon.
   f. Doing any other act that is likely to cause bodily harm to a student greater than transient pain or minor temporary marks.

   The regulation notes that this list is by no means exhaustive, and many uses of force not included on the list may be unreasonable under the circumstances (e.g., shaking a child over age three).

4. Denial of hygiene care.

5. Denial of medication.

6. Painful noise.

7. Noxious sprays/smells.

8. Taste treatment. No student may be forced to taste or ingest a substance which is not commonly consumed or which is not commonly consumed in its existing form or concentration.

9. Water treatment. No student's head may be partially or wholly submerged in water or any other liquid.

D. Isolation

1. Isolation (often called a "time-out room") is prohibited except under the conditions set forth in WAC 392-172A-03130(2).

2. The term "isolation" is included within the definition of "aversive intervention" set forth above, and is further defined as the exclusion of a student from his or her regular instructional or service area and isolation of the student within a room or any other form of enclosure.

3. Not every exclusion of a student constitutes an aversive intervention. Time-outs that do not meet the definition of "isolation" or "aversive intervention" may continue to be used as a part of general classroom discipline, unless they conflict in some way with a student's IEP/BIP.

a. Use of a time-out chair where a student was told to sit in "time-out" in a separate area of the classroom, but not a separate enclosed room, did not meet the definition of isolation. *In re Student with a Disability*, 2002-SE-0144, 106 LRP 2714 (Shave, 2002).

b. Sending a student to a nurse's office or small room adjacent to a classroom did not constitute "isolation" or aversive intervention where the evidence showed the rooms "were only used as quiet areas for the students to avoid noise, disruption, or to go voluntarily to get away from too much stimulation or when escalated." *Puyallup Sch. Dist.*, 2008-SE-0010, 109 LRP 21024 (Wash. SEA 2008) (Burdue). Further, telling the student on one occasion to go to the room (but not physically forcing him to do so) did not constitute an aversive intervention because the student's behavior had become out of control and Student posed a danger to himself and the other students. The ALJ noted that even assuming the Student was forced into the room as parents alleged, this situation "meets all three of the requirements in [WAC 392-172A-03120] for use of "reasonable force or other treatment. Thus, the teachers could have legally required the Student to enter the quite room on that day, had that been necessary for his safety or the safety of others. Simply instructing the Student to go to a quiet room when he is throwing a violent tantrum does not constitute the use of any kind of force, and is not within the definition of aversive intervention."

4. Use of isolation must meet all of the following criteria identified in the WAC 392-172A-03130(2):

a. Use of the room must be specified in the IEP;

b. The room must be ventilated, lighted, and temperature controlled from inside or outside for purposes of human occupancy;

c. The enclosure shall permit continuous visual monitoring of the student from outside the enclosure.

d. An adult responsible for supervising the student shall remain in visual or auditory range of the student.

e. Either the student shall be capable of releasing himself or herself from the enclosure or the student shall continuously remain within view of an adult responsible for supervising the student.

4. School districts are responsible for ensuring that time-out rooms used by third parties providing services to students in non-district facilities also meet all the conditions of the WAC. In *In re Student with Disability*, 99-SE-0065, 102 LRP 2684 (Kingsley 1999), the district denied the student a FAPE by failing to ensure that the residential treatment center staff complied with WAC and IEP provisions regarding use of

timeout room. The student was not visually monitored and was isolated in a room smelling of urine, which the ALJ ruled violated the prohibition against use of "noxious smells."

5. Parents must be afforded meaningful participation, and less restrictive alternatives must be considered, but the fact that parents disagree with the use of a time-out room does not, in itself, mean it is inappropriate. *North Beach Sch. Dist.*, 32 LRP 6112 (OCR 1999). In this decision, OCR found that the district's placement of a student with behavioral disability in a time-out room was proper under his IEP. The use of the time-out room was provided for in the student's IEP and an administrative law judge had previously declared the use of the time-out room appropriate following a due process hearing. Also, the district had renovated the room to ensure its effective use. OCR also found the district did not deny parental participation because it provided proper notice of its decision. *See also Eatonville Sch. Dist.*, 2001-SE-0094, 103 LRP 27269 (Wang, 2002) ("The regulations do not require that a parent consent or that a district must stop use of aversive interventions because a parent requests it.")

E. Physical Restraint

1. Physical restraints are prohibited except under the conditions set forth in WAC 392-172A-03130(3).

2. "Restraint" is included in the definition of "aversive interventions" set forth above, and the term "physical restraint" is further defined as "physically restraining or immobilizing a student by binding or otherwise attaching the student's limbs together or by binding or otherwise attaching any part of the student's body to an object." WAC 392-172A-03130(3). The definition of physical restraint is broad enough to include secure "holds" as well as harnesses and other types of restraints.

3. Use of physical restraint is even more severely restricted than use of isolation or timeout rooms. Unlike timeout rooms, which may be used for reasons other than protection from an immediate threat, physical restraint may only be used "when and to the extent it is reasonably necessary to protect the student, other persons, or property from serious harm." WAC 392-172A-03130(3)(a).

4. The use of the restraint, including the duration of its use, must be specified in the IEP. WAC 392-172A-03130(3)(b).

5. The restraint may not interfere with a student's breathing. WAC 392-172A-03130(3)(c).

6. At least one ALJ has recognized that in some limited circumstances, truly "systematic" use of restraints may be appropriate even if each use of restraints is not precipitated by specific dangerous behaviors. In *Mukilteo Sch. Dist.*, 2005-SE-0015, 105 LRP 32312 (2005), the ALJ ruled that the district did not violate the IDEA or state law by restraining a behaviorally disabled student in a harness while in transit,

because the evidence showed he presented a "clear and present danger" to himself and others, as exhibited by his occasional ability to break away, kick windows and bite and hit school personnel. Parents argued that such restraint was only authorized in response to a specific behavioral incident. The ALJ rejected this interpretation and ruled that where there has been a history of such behavior that is unpredictable, it is reasonable for a school district to conclude that the student constitutes an ongoing danger of harm. The use of restraint was appropriately included in the student's IEP and aversive plan because less restrictive alternatives had been proven insufficient to prevent an ongoing and significant safety risk to the student and others during transit. This was the case even though the harness was intentionally fashioned in a manner such that the student was unable to release himself. The ALJ noted that the District complied with all other requirements of the WAC, including that the student was within constant view of a supervising adult. The ALJ also noted that the IEP provided a means for ongoing evaluation of the appropriateness of the harness.

F. Procedural Requirements

For those types of aversive interventions not specifically prohibited, additional procedural requirements apply. *See* WAC 392-172A-03135.

1. IEP team members

a. WAC 392-172A-03135(a) requires that an IEP with aversive interventions be "consistent with the recommendations of the IEP team which includes a school psychologist and/or other certificated employee who understands the appropriate use of the aversive interventions and who concurs with the recommended use of the aversive interventions, and a person who works directly with the student."

b. Often an IEP team already will contain at least one person who "works directly with the student" and/or a school psychologist, but the school district must also be able to demonstrate that the staff member is trained in appropriate use of aversives. One Washington ALJ has held that it was a procedural violation of the IDEA to adopt an aversive plan without a school psychologist present, but in that case the violation did not deny the student FAPE because there was no evidence that the student lost educational opportunity as a result. *Seattle Sch. Dist.*, 102 LRP 2638, 2000-SE-0024 (Wash. SEA 2000). In that case, the interventions listed in the plan either were not used (bear hugs) or were consistent with the recommendations of experts who testified at the hearing (time-out). Notably, in that case a special education teacher and a BD special education teacher were in attendance at the meeting, but the ALJ did not deem the evidence sufficient to establish that either of them qualified as a "certificated employee [who] understood the appropriate use of aversive interventions."

2. Written Plan

WAC 392-172A-03135(b) through (g) provide the requirements of a written plan to use aversive interventions. At a minimum, the IEP must:

a. Specify the aversive interventions that may be used;

b. State the reason the aversive intervention is judged appropriate, the behavioral objective sought to be achieved by its use, the positive interventions attempted and the reasons they failed, if known;

Note: the plan should not rely on a general statement that positive behavioral supports have not worked. The specific attempts that have been made should be documented in the IEP.

c. Describe the circumstances under which the aversive interventions may be used;

d. Describe or specify the maximum duration of each isolation or restraint;

e. Specify any special precautions that must be taken in connection with the use of the aversive interventions;.

f. Specify the person or persons permitted to use the aversive interventions and the current qualifications and required training of the personnel permitted to use the aversive interventions; and

g. Establish a means of evaluating the effects of the use of the aversive interventions and a schedule for periodically conducting the evaluation, to occur no less than four times a school year.

Note: the Office of Superintendent of Public Instruction has proposed a change to WAC 392-172A-03135 that would require these periodic evaluations to take place "at least every three months when school is in session," instead of four times per school year. This change may take effect during the 2009-10 school year. Wash. St. Reg. 09-15-143.

3. Documentation

School districts must document each use of an aversive intervention, the circumstances under which it was used, and the length of time of use. WAC 392-172A-03135(2).

4. Procedural Violations that Deny FAPE

In the context of aversive plans, as in other contexts, a procedural violation may be considered a denial of FAPE if it impacts meaningful parental participation or the

educational benefit the student receives from his or her program. The following ALJ decisions have found procedural violations to be a denial of a FAPE:

a. No plan. School districts must "strictly comply with state regulations in order to use aversive therapy." *North Beach Sch. Dist.*, 1997-SE-041 and -060, 102 LRP 2748 (Radcliffe 1997). The district denied FAPE because its "cool down room" was used for a period of time prior to adoption of an aversive plan, and the room had no window for part of the time it was used, meaning that the student was not visible to staff on the outside. The ALJ also held that the plan calling for the use of the room was improperly implemented because the teacher escalated the student's behavior by pulling him out of the room when he was not ready to leave.

b. Improper documentation and incomplete plan. In *In re Student with Disability*, 99-SE-0065, 102 LRP 2684 (Kingsley 1999), the district denied a student FAPE by failing to record the date, time duration and reason for each isolation; and by failing to include the maximum duration of the isolation and the persons authorized to impose isolation in the IEP. Despite these violations, the remedy was limited due to the parents' acceptance of the terms of the IEP and aversive plan.

c. Failing to inform parents of incidents. At least two cases have held that a district's failure to keep parents informed of aversive interventions used on the student constituted a denial of FAPE. *See North Thurston Sch. Dist.*, 2006-SE-0055, 107 LRP 11242 (Conklin, 2006) (failure to inform father that student had disrobed and urinated in timeout room); *Issaquah Sch. Dist.*, 2007-SE-0003, 107 LRP 63423 (Conklin, 2007) (failing to keep parents informed about significant amount of time student spent in time-outs and student's aggressive and assaultive behavior). "Without such information, the Parents cannot meaningfully participate in the preparation of the Student's IEP." *Issaquah Sch. Dist., supra*. It is unclear from these decisions whether the IEP contained a specific requirement for such communications to occur.

5. "Harmless" Procedural Violations

Although ALJs have required rigorous adherence to the regulations governing aversive interventions, in a few cases procedural violations have been held to be so minor as not to constitute a denial of FAPE.

a. IEP team members. The failure to have school psychologist attend meeting at which aversive plan was drafted constituted a procedural violation but did not deny student FAPE, where the interventions listed either were not used (bear hugs) or were consistent with expert testimony offered at hearing (time-out room). *Seattle Sch. Dist*., 102 LRP 2638, 2000-SE-0024 (Wash. SEA 2000).

b. No plan. District accepted IEP from former school district but overlooked aversive plan. As a result no aversive plan was in place for approximately three

months. This procedural error did not deny the Student a FAPE where there was no evidence that the failure to have an aversive intervention plan during that time period resulted in inappropriate intervention by the School District, or adversely affected the Student's education. *Shelton Sch. Dist.*, 2002-SE-0086, 103 LRP 38298 (2002).

IV. Future Trends

A. Advocacy

Disability rights groups are currently advocating in Congress for restrictions on use of restraint and seclusion in public schools. *See* National Disability Rights Network, *School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools* (January 2009). This report calls for a nationwide ban on "prone restraints" and for regulations prohibiting restraint or seclusion except where necessary to ensure immediate physical safety of the student or others. The report notes that Washington State regulations already contain such a restriction on use of restraints, but not on the use of "seclusion" or "timeout rooms." However, the report suggests that these regulations do not go far enough because they do not ban "prone restraints" altogether or limit use of "seclusion" to situations where the student or others are in danger.

B. Congressional Action

Rep. George Miller, chairman of the House Committee on Education and Labor, held hearings on the use of seclusion and restraints in May 2009. In preparation for this hearing, investigators from the Government Accountability Office were asked to "(1) provide an overview of seclusion and restraint laws applicable to public and private schools, (2) verify whether allegations of student death and abuse from the use of these methods are widespread, and (3) examine the facts and circumstances surround cased where a student died or suffered abuse as a a result of being secluded or restrained." The GAO testimony was published in a report titled *Seclusion and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, GAO-09-719T (May 19, 2009). In addition, the Congressional Research Service published a report titled *The Use of Seclusion and Restraint in Public Schools: The Legal Issues*, R40522 (May 21, 2009), which summarizes current federal law applicable to seclusion and restraint.

APPENDIX

WAC 392-172A-03120 Aversive interventions definition and purpose. (1) The term "aversive interventions" means the systematic use of stimuli or other treatment which a student is known to find unpleasant for the purpose of discouraging undesirable behavior on the part of the student. The term does not include the use of reasonable force, restraint, or other treatment to control unpredicted spontaneous behavior which poses one of the following dangers:

(a) A clear and present danger of serious harm to the student or another person.

(b) A clear and present danger of serious harm to property.

(c) A clear and present danger of seriously disrupting the educational process.

(2) The purpose is to assure that students eligible for special education are safeguarded against the use and misuse of various forms of aversive interventions. Each school district shall take steps to assure that each employee, volunteer, contractor, and other agent of the district or other public agency responsible for the education, care, or custody of a special education student is aware of aversive intervention requirements and the conditions under which they may be used. No school district or other public agency and no educational service district shall authorize, permit, or condone the use of aversive interventions which violates WAC 392-172A-03120 through 392-172A-03135 by any employee, volunteer, contractor or other agent of the district or other public agency responsible for the education, care, or custody of a special education student. Aversive interventions, to the extent permitted, shall only be used as a last resort. Positive behavioral supports interventions shall be used by the school district and described in the individualized education program prior to the determination that the use of aversive intervention is a necessary part of the student's program.

[Statutory Authority: RCW 28A.155.090(7) and 42 U.S.C. 1400 et. seq. 07-14-078, § 392-172A-03120, filed 6/29/07, effective 7/30/07.]

WAC 392-172A-03125 Aversive intervention prohibitions. There are certain interventions that are manifestly inappropriate by reason of their offensive nature or their potential negative physical consequences, or their legality. The purpose of this section is to uniformly prohibit their use with students eligible for special education as follows:

(1) Electric current. No student may be stimulated by contact with electric current.

(2) Food services. No student who is willing to consume subsistence food or liquid when the food or liquid is customarily served may be denied or subjected to an unreasonable delay in the provision of the food or liquid.

(3)(a) Force and restraint in general. No force or restraint which is either unreasonable under the circumstances or deemed to be an unreasonable form of corporal punishment as a matter of state law may be used. See RCW 9A.16.100 which cites the following uses of force or restraint as uses which are presumed to be unreasonable and therefore unlawful:

(i) Throwing, kicking, burning, or cutting a student.

(ii) Striking a student with a closed fist.

(iii) Shaking a student under age three.

(iv) Interfering with a student's breathing.

(v) Threatening a student with a deadly weapon.

(vi) Doing any other act that is likely to cause bodily harm to a student greater than transient pain or minor temporary marks.

(b) The statutory listing of worst case uses of force or restraint described in this subsection may not be read as implying that all unlisted uses (e.g., shaking a four year old) are permissible. Whether or not an unlisted use of force or restraint is permissible depends upon such considerations as the balance of these rules, and whether the use is reasonable under the circumstances.

(4) Hygiene care. No student may be denied or subjected to an unreasonable delay in the provision of common hygiene care.

(5) Isolation. No student may be excluded from his or her regular instructional or service area and isolated within a room or any other form of enclosure, except under the conditions set forth in WAC 392-172A-03130.

(6) Medication. No student may be denied or subjected to an unreasonable delay in the provision of medication.

(7) Noise. No student may be forced to listen to noise or sound that the student finds painful.

(8) Noxious sprays. No student may be forced to smell or be sprayed in the face with a noxious or potentially harmful substance.

(9) Physical restraints. No student may be physically restrained or immobilized by binding or otherwise attaching the student's limbs together or by binding or otherwise attaching any part of the student's body to an object, except under the conditions set forth in WAC 392-172A-03130.

(10) Taste treatment. No student may be forced to taste or ingest a substance which is not commonly consumed or which is not commonly consumed in its existing form or concentration.

(11) Water treatment. No student's head may be partially or wholly submerged in water or any other liquid.

[Statutory Authority: RCW 28A.155.090(7) and 42 U.S.C. 1400 et. seq. 07-14-078, § 392-172A-03125, filed 6/29/07, effective 7/30/07.]

WAC 392-172A-03130 Aversive interventions — Conditions. Use of various forms of aversive interventions which are not prohibited by WAC 392-172A-03125 warrant close scrutiny. Accordingly, the use of aversive interventions involving bodily contact, isolation, or physical restraint not prohibited is conditioned upon compliance with the following procedural and substantive safeguards:

(1) Bodily contact. The use of any form of aversive interventions which involves contacting the body of a student shall be provided for by the terms of the student's individualized education program established in accordance with the requirements of WAC 392-172A-03135.

(2) Isolation. The use of aversive interventions which involves excluding a student from his or her regular instructional area and isolation of the student within a room or any other form of enclosure is subject to each of the following conditions:

(a) The isolation, including the duration of its use, shall be provided for by the terms of the student's individualized education program established in accordance with the requirements of WAC 392-172A-03135.

(b) The enclosure shall be ventilated, lighted, and temperature controlled from inside or outside for purposes of human occupancy.

(c) The enclosure shall permit continuous visual monitoring of the student from outside the enclosure.

(d) An adult responsible for supervising the student shall remain in visual or auditory range of the student.

(e) Either the student shall be capable of releasing himself or herself from the enclosure or the student shall continuously remain within view of an adult responsible for supervising the student.

(3) Physical restraint. The use of aversive interventions which involves physically restraining or immobilizing a student by binding or otherwise attaching the student's limbs together or by binding or otherwise attaching any part of the student's body to an object is subject to each of the following conditions:

(a) The restraint shall only be used when and to the extent it is reasonably necessary to protect the student, other persons, or property from serious harm.

(b) The restraint, including the duration of its use, shall be provided for by the terms of the student's individualized education program established in accordance with the requirements of WAC 392-172A-03135.

(c) The restraint shall not interfere with the student's breathing.

(d) An adult responsible for supervising the student shall remain in visual or auditory range of the student.

(e) Either the student shall be capable of releasing himself or herself from the restraint or the student shall continuously remain within view of an adult responsible for supervising the student.

[Statutory Authority: RCW 28A.155.090(7) and 42 U.S.C. 1400 et. seq. 07-14-078, § 392-172A-03130, filed 6/29/07, effective 7/30/07.]

WAC 392-172A-03135 Aversive interventions — Individualized education program requirements. (1) If the need for use of aversive interventions is determined appropriate by the IEP team, the individualized education program shall:

(a) Be consistent with the recommendations of the IEP team which includes a school psychologist and/or other certificated employee who understands the appropriate use of the aversive interventions and who concurs with the recommended use of the aversive interventions, and a person who works directly with the student.

(b) Specify the aversive interventions that may be used.

(c) State the reason the aversive interventions are judged to be appropriate and the behavioral objective sought to be achieved by its use, and shall describe the positive interventions attempted and the reasons they failed, if known.

(d) Describe the circumstances under which the aversive interventions may be used.

(e) Describe or specify the maximum duration of each isolation or restraint.

(f) Specify any special precautions that must be taken in connection with the use of the aversive interventions technique.

(g) Specify the person or persons permitted to use the aversive interventions and the current qualifications and required training of the personnel permitted to use the aversive interventions.

(h) Establish a means of evaluating the effects of the use of the aversive interventions and a schedule for periodically conducting the evaluation, to occur no less than four times a school year.

(2) School districts shall document each use of an aversive intervention, circumstances under which it was used, and the length of time of use.

[Statutory Authority: RCW 28A.155.090(7) and 42 U.S.C. 1400 et. seq. 07-14-078, § 392-172A-03135, filed 6/29/07, effective 7/30/07.]

Workshop 11

Transition Services Under IDEA 2004

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TRANSITION SERVICES UNDER THE IDEA 2004

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I. INTRODUCTION

This presentation addresses the key issues related to transition services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq.* (2005) and its implementing federal regulations, 34 C.F.R. § 300 (2006). We discuss the history of transition services in the IDEA, major 2004 changes to the IDEA, relevant federal and agency decisions, guidelines for assessing transition needs, and guidelines for developing Individualized Education Programs (IEP).

II. IDEA – TRANSITION COMPONENTS: PREVIOUS REAUTHORIZATIONS

A. The 1975 Education for All Handicapped Children Act required districts:
   1. To provide a Free and Appropriate Public Education (FAPE) for all children with disabilities.
   2. To develop IEPs for each child eligible to receive special education services.
   3. To educate disabled students in the least restrictive educational environment.

B. The Act established the right of parents to participate in their child's educational planning, and due process procedures to assure parents could enforce this right.

C. The 1990 Reauthorization of the IDEA:
   1. Changed the name of the law from the Education of the Handicapped Act to the IDEA.
   2. Included transition services for the first time, requiring an IEP to contain a statement of needed transition services.

D. The 1997 Reauthorization of the IDEA:
   1. Mandated that IEPs include a statement of transition needs related to students' courses of study beginning at age 14, and a transition services component for students with disabilities age 16 and older.
      a. At age 14, school districts needed to identify student's transition service needs.
      b. Then at age 16, school districts needed to develop a statement of necessary transition services.

The materials contained herein and discussed during the workshop are necessarily general in nature and are not intended to constitute legal advice. As always, if you have a specific legal question regarding transition services, please consult with your attorney or legal advisor.

i. The statement of needed transition services included instruction, related services, community experiences, the development of employment and other post-school adult living objectives; and if appropriate, acquisition of daily living skills and functional vocational evaluation. 34 C.F.R. § 300.29(a)(3).

2. Encouraged the participation of parents and students in educational planning and decision making.
   a. If transition service needs were to be discussed, the public agency was required to invite the student to participate in the IEP meeting and, if the student did not attend, additional steps needed to be taken to engage the student in the process.
      i. The public agency needed to invite a student with a disability of any age to attend his or her IEP meeting if a purpose of the meeting was to be the consideration of the student's transition services needs under 34 C.F.R. § 300.347(b)(1), the needed transition services for the student under 34 C.F.R. § 300.347(b)(2), or both.
      ii. If the student did not attend the IEP meeting, the public agency needed to take other steps to ensure that the student's preferences and interests received consideration. 34 C.F.R. §300.344(b)(1) & (2).
3. Encouraged the development of interagency responsibilities.
   a. It required the statement of needed transition services to include a statement of the interagency responsibilities or any needed linkages. 34 C.F.R. § 300.347(b)(2).
   b. It also required the public agency to invite a representative of any other agency likely to be responsible for providing or paying for transition services. If an agency invited to send a representative to a meeting did not do so, the public agency was required to take other steps to obtain participation of the other agency in the planning of any transition services. 34 C.F.R. § 300.344(b)(3).
4. Required states to inform a student of any rights that transfer when the student reached the age of majority.
   a. In a State that transfers rights at the age majority, beginning at least one year before a student reaches the age of majority under State law, the student's IEP must include a statement that the student has been informed of his or her rights under Part B of the Act, if any, that will transfer to the student on reaching the age of majority, consistent with 34 C.F.R. § 300.517. 34 C.F.R. § 300.347(c).

III. IDEA – TRANSITION COMPONENTS: 2004 REAUTHORIZATION

The 2004 Reauthorization made significant changes concerning transition services:

A. The Reauthorization added "further education" to the purposes of the IDEA.
   1. The purposes of the IDEA include ensuring that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A).

B. The Reauthorization redefined transition services.
   1. The term "transition services" means a coordinated set of activities for a child with a disability that:
      a. is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
      b. is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and
      c. includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and functional vocational evaluation. 20 U.S.C. § 1401(34).

C. The Reauthorization requires a summary of performance when a student's eligibility is terminated.
   1. The evaluation described in 34 C.F.R. § 300.305(e)(1) (see 20 U.S.C. § 1414(c)(5)(B)(i)) is not required before the termination of a child's eligibility under Part B due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law. 20 U.S.C. § 1414(c)(5)(B)(i).
   2. For a child whose eligibility under Part B terminates under circumstances described above, a local educational agency (LEA) shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's post-secondary goals. 20 U.S.C. § 1414(c)(5)(B)(ii).

D. The Reauthorization changes the requirements of the transition component of an IEP.
   1. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP team, and updated annually thereafter, the IEP must include:
      a. Appropriate, measurable post-secondary goals based upon age-appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills;
      b. The transition services (including courses of study) needed to assist the child in reaching those goals; and
      c. Beginning not later than one year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under Part B, if any, that will transfer to the child on reaching the age of majority under 20 U.S.C. § 1415(m). 20 U.S.C. § 1414 (d)(1)(A)(i)(VIII).

E. The Reauthorization requires a child to be invited to the IEP planning meeting, if transition services are discussed.
   1. The LEA must invite a child with a disability to attend the child's IEP team meeting if a purpose of the meeting will be the consideration of the post-secondary goals for the child and the transition services needed to assist the child in reaching those goals under 34 C.F.R. § 300.320(b). 20 U.S.C. § 1414(d)(1)(B).
   2. Need permission or consent to invite outside agencies to such meetings:
      a. If a purpose of a child's IEP team meeting will be the consideration of post-secondary goals for the child and the transition services needed to assist the child in reaching those goals, the LEA, to the extent appropriate, and with consent, must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services to attend the child's IEP team meeting. However, if the participating agency does not attend the meeting, the LEA is no longer required to take other steps to obtain participation of an agency in the planning of any transition services. 20 U.S.C. § 1414(d)(1).

IV. IDEA TRANSITION COMPONENTS – RELEVANT FEDERAL DECISIONS

A. *Chuhran v. Walled Lake Consolidated Sch.*, 51 F.3d 271, 1995 WL 138882 (6th Cir. 1995) (not designated for publication).
   1. The Court of Appeals for the Sixth Circuit held that technical defects in an IEP did not result in a violation of the IDEA as long as the student was not denied substantive services.
   2. The Court concluded that the failure to have a specific written transition plan was an insubstantial technical defect because the student had been provided with adequate transition services.
   3. The Court found that the school district had provided adequate transition services in that the IEP took into account the student's interest, abilities and possibilities for future employment and made coordinated efforts with outside agencies toward established goals.
   4. The Court was analyzing the 1990 Reauthorization of the IDEA.

B. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996).
   1. The Court concluded that the lack of an explicit statement of transition services, here a failure to designate a specific outcome or a specific set of activities for meeting that outcome, is a procedural defect, and did not result in denial of a FAPE.
   2. The Court further concluded that the student was not denied a FAPE because, while there was no explicit statement of transition services, he was not denied transition services, and his IEP contained language that addressed his transitional needs. The Court drew a distinction between the statement of transition services and the provision of transition services.
   3. The Court noted that the student's transitional needs included community awareness, daily living skills, and the ability to pay for purchases, with the

services focused on teaching the student to generalize and transfer skills from one environment to the other.

4. The Court was analyzing the 1990 Reauthorization of the IDEA.

C. *Bd. of Educ. of Township High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267 (7th Cir. 2007).
   1. The Court concluded that the school district's failure to include a specific transition plan in the student's IEP did not result in denial of a FAPE.
   2. The Court further concluded that in order to result in denial of a FAPE, the flaw in transition planning must have resulted in a loss of educational opportunity.
      a. The Court noted that here the school district should have included more specific transition plans in the student's IEP, but that the school district did not fail to give the student anything that she was entitled to.
   3. The Court also noted that it was acceptable for the school district to "defer" a transition plan when the student was not in a position to benefit from an elaborate transition plan, which here would have included advanced vocation or educational skills.
   4. The Court was analyzing the 2004 Reauthorization of the IDEA.

D. *J.L. v. Mercer Island Sch. Dist*., 2006 WL 3628033 (W.D.Wash. 2006) (not designated for publication). Appeal pending before the Ninth Circuit.
   1. The District Court for the Western District of Washington reversed the Administrative Law Judge's (ALJ) decision and remanded the case back to the ALJ for a new decision.
   2. The Court concluded that the standards in *Rowley* (whether schools provided access to specialized instruction, whether the student's progress was more than minimal, and whether the program was reasonably calculated to provide educational benefit) were no longer appropriate because of the 1997 reauthorization of the IDEA which placed emphasis on transition services, independent living, and economic self-sufficiency. The Court noted that the IDEA was no longer concerned with access, but instead focused on an outcome-oriented process.
   3. The Court further concluded that on remand the ALJ should analyze whether the school district met the IDEA standard of: "equality of opportunity, full participation, independent living, and economic self sufficiency," and whether the program provided meaningful educational benefits.
   4. The Court was analyzing the 1997 Reauthorization of the IDEA.

E. *Virginia v. Dept. of Educ., Hawaii*, 2007 WL 80814 (D.Hawaii 2007) (not designated for publication).
   1. The Court concluded that even though the transition plan listed on the student's IEP was not individualized (did not take into account the child's needs, strengths, preferences, and interest), this was a harmless error since the student would still receive adequate educational benefits from the general plan.

2. The generic transition plan listed the student's goals as graduating from high school, attending a university or community college, and employment in the community. The services related to those goals would include assistance in college planning and opportunities to explore career options.
3. The Court was analyzing the 2004 Reauthorization of the IDEA.

F. *Sinan v. Sch. Dist. of Philadelphia*, 2007 WL 1933021 (E.D. Pa. 2007) (not designated for publication).
   1. The Court found that the transition plan provided to the student contained only generic goals that did not change from year to year, the goals listed were overly vague and did not take into account the student's strengths, interests, needs, or preferences, and therefore the school district did not provide a meaningful transition plan.
   2. The Court was analyzing the 2004 Reauthorization of the IDEA.

G. *Marple Newton Sch. Dist. v. Rafael*, 2007 WL 2458076 (E.D. Pa. 2007) (not designated for publication).
   1. The Court noted that the IDEA only required functional and vocational planning when appropriate, concluding that school districts do not have a duty to provide functional and vocational training in all transition plans, without regard to the student's individual preferences.
      a. The Court held that it was appropriate for the student's IEP to focus on college planning to the exclusion of functional and vocational training as a result of his parent's rejection of a vocational outcome.
   2. The Court was analyzing the 2004 Reauthorization of the IDEA.

H. *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18 (1st Cir. 2008).
   1. The Court concluded that the IDEA did not require a stand alone transition plan. It required that an IEP contain statements of transition services, but those statements do not have to be articulated in a separate component of the IEP.
   2. The Court also reaffirmed that the *Rowley* standard (i.e. whether the IEP components are reasonably calculated to enable the child to receive educational benefits) was the correct standard to evaluate transition services, stating that the 1997 amendments to the IDEA did not change the legal standard for evaluating transition services.
   3. The Court further concluded that when considering the adequacy of the transition services provided to a student, the inquiring court must view those services in the aggregate and in light of the students overall needs. The inquiring court must consider whether the IEP, as a whole, is reasonably calculated to provide the child with the necessary educational benefits.
   4. Here the transition services that were provided, and found to be adequate were monthly field trips into the community, pre-vocational training, and specific transition skills training (such as using a telephone, identifying workers in community settings, self-hygiene, and food preparation).
   5. The Court was analyzing the 1997 Reauthorization of the IDEA.

V. IDEA TRANSITION COMPONENTS – RELEVANT AGENCY DECISIONS

A. *B.K. v. Brick Township Bd. of Edu*., 1998 WL 665968 (N.J. Adm. 1998).
   1. The Agency held that the student should be provided with one year compensatory education, and that the student's IEP and respective services needed to be revised to include transition services.
   2. The Agency found that none of the student's IEPs contained transition plans or services. The Agency held that the IEPs should have established post-high school goals and then developed a set of coordinated activities to meet those goals. Also, to comply with the IDEA the IEP needed to address three areas: instruction, community experiences, and the development of employment and other post-school living objectives. Daily living skills and functional vocational were included as additional objectives as appropriate.
   3. The Agency was analyzing the 1997 Reauthorization of the IDEA.

B. *C.K., G.K. AND P.K. v. New Providence Bd. of Edu*., 2006 WL 2645089 (N.J. Adm. 2006).
   1. The Agency held that the school district provided the student with a FAPE, and dismissed all charges against the school district.
   2. The Agency found that the IEP was sufficient because it provided the opportunity for significant learning and was reasonably calculated to confer meaningful educational benefit in the least restrictive environment.
      a. The transitional component of the IEP allowed for the student to participate in a school-to-work program, which allowed her the opportunity to work in the community where she lives. The program focused on teaching students skills that fostered personal independence and self-sufficiency. Also, the program had an extended summer option that helped teach functional life skills.
   3. The Agency was analyzing the 2004 Reauthorization of the IDEA.

C. *J.T. and C.T. v. West Windsor-Plainsboro Regional Bd. of Edu*., 2007 WL 1398738 (N.J. Adm. 2007).
   1. The Agency held that the student's IEPs failed to comply with the requirements of the IDEA and constituted a denial of a FAPE, resulting in the student's graduation to be set aside and the school district being required to provide the student with a year and a half of compensatory education.
   2. The Agency found that the IEPs were devoid of any provisions relating to transition services, there was no analysis done of the student's transitional needs and no details of the transitional services that the student would be provided in order to prepare herself for post-secondary education. The IEPs failed to consider the student's preferences and interests, and failed to focus on progressing her towards self-sufficiency, independent living, post-secondary education, and employment.
   3. The Agency was analyzing the 2004 Reauthorization of the IDEA.

D. *Z.R. v. Fort Lee Bd. of Edu*., 2008 WL 4277563 (N.J. Adm. 2008).
   1. The Agency held that while the student's IEP provided by the school district contained many procedural violations, there were no substantive violations of the IDEA since the student still received a meaningful benefit from her education, her parents were still able to participate in the decision-making process, and her educational achievements were at least average based on her level of ability.
   2. The Agency noted that the student's transition plan offered substantial information and assistance tailored to the student's unique needs and personal goals.
      a. Some of the actions included in the transition plan were: providing information about agencies that provide transition services; writing a checklist of activities and services needed to ensure a smooth transition into life after graduation; a specific IEP tailored to the student; and a social skills class to encourage interpersonal skills.
   3. The Agency was analyzing the 2004 Reauthorization of the IDEA.

VI. IDEA TRANSITION GUIDELINES – EVALUATING THE STUDENT AND DEVELOPING TRANSITION COMPONENTS

A. Transition Assessment: Introduction
   1. Definition:
      a. Transition Assessment, according to the Division on Career Development and Transition (DCDT) of the Council for Exceptional Children, is an

         ongoing process of collecting data on the individual's needs, preferences, and interests as they relate to the demands of current and future working, educational, living, and personal and social environments. Assessment data serve as the common thread in the transition process and form the basis for defining goals and services to be included in the IEP.

B. Transition Assessment

The NSTTAC developed a Transition Assessment Guide. The Guide provides information on transition assessment, assessment tools, and how to decide which tools to use. Material from this guide is summarized below.

1. Informal v. Formal Assessments:
   a. Informal Assessments:
      i. Lack formal reliability and validity measures.
      ii. Require more subjectivity to complete and should be given by more than one person to increase validity.
   b. Formal Assessments:
      i. Standardized instruments that have been tested and have data to show their reliability and validity.
      ii. Independent reviews of the tests are often available in books or online.

2. **Frameworks for Assessments:**
    a. Assess, Plan, Instruct, and Evaluate (Sitlington, Neubert, Begun, Lombard, and LeConte, 1996).
        i. Assess – assess the student's interest, preferences, and needs related to their post-secondary outcomes using both formal and/or informal methods.
        ii. Plan – interpret the results from the assessments and incorporate them into the student's transition plan.
        iii. Instruct – teach students the skills they will need to reach their post-secondary goals.
        iv. Evaluate – evaluate whether progress has been made toward achieving the transition activities, and IEP goals and objectives.
    b. Three Levels of Transition Assessment (Rojewski, 2002).
        i. Level I – for most students, review of existing information, student interview, interest assessment, personality or preference assessment and, if indicated, aptitude testing.
        ii. Level II – targets students having difficulty making career choices, preparing for adult living, or contemplating leaving school early to drop out. Level II would expand to include assessments targeting information related to work behaviors, such as career maturity and job readiness.
        iii. Level III – reserved for students needing additional assessment to identify long term career goals, if earlier tests were inconclusive or the child has severe disabilities. Usually these tests are given by a vocational assessment specialist.

3. **Purposes of Assessment**
    a. Identifying student's strengths, needs, and preferences.
    b. Identifying student's long-term and post-secondary goals.
    c. Help makes connection between individual studies and post-secondary goals.
    d. Help develop an IEP, specifically to identify the transition services and instructional programs needed by the student.

4. **Selection of Assessments (Clark, 1996)**
    a. First, become familiar with the types of assessments available.
    b. Second, identify assessments that assist the student in figuring out:
        i. Their goals, both for their life now and in the future;
        ii. The goals that the student can work to accomplish now;
        iii. The possible barriers to achieve the student's goals;
        iv. The resources available to the student at school and in the community.
    c. Third, select assessments that are appropriate for the student. Consider the nature of their disability, their post-secondary ambitions, and the opportunities that are available within their community.

5. Guidelines for Assessments (Sitlington, Neubert, and Leconte, 1997).

a. Assessment methods must incorporate assistive technology or accommodations that will allow an individual to demonstrate his or her abilities and potential.
b. Assessment methods must occur in environments that resemble actual vocational training, employment, independent living, or community environments.
c. Assessment methods must produce outcomes that contribute to ongoing development, planning, and implementation of "next steps" in the individual's transition process.
d. Assessment methods must be varied and include a sequence of activities that sample an individual's behavior and skills over time.
e. Assessment data must be verified by more than one method and by more than one person.
f. Assessment data must be synthesized and interpreted to individuals with disabilities, their families, and transition team members.
g. Assessment data and the results of the assessment process must be documented in a format that can be used to facilitate transition planning.

6. Types of Assessments

a. Informal:
    i. Interviews and Questionnaires:
        (i) Can be conducted with a variety of individuals to gain insight into the student's needs, preferences, and interests.
    ii. Direct Observation:
        (i) In a natural setting, an expert (such as job coach, co-worker or educator), observes student performance.
        (ii) Also, students should be encouraged to record their own performance.
        (iii) Data includes cataloging steps in completing a task, work behaviors, and affective information (is the student happy, bored?).
    iii. Environmental or Situational Analysis:
        (i) Involves the examination of environments where activities normally occur to assess things such as transportation needs, expectations the facility has of the students that attend, or requirements of a potential job site.
    iv. Curriculum-Based Assessments (CBAs):
        (i) Designed by educators to assess a student's performance in a specific curriculum and to help develop instruction plans tailored to a student's needs.
        (ii) Can include things such as task analyses, work samples, portfolio assessments, and criterion-reference tests.

b. Formal:
    i. Adaptive Behavioral Assessment Information:

(i) Assessment to determine the type and amount of special assistance a disabled student may need.
(ii) Test relies on a respondent (such as parent, teacher, or care provider) to provide information about the individual being assessed.
(iii) Usually involves either a direct interview, or having respondents fill out a response booklet.

ii. General and Specific Aptitude Tests:
(i) Used to measure skill and ability.
(ii) Two types:
1. Multi-aptitude – measures a wide range of aptitudes, sometimes in combination with each other.
2. Single aptitude – used to measure a specific aptitude, such as manual dexterity, clerical ability, or artistic ability.

iii. Interest and Work Values Inventories:
(i) Gathers information about the student's likes and dislikes of a variety of activities, objects, and types of persons the student commonly encounters.

iv. Intelligence Tests:
(i) Assesses a person's cognitive performance.

v. Achievement Tests:
(i) Measures the learning of general or specific academic skills.

vi. Personality or Preference Tests:
(i) Measures individual differences in social traits, motivational drives and needs, attitudes, and adjustment.
(ii) Often used to evaluate different career considerations.

vii. Career Maturity or Employability Tests:
(i) Measures developmental stages or tasks on a continuum. The level of the individual's career maturity is measured by their place on the continuum.

viii. Self-Determination Assessment:
(i) Provide information about the readiness of a student to make decisions related to post-secondary goals and provide data concerning the student's strengths and weaknesses that may affect goals.

ix. Work-Related Temperament Scales:
(i) Assesses work-related temperament, can be used to develop individual transition components to address particular student needs.

x. Transition Planning Inventories:
(i) Process that identifies transition strengths and needs.
(ii) Can encompass many topics, such as adult living, employment, post-secondary schooling and training, independent living, interpersonal relationships, and community living.

VII. IDEA TRANSITION GUIDELINES – EVALUATING THE IEP

A. Indicator 13: Introduction
   1. What is Indicator 13?
      a. In conjunction with the IDEA, the U.S. Department of Education, through the Office of Special Education Programs (OSEP) required states to develop six-year State Performance Plans around 20 indicators.
   2. Definition of Indicator 13:
      a. Percent of youth aged 16 and above with an IEP that includes coordinated, measurable, annual IEP goals and transition services that will reasonably enable the child meets the post-secondary goals.
   3. Information available at:
      a. http://www.nsttac.org/indicator13/indicator13.aspx

B. Indicator 13: Questions

The National Secondary Transition Technical Assistance Center (NSTTAC) developed a checklist that was approved by the OSEP. It serves as a resource for states to use in data collection or to compare their current monitoring system. The following questions and examples are from their checklist, which is available at http://www.nsttac.org/tm_materials/Default.aspx

1. Are there measureable post-secondary goals?
   a. To evaluate, ask:
      i. Can the goal(s) be counted?
      ii. Will the goal(s) occur after the student graduates from school?
      iii. Are there goals addressing education or training, employment and, if applicable, independent living?
   b. Example of Conformance:
      i. Upon completion of high school, John will enroll in courses at Ocean County Community College.
      ii. This goal meets NSTTAC Indicator 13 (I-13) standards for item #1 for the following reasons:
         (i) Participation in post-secondary education is the focus of this goal.
         (ii) Enrollment at a community college can be observed, as John enrolls in courses or he does not.
         (iii) The expectation, or behavior, is explicit, since John enrolls at the community college or he does not.
         (iv) Enrollment at a community college occurs after graduation, and it is stated that this goal will occur after graduation.
   c. Example of Non-Conformance:
      i. Jamarreo will learn about welding.
      ii. This goal does not meet I-13 standards for item #1 for the following reasons:
         (i) Learning about welding is not measurable as stated. This goal is not measurable, as no criterion or timeframe is identified.

(ii) The expectation for learning, or behavior, is not explicitly stated.
(iii)It is not stated that the goal will occur after graduation.

2. **Are there annual IEP goals that reasonably enable the child to meet the post-secondary goals?**
   a. To evaluate, ask:
      i. Are there short-term goals that that will help the student make progress toward the stated post-secondary goal?
   b. Example of Conformance:
      i. Given Ocean County Community College information, John will demonstrate knowledge of the college's admission requirements by verbally describing these requirements and identifying admission deadlines with 90% accuracy by November, 2007.
      ii. This annual goal meets I-13 standards for Item #2 for the following reasons:
         (i) Participation in education is the primary focus of this objective.
         (ii) Learning about the college's admission requirements is a step that can help John meet his goal of attending Ocean County Community College.
   c. Example of Non-Conformance:
      i. Allison will set up an appointment with the guidance counselor to be sure that she is taking the correct courses for admission to a four-year college.
      ii. This annual goal does not meet I-13 standards for Item #2 for the following reasons:
         (i) While the above example is an important activity, it does not represent her acquisition of knowledge or skills and is really a transition service activity, rather than an annual goal.
         (ii) Setting up an appointment is likely an activity that Allison can complete one time, not a goal that she would work toward all year.

3. **Are there transition services in the IEP that focus on improving the academic and functional achievement of the child to facilitate movement from school to post-school?**
   a. To evaluate, ask:
      i. In association with meeting post-secondary goals, are there types of instruction, related services, community experiences, employment development programs, post-school living objectives, and vocational and living skills evaluations (if appropriate) listed?
   b. Example of Conformance (for enrolling in community college):
      i. Instruction related to word processing / keyboarding skills.
      ii. Tutoring (peer or teacher) in reading comprehension strategies.
      iii. Self-monitoring instruction related to on-task behavior.
      iv. Self-advocacy training.
   c. Example of Non-Conformance (for enrolling in community college):
      i. Filling out an application.

ii. Touring a community college campus.
iii. Field trips to the grocery store.
iv. While the NSTTAC did not explicitly state why these examples do not conform, we believe it is because they do not relate to any actual transition services or programs.

4. For transition services that are likely to be provided or paid for by other agencies with parental consent, is there evidence that representatives of the agency were invited to the IEP meeting?

a. To evaluate, ask:
   i. For the current year, is there evidence in the IEP that representatives of any of the following agencies/services were invited to participate in the IEP development: post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living or community participation for this post-secondary goal?
   ii. Was consent obtained from the parent or child?
b. Example of Conformance:
   i. A consent form signed by John's father, indicating that the LEA may contact the disability services office of the Ocean County Community College.
   ii. An invitation to conference in the file, and mailed to professional staff in the disability services office of Ocean County Community College.
c. Example of Non-Conformance:
   i. John verbally stating that he will attend the local college fair.
   ii. A statement from John written on the IEP documenting that he will contact the Ocean County Community College disability support services office by November 2006.

5. Is there evidence that measureable post-secondary goals were based on age appropriate transition assessment?

a. To evaluate, ask:
   i. Is the use of a transition assessment(s) for the post-secondary goal(s) mentioned in the IEP or evident in the student's file?
b. Further Guidance:
   i. All students who plan on enrolling in post-secondary education (2 or 4-year college) should have the following information in their files:
      (i) State mandated test scores gathered during high school.
      (ii) Quarterly or semester grades throughout high school.
      (iii) Current psychological assessment data indicating strengths, weaknesses, and presence of a diagnosed disability.
      (iv) College entrance exam scores if applying to 4-year colleges.
   ii. This information would include data gathered over time.
   iii. Additional information may include: informal interviews with students, student completion questionnaires to establish student interests, and preferences in transition planning.

iv. Best practices would also include assessment information: provided by multiple people, regarding student performance in multiple environments, based on naturally occurring experiences, that is understandable, and that was gathered through instruments and methods sensitive to cultural diversity.

c. Example of Conformance:
   i. John has had perfect attendance throughout high school and particularly enjoys computer-based activities. John reads at a 5th grade level with some fluency problems, but struggles with oral reading comprehension and written expression. John's reported skills and interests match various occupations, including business data processing and medical technology.
   ii. This information meets I-13 standards for Item #5 for the following reasons:
      (i) Data was obtained over time (not one snapshot).
      (ii) It is responsive to student strengths, preferences, and interests.
      (iii) It considers present and possible future environments.
      (iv) There is no indication that the sources of information are not age appropriate.

d. Example of Non-Conformance:
   i. Results of the Aptitude Test for Occupations indicate that John may perform well in retail or business-related careers.
   ii. This information does not meet I-13 standards for Item #5 for the following reasons:
      (i) The information is from only one source.
      (ii) The source is not clearly connected with John's stated post-secondary goal (community college), so the information does not necessarily support the identification of annual goals and transition services that will support his stated post-secondary goal.

6. Do the transition services include courses of study that focus on improving the academic and functional achievement of the child to facilitate their movement from school to post-school?

a. To evaluate, ask:
   i. Do the transition services include courses of study that align with a student's post-secondary goal(s)?

b. Example of Conformance:
   i. For Allison's goal of obtaining a degree from a liberal arts university with a major in child development, her upcoming 12th grade year courses are listed as the following: Psychology (semester), English 12 (year), Algebra II (year), Band (year), Phys Ed. (semester), Cooperative Work Experience (semester), Advanced Biology (year), Child Development (semester), Resource Room (year)
   ii. These courses of study meet I-13 standards for Item #6 for the following reasons:

(i) The courses listed are relevant to the student's post-secondary goals.
(ii) Courses listed reflect the student's current (12th grade) to anticipated exit (12th grade) years.

c. Example of Non-Conformance:
i. The IEP lists Allison's courses for the current year:
(i) Occupational English I, II, III, IV (4 Credits), Occupational Mathematics I, II, III (3 Credits) Life Skills Science I, II (2 Credits), Social Studies I (Government/US History), II (Self-advocacy/Problem solving) (2 Credits), Computer proficiency as specified in the IEP.
ii. These courses of study do not meet I-13 standards for Item #6 for the following reason:
(i) These courses do not reflect adequate courses of study to meet Allison's post-secondary goal of graduating from a four-year liberal arts university.

7. Does the IEP meet the requirements of Indicator 13?
a. To evaluate, ask:
i. Are the answers to all of the questions listed above yes?

C. OSPI Training Module

1. Post-Secondary v. Annual Goals
a. Definitions:
i. Measurable Post-Secondary Goals are the student's identified goals for after the student leaves high school, and must address post-secondary education or training, employment, and (if appropriate) independent living skills.
ii. Measurable Annual Goals are the annual IEP goals, covering what the student will accomplish during that particular school year in each identified area of service.
b. Examples:
i. Measurable Post-Secondary Goal example: After graduation, Bob will attend a two-year community college program in order to become an auto mechanic.
ii. Measurable Annual IEP Goal example: Bob will increase his reading skills, using technical manuals relating to auto mechanics, from a 5th grade level to a 6th grade level by *(date)* as measured by curriculum-based assessments.

2. Specific Requirement: Education/Training
a. Definition: Enrollment in one or more of the following:
i. Community or technical college (two-year program),
ii. College/university (four-year program),
iii. College preparatory program,

iv. A high school completion document or certificate class (e.g., Adult Basic Education, GED),
v. Short-term education or employment training program (e.g., Job Corps, Vocational Rehabilitation, military).

3. Specific Requirement: Employment

a. Definitions:
   i. Competitive employment means work -
      (i) In the competitive labor market that is performed on a full-time or part-time basis in an integrated setting; and
      (ii) For which an individual is compensated at or above the minimum wage, but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by individuals who are not disabled.
   ii. Supported employment is competitive work in integrated work settings, consistent with the strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of the individuals, for individuals with the most significant disabilities for whom competitive employment has not traditionally occurred; and who, because of the nature and severity of their disability, need intensive supported employment services.

4. Specific Requirement: Independent Living Skills

a. Definition:
   i. Independent living skills are "those skills or tasks that contribute to the successful independent functioning of an individual in adulthood" (Cronin, 1996) in the following domains: leisure/recreation, home maintenance and personal care, and community participation.

5. Specific Requirement: Courses of Study

a. Definition:
   i. A description of coursework to achieve the student's desired post-school goals, from the student's current to anticipated exit year.
b. Compliant Examples:
   i. Sue receives specially designed instruction with an alternate curriculum; including instruction focused on self-care and communication skills, and will participate in work experience and vocational elective courses.
   ii. Bob receives specially designed instruction with an alternate curriculum, including instruction focused on career development, functional academics, and community referenced skills that are linked to the state standards for Language Arts, Math, and Science.
c. Non-Compliant Examples:
   i. The student took auto body repair and metal working last year.
   ii. Bob attends the self-contained classroom for students with developmental disabilities who are older than 18.

Workshop 12

Preschool Special Education

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PRESCHOOL SPECIAL EDUCATION: EARLY INTERVENTION AND TRANSITION TO PART B UNDER THE IDEA

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I. Introduction

A. Overview of the 2004 Reauthorization of the IDEA

Since 1965, the United States Congress has repeatedly enacted legislation aimed at improving educational opportunities for students with disabilities. Public Law 94-142, also known as the Education for All Handicapped Children Act of 1975,[1] was the first comprehensive reform that guaranteed a free, appropriate public education in the least restrictive environment for all students with disabilities, tailored to students' unique needs by means of individualized education programs. In 1990, this legislation was renewed and renamed as the Individuals with Disabilities Education Act ("IDEA").[2] The IDEA was reauthorized in 1997 following two years of analysis and congressional hearings.[3] When the IDEA was reauthorized again in 2004, it focused on the following specific goals (many of which are tied to requirements of the No Child Left Behind Act ("NCLB")):

- improving results for students by incorporating the accountability systems established in the NCLB;
- increasing parent involvement in the student's educational experience;
- increasing flexibility for parents who choose to home-school or enroll their children in private schools;
- improving early intervention services and evaluation/identification procedures;
- giving teachers and schools more discretion in disciplinary and safety-related matters;
- reducing frivolous litigation and encouraging the use of alternative dispute resolution;
- reducing the amount of paperwork that teachers and state and local administrators must complete;
- addressing the chronic shortage of special education teachers and regular education teachers who are not adequately trained to work with students with disabilities;
- setting guidelines for "highly qualified" special education teachers under the NCLB; and
- simplifying special education financing and giving local communities more control.

Federal funding of state educational programs is contingent on a state's compliance with IDEA 2004. States, in turn, implement statutes and regulations to implement IDEA 2004 and require compliance by local educational agencies like school districts. The substantive and procedural requirements of the IDEA as amended by IDEA 2004 are discussed below.

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[1] Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

[2] Education of the Handicapped Act Amendments of 1990, Pub. L. No 101-476, § 901(a)(1), 104 Stat. 1103 (1990).

[3] Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997).

B. Key Concepts

Critical to an understanding of special education law is an understanding of the following key concepts: free, appropriate public education ("FAPE"); "child with a disability"; "specially designed instruction"; individualized education program ("IEP"); IEP team; least restrictive environment ("LRE"); and "related services".

1. Free Appropriate Public Education ("FAPE")

The IDEA requires school district that receive Federal funds provide education to disabled students that is both ***free*** and ***appropriate*** for the student. This is known as the "FAPE" requirement. It has been firmly established by the U.S. Supreme Court that a student receives FAPE if the program is "reasonably calculated' to provide the student with ***some*** educational benefit, *Board of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982), and that schools are not required to maximize a child's potential. *Id.* at 189. Courts sometimes refer to this a the "Chevrolet v. Cadillac" rule, meaning that school districts must provide the educational equivalent of "a serviceable Chevrolet" to each disabled student, but not a luxury Cadillac. Courts have defined this requirement to mean that the student must make more than minimal or trivial progress in a placement, considering the student's unique characteristics. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001); 20 U.S.C. § 1401(9), 34 C.F.R. § 300.17.

2. "Child with a Disability"

In general, the term "child with a disability" means a child (1) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; **and** (2) who, as a result, needs special education and related services. 20 U.S.C. § 1401(3)(A), 34 C.F.R. § 300.8. The factor that distinguishes children who are eligible for special education from those who merely require reasonable accommodation, is the need for "special" education. Students with disabilities who require specially designed instruction that differs from the general curriculum in order to benefit from education are eligible for education and services (special education) under IDEA 2004 between the ages of 3 and 21.

3. "Specially Designed Instruction"

The requirement to provide "specially designed instruction" is what distinguishes IDEA 2004 from the ADA and § 504. Not only do schools have to accommodate the disabilities of students, but under IDEA 2004, schools that receive Federal funds must also take the further step of tailoring educational programming to meet the educational needs of the individual with disabilities who cannot obtain meaningful benefits from regular instruction. Under IDEA 2004 "specially designed instruction" means "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction (i) To address the unique needs of the child that result from the child's disability; and (ii) To

ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 20 U.S.C. § 1401(29), 34 C.F.R. § 300.39(b)(3).

4. Individualized Educational Program ("IEP")

The "free appropriate public education" required by the IDEA is tailored to the unique needs of the disabled child by means of an "individualized educational program" ("IEP"). *Id.* at § 1401(14), 34 C.F.R. § 300.22. The IEP, which is prepared at a meeting between qualified representatives of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing:

- a statement of the child's present levels of academic achievement and functional performance;
- a statement of measurable annual goals, including academic and functional goals;
- a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on progress will be provided;
- a statement of the special education and related services and supplementary aids and services to be provided to the child, a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and non-disabled children in the activities described in this subparagraph;
- an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class and in other school activities;
- a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments; and
- if the IEP Team determines that the child shall take an alternate assessment on a particular State or district-wide assessment of student achievement, a statement of why the child cannot participate in the regular assessment, and the particular alternate assessment selected is appropriate for the child;
- the projected date for the beginning of the services and modifications described above, and the anticipated frequency, location, and duration of those services and modifications; and
- when the child is 16, appropriate measurable postsecondary goals and transition services needed to assist the child in reaching those goals; and

- beginning not later than 1 year before the child reaches 18, a statement that the child has been informed of the child's rights under the IDEA, if any, that will transfer to the child on reaching the age of 18.

20 U.S.C. § 1414(d)(1)(A).

5. IEP Team

A team of individuals, including the parents of a student with a disability, meets at least anullay to develop a student's IEP. The IEP team is composed of the parents; at least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); at least one special education teacher of the child; a rperesentative of the school distict who is qualified to provide, or supervise the provision of, specially designed instruction, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the school district; an individual who can interpret the instructional implications of evaluation results (who may be the special education techer or the district representative); at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and whenever appropriate, the child with a disability. *Id.* at § 1414(d)(1)(B), 34 C.F.R. § 300.23 .

6. Least Restrictive Environment ("LRE")

A central goal behind the passage of the IDEA and its predecessors (the Education of the Handicapped Act and the Education for All Handicapped Children Act) was to remedy the past segregation of children with disabilities who had been denied access to public schools. The IDEA provides that "to the maximum extent appropriate, children with disabilities [must be] educated with children who are not disabled . . . ." 20 U.S.C. § 1412(a)(5)(A). Furthermore, children can only be removed from the regular classroom when education there cannot be satisfactorily achieved with the use of supplementary aids and services. *Id.* If the child is removed from the regular classroom, he or she must still be mainstreamed to the maximum extent appropriate, for example during lunch, recess, music or other non-academic activities. *Id.*; 34 C.F.R. § 300.114. This provision of the IDEA is known as the "least restrictive environment" or LRE provision.

7. Related Services

There are certain services that are not, strictly speaking, educational, but which must be provided to students so they can attend school and benefit from specially designed instruction. These services are referred to as "related services" and are defined under the IDEA to include transportation, speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation

counseling, orientation and mobility services, and medical services (except that such medical services shall be for diagnostic and evaluation purposes only). 20 U.S.C. § 1401(26)(A), 34 C.F.R. § 300.34.

C. Part B of the IDEA: Grants for Preschool Children with Disabilities

Under Part B of the IDEA, the federal government provides grants in the form of financial assistance to states and state education agencies (in Washington the Office of Superintendent of Public Instruction or OSPI), the District of Columbia, the Commonwealth of Puerto Rico, outlying areas, and the Department of the Interior, to assist them to provide special education and related services to children with disabilities between the ages of three (3) through twenty-one (21), inclusive, including children with disabilities who have been suspended or expelled from school. 20 U.S.C. § 1412.

In addition, the Secretary of Education is authorized to provide grants to assist States to provide special education and related services to children with disabilities aged three (3) through five (5), inclusive, and at the State's discretion, to two-year-old children with disabilities who will turn three (3) during the school year. 20 U.S.C. § 1419; 34 C.F.R. § 300.800-818. At their discretion, states may include preschool-age children who are experiencing developmental delays, as defined by the state and measured by appropriate diagnostic instruments and procedures, who need special education and related services. *Id.* at § 1419(f)(5). Allocations are based on the amount each state received in FY 1997, and on the relative number of children aged three (3) through five (5) in the state's general population and the number of these children living in poverty. *Id.* at § 1419(c)(2)(A). The allocation formula contains numerous provisions for situations in which the appropriation for the program remains constant, increases or decreases, as well as several maximum and minimum funding limitations.

Under the program, states distribute the majority of grant awards to local education agencies (LEAs). States may however, retain funds for state-level activities up to an amount equal to twenty-five percent (25%) of the amount they received for FY 1997 under the program, adjusted upward each year by the lesser of either the rate of increase in the state's allocation or the rate of inflation. The amount that may be used for administration is limited to not more than twenty percent (20%) of the amount available to a state for state-level activities. *Id.* at § 1419(d)-(e).

D. Part C of the IDEA

1. Infants and Toddlers with Disabilities: Early Intervention Programs

As defined under the IDEA, Part C, early intervention services are not the provision of a FAPE, but rather a multidisciplinary effort to provide infant and toddlers and their families with individualized services. The cornerstone of Part C of the IDEA is the provision of financial assistance to each state lead agency as designated by its Governor, for the development and implementation of comprehensive, coordinated, multidisciplinary,

interagency systems, in an effort to provide and enhance early intervention services for infants and toddlers with disabilities and their families. 20 U.S.C. § 1431 *et seq.*; 34 C.F.R. § 303 *et seq.* The program provides grants, administered by the Secretary of Education, under a statutory formula to all fifty (50) states, the District of Columbia, and the Commonwealth of Puerto Rico, the Department of the Interior, and other outlying areas. *Id.* at 1443. Allocations are based on the number of children from birth through age two (2) in the general population in the state relative to the population in this age range for all states. *Id.* Further, no state may receive less than 0.5 percent of the funds available to all states or five hundred thousand dollars ($500,000.00) whichever is greater. *Id.*

Under the program, states are responsible for providing early intervention services to eligible children and their families, including Indian infants and toddlers residing within the state on reservations. States are also encouraged to expand opportunities for children under three (3) years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services. 20 U.S.C. § 1431(b)(4). In addition to using funds provided to develop and implement the statewide system required, a state may use funds (with the written consent of the parents) to provide early intervention services to children with disabilities from their third (3rd) birthday until such children enter kindergarten, in lieu of a free appropriate public education provided in accordance with Part B of the IDEA. *Id.* at § 1438.

2. Washington State's Implementation of Early Intervention Programs

In Washington State, the Department of Social and Health Services ("DSHS") administers Part C's early intervention services under the Infant Toddler Early Intervention Program ("ITEIP"), within the Department of Developmental Disabilities ("DDD"). The DSHS also oversees the development of interagency agreements that define responsibilities for services and procedures (known as the State Interagency Coordinating Council or SICC). Through evaluation and assessment, services are identified to address the physical, cognitive, communication, social-emotional, and adaptive development needs of infants and toddlers with disabilities and to support families. 34 C.F.R. § 303.12. A key component to the provision of services to eligible children is the requirement of service coordination services, which ensure children and families receive rights, procedural safeguards, and services authorized under the early intervention program. *Id.* at 303.23. To this end, Part C provides the family with a Family Resources Coordinator (FRC) to coordinate services and assist the family.

II. How Do the Rights of Families of Infants and Toddlers Change When Their Children Turn Three?

A. Transition from Part C to Part B

Under Part C of the IDEA, when a child turns three (3), early intervention services end. However, states are required to ensure a smooth transition for toddlers receiving early intervention services to preschool, school, other appropriate services. 20 U.S.C. § 1437(a)(9)(A). Such transitional services include a review of the child's program options for

the period from the child's third birthday through the remainder of the school year, and the establishment of a transition plan, including steps to exit from the program. *Id.* at § 1437(a)(9)(B)-(C). As a result, transition planning begins at least six (6) months prior to a child's third birthday for all children eligible under Part C. In addition, state education agencies ("SEAs") and Lead Agencies (in Washington, DSHS), may elect to allow parents of children with disabilities who are eligible for services under Part B, and previously received services under Part C, to choose the continuation of early intervention services until such children enter, or are eligible under State law to enter, kindergarten. 20 U.S.C. § 1435(c).

Although both Part C and Part B have procedural safeguard requirements, the procedural safeguards required in a statewide system under Part C establish the minimum threshold requirements. 20 U.S.C. § 1439(a); 34 C.F.R. § 303.170. These requirements include the following:

- the timely administrative resolution of complaints by parents which includes allowing any party aggrieved by the findings and decision regarding an administrative complaint, to bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy;
- the right to confidentiality of personally identifiable information, including the right of parents to written notice of an written consent to the exchange of such information among agencies;
- the right of the parents to determine whether they, their infant or toddler, or other family members will accept or decline any early intervention services;
- procedures to protect the rights of the infant or toddler whenever the parents of the infant or toddler are not known or cannot be found or the infant or toddler is a ward of the State, including the assignment of an individual to act as a surrogate for the parents;
- written prior notice to the parents of the infant or toddler with a disability whenever the State agency or service provider proposes to initiate a change, or refuses to initiate or change, the identification, evaluation, or placement of the infant or toddler with a disability, or the provision of appropriate early intervention services to the infant or toddler;
- procedures designed to ensure that the prior notice fully informs the parents, in the parents' native language, unless it clearly is not feasible to do so, of all procedures available to the parents; and
- the right of parents to use mediation to resolve disputes.

Perhaps the most significant difference between the rights of families under Part C and the rights of families under Part B is the right to a FAPE. Other differences are highlighted below.

B. Procedural Safeguards Under Part C

The procedural safeguards in effect under Part C in State of Washington are available at: http://www.dshs.wa.gov/pdf/Publications/22-091.pdf. In summary, these include:

1. Parental Rights:

- an evaluation and assessment of the child
- the right to accept or decline any early intervention service
- confidentiality of personally identifiable information
- the right to review and correct records
- the right to an Individualized Family Service Plan ("IFSP") based on the family's resources, priorities, and concerns
- the right to be invited to and participate in meetings concerning the child's placement in early intervention services and assessments or changes in those services

2. Mediation

Parents may choose to use mediation to help resolve disputes relating to the identification, evaluation, or placement of their child or the provision of early intervention services to the child and family. Mediation will be provided at no cost to the family. The mediation process is voluntary and does not deny the parent of the right to a due process hearing or any other procedural safeguard under Part C of IDEA.

3. Due Process Hearing

"Due process" is the right of each citizen to be treated fairly and to receive the benefits the law provides. If a parent feels he or she has not received the services as required under Part C, he or she can ask for a "due process" hearing, by making a written request for a hearing to the director of the child's early intervention program. The request for a hearing must explain the parent's complaint.

4. Citizen's Complaint Process

Any person or organization may file a citizen's complaint if they feel DSHS or an early intervention service provider is violating a requirement of the law. The complaint must be written, signed, and include the facts regarding the complaint. The complaint must be sent to DSHS, Infant Toddler Early Intervention Program, at P.O. Box 45201, Olympia, WA 98504-5201. The agency must review the complaint, write a response, and take appropriate action within 60 days after the complaint is received.

C. Procedural Safeguards Under Part B

In addition to substantive guarantees for students with disabilities, such as the right to a free, appropriate public education in the least restrictive environment, IDEA Part B also requires states to adopt procedural safeguards that guarantee parents the opportunity to provide input into decisions about their child's education and the right to seek review of decisions they believe are inappropriate. 20 U.S.C. § 1415(a), (b); 34 C.F.R. § 300.121.

1. Procedural Safeguards and Written Prior Notice

Districts must provide parents with a procedural safeguards notice once per year and whenever the child is initially referred for or parents request an evaluation, whenever parents have registered a complaint, or upon request. *Id.* at § 1415(d)(1)(A). The procedural safeguards notice must contain information about the opportunity to present and resolve complaints, the opportunity for the agency to resolve the complaint, the availability of mediation, and information regarding the right to appeal the results of a due process hearing in state or federal court. *Id.* at § 1415(d)(2)(E), (K). In addition, parents must receive written prior notice whenever a school district seeks to initiate or change (or refuses to initiate or change) the identification, evaluation, or educational placement of a child. *Id.* at § 1415(b)(3).

2. Requests for Due Process Hearings and Preliminary Procedures

In order to begin the formal dispute resolution process a due process complaint notice must be filed. A due process hearing request can be filed by either parents or a school district. 20 U.S.C. § 1415(b)(7)(A). Once filed a party may amend its hearing request if the other party consents in writing and is given the opportunity to resolve the case in an informal meeting, or if the hearing officer grants permission at least five (5) days before the due process hearing is scheduled to occur. *Id.* at § 1415(c)(2)(E)(i). Washington has chosen to adopt a unified administrative due process system. OSPI has delegated its authority over special education due process hearings to the Office of Administrative Hearings and its staff of administrative law judges ("ALJs"). RCW 28A.155.090.

a. Resolution Sessions

IDEA includes the use of resolution sessions before a due process hearing can be held. At this meeting, parents and the district discuss their understanding of the facts and their grievance, giving the school district the opportunity to resolve the problem before the due process hearing takes place. *Id.* at § 1415(f)(1)(B)(i)(IV).

b. Due Process Hearings

IDEA contains substantive provisions regarding evidence introduced at due process hearings, the issues that may be raised, limitation periods for when a due process hearing request must be made, and the time period for appealing due process hearing determination. Both parents and school district representatives have the right to be accompanied at a due process hearing by an attorney or any other individuals of their choosing. 20 U.S.C. § 415(h)(1). Both parties may present evidence and cross-examine witnesses, and parents are

entitled to a written record of the hearing and the hearing officer's findings of fact at no cost. *Id.* at § 1415(3), (4). A decision by a hearing officer at the state level is considered a final administrative decision, and either party may then appeal the decision in state or federal court. Id. at § 1415(i)(2)(A).

3. Other Dispute Resolution Options

The IDEA requires states to adopt procedures to allow complaints by "any party" regarding the evaluation, identification, educational placement, or provision of a free appropriate public education to any child. 20 U.S.C. § 1415(b)(6)(A). In Washington, these types of complaints must be filed within one year (1) after the date that the parent or school district knew or should have known about the alleged violation, unless a longer period is reasonable because the violation is ongoing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint was received. WAC 392-172A-05025.

An additional means of seeking review of a school district's decision is the filing of a discrimination complaint with the Department of Education's Office of Civil Rights (OCR). OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.. Discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990.

4. Mediation

Every state receiving IDEA funds must establish procedures for the mediation of disputes between parents and school districts, either before or after the filing of a request for a due process hearing. 20 U.S.C. § 1415(e)(1). IDEA provides that states may offer parents or schools that decline the voluntary mediation process, to meet with a disinterested party who will explain the benefits of mediation and encourage the parties to use that process. *Id.* at § 1415(e)(2)(B).

III. Transitioning from IDEA Part C to Part B

A. Transition from Part C to Preschool Programs

Each state is required to ensure that children participating in early intervention programs assisted under Part C of the IDEA, and who will participate in preschool programs assisted under Part B of the IDEA, experience a smooth and effective transition to those preschool programs in a manner consistent with the policies and procedures used to ensure a smooth transition for toddlers receiving early intervention services. 20 U.S.C. § 1412(9); 34 C.F.R. § 300.124.

Participants under Part C of the IDEA are required as part of the grant application process, to include a description of the policies and procedures that will be used to ensure the transition for children receiving early intervention services. The policies and procedures must

include the following: a description of how the families will be included in the transition process; a description of how DSHS will (i) notify the LEA (School District) for the area in which the child resides, that the child will shortly reach the age of eligibility for preschool services under Part B, (ii) in the case of a child eligible for preschool services under Part B, convene a conference among the lead agency, the family, and the local education agency within ninety (90) days before the child is eligible for preschool services, (iii) in the case of a child who may not be eligible for preschool services under Part B, make reasonable efforts to convene a conference to discuss the appropriate services that the child may receive; a review of the child's program options for the period from the child's third birthday through the remainder of the school year; and the establishment of a transition plan. 34 C.F.R. § 303.148.

B. School District Responsibilities in Washington State

Effective September 1, 2009, each school district in the State is required to provide or contract for early intervention services in partnership with DSHS and birth-to-three providers, to all eligible children with disabilities from birth to three years of age. RCW 28A.155.065. However, the services are not intended to supplant services or funding currently provided in the state for early intervention services to eligible children with disabilities from birth to three years of age, and as a result, DSHS is designated as the payor of last resort for birth-to-three early intervention services under the statute (ITEIP Part C funding can only be used after other federal, state, local, and private funding has been utilized as Part C funds supplement, but do not supplant, existing resources). *Id.*

C. Transition Plan

IDEA Part C requires a written plan for transition at a child's third birthday. Under Part B of the IDEA, school districts are required to participate in the transition planning conferences arranged by the lead agency under Part C (DSHS). The transition planning conference must be convened for each student who may be eligible for preschool services at least ninety (90) days prior to the student's third birthday. WAC 392-172A-02080. By the third birthday of a child that meets state eligibility requirements, an IEP must be developed and implemented for the child. 20 U.S.C. § 1412(9); 34 C.F.R. § 300.124.

D. Least Restrictive Environment ("LRE")

Part C of the IDEA requires that early intervention services and supports be provided in the child and family's "natural environment," meaning the settings that are natural or normal for the child's age peers who have no disabilities. 20 U.S.C. § 1435-36; 34 C.F.R §303.18. Natural environments include home and community locations where infants and toddlers without disabilities participate, but services are still developed in conjunction with the family to meet the unique identified needs and priorities of each participating child.

Under Part B, the State must have policies and procedures in place to ensure that each public agency (including school districts) to the maximum extent appropriate, children with

disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled. 20 U.S.C § 1412(a)(5); 34 C.F.R. § 300.114. Preschool service opportunities will vary as to location and the unique characteristics impacting service recipients, and the overall service program. Although the fundamental concept of provision of services in both Part C and Part B aims to educate children eligible for special education services with non-disabled students, the option of a least restrictive environment may be a new concept to families who participated under Part C and received early intervention services in the home or in a community-based program that served only children with special needs. Because the least restrictive requirement means that parents have the right to consider preschool programs that enroll children with special needs and children who do not have special needs, parents may find among other options, that the least restrictive environment includes placement in a private community program that may or may not enroll other children with special needs, or placement in a segregated class for children with special needs offered as part of the regular education school program.

IV. Key Differences Between Part C and Part B of the IDEA

A. Eligibility

Although states under both Part C and Part B must submit a plan outlining policies and procedures for development and implementation of the respective program requirements, Part C contains limitations on eligibility for children with disabilities receiving a FAPE in accordance with Part B, where funds are received under the preschool grant program. 20 U.S.C § 1434; 34 C.F.R § 303.2-303.4. Conversely, Part B requires as a condition to the provision of assistance, that a FAPE is available to all children with disabilities residing in the State between the ages of three (3) and twenty-one (21). 20 U.S.C. § 1412-13; 34 C.F.R § 300.41.

Eligibility under Part C is based on "developmental delay," or established conditions that have a high probability of resulting in developmental delay. A developmental delay is demonstrated by a twenty-five percent (25%) delay, or by showing a 1.5 standard deviation below a child's age in one or more of the designated developmental areas. An eligible child under Part C is one who is under the age of three (3) and who meets the criteria of experiencing developmental delays in one of the following areas: cognitive development physical development, communication development, social or emotional development, and adaptive development, or who has been diagnosed with a physical or mental condition that has a high probability of resulting in developmental delay. 20 U.S.C. §1432(5).

Eligibility under Part B is based on a child having one or more identified categories of disability. Under Part B, developmental delay is an optional eligibility category for children ages three (3) through Nine (9). An eligible child under Part B is one who is between the ages of three (3) and twenty-one (21), and by reason of one or more of the following conditions, is unable to receive reasonable educational benefit from regular education: mental retardation, hearing impairments (including deafness) speech or language impairments, serious emotional

disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who needs special education and related services. 20 U.S.C. § 1401(3)(A).

B. IFSP vs. IEP

One major distinction between Part C and Part B of the IDEA is the manner in which development and delivery of services occurs. Although there are similarities in the areas of plan development, family inclusion, and parental consent, measuring development, and a desire to educate in the least restrictive environment, under Part C, the focus is on early intervention services provided through the development of an Individualized Family Service Plan (IFSP). An IFSP is a written plan developed by a multidisciplinary team, including the parents, that is used to document the infant's or toddler's development, to identify desired outcomes for the infant or toddler, and to identify the method of delivering services in accordance with the assessment and program development standards. 20 U.S.C. § 1436(a)-(d); 34 C.F.R. § 303.167. An IFSP also requires identification of the natural environments in which early interventions services will appropriately be provided, and identification of the service coordinator from the profession most immediately relevant to the infant's or toddler's or family's needs. *Id.* Because of the unique timeline under the program, Part C participants have their IFSP reviewed at least once every six months, and each time a statement of the major outcomes expected in the next six (6) to twelve (12) month period and functional criteria to measure progress of each outcome, is required. 34 C.F.R. § 303.342.

Similar to Part C, Part B of the IDEA advocates strengthening the role of parents in the special education process and ensuring parents of eligible children have meaningful opportunities to participate in the education of their children. However, the focus of Part B is on child development through facilitation of specifically identified educational mechanisms. The method for ensuring child development under Part B is the IEP. 20 U.S.C. § 1414(d)(A), 34 C.F.R. § 300.112, 320-324. An IEP is a written statement for each child with a disability that contains a statement of the student's present level of development or educational performance, identifies the student's needs, contains annual goals a statement of measurable benchmarks or short-term objections with appropriate criteria and evaluation of achievement of goals, a statement of the specific special education and/or related services to be provided to the student, the anticipated duration of services, and a statement justifying the use of settings other than the regular classroom with non-disabled children. *Id.*

One significant difference between the delivery of services in Part B from Part C is that Part B does not provide for a service coordinator as part of the IEP, whereas Part C requires the service coordinator as part of the IFSP. However, in the case of a child who was previously served under Part C of the IDEA, the initial IEP Team meeting for a child under Part C, must include, at the request of the parent, an invitation be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services. 34 C.F.R. § 300.321(f).

C. Decision-Making (Placements)

Both Part C and Part B requirements focus on ensuring both that a child's parents are members of any group that makes decisions about the child's program, and that service delivery is individualized to the particular child. In addition, both Part C and Part B have procedural safeguards to ensure these requirements are met. In addition, placement decisions under Part C require that to the maximum extent appropriate, early intervention services must be provided in natural environments. Similarly, placement decisions under Part B placements occur so that to the maximum extent possible, children with disabilities are educated with children who are non-disabled, i.e. the least restrictive environment.

Under Part C, DSHS is responsible for ensuring that the IFSP is developed and implemented for each eligible child. 34 C.F.R. § 303.340, 501. However, because of the incorporation of interagency agreements, family resource coordinators, and service coordinators, all of whom are involved in the provision of early intervention services, and because Part C services may be provided through local lead agencies, school districts, a variety of public and private agencies, and/or individual service providers, placement decisions are coordinated under the IFSP. 20 U.S.C. § 1435,36; 34 C.F.R. § 303.167, 501.

In determining the educational placement of a child with a disability including a preschool child with a disability, under Part B, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and is made in conformity with LRE provisions requiring the child's placement must be determined at least annually, and must be based on the child's IEP, and is as close as possible to the child's home. Part B 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.116. Further, in determining the educational placement of a child the public agency must ensure that unless the IEP requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled, and in selecting the LRE, consideration be given to any potential effect on the child or on the quality of services needed. *Id.*

D. Team Members

Under Part C, when a child has been evaluated for the first time and has been determined to be eligible for services, a meeting to develop the initial IFSP must be conducted within forty-five (45) days after a referral for evaluation. 20 U.S.C. § 1436; 34 C.F.R. § 303.342. Each initial meeting and each annual meeting to evaluate the IFSP must include the following participants: (i) the parent or parents of the child; (ii) other family members, as requested by the parent; (iii) an advocate or person outside of the family, if the parent requests that the person participate, (iv) the service coordinator who has been working with the family since the initial referral of the child for evaluation,; (v) a person or persons directly involved in conducting the evaluations and assessments; and (vi) persons who will be providing services to the child or family. 34 C.F.R. § 303.343.

Under Part B, an IEP is developed by the "individualized education program team" or IEP Team. The IEP Team is a group of individuals composed of the following: (i) the parents of a child with a disability; (ii) not less than one (1) regular education teacher of such child if the child is, or may be, participating in the regular education environment,; (iii) not less than one (1) special education teacher,; (iv) a representative of the local education agency who is qualified to provide, or supervise specially designed instruction to meet the unique needs of children with disabilities; (v) an individual who can interpret the instruction al implications of evaluation results; (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321.

E. Evaluation

1. Initial Evaluation

Initial evaluations under Part C occur within forty-five (45) days of a referral for services. 34 C.F.R. § 303.322(e). The evaluation of each eligible child is performed by a multidisciplinary team of appropriate qualified personnel. The evaluation must be based on comprehensive, informed clinical opinion, and must include the following: (i) a review of pertinent records related to the child's current health status and medical history; (ii) an evaluation of the child's level of functioning in cognitive development, physical development, communication development, social or emotional development, and adaptive development. *Id.* at § 303.322(b).

IDEA Part B requires school districts to conduct full and individualized initial evaluations to determine whether a student has a disability, before they begin providing special education or related services. 20 U.S.C. § 1414(a)(1)(A). The evaluation must occur within sixty (60) days after receiving parental consent, unless the student transfers to a new school during the timeframe before the former school is able to make a determination, or where the parents repeatedly fail or refuse to produce their child for an evaluation. *Id.* at § 1414(a)(1)(C). If parents do not agree to an initial evaluation, a school district may seek a due process hearing to resolve the conflict. *Id.* at § 1414(a)(1)(D). If parents refuse consent to the actual provision of services, districts may not provide them and may not initiate a due process hearing. *Id.* In conducting the evaluation the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability, and the content of the IEP. 34 C.F.R. § 300.304(b). In addition, the school district must not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program, and the district must use technically sound instruments that may assess the relative contribution of cognitive and behavior factors, in addition to physical or developmental factors. *Id.*

2. Reevaluation

Part C participants have their IFSP reviewed at least once every six months, and each time a statement of the major outcomes expected in the next six (6) to twelve (12) month period and functional criteria to measure progress of each outcome, is required. 34 C.F.R. § 303.342.

Once a student under Part B has been identified as needing special education and related services, periodic reevaluations are required to continue monitoring the student's progress and changing needs. 34 C.F.R. § 300.301-303. A reevaluation should occur if a district concludes that the student's educational or related service needs warrant a reevaluation, or upon request by the parents or teacher. 20 U.S.C. § 1414(a)(2)(A). Reevaluations should not occur more than once per year or less than at least once every three years, unless parents and the district agree otherwise. Procedures for reevaluations correspond with notice and assessment requirements for initial evaluations, and must be conducted in a family's native language.

F. "Stay Put"

Part C requires that during the pendency of any proceeding or action involving a complaint by the parents of an infant or toddler with a disability, unless the State agency and the parents otherwise agree, the infant or toddler shall continue to receive the appropriate early intervention services currently being provided, or if applying for initial services, shall receive the services not in dispute. 20 U.S.C. § 1439(a)(7); 34 C.F.R. § 303.425.

Part B of the IDEA generally requires that students remain in their current last agreed placements during the pendency of any administrative or judicial due process proceedings and appeals. 20 U.S.C. § 1415(j). Where the hearing involves an application for initial admission to public school, the child must be placed in the public school until all proceedings are completed. 34 C.F.R. § 300.518. However, where the complaint involves an application for initial services under Part B from a child who is transitioning from Part C to Part B, and is no longer eligible for Part C services because the child has turned three (3), the school district is ***not*** required to provide the part C services that the child had been receiving. *Id.* at § 300.518(c). However, if the child is found eligible for special education and related services under Part B, and the parent consents to the initial provision of special education and related services, then the school district must provide those special education and related services that are not in dispute between the parent and the district. WAC 392-172A-05125.

V. Recent Case Law Highlights

A. FAPE

In U.S. District Court for the Eastern District of New York, the New York Department of Education (DOE) succeeded in arguing that minor deficiencies in a four-year-

old (4) boy's IEP did not require a New York district to pay for the child's private schooling. The District Court, affirming a decision that denied the parents' reimbursement requests, concluded that the IEP as a whole was reasonably calculated to provide the student with FAPE. The Court rejected the parents' claim that the district predetermined the child's program, and instead noted that the parents participated in the IEP meetings and that the IEP contained detailed information about the child, his disability, and his educational needs. Further, although the parents were not present when the district decided the specific location of the child's services, the court noted that the proposed class matched the placement identified in the IEP consistent with the plan that was developed by the IEP Team, which included the parents. *K.Y. and T.Y. on behalf of T.Y., v. New York City De'pt. of Educ.*, 51 IDELR 78 (E.D. N.Y. 2008).

B. LRE

In *Northshore*, the Office of Superintendent of Public Instruction (OSPI), Washington State's Educational Agency, rejected the parents' argument that placement of their five-year-old autistic child in a developmental preschool class was not the least restrictive environment for the child. The parents had requested reimbursement for a private preschool placement, that did not include specially designed instruction. They argued that the self-contained program offered by the District was too restrictive because it did not include typically developing peers. The Administrative Law Judge (ALJ) found that there were adequate opportunities for the student to be exposed to typically developing peers because the preschool setting offered by the district was integrated. The ALJ determined that the district's placement of the child in an integrated preschool satisfied the child's need for specially designed instruction while still providing the child with appropriate exposure to typically developing peers. *Northshore Sch. Dist.*, Spec. Ed. Cause No. 2005-SE-0135 (2005).

C. "Stay Put"

In U.S. District Court for the Southern District of New York, the District Court held that a New York district did not have to pay for early intervention services that a three-year-old girl received from a private provider during a dispute over her initial IEP. The Court held that the IDEA's stay-put provision does not apply to IFSPs provided as part of Part C early intervention services. Although the Second U.S. Circuit Court of Appeals has not addressed whether stay-put applies to children transitioning from Part C to Part B of the IDEA, the Eleventh U.S. Circuit Court of Appeals has held that the stay-put provision does not require a district to continue a child's early intervention services when the parent contests the child's initial IEP. See *D.P. ex frel. E.P., D.P. and K.P. v. School Bd. of Broward County,* 47 IDELR 181 (11th Cir. 2007) . The Court, in adopting 11th Circuit's view, noted OSEP's official comments to the 2006 Part B regulations, indicated that districts have no obligation to fund Part C services when a parent disputes services to be provided under Part B. *M.M. and H.M. ex rel. A.M. v. New York City Dep't. of Educ.*, 51 IDELR 128 (S.D.N.Y. 2008)

In U.S. District Court for the Eastern District of Arizona, the District Court determined that the parent's request for a stay-put order was unnecessary even though it was

not clear whether a parent could pursue a claim against Arizona's Part C lead agency for potential changes to a child's early intervention services. The Court explained that Part C's pendency provision required the lead agency to continue the child's services until the dispute was resolved, unless the parents and the agency agreed otherwise. Because the Part C lead agency did not dispute its obligation to continue services, the Court held that the stay-put order requested by the parents was unnecessary. *Zoe M., et al., v. Blessing*, 52 IDELR 184 (D. Ariz. 2009).

D. Related Services

In *Prince George's County*, the Maryland State Department of Education, Division of Speical Education/Early Intervention Services (MSDE), instructed a district to determine whether its violations of a student's implemented IEP negatively impacted the student's ability to benefit from her educational program, thus denying her FAPE. The IEP of the four-year-old girl with autism provided for a "dedicated aide" to assist the student. The district provided an aide to the student, but allowed the aide to assist other students in the class as needed. The Department determined that although the district provided an aide, the aide was permitted to turn her focus to other students and was not dedicated exclusively to the student until halfway through the school year when the district placed additional employees in the class. The Department noted that once a district develops an IEP for a student with a disability, it must provide the special education and related services to the student in accordance with the IEP. *Prince George's County Pub. Schools*, 52 IdELR 173.

Workshop 13

Section 504 and the ADA - The Definition of "Student With a Disability" Broadened: What Does This Mean for Schools?

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Protecting Students With Disabilities

Frequently Asked Questions About Section 504 and the Education of Children with Disabilities

This document is a revised version of a document originally developed by the Chicago Office of the Office for Civil Rights (OCR) in the U.S. Department of Education (ED) to clarify the requirements of Section 504 of the Rehabilitation Act of 1973, as amended (Section 504) in the area of public elementary and secondary education. The primary purpose of these revisions is to incorporate information about the Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, which amended the Americans with Disabilities Act of 1990 (ADA) and included a conforming amendment to the Rehabilitation Act of 1973 that affects the meaning of disability in Section 504. The Amendments Act broadens the interpretation of disability. The Amendments Act does not require ED to amend its Section 504 regulations. ED's Section 504 regulations as currently written are valid and OCR is enforcing them consistent with the Amendments Act. In addition, OCR is currently evaluating the impact of the Amendments Act on OCR's enforcement responsibilities under Section 504 and Title II of the ADA, including whether any changes in regulations, guidance, or other publications are appropriate. The revisions to this Frequently Asked Questions document do not address the effects, if any, on Section 504 and Title II of the amendments to the regulations implementing the Individuals with Disabilities Education Act (IDEA) that were published in the Federal Register at 73 Fed. Reg. 73006 (December 1, 2008).

INTRODUCTION

An important responsibility of the Office for Civil Rights (OCR) is to eliminate discrimination on the basis of disability against students with disabilities. OCR receives numerous complaints and inquiries in the area of elementary and secondary education involving Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504). Most of these concern identification of students who are protected by Section 504 and the means to obtain an appropriate education for such students.

Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education (ED). Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."

OCR enforces Section 504 in programs and activities that receive Federal financial assistance from ED. Recipients of this Federal financial assistance include public school districts, institutions of higher education, and other state and local education agencies. The regulations implementing Section 504 in the context of educational institutions appear at 34 C.F.R. Part 104.

The Section 504 regulations require a school district to provide a "free appropriate public education" (FAPE) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability. Under Section 504, FAPE consists of the provision of regular or special education and related aids and services designed to meet the student's individual educational needs as adequately as the needs of nondisabled students are met.

This resource document clarifies pertinent requirements of Section 504.

For additional information, please contact the Office for Civil Rights.

INTERRELATIONSHIP OF IDEA AND SECTION 504

1. What is the jurisdiction of the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS) and state departments of education/instruction regarding educational services to students with disabilities?

OCR, a component of the U.S. Department of Education, enforces Section 504 of the Rehabilitation Act of 1973, as amended, (Section 504) a civil rights statute which prohibits discrimination against individuals with disabilities. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), which extends this prohibition against discrimination to the full range of state and local government services, programs, and activities (including public schools) regardless of whether they receive any Federal financial assistance. The Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, amended the Americans with Disabilities Act of 1990 (ADA) and included a conforming amendment to the Rehabilitation Act of 1973 (Rehabilitation Act) that affects the meaning of disability in Section 504. The standards adopted by the ADA were designed not to restrict the rights or remedies available under Section 504. The Title II regulations applicable to free appropriate public education issues do not provide greater protection than

applicable Section 504 regulations. This guidance focuses primarily on Section 504.

Section 504 prohibits discrimination on the basis of disability in programs or activities that receive Federal financial assistance from the U.S. Department of Education. Title II prohibits discrimination on the basis of disability by state and local governments. The Office of Special Education and Rehabilitative Services (OSERS), also a component of the U.S. Department of Education, administers the Individuals with Disabilities Education Act (IDEA), a statute which funds special education programs. Each state educational agency is responsible for administering IDEA within the state and distributing the funds for special education programs. IDEA is a grant statute and attaches many specific conditions to the receipt of Federal IDEA funds. Section 504 and the ADA are antidiscrimination laws and do not provide any type of funding.

2. How does OCR get involved in disability issues within a school district?

OCR receives complaints from parents, students or advocates, conducts agency initiated compliance reviews, and provides technical assistance to school districts, parents or advocates.

3. Where can a school district, parent, or student get information on Section 504 or find out information about OCR's interpretation of Section 504 and Title II?

OCR provides technical assistance to school districts, parents, and students upon request. Additionally, regulations and publicly issued policy guidance is available on OCR's website, at http://www.ed.gov/policy/rights/guid/ocr/disability.html.

4. What services are available for students with disabilities under Section 504?

Section 504 requires recipients to provide to students with disabilities appropriate educational services designed to meet the individual needs of such students to the same extent as the needs of students without disabilities are met. An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services.

5. Does OCR examine individual placement or other educational decisions for students with disabilities?

Except in extraordinary circumstances, OCR does not review the result of individual placement or other educational decisions so long as the school district complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or of an individualized education program (IEP); rather, any disagreement can be resolved through a due process hearing. The hearing would be conducted under Section 504 or the IDEA, whichever is applicable.

OCR will examine procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. Such incidents may involve the unwarranted exclusion of disabled students from educational programs and services.

6. What protections does OCR provide against retaliation?

Retaliatory acts are prohibited. A recipient is prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Section 504.

7. Does OCR mediate complaints?

OCR does not engage in formal mediation. However, OCR may offer to facilitate mediation, referred to as “Early Complaint Resolution,” to resolve a complaint filed under Section 504. This approach brings the parties together so that they may discuss possible resolution of the complaint immediately. If both parties are willing to utilize this approach, OCR will work with the parties to facilitate resolution by providing each an understanding of pertinent legal standards and possible remedies. An agreement reached between the parties is not monitored by OCR.

8. What are the appeal rights with OCR?

OCR is committed to a high quality resolution of every case. If a complainant has questions or concerns about an OCR determination, he or she may contact the OCR staff person whose name appears in the complaint resolution letter. The complainant should address his or her concerns with as much specificity as possible, focusing on factual or legal questions that would change the resolution of the case. Should a complainant continue to have questions or concerns, he or she is advised to send a request for reconsideration to the Director of the responsible OCR field office. The Director will review the appropriateness of the complaint resolution. If the complainant remains dissatisfied, he or she may submit an appeal in writing to the Deputy Assistant Secretary for Enforcement. The decision of the Deputy Assistant Secretary for Enforcement constitutes OCR’s final decision.

9. What does noncompliance with Section 504 mean?

A school district is out of compliance when it is violating any provision of the Section 504 statute or regulations.

10. What sanctions can OCR impose on a school district that is out of compliance?

OCR initially attempts to bring the school district into voluntary compliance through negotiation of a corrective action agreement. If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action. OCR may: (1) initiate

administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.

11. Who has ultimate authority to enforce Section 504?

In the educational context, OCR has been given administrative authority to enforce Section 504. Section 504 is a Federal statute that may be enforced through the Department's administrative process or through the Federal court system. In addition, a person may at any time file a private lawsuit against a school district. The Section 504 regulations do not contain a requirement that a person file a complaint with OCR and exhaust his or her administrative remedies before filing a private lawsuit.

STUDENTS PROTECTED UNDER SECTION 504

Section 504 covers qualified students with disabilities who attend schools receiving Federal financial assistance. To be protected under Section 504, a student must be determined to: (1) have a physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment. Section 504 requires that school districts provide a free appropriate public education (FAPE) to qualified students in their jurisdictions who have a physical or mental impairment that substantially limits one or more major life activities.

12. What is a physical or mental impairment that substantially limits a major life activity?

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the Amendments Act (see FAQ 1), Congress provided additional

examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Congress also provided a non-exhaustive list of examples of "major bodily functions" that are major life activities, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Section 504 regulatory provision, though not as comprehensive as the Amendments Act, is still valid – the Section 504 regulatory provision's list of examples of major life activities is not exclusive, and an activity or function not specifically listed in the Section 504 regulatory provision can nonetheless be a major life activity.

13. Does the meaning of the phrase "qualified student with a disability" differ on the basis of a student's educational level, i.e., elementary and secondary versus postsecondary?

Yes. At the elementary and secondary educational level, a "qualified student with a disability" is a student with a disability who is: of an age at which students without disabilities are provided elementary and secondary educational services; of an age at which it is mandatory under state law to provide elementary and secondary educational services to students with disabilities; or a student to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).

At the postsecondary educational level, a qualified student with a disability is a student with a disability who meets the academic and technical standards requisite for admission or participation in the institution's educational program or activity.

14. Does the nature of services to which a student is entitled under Section 504 differ by educational level?

Yes. Public elementary and secondary recipients are required to provide a free appropriate public education to qualified students with disabilities. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.

At the postsecondary level, the recipient is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school's program. Recipients are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient's program or impose an undue burden.

15. Once a student is identified as eligible for services under Section 504, is that student always entitled to such services?

Yes, as long as the student remains eligible. The protections of Section 504 extend only to individuals who meet the regulatory definition of a person with a disability. If a recipient school district re-evaluates a student in accordance with the Section 504 regulatory provision at 34 C.F.R. 104.35 and determines that the student's mental or physical impairment no longer substantially limits his/her

ability to learn or any other major life activity, the student is no longer eligible for services under Section 504.

16. Are current illegal users of drugs excluded from protection under Section 504?

Generally, yes. Section 504 excludes from the definition of a student with a disability, and from Section 504 protection, any student who is currently engaging in the illegal use of drugs when a covered entity acts on the basis of such use. (There are exceptions for persons in rehabilitation programs who are no longer engaging in the illegal use of drugs).

17. Are current users of alcohol excluded from protection under Section 504?

No. Section 504's definition of a student with a disability does not exclude users of alcohol. However, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.

EVALUATION

At the elementary and secondary school level, determining whether a child is a qualified disabled student under Section 504 begins with the evaluation process. Section 504 requires the use of evaluation procedures that ensure that children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials.

18. What is an appropriate evaluation under Section 504?

Recipient school districts must establish standards and procedures for initial evaluations and periodic re-evaluations of students who need or are believed to need special education and/or related services because of disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(b) requires school districts to individually evaluate a student before classifying the student as having a disability or providing the student with special education. Tests used for this purpose must be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability, except where those are the factors being measured. Section 504 also requires that tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient. The tests and other evaluation materials must be validated for the specific purpose for which they are used and appropriately administered by trained personnel.

19. How much is enough information to document that a student has a disability?

At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The committee should include persons knowledgeable about the student, the meaning of the evaluation data, and the placement options. The committee members must determine if they have enough information to make a knowledgeable decision as to whether or not the student has a disability. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that school districts draw from a variety of sources in the evaluation process so that the possibility of error is minimized. The information obtained from all such sources must be documented and all significant factors related to the student's learning process must be considered. These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. In evaluating a student suspected of having a disability, it is unacceptable to rely on presumptions and stereotypes regarding persons with disabilities or classes of such persons. Compliance with the IDEA regarding the group of persons present when an evaluation or placement decision is made is satisfactory under Section 504.

20. What process should a school district use to identify students eligible for services under Section 504? Is it the same process as that employed in identifying students eligible for services under the IDEA?

School districts may use the same process to evaluate the needs of students under Section 504 as they use to evaluate the needs of students under the IDEA. If school districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulatory provision at 34 C.F.R. 104.35.

21. May school districts consider "mitigating measures" used by a student in determining whether the student has a disability under Section 504?

No. As of January 1, 2009, school districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must ***not*** consider the ameliorating effects of any mitigating measures that student is using. This is a change from prior law. Before January 1, 2009, school districts had to consider a student's use of mitigating measures in determining whether that student had a physical or mental impairment that substantially limited that student in a major life activity. In the Amendments Act (see FAQ 1), however, Congress specified that the ameliorative effects of mitigating measures must not be considered in determining if a person is an individual with a disability.

Congress did not define the term "mitigating measures" but rather provided a non-exhaustive list of "mitigating measures." The mitigating measures are as follows: medication; medical supplies, equipment or appliances; low-vision devices (which do not include ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and

supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining if an impairment substantially limits a major life activity. "Ordinary eyeglasses or contact lenses" are lenses that are intended to fully correct visual acuity or eliminate refractive error, whereas "low-vision devices" (listed above) are devices that magnify, enhance, or otherwise augment a visual image.

22. Does OCR endorse a single formula or scale that measures substantial limitation?

No. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. 104.35 (c) requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination.

23. Are there any impairments which automatically mean that a student has a disability under Section 504?

No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504.

24. Can a medical diagnosis suffice as an evaluation for the purpose of providing FAPE?

No. A physician's medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. As noted in FAQ 22, the Section 504 regulations require school districts to draw upon a variety of sources in interpreting evaluation data and making placement decisions.

25. Does a medical diagnosis of an illness automatically mean a student can receive services under Section 504?

No. A medical diagnosis of an illness does not automatically mean a student can receive services under Section 504. The illness must cause a substantial limitation on the student's ability to learn or another major life activity. For example, a student who has a physical or mental impairment would not be considered a student in need of services under Section 504 if the impairment does not in any way limit the student's ability to learn or other major life activity, or only results in some minor limitation in that regard.

26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight?

The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. The weight of the information is determined by the committee given the student's individual circumstances.

27. What should a recipient school district do if a parent refuses to consent to an initial evaluation under the Individuals with Disabilities Education Act (IDEA), but demands a Section 504 plan for a student without further evaluation?

A school district must evaluate a student prior to providing services under Section 504. Section 504 requires informed parental permission for initial evaluations. If a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, the IDEA and Section 504 provide that school districts may use due process hearing procedures to seek to override the parents' denial of consent.

28. Who in the evaluation process makes the ultimate decision regarding a student's eligibility for services under Section 504?

The Section 504 regulatory provision at 34 C.F.R.104.35 (c) (3) requires that school districts ensure that the determination that a student is eligible for special education and/or related aids and services be made by a group of persons, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options. If a parent disagrees with the determination, he or she may request a due process hearing.

29. Once a student is identified as eligible for services under Section 504, is there an annual or triennial review requirement? If so, what is the appropriate process to be used? Or is it appropriate to keep the same Section 504 plan in place indefinitely after a student has been identified?

Periodic re-evaluation is required. This may be conducted in accordance with the IDEA regulations, which require re-evaluation at three-year intervals (unless the parent and public agency agree that re-evaluation is unnecessary) or more frequently if conditions warrant, or if the child's parent or teacher requests a re-evaluation, but not more than once a year (unless the parent and public agency agree otherwise).

30. Is a Section 504 re-evaluation similar to an IDEA re-evaluation? How often should it be done?

Yes. Section 504 specifies that re-evaluations in accordance with the IDEA is one means of compliance with Section 504. The Section 504 regulations require that re-evaluations be conducted periodically. Section 504 also requires a school district to conduct a re-evaluation prior to a significant change of placement. OCR considers an exclusion from the educational program of more than 10 school days a significant change of placement. OCR would also consider transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement.

31. What is reasonable justification for referring a student for evaluation for services under Section 504?

School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services.

32. A student is receiving services that the school district maintains are necessary under Section 504 in order to provide the student with an appropriate education. The student's parent no longer wants the student to receive those services. If the parent wishes to withdraw the student from a Section 504 plan, what can the school district do to ensure continuation of services?

The school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education.

33. A student has a disability referenced in the IDEA, but does not require special education services. Is such a student eligible for services under Section 504?

The student may be eligible for services under Section 504. The school district must determine whether the student has an impairment which substantially limits his or her ability to learn or another major life activity and, if so, make an individualized determination of the child's educational needs for regular or special education or related aids or services. For example, such a student may receive adjustments in the regular classroom.

34. How should a recipient school district view a temporary impairment?

A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected

duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

In the Amendments Act (see FAQ 1), Congress clarified that an individual is not "regarded as" an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

35. Is an impairment that is episodic or in remission a disability under Section 504?

Yes, under certain circumstances. In the Amendments Act (see FAQ 1), Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to a free appropriate public education under Section 504.

PLACEMENT

Once a student is identified as being eligible for regular or special education and related aids or services, a decision must be made regarding the type of services the student needs.

36. If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504?

No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP.

37. Must a school district develop a Section 504 plan for a student who either "has a record of disability" or is "regarded as disabled"?

No. In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE). This is consistent with the Amendments Act (see FAQ 1), in which Congress clarified that an individual who meets the definition of disability solely by virtue of being "regarded as" disabled is not entitled to reasonable accommodations or the reasonable modification of policies, practices or procedures. The phrases "has a record of disability" and "is regarded as disabled" are meant to reach the situation in which a student either does not currently have or never had a disability, but is treated by others as such.

As noted in FAQ 34, in the Amendments Act (see FAQ 1), Congress clarified that an individual is not "regarded as" an individual with a disability if the impairment

is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

38. What is the receiving school district's responsibility under Section 504 toward a student with a Section 504 plan who transfers from another district?

If a student with a disability transfers to a district from another school district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options determines that the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district is to evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student. There is no Section 504 bar to the receiving school district honoring the previous IEP during the interim period. Information about IDEA requirements when a student transfers is available from the Office of Special Education and Rehabilitative Services at http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C3%2C

39. What are the responsibilities of regular education teachers with respect to implementation of Section 504 plans? What are the consequences if the district fails to implement the plans?

Regular education teachers must implement the provisions of Section 504 plans when those plans govern the teachers' treatment of students for whom they are responsible. If the teachers fail to implement the plans, such failure can cause the school district to be in noncompliance with Section 504.

40. What is the difference between a regular education intervention plan and a Section 504 plan?

A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school. School districts vary in how they address performance problems of regular education students. Some districts employ teams at individual schools, commonly referred to as "building teams." These teams are designed to provide regular education classroom teachers with instructional support and strategies for helping students in need of assistance. These teams are typically composed of regular and special education teachers who provide ideas to classroom teachers on methods for helping students experiencing academic or behavioral problems. The team usually records its ideas in a written regular education intervention plan. The team meets with an affected student's classroom teacher(s) and recommends strategies to address the student's problems within the regular education environment. The team then follows the responsible teacher(s) to determine whether the student's performance or behavior has improved. In addition to building teams, districts may utilize other regular education intervention methods, including before-school and after-school programs, tutoring programs, and mentoring programs.

PROCEDURAL SAFEGUARDS

Public elementary and secondary schools must employ procedural safeguards regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services.

41. Must a recipient school district obtain parental consent prior to conducting an initial evaluation?

Yes. OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.

42. If so, in what form is consent required?

Section 504 is silent on the form of parental consent required. OCR has accepted written consent as compliance. IDEA as well as many state laws also require written consent prior to initiating an evaluation.

43. What can a recipient school district do if a parent withholds consent for a student to secure services under Section 504 after a student is determined eligible for services?

Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services. Nonetheless, school districts should consider that IDEA no longer permits school districts to initiate a due process hearing to override a parental refusal to consent to the initial provision of services.

44. What procedural safeguards are required under Section 504?

Recipient school districts are required to establish and implement procedural safeguards that include notice, an opportunity for parents to review relevant records, an impartial hearing with opportunity for participation by the student's parents or guardian, representation by counsel and a review procedure.

45. What is a recipient school district's responsibility under Section 504 to provide information to parents and students about its evaluation and placement process?

Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

46. Is there a mediation requirement under Section 504?

No.

TERMINOLOGY

The following terms may be confusing and/or are frequently used incorrectly in the elementary and secondary school context.

Equal access: equal opportunity of a qualified person with a disability to participate in or benefit from educational aid, benefits, or services

Free appropriate public education (FAPE): a term used in the elementary and secondary school context; for purposes of Section 504, refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards

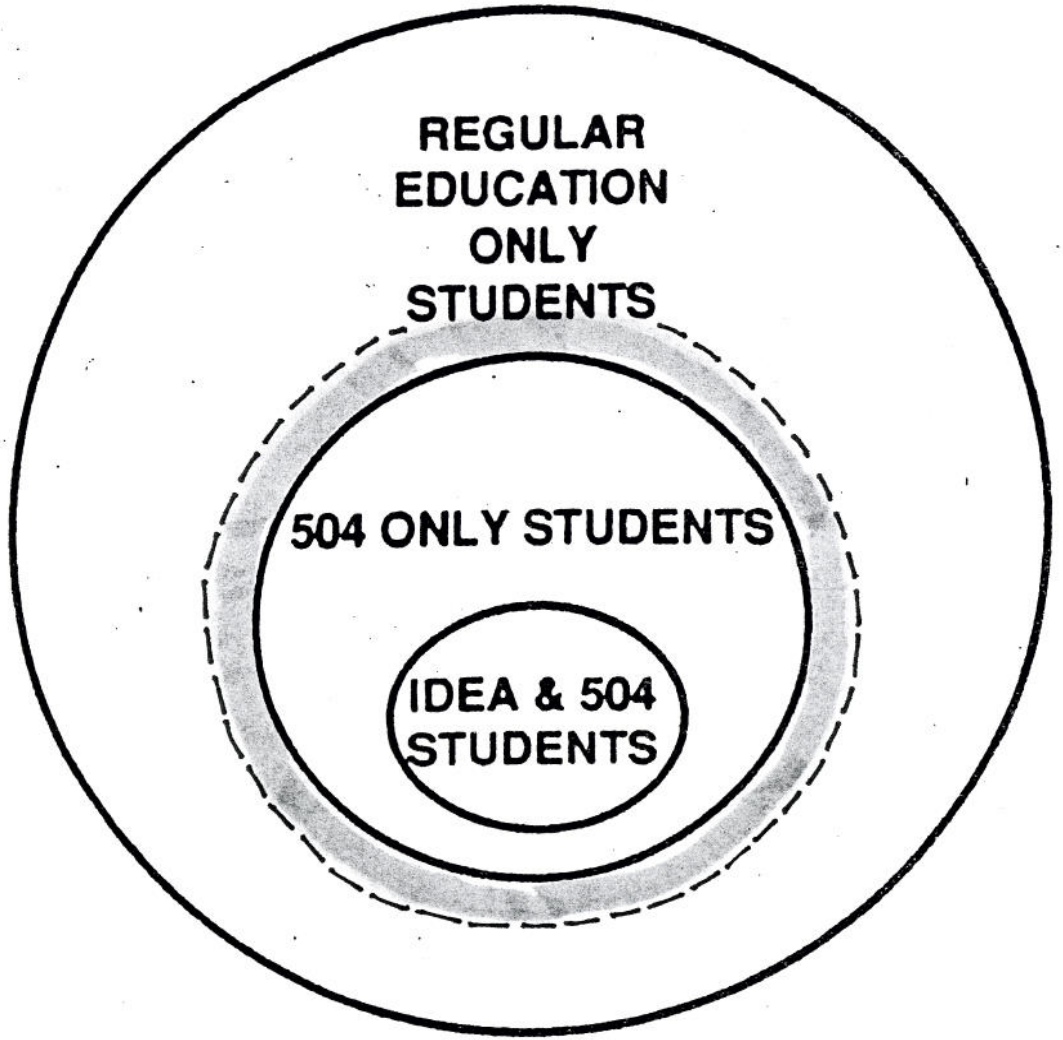
Placement: a term used in the elementary and secondary school context; refers to regular and/or special educational program in which a student receives educational and/or related services

Reasonable accommodation: a term used in the employment context to refer to modifications or adjustments employers make to a job application process, the work environment, the manner or circumstances under which the position held or desired is customarily performed, or that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment; this term is sometimes used incorrectly to refer to related aids and services in the elementary and secondary school context or to refer to academic adjustments, reasonable modifications, and auxiliary aids and services in the postsecondary school context

Reasonable modifications: under a regulatory provision implementing Title II of the ADA, public entities are required to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity

Related services: a term used in the elementary and secondary school context to refer to developmental, corrective, and other supportive services, including psychological, counseling and medical diagnostic services and transportation.

STUDENT POPULATION



Workshop 14

Parents and Their Rights Under the IDEA and Related State Law: What Does "Parent Participation" Really Mean?

By:

Charlotte Cassady
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Seattle, Washington

Pacific Northwest Institute on Special Education and the Law
October 5-7, 2009
Seattle, Washington

The outline for workshop #14 is available online, www.uwschoollaw.org.

If you are attending this workshop, you will receive a handout there.

Workshop 16

Compensatory Education: What it is and When it is Available

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Pacific Northwest Institute on Special Education and the Law
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COMPENSATORY EDUCATION: WHAT IT IS AND WHEN IT IS AVAILABLE

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I. COMPENSATORY EDUCATION

A. Compensatory education is a remedy under the Individuals with Disabilities Education Act (IDEA), and can be different things, including:

1. Reimbursement for private school placement;

2. Extending a student's educational services for a specific amount of time.

B. Any action brought under the IDEA:

1. Authorizes courts to grant such relief as they determine appropriate. 20 U.S.C. § 415(I)(2)(C)(iii).

2. The federal regulations provide that the court, "[b]asing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate." 34 C.F.R. § 300.516(c)(3).

II. HISTORICAL BACKGROUND

A. *Burlington School Community v. Massachusetts Department of Education*, 556 IDELR 389 (U.S. 1985).

1. U.S. Supreme Court recognized the authority of the courts to grant retroactive reimbursement of private school tuition—a remedy not specifically identified in the IDEA.

2. *Burlington* Test—in order to receive reimbursement the parents must prove that:

a. The individualized education program (IEP) calling for placement in a public school was inappropriate under IDEA, and

b. The private placement was proper under the Act.

3. The U.S. Supreme Court ruled that the IDEA allowed for "all appropriate relief" to remedy free appropriate public education (FAPE) violations.

B. Since Burlington:

1. *Miener v. State of Missouri,* 558 IDELR 123 (8th Cir. 1986). Parent looked for a remedy other than tuition reimbursement because he could not afford to place his child in a private school. A parent's financial means, or lack thereof, should not affect the right of a child with a disability to receive FAPE.

2. *Burr v. Ambach*, 441 IDELR 314 (2nd Cir. 1988), *reaff'd*, 16 IDELR 151 (2nd Cir. 1989). A hearing officer also has the authority to grant a student compensatory education when it is an appropriate remedy.

3. *Letter to Kohn,* 17 IDELR 522 (OSEP 1991). Compensatory education is an appropriate means for providing FAPE to a student with disabilities who previous had been denied services**.**

4. *Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (S. Ct. 1993). A court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under the IDEA and put the child in a private school that provides an education that is otherwise proper under the IDEA, but does not meet all of the FAPE requirements.

a. The U.S. Supreme Court ruled that, in order to be entitled to reimbursement, parents need only demonstrate that the public school placement was improper under the IDEA and that the private school placement complied with the IDEA's minimum standard of appropriateness—namely, that it was reasonably calculated to provide an educational benefit.

b. In cases where reimbursement is claimed by the parent, the private school placement does not need to meet all of the specific IDEA requirements applicable to educational placements made by public agencies.

(1) In particular, the FAPE mandate that requires, among other things, a child's education to be provided under public supervision and direction and a child's IEP to be developed and annually reviewed by the school district, cannot feasibly be met within the context of a parental placement.

(a) To apply these requirements to parental placements would effectively eliminate the right of unilateral withdrawal that was recognized in *Burlington.*

5. *Forest Grove School District v. T.A.*, 52 IDELR 151 (S. Ct. 2009). School districts that fail to make FAPE available could find themselves facing reimbursement claims—regardless of whether those students previously received special education services through the public school system. "Indeed, its statement that reimbursement *is not* authorized when a school district provides a FAPE could be read to indicate that reimbursement *is* authorized when a school district does not fulfill that obligation." (Emphasis original.)

6. *Lauren P. by David and Annmarie P. v. Wissahickon Sch. Dist*., 51 IDELR 206 (3rd Cir. 2009). Courts are not likely to award tuition reimbursement when the private school program has the same flaws that made a student's IEP deficient. While an award of compensatory education was upheld based on a district's failure to address a student's behavior problems, the Third Circuit Court of Appeals reversed the award of tuition reimbursement, holding that the private school did not address the student's distractibility and organizational difficulties—the key areas of her behavioral needs.

III. CALCULATION OF COMPENSATORY EDUCATION

A. Position of Ninth Circuit Court of Appeals:

1. *Parents of Student W. v. Puyallup School District No. 3*, 31 F.3d 1489 (9th Cir. 1994). Compensatory education is not a contractual remedy, but an equitably remedy; the court has the authority to provide "appropriate relief."

a. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA."

b. "Student W. was able to graduate from high school before reaching age 21, without more services than provided for in his annual IEP. The IDEA promises him no more."

B. *Richardson Indept. Sch. Dist. v. Michael Z.*, 109 LRP 52635 (5th Cir. 2009). Fifth Circuit Court of Appeals' new test:

1. "In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education."

C. *B.S. v. Placentia-Yorba Linda Unified School District*, 51 IDELR 237 (9th Cir. 2009). Prospective placement is not appropriate for compensatory education.

1. The Ninth Circuit Court of Appeals rejected a parent's argument that the student was entitled to prospective placement, "through the lens of hindsight":

a. "Instead of asking whether the IEP was adequate in light of the student's progress, the pertinent question is whether an IEP was appropriately designed and implemented so as to provide the student with a meaningful benefit."

b. "An IEP cannot be judged in hindsight; rather, the court looks to the IEP's goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer a meaningful benefit on the student."

D. *Schaffer by Schaffer v. Weast*, 51 IDELR 177 (4th Cir. 2009). The appropriateness of a current program cannot be used to prove the inadequacy of a prior IEP program.

1. The Fourth Circuit Court of Appeals held that, just because a Maryland school district offered a student a full-time special education placement for the tenth grade, it didn't mean that the inclusion classes proposed in his eighth grade IEP were inappropriate.

a. The Fourth Circuit Court of Appeals upheld the district court's determination that the eighth grade IEP was reasonably calculated to provide FAPE.

(1) "To interpret the tenth-grade IEP as an admission of fault as to the eighth-grade IEP would discourage [the district] and other school systems from reassessing and updating IEPs out of fear that any addition to the IEP would be seen as a concession of liability for an earlier one."

(2) Determining that the eighth-grade IEP met the student's identified needs, the Fourth Circuit Court of Appeals affirmed a decision that denied the parents' request for tuition reimbursement.

E. *Neena S. by Robert and Tami S. v. School Dist. of Philadelphia*, 51 IDELR 210 (E.D. Pa. 2008). Hearing officers are not required to award compensatory education in full-day increments.

1. Although a Pennsylvania school district was found to have denied FAPE to a student for five successive school years, the award of three hours of compensatory education for each day she attended school between February 1998 and June 2001 was found to be appropriate.

a. Neither the IDEA nor any case law requires hearing officers to award compensatory education in full-day increments.

b. Further, it was appropriate to limit the compensatory education to the student's areas of need.

2. The court also declined to award monetary damages in addition to compensatory education.

F. *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 49 IDELR 159 (D.D.C. 2008). A court criticized a hearing officer's "cookie-cutter" approach to compensatory education.

1. The hearing officer awarded a high school student 3,300 hours of tutoring services through the use of a formula.

a. Although the use of a formula does not necessarily render a compensatory education award invalid, the court held that the hearing officer could not award an appropriate amount of services without first identifying the student's current levels of performance.

b. "A formula-based award may in some circumstances be acceptable if it represents an individually tailored approach to meet a student's unique prospective needs, as opposed to a backwards-looking calculation of educational units denied to a student."

2. However, the hearing officer did not have information about the student's current levels of performance.

a. Relying on her determination that the school district denied FAPE for three years, the court observed, the hearing officer simply multiplied 27.5 hours of weekly services by the 120 weeks of services that the student missed.

b. The court pointed out that the award bore no relation to the student's educational needs.

G. Mary *McLeod Bethune Day Academy Pub. Charter Sch. c. Bland ex rel. T.B.,* 50 IDELR 134 (D.D.C. 2008). The federal district court for the District of Columbia reviewed *Nesbitt* but still upheld an award of compensatory education based on the hours of services that a charter school failed to provide; the calculation did not violate the prohibition of "cookie-cutter" awards.

1. In this case, the hearing officer based the award of compensatory education on the student's unique needs rather than a mathematical formula.

a. The purpose of compensatory education is to place a student in the position he would have obtained but for the LEA's failure to provide FAPE.

b. Thus, while an hour-for-hour award of compensatory services is not necessarily invalid, the award must be tailored to the student's individual needs.

2. The district court held that the hearing officer had sufficient information about the student's needs to craft an award that was reasonably calculated to compensate the student for the charter school's FAPE violation.

a. Evidence relied upon by the hearing officer included an evaluation report, which showed that the student was reading well below grade level; a report card and a progress report, which showed that the student was unable to perform at a fifth-grade level; and a private

tutoring service, which estimated that the student required at least 408 hours of tutoring.

b. The evidence supported the hearing officer's decision to award 375 hours of compensatory education.

(1) "While it is true that the hearing officer's award reflects the exact number of service hours that the [charter school] denied [the student], the hearing officer conducted a fact-specific inquiry and tailored the award to [the student's] individual needs."

(2) The court found that the compensatory education award was appropriate.

IV. STAY-PUT AND COMPENSATORY EDUCATION

A. *Mr. and Mrs. C. ex rel. K.C. v. Maine Sch. Admin. Dist. No. 6*, 49 IDELR 281 (D. Me. 2008). The failure of a school district to abide by the stay-put provision during a due process hearing resulted in compensatory education being awarded to the parents.

1. The fact that the student's amended IEP offered meaningful educational benefit did not excuse a district's failure to implement his last agreed upon IEP while a due process hearing was pending.

a. The parent filed a due process complaint to challenge the amended IEP; until the IEP dispute was resolved, the district was required to implement the last agreed upon IEP.

b. Compensatory education consisted of:

(1) Free tuition, transportation, and adult aides for seven weeks of camp;

(2) Direct tutoring for 14 hours in reading, math, computer skills, and independent living because of a violation of the stay-put requirement for the third quarter of the 2005-2006 school year; and

(3) Tutorial instruction for 409 hours in functional life skills, computer skills, English, and math because of a violation of

the stay-put requirement for the fourth quarter of the 2005-2006 school year.

2. Given the significance of the ruling, the parents were entitled to recover a substantial portion of their attorney fees in the amount of $35,804.

B. *L.J. by V.J. and Z.J. v. Audubon Bd. Of Educ*., 49 IDELR 184 (D.N.J. 2008).

1. Because a New Jersey school district violated a court order when it failed to provide 270 hours of compensatory applied behavior analysis (ABA) services to a student with autism, a court held the school district in contempt, and order the district to pay $250 for each subsequent day of noncompliance.

2. Although the district had initially provided 22 weeks of compensatory education, the court found that the district "made no effort to provide the [18] remaining weeks of educational programming."

3. The court denied the parents' request for sanctions that included a $10,000 daily fine and the incarceration of the district superintendent.

C. *Brennan ex rel. Brennan v. Regional Sch. Dist. No. 1 Bd. of Educ.*, 49 IDELR 99 (D. Conn. 2007).

1. A hearing officer ruled that a student's ninth grade IEP was inadequate and ordered the school district to provide for one year's private school placement.

2. Although the school district remedied the defects in the student's ninth-grade IEP when developing his tenth-grade IEP, the district continued to be responsible for payment for the student's placement in a private school for students with disabilities.

3. The court relied on the hearing officer's decision that the student's private placement would serve as compensatory education for the services he missed in ninth grade and ordered the district to continue funding the placement based on the IDEA's stay-put provision.

a. "Although the [hearing officer's] award was one of compensatory education, it is plain that she understood her decision to be one that specifically approved of [the student's] placement at [the private school] for the 2004-2005 school year."

b. The hearing officer's reimbursement ruling was sufficient to transform the private school into the student's stay-put placement.

4. The court rejected the parent's claims that the student's tenth-grade IEP was not reasonably calculated to offer FAPE; however, noting that the dispute was not yet resolved, the court ruled that the district remained financially responsible for the student's private placement.

V. POST-SECONDARY EDUCATION

A. *Letter to Frank*, 109 LRP 15039 (OSEP 2008).

1. Part B funds are typically not available for postsecondary education, unless ordered as compensatory education.

   a. OSEP has indicated that neither the state department of education nor school districts may generally use Part B funds to pay for a student's courses in a college setting.

   b. The IDEA's definition of FAPE confines it to appropriate preschool, elementary school, or secondary school education.

   c. The IDEA excludes postsecondary education from its definition of FAPE.

2. In only very narrow circumstances, could Part B funds be used for services provided outside of public or private elementary or secondary schools if, under state law, the education would be considered secondary school education.

   > We presume that most education provided at postsecondary institutions would be considered education beyond grade 12, and would not be considered secondary school education. However, the Department has advised States that in some very limited circumstances, Part B funds could be used for services provided outside of a public or private elementary or secondary school if, under State law, the education would be considered secondary school education. Unlike the situation prompting your inquiry, this clarification has been provided in situations where students have dropped out of high school or have graduated from high school and are seeking transition services or are entitled to compensatory education pursuant to an administrative or judicial order.

B. *Smith County Bd. of Educ.*, 52 IDELR 117 (SEA Tenn. 2008).

1. A student's graduation from high school with a regular diploma ends the district's obligation to provide FAPE.

2. However, a student may seek relief for a previous denial of FAPE.

3. A graduate's right to compensatory education will turn on whether the district provided appropriate services to him during his period of eligibility.

4. A student who failed to take the advice of school personnel on appropriate classes when he expressed an interest in becoming a veterinarian was not entitled to compensatory education to fulfill his goal of graduating from college.

C. *Gregory-Rivas v. District of Columbia*, 51 IDELR 42 (D.D.C. 2008).

1. A student who graduated with passing grades was denied his request for 2000 hours of compensatory education.

2. During his senior year, the student entered into a settlement with the school district regarding an alleged two-year denial of FAPE.

3. The district failed to honor the terms of the settlement and the student requested a due process hearing.

    a. The hearing officer order the district to convene an IEP meeting to discuss the student's need for compensatory education.

    b. The IEP team determined that the student was ineligible for compensatory education services, and the hearing officer upheld the team's decision.

4. The court explained that compensatory education is designed to make up for harm resulting from inappropriate IDEA services.

    a. "[I]n order to craft an appropriate remedy, there must be a showing of the educational benefits denied to the student as a result of [the district's] failure to comply with [the IDEA]."

    b. Because the student failed to demonstrate educational harm, he was not entitled to compensatory education.

VI. PERSONNEL QUALIFICATIONS

A. *Letter to Anonymous*, 49 IDELR 44 (OSEP 2007).

1. OSEP has indicated that personnel qualification standards found in the Part B regulations also apply to providers of compensatory education services.

> Under Part B regulations, no distinction is made between the personnel qualifications for special education and related services provided pursuant to a child's individualized education program (IEP) as part of the regular school program and those provided pursuant to an IEP as compensatory services. Personnel providing compensatory services should meet the same requirements that apply to personnel providing the same types of services as a part of a regular school program. There is similarly no distinction between instructional materials provided as part of special education and related services under the IEP as part of the regular school program and those provided pursuant to an IEP as compensatory services.

B. *Damian J. v. School Dist. Of Philadelphia*, 49 IDELR 161 (E.D. Pa. 2008).

1. A Pennsylvania district was found to have denied FAPE to a student with emotional disturbance when it assigned an unqualified staff member to teach his emotional support class.

2. The court held the teacher substantially failed to implement the student's IEP and ordered three months of compensatory education services.

> Kenya Jones, Damian's emotional support classroom teacher, lacked the qualifications to be teaching an emotional support classroom and received little training or instruction on implementing Damian's IEP. She was left to teach based on her own "instinct." (Citation omitted.) Yet, Jones was responsible for implementing Damian's IEP. (Citation omitted.) Consequently, substantial provisions of Damian's IEP were not implemented.

VII. LACK OF ACCESS TO STUDENT

A. *Hester v. District of Columbia*, 107 LRP 61017 (D.C. Cir. 2007).

1. A school district that had entered into an agreement to provide special education services to a student, was unable to provide special education

services to the student because he was incarcerated and because prison officials would not allow the service providers to enter the prison.

2. The court held a school district cannot be held responsible for failing to provide special education if it is denied access to the student.

    a. Multiple phone calls were made to the prison officials, which showed the district made every effort to provide services to the student, but its efforts were rejected due to security concerns.

    b. "Because Maryland officials made it impracticable for [the district] to provide special education services in the prison, [the district] did not breach its 2001 agreement with the [student]."

    c. While the agreement required the school district to provide special education services during the student's confinement, the agreement did not identify the specific actions the district would take if the providers could not access the prison.

3. Even though the school district failed to provide special education services, it was not required to provide compensatory education services to the student following his release from prison.

B. *Garcia v. Board of Educ. of Albuquerque Pub. Schs.*, 49 IDELR 241 (10th Cir. 2008).

1. Although a school district may have violated its FAPE obligations by failing to review a ninth-grader's IEP, the Tenth Circuit Court of Appeals held that the lapse did not entitle the student to compensatory education.

2. The Tenth Circuit determined that the student's truancy justified the district court's decision to deny her request for relief—she had failed to attend school for more than two years.

    a. The IDEA permits a court to "grant such relief as [it] determines is appropriate."

    b. The Tenth Circuit held that courts can also withhold relief based on equitable principles.

3. The district court's decision did not interfere with the IDEA's stated purpose of providing FAPE to students with disabilities.

a. "[The student] is, after all, *already* guaranteed the provision of a FAPE at any time she chooses to return to school, so long as she remains eligible to receive benefits under the IDEA."

b. Based on the student's previous rejection of IDEA services, it was not unreasonable to conclude that she would fail to take advantage of any compensatory services awarded.

VIII. PHYSICAL INJURIES

A. *J.N. v. Pittsburgh City Sch. Dist.*, 50 IDELR 74 (W.D. Pa. 2008).

1. Physical injuries suffered by a student with disabilities do not necessarily mean the student has been denied FAPE.

2. In one case, where a student suffered six injuries—five at the hands of his classmates—over a six-month period, the student was found not to have suffered more than a *de minimis* loss of educational services.

3. Absent a loss of educational opportunities, the parents could not demonstrate a right to compensatory education.

IX. EXTENDED SCHOOL YEAR

A. *S.S. by Shank v. Howard Road Academy*, 51 IDELR 15 (D.D.C. 2008).

1. A student was found to be entitled to compensatory education due to the failure of a charter school to provide the identified services.

2. The school conceded that it forgot to submit the extended school year (ESY) form for summer services and the student did not receive ESY services as a result of the error.

3. The court noted that the IEP identified prior instances of "serious regression" during school closings, and found that the implementation failure was material.

4. The case was remanded back to the hearing officer to determine an appropriate award of compensatory education based on the hearing record.

Accordingly, the IEP team acknowledged that due to prior "serious regression" following periods of school closure, S.S. had a "critical need" for program continuity in order to "facilitate achieving

> educational benefit." (Citation omitted.) Given this acknowledgment based, presumably, on the team's awareness of S.S.'s poor academic performance during sixth grade following a summer in which ESY services had been deemed unnecessary, the Court concludes that the failure to provide S.S. with ESY services during the summer of 2007 constituted a material failure to implement his IEP.

X. LACK OF PROGRESS

A. *Draper v. Atlanta Indep. Sch. Sys*., 108 LRP 13764 (11th Cir. 2008).

1. A school district was required to fully fund a private school until June 2011 for a high school student with a learning disability as compensatory education at the cost of $38,000 per year.

2. The court held that, for three years, the district failed to change the computer-based reading methodology, despite the student's lack of progress.

3. The district had initially determined that the student had intellectual impairments, but a subsequent evaluation, conducted five years later, identified a specific learning disability.

4. The court held that the initial evaluation was "spectacularly deficient," and the subsequent evaluation was two years overdue.

5. The student was 21 when the case was heard by the Eleventh Circuit Court of Appeals.

> This appeal reminds us of words written by the late Judge John Minor Wisdom about a denial of educational opportunity in a different era: "A man should be able to find an education by taking the broad highway. He should not have to take by-roads through the woods and follow winding trails through sharp thickets, in constant tension because of the pitfalls and traps, and, after years of effort, perhaps attain the threshold of his goal when he is past caring about it. *Meredith v. Fair,* 298 F.2d 696, 703 (5th Cir. 1962).

B. *Parenteau ex rel. C.P. v. Prescott Unified Sch. Dist.,* 51 IDELR 213 (D. Ariz. 2008).

1. The parents of a student with autism argued that he made little or no progress in his educational program.

The Parenteaus contend that the District provided "only procedural compliance with the law," but failed to provide Cody with a free appropriate public education. Their challenge relies primarily on allegations that Cody's IEP Team should have included an autism expert; Cody's IEP goals and objectives should have been quantitatively measurable; Cody's progress under the IEPs should have been measured quantitatively; the District should have provided Cody services based on the Applied Behavioral Analysis methodology with intensive, quantitative data collection and precisely structured reinforcement; and the District failed to provide Cody a meaningful educational benefit because, in the parents' opinion, did not make any educational progress in the school years 2003-04, 2004-05, and 2005-06.

2. The court rejected the parents' request for compensatory education and held that the student made slow but steady progress.

3. Further, the parents had remarked that they were "ecstatic" about the student's recent progress.

XI. STUDENTS NO LONGER ELIGIBLE FOR SPECIAL EDUCATION SERVICES DO NOT QUALIFY FOR COMPENSATORY EDUCATION

A. *M.L. ex rel. A.L. v. El Paso Indep. Sch. Dist.*, 52 IDELR 159 (W.D. Tex. 2009).

1. During the year prior to a student's IEP team determining that the student was no longer eligible for special education services, the district failed to provide the student with the 60 minutes of speech-language services each week specified on his IEP.

2. Because of a shortage of speech language pathologists (SLPs), the student missed several therapy sessions.

3. The district notified the parents of the shortfall and indicated it would consider the student's need for compensatory services.

4. After the student was exited from special education, the parents filed a due process complaint requesting compensatory education services to make up the previous shortfall in speech-language therapy.

5. The court held that the student's right to compensatory education terminated with his eligibility for IDEA services.

Ultimately, providing additional compensatory speech therapy services for A.L. when A.L. has no speech disability would serve only as a form of damages, a remedy that is not appropriate under the IDEA.

26th Annual
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Inquiries

For questions about the Institute, clock hours, CLEs, registration issues or general inquiries, please contact Mary Jane Shirakawa, UW Conference Management, 206-221-3936, or send email to: slawd@u.washington.edu

Additional Conference Materials

A limited number of additional conference manuals will be available for purchase. The price is $80 if purchased and picked up during the conference. Otherwise, the cost is $100, which includes shipping within the U.S. A limited number of mini-course outlines will also be available for purchase at the conference only. The price is $20 each.

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