NB1: What Every Educator Needs to Know About the IDEA

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Learning Objectives:

- Participants will gain a general understanding of the major components of the Individuals with Disabilities Education Act ("IDEA").
- Participants will gain an understanding of the major court decisions impacting the development and implementation of the IDEA.
- Participants will be better prepared to function as special education administrators, teachers, consultants, advocates, attorneys, and parents of children with disabilities.

I. Introduction

The Individuals with Disabilities Education Act (IDEA) was formerly known as The Education for All Handicapped Children Act (EAHCA). The EAHCA was enacted in 1975, and has been subsequently reauthorized and significantly revised by Congress. The last reauthorization of the IDEA was completed in 2004, with final federal implementing regulations issued in 2006.

II. Purpose of the IDEA

1. To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.

2. To ensure that the rights of children with disabilities and parents of such children are protected.

3. To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.

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4. To assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families.

5. To ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

6. To assess, and ensure the effectiveness of, efforts to educate children with disabilities.

III. Categories of Disability Under the IDEA

1. There are thirteen (13) categories of disability in the IDEA. (A State may include additional categories.)

1. Intellectual Disability
2. Hearing Impairment
3. Speech/Language Impairment
4. Visual Impairment
5. Emotional Disturbance
6. Orthopedic Impairment
7. Autism
8. Traumatic Brain Injury
9. Other Health Impairment
10. Learning Disability
11. Multiple Disabilities
12. Deaf-Blindness
13. Developmental Disability

IV. Child Find (34 C.F.R. 300.111)

A. All states must have in place procedures (called "child find") to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.

B. Child find also includes children who are suspected of being a "child with a disability" and in need of special education and related services, even though they are advancing from grade to grade, and highly mobile children, including migrant children.

Significant Court Cases:

***Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011).** The use of RTI does not diminish a district's obligation under the IDEA to obtain parental consent and evaluate a student in a timely manner, OSEP informed state education directors. When there is reason to suspect the student may have a disability and need special education and related services as a result, the IDEA's initial evaluation provisions kick in, regardless of whether the district plans to or is currently utilizing RTI strategies with the student. OSEP noted that the IDEA implementing regulation at 34 CFR 300.301(b) allows a parent to request an initial evaluation at any time. Thus, districts cannot point to their use of RTI strategies as a basis for delaying or denying the evaluation. If the district agrees with the parent that the student may be eligible, it must obtain parental consent within a reasonable period of time and evaluate the student within 60 days or in accordance with the state deadline. OSEP noted that a district is free to deny an evaluation in response to a referral if it does not suspect a disability. However, it must notify the parent of the basis for its decision, and that basis cannot be that the district is waiting to see how the child responds to general education interventions. "It would be inconsistent with the evaluation provisions at 34 CFR 300.301 through 34 CFR 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework," OSEP Director Melody Musgrove wrote.

***D.G. v. Flour Bluff Indep. Sch. Dist.*, 56 IDELR 255 (S.D. Texas 2011).** While a ninth-grader's ADHD diagnosis and behavioral problems did not in themselves demonstrate his need for IDEA services, they should have prompted a Texas district to conduct a special education evaluation. The District Court held that the district violated its child find obligation by continuing the student's ineffective Section 504 accommodations. The court noted that the student, who had no history of academic or behavioral problems, began exhibiting hyperactivity, impulsive behaviors, and uncontrolled vocalizations in ninth grade. Those behaviors resulted in two removals to an alternative school that totaled more than 100 school days. Because the parent informed the district early in the school year that the student had been diagnosed with ADHD, the court ruled that the district had reason to suspect a disability requiring special education services. However, the court pointed out that the district did not evaluate the child until one year later, and only did so upon the parent's request. In the meantime, the district continued to implement Section 504 accommodations that had no impact on the student's behavior. U.S. District Judge Janis Graham Jack criticized the district's failure to evaluate the student within a few months after his behavioral problems manifested. "[The student] should not have been allowed to languish in the disciplinary program at [the alternative school] for almost an entire academic year before he was evaluated for IDEA services," Judge Jack wrote. Noting that the district had since found the student eligible for special education based on his diagnosis of rheumatoid arthritis, the court ordered the district to provide the student with one year of compensatory education.

V. Evaluation and Reevaluation (34 C.F.R. 300.300 – 300.306)

A. Consent for Initial Evaluation

The public agency must obtain informed consent from the parent of the child prior to conducting an initial evaluation to determine eligibility for special education and related services.

Parental consent for initial evaluation is not the equivalent of consent for the provision of special education and related services.

The public agency must make reasonable efforts to obtain the informed parental consent for an initial evaluation.

If the child is a ward of the State and is not residing with the parents, the public agency is not required to obtain informed consent for evaluation IF, despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parents, parental rights have been terminated, or a court has appointed a representative for the child (e.g., a guardian ad litem).

If the parent either refuses or fails to provide informed consent for evaluation, the public agency may, but is not required to, file a lawsuit seeking a court order permitting it to evaluate the child.

B. Initial Evaluation (34 C.F.R. 300.301)

Each public agency must conduct a "full and individual" initial evaluation before the initial provision of special education and related services to a child with a disability. 34 C.F.R. 300.301(a).

Either a parent of a public agency may initiate a request for an initial evaluation to determine if a child is a "child with a disability." 34 C.F.R. 300.301(b).

The initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation (or within the specific timeframe set by a State). 34 C.F.R. 300.301(c).

The timeframe does not apply if the parent of a child repeatedly fails or refuses to produce the child for an evaluation or the child moves to another school district during the evaluation process but before the final eligibility determination is completed. 34 C.F.R. 300.301(d).

Screening by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not an eligibility evaluation. 34 C.F.R. 300.302.

The public agency must provide notice to the parents of a child with a disability that describes any evaluation procedures the agency proposes to conduct. 34 C.F.R. 300.304

Conduct of the Evaluation (34 C.F.R. 300.304):

1. The public agency must use a variety of assessment tools and strategies to gather relevant functional, development, 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 child's IEP and placement.

2. The public agency must not use any single measure of assessment as the sole criterion for determining whether a child is a "child with a disability" and for determining an appropriate educational program for the child.

3. The public agency must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

4. The public agency must ensure that assessments and other evaluation materials are selected and administered so as not to be discriminatory on a racial or cultural basis and are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer.

5. Assessments must be used for the purposes for which the assessments or measures are valid and reliable, and not merely designed to produce a single general intelligence quotient.

6. Assessments must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

7. Assessments must be selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking sills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless that is what the test is designed to measure).

8. The child must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

9. The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

10. As part of an evaluation, the IEP team must:

    a. Review existing evaluative data on the child, including evaluations and information provided by the parents, current classroom-based observations and assessments, and observations by teachers and related services providers. 34 C.F.R. 300.305(a)(1).

    b. On the basis of that review, identify what additional data are needed to determine whether the child is a "child with a disability," the educational needs of the child, the present levels of educational performance, whether the child needs special education and related services, and whether any additions and modifications to the IEP are needed to enable the child to meet the measurable annual goals and

to participate, as appropriate, in the general education curriculum. 34 C.F.R. 300.305(a)(2).

C. Reevaluation (34 C.F.R. 300.303).

A public agency must ensure that a reevaluation of each child with a disability is conducted at least once every three (3) years, unless the parent and the public agency agree otherwise.

A reevaluation may not occur more than once a year, unless the parent and the public agency agree otherwise.

D. Independent Educational Evaluations (34 C.F.R. 300.502)

The parents of a child with a disability have a right to obtain a publicly funded independent educational evaluation of their child if they disagree with the evaluation conducted by the public agency.

An "independent educational evaluation" means an evaluation that is conducted by a qualified examiner who is not employed by the school district.

The school district may ask the parents why they disagree with the school's evaluation, but may not require the parents to provide this information.

School districts must provide to parents information about where an independent evaluation may be obtained and the criteria that may apply to the evaluation.

If a parent requests an independent educational evaluation, the school district must, without unnecessary delay, either file a due process complaint to prove that its evaluation is appropriate, or pay for the independent educational evaluation.

Parents are always entitled to obtain private evaluations at their own expense, and these must be "considered" by the IEP team.

A parent is entitled to only one independent educational evaluation at public expense each time the school district conducts an evaluation with which the parent disagrees.

The results of the independent educational evaluation must be considered by the IEP team, and may be used as evidence in a due process hearing.

A hearing officer/administrative law judge may request that an independent educational evaluation be conducted at public expense.

The independent educational evaluation must meet the same criteria as the school district's evaluation.

A school district may not impose any additional timelines or conditions upon an independent educational evaluation.

Significant Court Cases:

***N. B. v. Hellgate Elementary Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008).** A district could not fulfill its duty to evaluate a preschooler with autism by referring the parents to a child development center. Because the IEP team could not develop an appropriate program without evaluative data, the procedural violation amounted to a denial of FAPE. The 9th Circuit observed that the parents disclosed the child's medical diagnosis of autism at a September 2003 IEP meeting. At that time, the district recommended that the parents obtain a general evaluation from the child development center. The district maintained that because the parents failed to obtain the suggested evaluation, it could not develop an appropriate IEP. The 9th Circuit disagreed. Under the IDEA, the court explained, the district had an obligation to "ensure that ... the child is assessed in all areas of suspected disability." 20 USC 1414(b)(3)(B). "[W]ithout evaluative information that [the child] has autism spectrum disorder, it was not possible for the IEP team to develop a plan reasonably calculated to provide [the child] with a meaningful educational benefit throughout the 2003-04 school year," U.S. Circuit Judge Arthur L. Alarcon wrote. Although the district did not have to conduct an evaluation with its own personnel, it did have an obligation to arrange for an evaluation at no cost to the parents. The 9th Circuit held that the district's failure to evaluate the child required it to pay for the parent's private services and legal expenses. It affirmed the District Court's decision that the child did not need ESY services to obtain a meaningful educational benefit.

E. Eligibility (34 C.F.R. 300.306)

1. Eligibility for Special Education and Related Services

A group of qualified professionals and the parent of the child determine whether the child is a "child with a disability" pursuant to the IDEA.

The school district must provide to the parent a copy of the eligibility determination at no cost.

If a determination is made that the child is a "child with a disability" and needs special education and related services, an individualized education program ("IEP") must be developed for the child.

F. Special Rule for Eligibility Determinations (34 C.F.R. 300.306(b))

A child must not be determined to be a "child with a disability" if the determinant factor for that determination is:

1. A lack of appropriate instruction in reading, including the essential components of reading instruction as defined by the No Child Left Behind Act;

2. A lack of appropriate instruction in math;

3. Limited English proficiency; or

4. The child does not otherwise meet the eligibility criteria.

Significant Court Cases:

***Timothy W. v. Rochester, New Hampshire Sch. Dist.*, 441 IDELR 393 (1st Cir. 1989).** When profoundly physically and mentally handicapped child was four, the district determined he did not qualify for special education because he was unable to benefit from it. Timothy's multiple handicaps included profound mental retardation, severe spasticity, cerebral palsy, brain damage, joint contractures, cortical blindness, and quadriplegia that made him non-ambulatory. He needed special education and related services for sensory stimulation, physical therapy, better head control, socialization, responding to sound, and eating. Experts who drafted the IEP recommended program with goals and objectives on motor control, communication, socialization, daily living skills, and recreation, all of which fit under EAHCA's statutory and regulatory definitions. When child was eight, the parent sought to compel the district to place son in special education. The court found Congress clearly intended to provide public education for every handicapped child, unconditionally and without exception, regardless of severity of handicap. Also, most severely handicapped children were to get priority attention, although no educational benefit was guaranteed and potential for such benefit was not prerequisite. Because he got no education at all, Timothy was entitled to highest priority under EAHCA. The First Circuit found the District Court's ruling directly contradicted EAHCA's legislative history, language, and case law, and was the only decision since passage of EAHCA to hold that a handicapped child was not entitled to public education because of inability to benefit.

***C.B. v. State of Hawaii Dept. of Education*, 55 IDELR 287 (D. Hawaii 2010).** The U.S. District Court, District of Hawaii upheld an IHO's finding that the Hawaii ED complied with state and federal law when it ended the IDEA eligibility of a student with autism, mild "mental retardation," and a seizure disorder. The testimony at the hearing supported the IHO's conclusion that the student no longer needed special education and related services. In accordance with state statutory law, the ED informed the student's parent that it was exiting him from special education because the student would be over age 20 on the first school day. It also explained that the student had gained the functional and academic skills necessary to transition to the noncompetitive work force. The parent claimed the ED's decision denied the student FAPE. The IHO sided with the district. On appeal, the District Court noted that pursuant to *B.T. v. Department of Education,* 53 IDELR 256 (D. Haw. 2009), Hawaii districts must provide FAPE to students through age 21 when the IEP team so recommends. In this case, the team did not. In contrast to the parent's contention, the team did not exit the student merely because of his age. Rather, it stated the student had acquired the skills he needed to enter the noncompetitive work force, and that because he had plateaued, he stood to gain no further benefit from IDEA services. The IEP team set a goal for the student to be employed, and the student achieved that goal. The testimony of the student's autism consult teacher, the person most familiar with him, confirmed that his level of independence and basic academic skills were pretty well set. Thus, the IEP team was within its rights not to provide further education.

***Mr. and Mrs. I v. Maine Sch. Admin. Dist. 55*, 45 IDELR 4 (D. Me. 2006*), aff'd*, 45 IDELR 121 (1st Cir. 2007).** The District Court denied the parents' request for reimbursement for their tuition costs for their 12-year-old daughter with Asperger disorder because they failed to

demonstrate the appropriateness of their chosen placement, but ordered the district to convene an IEP meeting and develop an appropriate IEP for her. Although a magistrate judge found that the sixth-grade girl made excellent academic progress throughout her public school tenure, the court held that the judge's finding was based on a limited notion of "educational performance." In finding that the student met the IDEA's eligibility requirements, the court explained that academic progress also included communication and social skills. Because the student's Asperger disorder adversely affected her ability to communicate and relate socially, she was entitled to special education services. Although the girl excelled academically, met the school's standards for learning, communicated skillfully in writing and orally, participated thoughtfully in class, obeyed rules even when she did not agree with them, was not rude or a disciplinary problem, and maintained some close friends, she was also described by her teachers as isolated and inflexible. She also self-mutilated during school time. Although the IHO attributed a subsequent mental health crisis that included a suicide attempt to a short-term problem, a neuropsychiatrist testified that the student's condition was permanent. The district initially agreed to provide accommodations under a Section 504 plan, but the parents rejected its plan after the district failed to provide the first of the required services. Thereafter, when the parents attempted to reenroll the student in the district, the district maintained that the student was not eligible for services.

***Springer v. Fairfax County Sch. Board*, 27 IDELR 367 (4th Cir. 1998).** The parents of a student who failed the eleventh grade unilaterally placed him at a private school and requested the district fund the student's placement. According to the parents, the student qualified for special education due to a serious emotional disturbance. The district concluded the student did not have an SED and refused to fund the private placement. The court found that the student did not meet the eligibility criteria for SED. The student's misbehavior, which included truancy, drug use, and theft, was not consistent with SED, it was consistent with his diagnosed social maladjustment. A diagnosis of social maladjustment alone does not qualify a student as SED. The Circuit Court noted that none of the psychologists who evaluated the student concluded he was SED, not even the parents' expert. The student maintained satisfactory relationships with teachers and peers, and did not manifest "pervasive" unhappiness or depression. Further, the student's educational difficulties were the result of his misbehavior, not an SED. Accordingly, the student was not eligible for special education and the district was not required to reimburse the parents for the costs of the unilateral private placement.

VI. Provision of FAPE

A. Free appropriate public education (20 U.S.C. 1401)

All eligible students with disabilities are entitled to receive a free appropriate public education, or FAPE. The IDEA defines FAPE as special education and related services that:

1. Have been provided at public expense, under public supervision and direction, and without charge;

2. Meet the standards of the State educational agency;

3. Are provided in conformity with the individualized education program (IEP).

B. Special Education (34 C.F.R. 300.39)

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including:

1. Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

2. Instruction in physical education.

3. Special education also includes the following:

    a. Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

    b. Travel training; and

    c. Vocational education.

C. <u>Related Services (34 C.F.R. 300.34)</u>

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. Exception – services that apply to children with surgically implanted devices, including cochlear implants.

<u>Significant Court Cases:</u>

***Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 102 S. Ct. 3034, 553 IDELR 656 (U.S. 1982).** The Court held that an elementary school student with a hearing impairment was not entitled to a publicly funded sign language interpreter because she was making A's and B's without this related service. The IDEA does not mandate the provision of educational services to "maximize" the capabilities of students with disabilities. Rather, the law mandates the provision of FAPE. To determine whether a school district is providing FAPE, the court will review:

1. Is the school district adequately complying with the procedural safeguards of the IDEA?

2. Is the IEP "reasonably calculated" to provide educational benefit to the child?

***Lachman v. Illinois State Bd. Of Education*, 441 IDELR 156 (7th Cir. 1988), *cert. denied* 111 LRP 7412, 488 U.S. 925 (1988).** Where parental preference for one particular methodology conflicts with district's proposed placement, the court will not attempt to resolve the question of whether one educational methodology is better than another. Parents have no right under EAHCA to compel the school district to instruct handicapped child in one specific method when

the district's method allows child to benefit from his education and progress toward his IEP goals.

***Joshua A. v. Rocklin Unified Sch. Dist.,* 52 IDELR 64 (9th Cir. 2009).** A California district did not violate the IDEA when it denied a parent's request for an ABA-based autism program. Concluding that the district's eclectic program was appropriate, the 9th Circuit affirmed a decision in the district's favor. The court rejected the parent's argument that the eclectic program failed to meet the IDEA's peer-reviewed research requirement. Although the program itself was not peer-reviewed, the court noted that it was "based on peer-reviewed research to the extent practicable." The court observed that the district only had to provide the child with a basic floor of opportunity. "We need not decide whether the district made the best decision or a correct decision, only whether its decision satisfied the requirements of the IDEA," the 9th Circuit wrote in an unpublished decision. The court also found that the IEP targeted the child's unique needs, was administered by qualified personnel, and was implemented based on accepted principles in the field of autism education. Determining that the district offered the child FAPE, the 9th Circuit granted judgment in the district's favor.

***L.F. v. Houston Indep. Sch. Dist.*, 58 IDELR 63 (5th Cir. 2012).** Notes taken at IEP meetings helped a Texas district overcome allegations that it failed to consider the unique needs of a student with an emotional disturbance. Concluding the district offered the student FAPE, the 5th Circuit affirmed a decision at 53 IDELR 116 that the IEPs were procedurally and substantively appropriate. The court observed that an IEP is reasonably calculated to provide an educational benefit if it reflects the student's assessments and performance, is administered in the LRE, is developed and implemented by key stakeholders, and is designed to produce positive academic and nonacademic benefits. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 26 IDELR 303 (5th Cir. 1997). The district in this case met that standard. Although the parent claimed that the district failed to consider the student's behavioral needs, the court pointed out that the IEP team report included an FBA and a BIP. Records also showed the IEP team considered ESY services and determined that they were unnecessary. The court pointed out that the team considered several placements before concluding that a behavioral class was the student's LRE. Moreover, the records showed that the district implemented the student's IEP, and that the team developed goals that reflected the student's abilities. "Although [the student] consistently performed at least one grade level below her peers, the IEP listed goals, specific objectives, and evaluation methods that required [her] to improve," the 5th Circuit wrote in an unpublished decision. The district's records further demonstrated that the district made multiple attempts to include the parent in the development of the student's fifth-grade IEP, but that it never received a response. Finding no evidence of an IDEA violation, the 5th Circuit ruled that the district offered the student FAPE.

***Daniel P. v. Downingtown Area Sch. Dist.*, 57 IDELR 224 (E.D. Pa. 2011).** Keeping close tabs on the progress that a student with an SLD was making in its RTI program helped a district avoid a child find violation. The District Court ruled that the district acted properly by evaluating the student and finding him eligible as soon as it became apparent that he needed special education. The child had some academic challenges through second grade. In first grade, the district determined that he had an SLD, but found him ineligible because he was making progress through RTI. By the end of second grade, the student's academic difficulties were increasing, along with his anxiety concerning his performance. The district reevaluated him and found him eligible. The parents, however, placed him in a private program and sought tuition reimbursement. Affirming an administrative appeals panel's decision in the district's favor, the court concluded that the district had no reason to act sooner than it did. The student's report cards showed that he was progressing through the first and second grades, and there was no evidence suggesting otherwise. The court also pointed out that although it offered the student RTI only, the district continued to monitor his progress. When his RTI teacher noted his increasing difficulties

at the end of the second grade, the district reassessed him, found him eligible, and promptly developed an IEP. The court also held that the district was not liable for private tuition because the parents failed to timely notify the district of their intent to seek reimbursement. The court rejected the parents' assertion that an exception applied because the student would have suffered emotional harm in the district's placement. To the contrary, the district appropriately addressed the student's academic anxiety by offering a small class placement, with supports, and instruction matched to his academic abilities.

***Irving Indep. Sch. Dist. v. Tatro*, 555 IDELR 511 (U.S. 1984).** Respondents' 8-year-old daughter was born with a defect known as spina bifida. As a result, she suffers from orthopedic and speech impairments and a neurogenic bladder, which prevents her from emptying her bladder voluntarily. Consequently, she must be catheterized every three or four hours to avoid injury to her kidneys. To accomplish this, a procedure known as clean intermittent catheterization (CIC) was prescribed. This is a simple procedure that can be performed in a few minutes by a layperson with less than an hour's training. Since petitioner School District received federal funding under the Education of the Handicapped Act, it was required to provide the child with a free appropriate public education, which is defined in the Act to include "related services," which are defined in turn to include "supportive services (including ... medical ... services except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from a special education." Pursuant to the act, the petitioner developed an individualized education program for the child, but the program made no provision for school personnel to administer CIC. The Court held:

1. CIC is a "related service" under the Education of the Handicapped Act.

(a) CIC services qualify as a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education," within the meaning of the Act. Without CIC services available during the school day, respondents' child cannot attend school and thereby "benefit from special education." Such services are no less related to the effort to educate than are services that enable a child to reach, enter, or exit a school.

(b) The provision of CIC is not subject to exclusion as a "medical service." The Department of Education regulations, which are entitled to deference, define "related services" for handicapped children to include "school health services," which are defined in turn as "services provided by a qualified school nurse or other qualified person," and define "medical services" as "services provided by a licensed physician." This definition of "medical services" is a reasonable interpretation of congressional intent to exclude physician's services as such and to impose an obligation to provide school nursing services.

***Cedar Rapids Community Sch. Dist. v. Garrett F.*, 29 IDELR 966 (U.S. 1999).** The Supreme Court concluded a school district was obligated to provide certain school health services to a medically fragile high school student. Garrett F. suffered from quadriplegia, and required urinary bladder catheterization, suctioning of his tracheotomy, ventilator setting checks, ambu bag administrations as a backup to the ventilator, blood pressure monitoring, observation to determine if he was in respiratory distress or autonomic hyperreflexia, and disimpation in the event of autonomic hyperreflexia. Looking to the IDEA definition of "related services" first, the court noted that the district admitted the disputed services were incorporated within the statutory definition of related services as supportive services. In examining whether the medical services exclusion applied, the court stated that the scope of this exclusion was addressed by the Supreme Court in the *Tatro* decision, which held medical services are those services that must be

performed by a physician. Applying the reasoning from *Tatro* to the current dispute, because the requested services did not have to be provided by a physician, the district was required to provide them. The court rejected the proposed multi-factor approach favored by the district as unsupported by the applicable judicial and statutory precedent. The court stated that if it adopted the district's proposed cost-based standard, it would be engaging in inappropriate judicial rule-making. For these reasons, the court concluded the IDEA, *Tatro*, and the intent behind the IDEA, all supported the conclusion that the district was required to furnish the student with the requested services.

VII. Least Restrictive Environment (34 C.F.R. 300.114 – 300.120)

Each school district 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 nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Each school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum must:

1. Include instruction of regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and

2. Make provision for supplementary services, such as resource room or itinerant instruction to be provided in conjunction with regular class placement.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each school district must ensure that the placement decision:

1. 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

2. Is made in conformity with the LRE provisions of the IDE;

3. Is determined at least annually;

4. Is based on the child's IEP; and

5. Is as close as possible to the child's home.

Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

A child with a disability is not removed from education in the age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

Significant Court Cases:

***Daniel R.R. v. El Paso Indep. Sch. Dist*., 441 IDELR 433 (5th Cir. 1989).** Parents of 5-year-old boy with Down syndrome enrolled him in district's half-day preschool special education program in 1985. Parent requested new placement for 1986-87 school year in regular half-day pre-kindergarten class. The student was placed in that program and continued in preschool class as well, but in November 1986, following discussion with the prekindergarten teacher about the student's inability to participate in class activities, the placement committee recommended that the student attend only special education classes and have lunch with regular education children when parent was available to supervise. The parent appealed, and the hearing officer upheld the school district on the grounds that the student was receiving little educational benefit from prekindergarten class and that instructor's time was spent almost exclusively with the handicapped student to detriment of other students. On appeal to federal District Court, the court affirmed the hearing officer's decision, and the parents appealed. The court held that EHA's stated preference for mainstreaming a student must include examination of degree of benefit child will obtain from regular education, expectation of benefit may not be sole criterion, as mainstreaming may bring benefits in and of itself. State must take steps to accommodate handicapped child in regular classroom, and such steps may not be "mere token gestures;" nor must districts so modify curriculum that handicapped child is not required to learn skills normally taught in regular education curriculum. Academic achievement is not, under EHA, the only purpose of mainstreaming; in determining extent of mainstreaming appropriate, inquiry must also include overall educational experience of child and effect on regular classroom environment and education of regular education students.

***Sacramento Unified Sch. Dist. v. Rachel H*., 20 IDELR 812 (9th Cir. 1994).** An 11-year-old child who was moderately intellectually disabled was entitled to receive a full-time placement in a regular education classroom. In determining the child's appropriate placement under the IDEA, the Circuit Court approved of and adopted the District Court's four-factor balancing test which considered the educational benefits of placing the child in a full-time regular education program, the non-academic benefits of such a placement, the effect that the child would have on the teacher and other students in the regular classroom, and the costs associated with this placement. The Circuit Court concluded that the balancing test applied by the District Court for determining the school district's compliance with 20 USC 1412(5)(B), the provision of the IDEA which establishes a preference for educating children with disabilities in regular classrooms to the maximum extent possible, directly addressed the issue of an appropriate placement for the child in accordance with this statute. Therefore, the Circuit Court approved of and adopted the District Court's test in its own review. The District Court's test considered factors including the educational benefits of placing the child in a full-time regular education program, the non-academic benefits of such a placement, the effect that the child would have on the teacher and other students in the regular classroom, and the costs associated with this placement. On appeal, the district opposed the District Court's findings that the child was benefiting both academically and non-academically in a regular classroom environment and that the child did not have a detrimental effect on the teacher or other students. The Circuit Court determined that the District Court undertook a complete evidentiary hearing and found the parents' evidence regarding these factors to be more convincing than the district's evidence, and it did not disturb these findings on appeal. The district also claimed that it would lose up to $190,764 in state special education funding if the child were not enrolled in a special education class at least 51% of the day. The Circuit Court found the district unconvincing on the issue of cost as well, and pointed out that the district had not sought a waiver pursuant to the state education code. Finally, the court rejected

the district's argument that the child must receive her academic and functional curriculum in special education from a specially credentialed teacher, since this proposition conflicted with 20 USC 1412(5)(B). Accordingly, the Circuit Court affirmed the judgment of the District Court.

***D.F. v. Red Lion Area Sch. Dist.*, 58 IDELR 65 (M.D. Pa. 2012).** A Pennsylvania district's decision to place a deaf-blind student in a nonacademic summer camp for students with disabilities did not violate the LRE requirement. The student's parents believed that of its three options, the district chose the most restrictive ESY option: a camp for children with disabilities. They claimed the placement violated the IDEA's LRE requirement. They sued and a magistrate judge, in a report at 112 LRP 4101, recommended their suit be dismissed. In adopting the magistrate's recommendation, the District Court explained that while the LRE requirement at 20 USC 1412(a)(5)(A) creates a presumption in favor of educating students with disabilities alongside their nondisabled peers to the maximum extent possible, mainstreaming a child in certain circumstances may actually violate the requirement. The parents' main objection to the magistrate judge's recommendation was her focus on the appropriateness of the three placement options. However, the court explained that while the "appropriateness" inquiry is typically associated with issues involving the provision of FAPE, it remains an integral part of determining whether the LRE requirement was violated. That's because unless an integrated placement also provides a student with meaningful educational benefit, it cannot be the LRE. The other two potential camps were not appropriate for the student, the court ruled. The first alternative, the one the parents would have preferred, did not provide peers that were similar in age to the student. Plus, it did not have personnel that were trained to promote the student's social interaction with peers, and it often showed movies in the afternoon, an activity in which the student could not participate. The district ruled out the second alternative because its students who attended that camp in the past were uncomfortable and decided not to return. Consequently, the student would have been limited in his interaction with peers from his school. There were also concerns that the camp did not tailor its activities to accommodate students with special needs. In stark contrast, the district's proposed camp provided the student with greater opportunities to interact with similar-aged peers and had trained staff that could accommodate the needs of students with disabilities. Moreover, the district's offer to arrange for the student to have nondisabled "peer buddies" accompany him to the camp made it less restrictive, the court opined. The parents' disagreement with the magistrate judge's reasoning didn't impact the District Court's decision to dismiss the case.

VIII. IEP Teams and the Development of the IEP (34 C.F.R. 300.320 – 300.325)

A. The IEP Team

1. The parents;

2. A regular education teacher of the child (if the child is, or may be, participating in the regular education environment).

3. A special education teacher (or related services provider, if the student is not receiving specialized instruction).

4. A representative of the school district (LEA) who is:

a. Qualified to provide, or to supervise, the provision of special education;

b. Knowledgeable about the general education curriculum;

c. Knowledgeable about the availability of resources of the LEA.

5. An interpreter of the evaluation results.

6. The child, if appropriate.

7. Other individuals at either party's request.

U.S. Department of Education Official Guidance:

Letter to Richards, 55 IDELR 107 (OSEP 2010). The IEP team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal partners, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child. The IEP team should work toward a general agreement, but the school district is ultimately responsible for ensuring that the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the school district must determine the appropriate services and provide the parents with prior written notice of the district's determinations regarding the child's program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.

1. If the LEA is considering a private placement, it shall ensure that a representative of the private school attends the meeting or participates through other means.

2. If the child was previously served under Part C (infants and toddlers program), the parent has the right to request that the Part C coordinator or representative be invited to the initial IEP meeting.

3. An IEP team member may be excused from attending the IEP team meeting with written consent of the parent and the LEA. However, this IEP team member must submit written input to the team prior to the IEP meeting.

4. IEP amendments made between annual IEP reviews may be developed without convening the entire IEP team, if agreed to by the parents and the LEA. The amendment must be in writing. If changes are made to the IEP, the entire IEP team must be informed of these changes. (34 C.F.R. 300.324).

B. Components of the IEP

2. Present Levels of Educational Performance (PLEPs)
3. Goals/Objectives/Benchmarks
4. Special education
5. Related services
6. Program modifications
7. Support for school personnel

8. Explanation of the extent, if any, to which the child will not participate in class and extracurricular activities with nondisabled children.
9. Supplementary aids and services
10. Participation in district and statewide assessments
11. Transition services
12. A description of how progress toward the IEP goals will be measured and when periodic progress reports will be provided to the parents.
13. Extended School Year services (ESY)

C. IEP Requirements and Implementation (34 C.F.R. 300.323)

1. IEP meeting must be convened "within a reasonable time" following receipt of parental consent for an initial evaluation.

2. IEP meeting must be convened within 30 days of an eligibility determination.

3. The parents must receive notice of the purpose, time, and location of an IEP meeting, and who will be in attendance. 34 C.F.R. 300.222.

4. An IEP must be in effect before special education and related services can be provided to a child with a disability. The IEP must be implemented "as soon as possible" after the IEP meeting.

5. Parents must be given a copy of their child's IEP at no cost. 34 C.F.R. 300.222.

6. If a student with an IEP transfers from one LEA to another LEA within the same school year, the new LEA must provide comparable services until it develops a new IEP.

Significant Court Cases:

***B.P. v. New York City Dept. of Education*, 58 IDELR 74 (E.D.N.Y. 2012).** Allegations that a New York district failed to include an appropriate general education teacher on a grade schooler's IEP team or provide access to evaluative data were not enough to show that the district denied the student FAPE. Concluding that the proposed IEP was substantively and procedurally appropriate, the District Court denied the parents' request for tuition reimbursement. The parents contended that the general education teacher selected for the student's IEP team was not appropriate, as there was no evidence she was teaching fourth or fifth grade at the time of the meeting. However, the court pointed out that the IDEA does not require the general education teacher on an IEP team to be teaching at a particular grade level. As for the claim that the student's private school teacher, who participated in the meeting by phone, did not have access to adequate evaluative data, the parents' own testimony showed that the teacher reviewed evaluation and progress reports before the meeting. The court further noted that the IEP included appropriate, measurable goals, and that the other children in the student's proposed SDC placement functioned at substantially similar levels despite their varying disabilities. Finding no evidence of a procedural or substantive violation, the court affirmed an administrative decision in the district's favor.

***B.D. v. Puyallup Sch. Dist.*, 57 IDELR 211 (9th Cir. 2011).** The fact that a student's IEP team did not include an expert on Landau-Kleffner syndrome did not mean that a Washington district

denied the student FAPE. Finding no flaws with the composition of the student's IEP team, the 9th Circuit affirmed a ruling for the district reported at 53 IDELR 120. In a brief, unpublished decision, the 9th Circuit upheld a District Court's finding that the district did not commit a procedural violation of the IDEA. "[Section] 1414(d)(1)(B) provides a list of those individuals who must participate in designing an IEP; an expert on the child's specific disability is not one of them," the court wrote. As for the district's allegedly improper use of a "quiet room" when the student became over-stimulated, the 9th Circuit found no evidence that the district failed to implement the student's IEP. It adopted the District Court's determination that the student used the room voluntarily, and was not an aversive that needed to be included in his IEP under Washington law.

***Upper Freehold Regional Bd. Of Education*, 56 IDELR 215 (D. N.J. 2011).** Refusing to cooperate with the IEP process proved to be an expensive mistake for the parents of a kindergartner with PDD-NOS. Determining that the parents' conduct was unreasonable, the District Court reversed an order reported at 7 ECLPR 48 that required a New Jersey district to fund the child's out-of-district placement. The court observed that it could not determine whether the IEP proposed by the district was appropriate, as there was no IEP to review. The parents did not accept or reject a draft IEP, and they did not respond to the district's efforts to schedule a follow-up IEP meeting. U.S. District Judge Joel A. Pisano noted that the 3d U.S. Circuit Court of Appeals permits the reduction or elimination of tuition reimbursement when parents disregard their obligations to cooperate and assist in IEP formation. "The court finds that the parents' conduct in delaying, canceling, or refusing to set up additional meetings with the IEP team substantially precluded any possibility that the district could timely develop an appropriate IEP for [the child] and provide the necessary services to him, or that the parties could resolve this dispute without resort to litigation," Judge Pisano wrote in an unpublished decision. In the alternative, the court found that the parents' failure to provide timely notice of the out-of-district placement precluded them from recovering tuition expenses from the district.

IX. Unilateral Placement and Reimbursement (34 C.F.R. 300.148)

A. 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 preschool, 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 failed to make FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

B. 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 State or local education agencies.

   BUT, the cost of reimbursement may be reduced or denied if:

   1. At the most recent IEP meeting that the parents attended prior to the removal of the child from public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the school district to provide

FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

2. At least ten (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 school district of the above intent and information.

3. Prior to the parent's removal of the child from the public school, the school district informed the parents of its intent to evaluate the child, but the parents did not make the child available for the evaluation; or

4. Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

EXCEPTIONS:

The cost of reimbursement must not be reduced or denied if:

a. The school prevented the parents from providing the notice;
b. The parents had not received notice; or
c. Compliance with this requirement would likely result in physical harm to the child.

The cost of reimbursement may, in the discretion of the court or a hearing officer, not be reduced or denied if:

a. The parents are illiterate or cannot write in English; or

b. Compliance with this requirement would likely result in serious emotional harm to the child.

Significant Court Cases:

***Burlington Sch. Committee v. Massachusetts Dept. of Education*, 556 IDELR 389 (U.S. 1985).** The grant of authority to a reviewing court under Sec. 1415(e)(2) includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act. The ordinary meaning of the language in Sec. 1415(e)(2) directing the court to "grant such relief as [it] determines is appropriate" confers broad discretion on the court. To deny such reimbursement would mean that the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards of the Act would be less than complete. A parental violation of Sec. 1415(e)(3) by changing the "then-current educational placement" of their child during the pendency of proceedings to review a challenged proposed IEP does not constitute a waiver of the parents' right to reimbursement for expenses of the private placement. Otherwise, the parents would be forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. But if the courts ultimately determine that the proposed IEP was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated Sec. 1415(e)(3).

***Florence County Sch. Dist. Four v. Carter*, 20 IDELR 532 (U.S. 1993).** The Supreme Court ruled that, in order to be entitled to reimbursement, parents need only to 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. Moreover, the Court held that, in cases where reimbursement is claimed, the private school placement does not need to meet all of the specific IDEA requirements applicable to educational placements made by public agencies. In particular, the FAPE mandate of 20 USC 1401(a)(18), which requires, inter alia, 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 local educational agency, cannot feasibly be met within the context of a parental placement; therefore, to read these requirements as applying to parental placements would effectively eliminate the right of unilateral withdrawal that was recognized in *Burlington.* The Court further determined that 20 USC 1401(a)(18)(B), which requires special education placements to meet the standards of the state educational agency, cannot be applied to parental placements, reasoning that it would be inconsistent with the goals of the IDEA to forbid parents from placing their child at a private school that otherwise offers an appropriate education simply because the private school lacks the stamp of approval of the same public school system that failed the child in the first place. Finally, the Court concluded that the parental right to reimbursement in these cases does not necessarily place an undue financial burden on local educational agencies; however, total reimbursement would not be appropriate if it is determined that the private school placement costs are unreasonable.

X. Procedural Safeguards (34 C.F.R. 300.500 – 300.537)

A. Opportunity to Examine Educational Records (34 C.F.R. 300.501)

1. The parents of a child with a disability must be afforded an opportunity to "inspect and review" their child's education records.

2. The parents of a child with a disability have the right to participate in meetings with respect to the identification, evaluation, educational placement, and the provision of FAPE to their child. The school district must provide notice of such meetings to ensure that the parents have the opportunity to participate. (A meeting does not include informal or unscheduled conversations involving school district 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 school district personnel engage in to develop a proposal or a response to a parent proposal that will be discussed at a later meeting).

3. The school district must ensure that parents participate in any decision related to their child's educational placement. The school district must provide notice of meetings, and if parents cannot attend the meeting in person, the district must arrange for participation by telephone or video conferencing. Placement decisions may be made without parental involvement ONLY if the school district

cannot convince the parents to be involved, and have records of its attempts to do so.

B. <u>Independent Educational Evaluation (34 C.F.R. 300.502)</u>

Parents of a child with a disability have the right to a publicly funded independent educational evaluation if they disagree with an evaluation performed by the school district, subject to the following conditions:

1. The school district may choose to initiate a due process hearing to prove that its evaluation is appropriate.

2. The school district is not required to pay for an evaluation if a hearing officer determines via a due process hearing that the independent educational evaluation did not meet the district's criteria.

3. A parent is entitled to only one independent educational evaluation each time the school district conducts an evaluation with which the parent disagrees.

4. The independent educational evaluation must meet the same criteria as the school district's evaluation, including the location of the evaluation and the qualifications of the examiner.

An "independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the school district.

"Publicly funded" means that the school district pays the full cost of the evaluation or otherwise ensures that the evaluation is provided at no cost to the parents.

If a parent requests an independent educational evaluation, the school district must provide information about where it may be obtained and the applicable criteria.

The results of an independent educational evaluation must be considered by the child's IEP team when any decisions are made regarding the provision of FAPE to the child.

A hearing officer may request that an independent educational evaluation be conducted.

C. <u>Prior Written Notice (34 C.F.R. 300.503)</u>

The school district must provide "prior written notice" to the parent of a child with a disability a reasonable time before it:

1. Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child
2. Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

The written notice must include the following components:

1. A description of the action proposed or refused by the school district;

2. An explanation of why the school district proposes or refuses to take the action;

3. A description of each evaluation procedure, assessment, record, or report the school district used as a basis for the proposed or refused action.

4. A statement that the parents of the child have protection under the procedural safeguards of the IDEA (and information about where a copy of their rights can be obtained);

5. Sources for parents to contact to obtain assistance in understanding the provisions of the IDEA;

6. A description of other options that the IEP team considered and the reasons why those options were rejected; and

7. A description of other factors that are relevant to the district's proposal or refusal.

The notice must be written in language understandable to the general public, and provided in the native language or other mode of communication of the parents unless it is clearly not feasible to do so. If necessary, the district must take steps to ensure that the notice is translated orally and that the parent understands his/her rights.

D. <u>Procedural Safeguards Notice (34 C.F.R. 300.504)</u>

A copy of the procedural safeguards notice must be given to the parents of a child with a disability only one time per school year.

<u>Exception</u>: A copy of the rights must be given to the parents upon initial referral and each time they request an evaluation, file a State complaint or initiate a due process hearing, when the child is subject to a disciplinary change of placement, and upon the request of the parent.

E. Electronic Mail (34 C.F.R. 300.505)

A parent of a child with a disability may choose to receive notices via email, if the school district makes that option available.

F. Mediation (34 C.F.R. 300.506)

1. Must be offered to parents and school districts by the State.

2. Is voluntary and may be refused by either party.

3. Cannot be used to delay a parties' right to a due process hearing.

4. Must be conducted by a trained and impartial mediator, who is knowledgeable about special education law.

5. The State must cover the costs of mediation.

6. A written mediation agreement is a legally binding agreement that is enforceable in a court of law. Mediation agreements are executed at the time of the mediation and become immediately enforceable. All discussions in mediation are confidential and cannot be used in any subsequent due process hearing.

7. Parties to mediation may be accompanied by an attorney.

G. Impartial Due Process Hearing (34 C.F.R. 300.507 – 300.513)

1. Either the parent or the school district may initiate a due process hearing on any issue related to the identification, evaluation, or educational placement of a child with a disability.

2. There is a two-year statute of limitations for requesting a due process hearing (unless the State establishes a specific timeframe, or the parents have been misinformed or uninformed of the timeframe by the school district).

3. The party requesting the due process hearing must do so in writing, and must specify the issues, the facts, and the proposed resolution.

4. The hearing officer or administrative law judge is appointed by the State educational agency, must not be employed by the SEA or LEA, must not have any conflict of interest, and must be knowledgeable about the IDEA and relevant State laws and regulations and case law.

5. The parties have the right to be represented by legal counsel, or by non-attorneys (if permitted by State law).

6. Prior to the hearing, the parties have thirty (30) days to engage in efforts to resolve the conflict. The school district must convene a resolution session within fifteen (15) calendar days of its receipt of a complaint for due process hearing. The school district may not be accompanied by its attorney unless the parent is accompanied by an attorney. Discussions are not confidential, and the resolution agreement may be voided within three (3) business days.

H. Appeal from Adverse Due Process Hearing Decision (34 C.F.R. 300.514 – 300.516)

1. The party receiving an adverse decision may appeal to either State or federal court.

2. The timeline for filing an appeal in court is 90 days (unless a different timeline is determined by State law).

3. A hearing officer can find a FAPE violation based on procedural violations ONLY if the procedural violations resulted in a deprivation of educational benefit, significantly impeded the parents' opportunity for meaningful participation in the development of their child's IEP, or impeded the child's right to FAPE.

I. Attorney's Fees (34 C.F.R. 300.517)

1. A parent who is the prevailing party in a due process hearing may seek reimbursement of attorney's fees.

2. A school district that prevails in a due process hearing may seek reimbursement of its attorney's fees if:

   a. The parents or their attorney filed a frivolous action.

   b. The parents or their attorney pursued the due process hearing for an improper purpose or to cause unnecessary delay, or to needlessly increase the cost of the litigation.

3. A court may reduce an award of attorney's fees if:

   a. The parent unreasonably protracted the proceedings.

   b. The fees requested are unreasonable.

c. The hearing request did not contain appropriate information.

J. Stay Put (34 C.F.R. 300.518)

A child's educational placement is "frozen" when the parents initiate a due process hearing against a school district, and cannot be changed without the agreement of the parties or a court order modifying "stay put."

K. Surrogate Parents (34 C.F.R. 300.519)

A school district must appoint a trained surrogate parent for a child with a disability when:

1. No parent can be identified;
2. The school district, after reasonable efforts, cannot locate a parent.
3. The child is a ward of the State; or
4. The child is an unaccompanied homeless youth.

L. Transfer of Parental Rights at Age of Majority (34 C.F.R. 300.520)

A State may provide that all parent's rights under the IDEA transfer to the student upon reaching the age of majority as defined by State law.

A State must establish procedures for appointing the parent of a child with a disability or another appropriate individual to represent the child's interests after the student reaches the age of majority if:

i. The student has not been determined under State law to be incompetent but the student is determined not to have the ability to provide informed consent with respect to his/her educational program.

M. Confidentiality (34 C.F.R. 300.611 – 300.627)

School districts must ensure the protection of any personally identifiable information about students with disabilities.

Parents of students with disabilities have the rights guaranteed by the Family Education Rights and Privacy Act (FERPA), including the right to access and challenge alleged inaccurate or misleading information in their child's education records.

N. Discipline (34 C.F.R. 300.530 – 300.536)

1. **Authority of School Personnel** – School personnel may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, ***for not more than 10 school days*** (to the extent such alternatives are applied to children without disabilities). 20 U.S.C. 1415(k)(1)(B).

Note: The proposed regulations clarify that the 10 school days is either "10 consecutive school days" or "for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement)." 300.530.

2. **Case-by Case Determination** – School personnel may consider any unique circumstances on a case-by-case basis when disciplining a child with a disability. 20 U.S.C. 1415(k)(1)(A).

3. **Additional Authority** – 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 either (1) directly and substantially related to the child's disability, or (2) a result of the school district's failure to implement the IEP, ***the relevant disciplinary procedures for nondisabled students may be applied to the child with a disability in the same manner and for the same duration as would be applied to a nondisabled child.***

Exception: The child with a disability who is removed for disciplinary reasons for more than 10 school days must be provided a "free appropriate public education" (although FAPE may be provided in an "interim alternative educational setting as determined by the IEP Team). 20 U.S.C. 1415(k)(1)(C); (k)(2).

4. **Continuation of FAPE** – A child with a disability who is removed from his/her educational setting for disciplinary reasons for more than 10 school days (or who is removed for 45 school days for weapons, drugs, or serious bodily injury) must continue to receive the services in his/her IEP and access to the general education curriculum. Such student must also receive, as appropriate, a ***functional behavioral assessment*** and ***behavior intervention services and modifications*** that are designed to address the behavior violation so that it does not recur. 20 U.S.C. 1415(k)(1)(D).

Note: The proposed regulations clarify that educational services must begin "after a child with a disability has been removed from his or her current placement for 10 school days in the same school year…." 300.530.

5. **Manifestation Determination** – ***Within 10 school days of any decision to change a child's educational placement for disciplinary reasons for more than 10 school days,*** the school district, the parent, and the relevant members of the IEP team shall review all relevant information in the student's file, the IEP, any teacher observations, and other relevant information provided by the parent to determine:

   a. if the conduct in question was ***caused by***, or had a ***direct and substantial relationship to, the child's disability***; or

   b. if the conduct in question was the ***direct result of the school district's failure to implement the IEP.***

If either (a) or (b) is applicable, the conduct shall be determined to be a manifestation of the child's disability. 20 U.S.C. 1415(k)(1)(E).

6. **Determination that Behavior Was a Manifestation** – If the child's conduct was a manifestation of the disability, the IEP shall:

   a. Conduct a ***functional behavior assessment,*** and implement a ***behavior intervention plan*** (if no FBA had been done prior to the conduct);

   b. If a BIP had been developed prior to the conduct, ***review and modify the existing BIP*** as necessary to address the behavior; and

   c. ***Return the child to his/her previous placement,*** unless the school district and parents agree to a change of placement as part of the modification of the behavior plan. 20 U.S.C. 1415(k)(1)(F).

7. **45-day Removal** – School personnel may remove a child with a disability to an interim alternative educational setting (determined by the IEP Team) 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:
   a. Carries or possesses a ***weapon*** at school, on school premises, or to or at a school function under the jurisdiction of the school district;

b. 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 the school district.

c. Has inflicted ***serious bodily injury*** upon another person while at school, on school premises, or at a school function under the jurisdiction of the school district. 20 U.S.C. 1415(k)(1)(G); (k)(2).

Note: A "serious bodily injury" means "a serious risk of death; protracted loss or enjoyment of a bodily organ, member, or mental faculty; extreme physical pain."

8. **Notification of Rights** – On the day of a decision to take disciplinary action against a child with a disability, the school district must provide notification to the parents of all applicable procedural rights. 20 U.S.C. 1415(k)(1)(H).

9. **Appeal** – The parent of a child with a disability who disagrees with any decision regarding placement or manifestation, or a school district that believes that maintaining the current placement of a child is substantially likely to result in injury to the child or to others, may request a hearing. 20 U.S.C. (k)(3)(A). The hearing officer may return the child to his/her previous placement, or order that the child be placed in an interim alternative educational setting for not more than 45 school days (if the hearing officer determines that maintaining the current placement is substantially likely to result in injury to the child or others). 20 U.S.C. 1415(k)(3)(B)(ii).

10. **Placement During Appeals** – When an appeal is requested (above), ***the child shall remain in the interim alternative educational setting pending a final decision, or until the expiration of the time period for removal as ordered by school personnel, whichever occurs first***, unless the school district and the parents agree otherwise. The State shall arrange for an expedited hearing to occur ***within 20 school days*** of being requested, and shall result in a determination ***within 10 school days*** after the hearing. 20 U.S.C. 1415(k)(4)

11. **Protections for Children Not Yet Eligible for Services** – ***Removes*** "behavior or performance demonstrates a need for services." ***Adds*** "A local educational agency shall not be deemed to have knowledge that the child is a child with a disability ***if the parent of the child has not allowed an evaluation of the child …or has refused services*** .or the child has been evaluated and it was determined that the child was not a child with a disability.". 20 U.S.C. 1415(k)(5)(C).

NB1: What Every Educator Needs to Know About the IDEA

Melinda Jacobs, Esq.

Monday, May 7, 2012

10:30 – 11:45 a.m.

Learning Objectives

- Participants will gain a general understanding of the major components of the IDEA.
- Participants will gain an understanding of significant court decisions impacting the development and implementation of the IDEA.
- Participants will be better prepared to function as special education administrators, teachers, consultants, advocates, attorneys, and parents of children with disabilities.

Supremacy of Federal Law

- Article VI, Clause 2 of the U.S. Constitution ("The Supremacy Clause")
  - Federal law trumps state law (always)
  - That means that your state CANNOT pass laws that take away rights guaranteed by the IDEA

Purpose of the IDEA

- "To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Sec. 1400(d).

Students Affected

- Approximately 7 million public school students are currently receiving special education and related services pursuant to the IDEA.
- A "child with a disability" is a student who meets the eligibility criteria for one of 13 categories of disability and who, by reason thereof, needs special education and related services. 20 U.S.C. 1401(3).

Categories of Disability

- Intellectual Disability (formerly MR)
- Hearing Impairment
- Speech or Language Impairment
- Visual Impairment
- Emotional Disturbance
- Orthopedic Impairment
- Autism
- Traumatic Brain Injury
- Other Health Impairment (ADHD or ADD)
- Learning Disability
- Multiple Disabilities
- Deaf-Blindness
- Developmental Disability

Child Find

- All children with disabilities residing in the State and who are in need of special education and related services must be identified, located, and evaluated. 20 U.S.C. 1412(a)(3).

Evaluation

- The school district must conduct a "full and individual" evaluation before the initial provision of special education and related services to a child with a disability. 20 U.S.C. 1414(a).
- Parents or school officials may initiate a request for a special education evaluation. 20 U.S.C. 1414(a)(1).
- The initial evaluation must be conducted within 60 calendar days of receiving parental consent (or pursuant to a different State timeline). 20 U.S.C. 1414(a)(1)(C).

Evaluation (cont'd.)

- The 60-day timeline is extended if:
  - The family relocates during the evaluation process (and the new LEA and parent agree on a new timeline); or
  - If the parent repeatedly fails or refuses to produce the child for the evaluation. 20 U.S.C. 1414(a)(1)(c)(ii).

Consent for Initial Evaluation

- Parents must give "informed consent" to an initial evaluation.
- The LEA may initiate a due process hearing and/or mediation if the parent refuses to give consent.
- If the parent refuses to consent, the LEA is not liable for failure to provide FAPE and is not required to convene an IEP meeting.
  - 20 U.S.C. 1414(a)(1)(D).

Exceptions to Consent

- The LEA is not required to obtain parental consent if:
  - Despite reasonable efforts to do so, the LEA cannot discover the whereabouts of the parents;
  - Parental rights have been legally terminated;
  - A judge has appointed a legal representative for the child who has given consent (e.g., a guardian ad litem).
    - 20 U.S.C. 1414(a)(D)(iii).

Initial Evaluation

- LEA must use a variety of assessment tools and strategies;
- LEA may not use any single measure or assessment as the sole criterion for eligibility;
- IEP team must review existing evaluation data, including:
  - Information provided by the parents,
  - Current assessments and classroom observations.
    - 20 U.S.C. 1414(b) and(c).

Reevaluation

- The LEA must ensure that a reevaluation is conducted at least once every three (3) years, unless the parent and the LEA agree otherwise.
- The LEA must use a variety of assessment tools to gather relevant information, including information provided by the parents.
- No single measure or assessment can be used as the sole eligibility criterion.
    - 20 U.S.C. 1414(a)(2).

Independent Educational Evaluations

- A parent may request an independent educational evaluation at public expense any time he/she disagrees with the LEA's evaluation.
- The LEA must either pay for the IEE or initiate a DPH to prove the appropriateness of its evaluation.
- The IEP team must "consider" the results of the IEE.
- The IEE must meet the same criteria as the LEA's evaluation.

Special Rule for Eligibility Determination

- A child shall not be determined to be a "child with a disability" if the major factor in the eligibility determination is:
  - A lack of scientifically based instruction in reading or math; or,
  - Limited English proficiency.
    - 20 U.S.C. 1414(b)(5).

FAPE

- Special education and related services that:
  - Are provided at public expense;
  - Meet State standards;
  - Include an appropriate preschool, elementary, or secondary school education;
  - Are provided in conformity with an IEP.

    - 20 U.S.C. 1401(9).

Special Education

- Specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.
- Also includes speech-language pathology, P.E., travel training, and vocational education.

Related Services

- Transportation, and such developmental, corrective, and other supportive services that are required to assist a child with a disability to benefit from special education.
  - Transportation
  - Speech/Language therapy
  - OT
  - PT
  - Counseling
  - Social work services

LRE

- To the maximum extent appropriate, children with disabilities must be educated with children who are not disabled, and removal of children with disabilities from the regular educational environment occurs only when the nature or severity of their disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
    - 20 U.S.C. 1412(a)(5).

IEP Teams

- Parents of the child;
- A regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- A special education teacher;
- An LEA representative who:
  - Is qualified to teach, or to supervise, special education.
  - Is knowledgeable about the general education curriculum.
  - Has the ability to commit resources.
    - 20 U.S.C. 1414(d)(1)(B).

Role of the General Education Teacher

- Participate in the development of the IEP;
- Assist in determining appropriate positive behavioral interventions, supports, and other strategies;
- Assist in determining supplementary aids and services, program modifications, and support for school personnel.

  – 20 U.S.C. 1414(d)(3)(C).

IEPs

- A written statement for each child with a disability that includes:
  - A statement of the child's present levels of educational performance;
  - A statement of measurable annual goals
  - A description of how the child's progress will be measured.
  - A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child.

Additional IEP components

- A statement of the program modifications or supports for school personnel that will be provided for the child;
- An explanation of the extent to which the child will NOT participate with non-disabled peers;
- A statement of testing accommodations;
- Transition services

  - 20 U.S.C. 1414(d)(1)(A).

Unilateral Placement and Reimbursement

- LEAs may be liable for reimbursement of the costs of a parentally made private placement if:
  - The LEA failed to provide FAPE;
  - The placement was appropriate;
  - The costs were reasonable.

- Parents may be barred from seeking reimbursement if they fail to provide 10 days' written notice of their intent to withdraw their child, make a unilateral private placement, and seek reimbursement from the LEA.

Procedural Safeguards

- Opportunity to Examine Educational Records
- Independent Educational Evaluation (IEE)
- Prior Written Notice
- Procedural Safeguards Notice
- Electronic Mail
- Mediation
- Impartial Due Process Hearing
- Appeal

More Procedural Safeguards

- Attorney's Fees
- Stay Put
- Surrogate Parents
- Transfer of Parental Rights at Age of Majority
- Confidentiality

Discipline

- LEA may not remove a child with a disability from his/her educational placement for disciplinary reasons for more than 10 school days per school year without conducting a manifestation determination.
- Students with disabilities may be expelled from school, but cannot be denied the provision of FAPE for more than 10 school days per school year.
    - 20 U.S.C. 1415.

Manifestation Determinations

- Conducted by the student's IEP team, including the parents.
- Is the student's misbehavior caused by his/her disability?
- Is the student's misbehavior the direct result of the LEA's failure to implement the student's IEP?

  - 20 U.S.C. 1415.

The Future of the IDEA

- LD population is decreasing (due to RTI)
- Autism population is exploding! (40% increase over the past five years)
- OHI population is increasing (ADHD and ADD)
- IDEA continues to enjoy broad bipartisan support in Congress, and efforts to slash funding for special education were rebuffed