

Advocating for Students with Disabilities Under the Individuals with Disabilities Education Act (With a Focus on Assistive Technology)

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I. IDEA INTRODUCTION

A. Constitutional background

1. *PARC & Mills*
 - a. Due Process & Equal Protection
 - b. Consent decrees, remarkable similarities to IDEA
 - c. National publicity & mentioned in legislative history to IDEA & 504
2. Series of several other cases across the country
3. All presumed a constitutional right to some level of appropriate services

B. Statutory history

1. Passed in 1975, effective in 1978
2. 1990 revisions
 - a. Changed name to Individuals with disabilities Education Act (IDEA)
 - b. Added transition

- c. Added definitions of AT devices and services
- 3. IDEA '97
 - a. Many more substantive changes
 - b. But, core principles have remained unchanged since beginning
 - c. Regulations in March 1999
- 4. IDEA 2004 (IDEIA)
 - a. Passed on December 3, 2004
 - b. Majority of changes effective July 1, 2005
 - c. Requirement for "highly qualified teachers" went into effect upon enactment date (12/3/04)
 - d. Some Major Changes:
 - (1) Statute of Limitations: evaluations, bringing a claim
 - (2) Discipline
 - (3) Due Process Complaint Process
 - e. Implementing regulations published on August 14, 2006, 71 FR 46540, and effective on October 13, 2006

II. Free Appropriate Public Education (FAPE)

- A. Available to all students with disabilities aged 3 through 21
 - 1. 20 U.S.C. § 1414(c)(5)(i): the right to a FAPE ends when a student graduates with a regular high school diploma
 - 2. This does not include students who have received a certificate of attendance, GED, or any other graduation that is not a regular high school diploma. 34 C.F.R. § 300.102(a)(3)(ii) and (iv).
 - 3. Graduation is considered a change of placement, requiring notice and the right to due process. 34 C.F.R. § 300.102(a)(3)(iii).

4. 20 U.S.C. § 1414(c)(5)(ii): Upon graduation or aging out a summary of the student's academic achievement and functional performance must be provided to the student. The report must include recommendations on how to assist the student in meeting his/her postsecondary goals.
- B. Student must meet the definition of one of several enumerated disabilities and, "by reason thereof," need special education and related services
- C. Must be at no cost to parents or student-comes up with Medicaid & private insurance for AT
- D. *Bd. of Ed. of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
1. First Supreme Court case
 2. The obligation to provide an appropriate education does not mean a district must provide the "best" education or one designed to maximize a student's potential. *Rowley* at 199.
 3. However, the program must be based on the student's unique individual needs and be designed to enable the student to benefit from an education. In other words, the student must be making progress.
 4. *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989) -- more than a minimal benefit is required for program to be appropriate.
 5. Noting the importance of the procedural safeguards for developing a student's program, the Court developed a two part test to determine if a program was appropriate.
 - a. First, did the District comply with IDEA's procedures and, second, was the individualized education program (IEP) reasonably calculated to enable the child to benefit.
 - b. In answering this second question, the Supreme Court cautioned that lower courts should not substitute their view of appropriate educational methodology for that of the educational experts.
- E. Effect of IDEA '97 and IDEA '04

1. When passing IDEA '97, Congress did not specifically modify the definition of FAPE itself.¹
2. However, Congress did make some profound statements which undercut the Supreme Court's analysis in *Rowley*.
3. First, in its statement of findings, Congress found that the education of students with disabilities can be made more effective by supporting professional development of those working with them to ensure that students with disabilities:

[H]ave the skills and knowledge necessary to enable them–

(i) [T]o meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

(ii) [T]o be prepared to lead productive, independent, adult lives, to the maximum extent possible ...²

4. IDEA '04 continues the undercutting of *Rowley* that began with IDEA '97.
5. The preamble now states, without reference to teacher training, that “the education of children with disabilities can be made more effective by ... having high expectations for such children and ensuring their access to the general education curriculum, to the maximum extent possible, in order to ... meet developmental goals, and to the *maximum* extent possible, the challenging expectations that have been established for all children; and ... to be prepared to lead productive and independent lives, to the *maximum* extent possible.” 20 U.S.C. § 1400(c)(5)(A) (emphasis added).
6. More importantly, in delineating the purposes of the IDEA, Congress also enlarged the scope of an appropriate education by requiring that not only should it meet students' unique needs, it should also “prepare them for employment and independent

¹See 20 U.S.C. § 1401(8).

²*Id.* § 1400(c)(5)(E) (emphasis added).

living.”³

7. This addition is more than mere window dressing, as States must develop goals for the performance of children with disabilities which will promote meeting this requirement.⁴
8. The U.S. Department of Education, in the commentary to its proposed Regulations implementing IDEA ‘97, stressed:

This change represents a significant shift in the emphasis of [IDEA]—to an outcome oriented approach that focuses on better results for children with disabilities rather than on simply ensuring their access to education.⁵

9. The comments to the final 1999 regulations reaffirm this position:

Therefore, it is correct to state that the 1997 amendments [to IDEA] place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law.⁶

10. Under IDEA ‘04, this purposes of IDEA have been further strengthened. “The purposes of [IDEA] are ... to ensure 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) (highlighted text added by IDEA 04).
11. Nevertheless, because the phrase “appropriate” is still used in the definition, it is unlikely that these comments mean that *Rowley* has been effectively overruled by Congress in all circumstances.
12. However, in determining whether a student is benefitting from an education, the analysis cannot be limited solely to academic achievement.
13. Even if a student is making academic progress, that can no longer

³*Id.* § 1400(d)(1)(A).

⁴*Id.* § 1412(a)(16)(A)(I).

⁵62 Fed. Reg. 55029.

⁶64 Fed. Reg. 12538.

be the end of the inquiry.

14. By adding that the purpose of the IDEA is to prepare students for employment and independent living, Congress simply took what already applied to students during the transition years and applied it to students of all ages.
15. IDEA '97 and IDEA '04 expand the question of what the purpose of an education is.
16. This view has been adopted in *J.L. and M.L. v. Mercer Island School District*, 46 IDELR 273 (W.D. Wash. 12/8/2006).
 - a. IDEA has been modified so as to no longer only require a "basic floor of opportunity" as determined in *Rowley*.
 - b. IDEA now requires that students with disabilities be able to live independently and be economically self-sufficient.
 - c. Here, the district did not meet this requirement as it merely provided an aide to do the student's reading and writing for her instead of addressing her reading and writing deficiencies.

F. Child find

1. Locate, evaluate and identify students with disabilities (IDEA 2004 specifically added homeless children and wards) 20 U.S.C. §1412(a)(3)
2. After *Rowley*, many districts would not even classify a student who was advancing from grade to grade
3. 2006 regulations-applies even to children advancing from grade to grade. 34 C.F.R. § 300.101(c).

G. "Zero reject"

1. Children entitled to FAPE "regardless of the severity of their disabilities." 20 U.S.C. § 1412(a)(3)(A); §1412(a)(1)(A)
2. *Timothy W. v. Rochester, N.H., School Dist.*, 875 F.2d 954 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 519 (1989).

H. Methods of Ensuring Services

1. Children with disabilities who are covered by insurance or Medicaid. The 06 regulation at 300.154(d)(2)(iv) requires that a school obtain parental consent to use a child's insurance or Medicaid each time the school wishes to access the child's insurance or public benefit.
2. Prior to the 06 regulations, the school only needed permission one time to access a child's public benefits.

III. Related Services

A. Surgically implanted medical devices

1. Exception excludes "a medical device that is surgically implanted, the optimization of that device's functioning (e.g. mapping), maintenance of that device, or the replacement of that device." 34 C.F.R. § 300.34(b)(1).
2. Public agency must: perform routine checks of the external components of a device, monitor and maintain medical devices that are necessary for health and safety of a child (including breathing, nutrition, or operation of other bodily functions). Agency is responsible while the child is being transported to and from school, and when child is at school. 34 C.F.R. §300.34(b)(2).
3. The obligation of a public agency with respect to routine checking of external components of surgically implanted medical devices is discussed in more detail in 34 C.F.R. §300.113(b).
4. Subsection (b) requires each public agency to ensure that the external components of surgically implanted medical devices are functioning properly. However, the public agency is "not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device)." 34 C.F.R. §300.113.

B. Interpreting Services. Added to list of related services.

1. Includes "oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell" 34 C.F.R. § 300.34(c)(4).

2. For children who are deaf-blind, interpreting services includes “special interpreting services.” 34 C.F.R. §300.34(c)(4). There is no explanation or further definition of “special interpreting services” for children who are deaf-blind.”

C. School Health Services and School Nurse Services.

1. The 1999 regulations contain a definition of school health services that simply identifies them as “services provided by a qualified school nurse or other qualified person.” Old 34 C.F.R. §300.24(b)(12).
2. The 2006 regulations have a combined definition of “School health services and school nurse services:” School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child’s IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. 34 C.F.R. § 300.34(c)(13).

IV. Assistive Technology

A. Overview

1. History
 - a. Tech Act–1988
 - b. IDEA Amendments of 1990
 - (1) Added definitions
 - (2) Legislative history emphasizes use for LRE
 - c. IDEA ‘97
 - (1) Must consider for all students (also in IDEA 2004, 20 U.S.C. § 1414(d)(3)(B)(v)).
 - (2) Added to the 1999 regulations—then 34 C.F.R. § 300.308. Retained in the 2006 regulations at 34 C.F.R. § 300.105.
 - d. IDEA 2004

- (1) Exception: AT device does not include a medical device that is surgically implanted or the replacement of such device (cochlear implant exception). 20 U.S.C. § 14012(1)(B); 34 C.F.R. § 300.5.
- (2) The education of children with disability can be made more effective by supporting the development and use of technology, including AT devices and service, to maximize accessibility for children with disabilities. 20 U.S.C. §1400(c)(5)(H).
- (3) Each State Educational Agency must adopt the National Instructional Materials Access Standard (NIMAS) to ensure that blind and other persons with print disabilities receive instructional materials in a timely manner. 20 U.S.C. § 1412(a)(23); 34 C.F.R. § 300.172.

2. Uses

- a. AT used by all students—ensure access
- b. AT used by the individual student
- c. Integrated transportation

B. General Standards

1. Examples

2. Basis for providing—34 C.F.R. § 300.105(a)

- a. Special education—significance
- b. Related service
- c. Supplementary aids and services

3. If needed to provide FAPE

- a. The court found that because: the Student was making progress, the IEP team considered his need for a computer and determined he did not need one, and because a school district is not required to maximize a student's educational

benefit, the Student was not entitled to an AT evaluation. The Court stated an evaluation is only needed when the student's particular circumstances show that technology might be necessary. The court found that the record was "replete with evidence" showing the Student was receiving meaningful benefit from his education without Assistive Technology. The court based this on the fact that the Student was receiving As and Bs in reading and English, showed improvement on testing and received Bs and Cs in math. *Grant v. Independent School District*, 2005 WL 1539805, 43 IDELR 219 (D.Minn. June 30, 2005).

- b. Student and his parents sought the use of an advanced calculator (TI-92) for use in math class and on exams. The Student had access to a less advanced calculator known as the TI-82. The school argued that the TI-92 did not require the student to go through any of the mathematical steps to come up with the answer to a math problem, whereas the TI-82 did. The school also argued that the Student was capable of processing the problems step-by-step with the TI-82 calculator and that the student would not gain educational benefit from the TI-92. The Circuit Court found in favor of the school system. The Second Circuit found that even-though failing grades (the Student had failed his math class) is typically indicative of a denial of educational benefit, in this case the student did not make sufficient effort by refusing to take exams without the TI-92 and failing to turn in a make-up test. The court found a school is not required to pass a student with a disability when they seek more assistive technology than is needed. *Sherman v. Mamaroneck Union Free School District*, 340 F.3d 87, 39 IDELR 181 (2nd Cir. 2003).

4. Extended school year services (ESY). 34 C.F.R. § 300.108.
5. Evaluations, including independent evaluations at district expense.
6. AT can assist students to remain in the Least Restrictive Environment.
7. Implementation
 - a. Provision for AT must be made when IEP for upcoming year is finalized so AT can be implemented at beginning of next school year

- b. Parent training expanded to teach parents the skills needed to help their children reach their IEP goals. 20 U.S.C. § 1401(2)(E).
- c. Classic case—*East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D. Pa. 1999) *aff'd*, 213 F.3d 628 (3rd Cir. 2000).

C. Special Uses

- 1. Home use if needed to ensure FAPE. 34 C.F.R. § 300.105(b).
- 2. Personally prescribed devices
 - a. If needed to ensure FAPE
 - b. School owns, not parents
 - c. Suggested as last resort
- 3. Private insurance and Medicaid
 - a. Policy letters
 - (1) Free
 - (2) Voluntary
 - (3) Practical considerations
 - (a) Lifetime/annual cap
 - (b) Waiver cap
 - (c) Frequency of approval
 - (d) Co-payments and deductibles—school can pay
 - b. Regulations
 - (1) Private insurance—34 C.F.R. § 300.154(e)
 - (a) Must obtain informed consent with each use

- (b) If parents refuse to authorize use, school must still provide services
 - (2) Medicaid--34 C.F.R. § 300.154(d)
 - (a) Now required to get consent prior to each use
 - (b) Cannot require parents to sign up for Medicaid
 - (c) If parents refuse to authorize use, school must still provide services
- 4. Repairs/damages
 - a. School cannot make parent responsible for normal wear and tear
 - b. However, State law, not the IDEA, governs liability for loss due to theft, negligence or misuse
 - c. However, State law must be administered consistent with FAPE
 - d. Ignores definition of AT services, which includes repair and maintenance as an obligation of the school
- 5. School health services
 - a. Issue is AT and school health related aids to support or maintain
 - b. In *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999), the Supreme Court established a "bright line" test
 - (1) If services can be performed by someone other than a physician, they are not an excluded medical service
 - (2) Service must need to be performed during the school day to enable the student to remain in school
 - c. *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), states that the risks of increased liability should not prove to be a large burden. "Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks.

- d. *Garret F.* Court stated the school need to train or obtain trained staff. The Court reasoned that schools "cannot limit educational access simply by pointing to the limitations of existing staff."

V. ELIGIBILITY

A. How Do I Determine Whether My Client is Eligible For Special Education Per the IDEA?

1. Determine whether the client is between his or her 3rd and 22nd birthday (or older if allowed under state law). The state may be able to restrict its coverage to students under age 5 or over age 18 in certain circumstances. 34 C.F.R. §300.102(a) and §1412(a)(i)(B).
2. State rules or regulations should indicate what age ranges the state has opted to cover. If the client is incarcerated, please see below.
3. There is a separate program, which serves students with disabilities under age 3. The requirements for that program are included in the IDEA, Part C.
4. If age eligible, evaluate whether or not the client is also potentially eligible under one of the disability categories allowed in the regulations or under state law (see italicized text below) and is in need of special education.
 - a. The Federal categories are: (34 C.F.R. §300.8 and 20 U.S.C. § 1401(3)(A)(i))
 - (1) mental retardation
 - (2) hearing impairment including deafness
 - (3) speech or language impairment
 - (4) visual impairment including blindness
 - (5) serious emotional disturbance (hereafter referred to as emotional disturbance)
 - (6) orthopedic impairment

- (7) autism
 - (8) traumatic brain injury
 - (9) other health impairment
 - (10) specific learning disability
 - (11) 34 C.F.R. 300.8 only:
 - (a) deaf-blindness
 - (b) multiple disabilities
5. Special education is defined as : "... specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability." 34 C.F.R. § 300.39; 20 U.S.C. § 1401(29).
6. The parent is not required to diagnose the student as a medical professional would - an evaluation can be requested based on a suspicion that the student may be eligible.
7. It is possible and often advisable to request evaluation for IDEA and Section 504 eligibility at the same time. That way, no time is wasted obtaining Section 504 coverage if the student is not IDEA eligible. The student can unquestionably take advantage of the benefits of both programs if she or he is eligible for both.
8. Once the student is evaluated, a team of individuals meet to determine whether or not the student is eligible under the IDEA based on the results of that evaluation. If the student is also being evaluated for eligibility under Section 504, the eligibility under that statute may also be determined concurrently.
9. The eligibility determination team must consist of "a group of qualified professionals and the parent." 34 C.F.R. 300.306(a).
10. A student may not be found eligible under the IDEA if low achievement is caused by a lack of instruction in reading, math or limited English proficiency, the student does not fit into one of the disability categories as specified in 34 C.F.R. §300.8, or per state law, or if the student does not require special education. 34 C.F.R. 300.306(c); 20 U.S.C. § 1414(b)(4).

B. Special Situation: Other Health Impairment

1. The definition of “other health impairment” (OHI) now includes Tourette syndrome among the list of “chronic or acute health problems. 34 C.F.R. § 300.8(c)(9). Tourette Syndrome has been added as it is commonly misunderstood to be emotional or behavioral instead of neurological. 71 FR 46550.
2. The list of conditions in the regulations is not exhaustive. Fetal Alcohol Syndrome, Bipolar Disorders and other organic neurological disorders are understood to be health impairments and therefore do not need to be explicitly included in the list of OHI in text of regulation. 71 FR 46550.

C. Special Situation: Learning Disability

1. IDEA 2004
 - a. LEA is not required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability.
 - b. LEA may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures. 20 U.S.C. § 1414(a)(B)(6).
2. 2006 Regulations.
 - a. Each State must adopt criteria for determining the existence of a learning disability, consistent with the requirements set out below, which the school district must follow. 34 C.F.R. § 300.307.
 - b. Comments to the 2006 regulations, 71 FR 46648, clarify:
 - (1) A child's eligibility for special education cannot be changed solely based on the response to intervention process.
 - (2) States should carefully consider whether to remove a child from special education who has been receiving special education services for many years, particularly for a child in the final years of high school.
 - c. Section 300.309 sets out when a group of qualified professionals and the parent may determine a child has a

specific learning disability.

- (1) (a)(1) A child may be a child with a Learning Disability if the child is not achieving adequately for his or her age or grade-level in one or more of several categories (oral expression, listening comprehension, written expression, reading, mathematics, etc.) and the child was provided with an appropriate learning experience and instruction for the child's age or grade-level "and" (regulations do not include add, but should)
- (2) (a)(2)(i) With the use of scientific, research-based intervention the child does not make sufficient progress to meet age or grade-level standards; or
- (3) (a)(2)(ii) Using appropriate assessments, the child exhibits a pattern of strengths and weaknesses in performance, achievement or both based on the child's age grade-level or intellectual development that is determined by the group to be relevant to the identification of a LD; and
- (4) (3)(a) The determination of failure to achieve adequately cannot be a result of vision, hearing, motor disability, mental retardation, ED, cultural factors, environmental or economic disadvantage; or Limited English Proficiency (LEP).
- (5) (3)(b) However when the group determines whether or not a child has a Learning Disability, as part of the evaluation process the group must consider:
 - (a) Data that shows that child was provided with appropriate instruction in a regular education setting, provided by qualified personnel. The instruction must have been provided either prior to or as part of the referral process (comments to the regulations indicate that you may be able to demonstrate the learning problems are not the result of a failure to teach if you can point to some other cause, 71 FR 46656); and
 - (b) There must be data-based documentation of

repeated assessments done at reasonable intervals and the assessments must reflect formal assessment of the student's progress and the documentation must have been provided to the child's parents.

- d. Section 300.309(c) requires the public agency to evaluate a student with a possible learning disability within the 60-day timeline applicable to other testing (300.301 and 300.303). However, this section explicitly permits parents and schools to mutually agree to extend the evaluation timeline.
 - (1) This section also provides a general child find requirement at (c)(1) (if child has not made adequate progress after an appropriate amount of time in school) and (c)(2) requires the public agency to promptly request parental consent to evaluate the child when the child is referred for an evaluation.

D. Special Situation: Developmental Delay

- 1. Although there is no IDEA category for students with generalized developmental delay, students aged 3 through 9 may be found eligible under that category in states that elect to recognize it under certain circumstances. 20 U.S.C. § 1401 (3)(B); 34 C.F.R. § 300.7.

E. Special Situation: Students With Disabilities in Adult Prisons

- 1. States do not have to provide a free appropriate public education to students with disabilities aged 18 through 21 who are convicted as adults under State law and incarcerated in adult prisons, as long as:
 - a. State law does not require it, or if to do so would conflict with state law or a court order, and
 - b. The student did not have an IEP in the last educational setting, and were not identified as a "child with a disability" under 34 C.F.R. § 300.7, or
 - c. The student graduated with a regular high school diploma.
- 2. Incarcerated students do not receive exactly the same services as non-incarcerated students, even when they are IDEA eligible. For

instance, they do not have to be allowed to participate in general assessments, and a transition plan is not necessary if the student will become ineligible for IDEA prior to his or her anticipated release date.

F. Special Situation: Protections For Students Not Yet Eligible for IDEA

1. Students with disabilities do have some protections prior to the completion of the eligibility determination process.
 - a. The student may be covered by the Americans With Disabilities Act (ADA; 42 U.S.C.A. § 12131, *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, *et seq.*), or state civil rights statutes.
 - b. A student does not need to complete the IDEA or Section 504 eligibility evaluation process in order to be covered by the ADA.
2. Also, the IDEA itself provides some protection for students prior to the completion of this process if the student is being punished for behavior at school. See 20 U.S.C. § 1415(k)(5).

VI. LEGAL STANDARDS FOR EVALUATIONS

A. Initial Evaluation Process

1. Parental consent issues
 - a. Terminology
 - (1) Throughout the regulations the Department states a parent must either “consent” “agree” or provide “informed consent.”
 - (2) The Department states in the comments that there is no need to differentiate among these words in the regulations.
 - (3) The Department states that whenever the following words are used it means the consent is both informed and written: consent, informed consent, parental consent and written informed consent.
 - (4) When the words “agree” or “agreement” are used it

means an understanding between the parent and the LEA about an issue. There is no requirement that an agreement be in writing unless the statute or regulations specifically require it. 71 FR 46629.

- b. The comments note that a State may use electronic or digital signatures for consent. State must take appropriate safeguards to protect the integrity of the consent process. 71 FR 46629.
- c. Before proceeding with initial evaluation, school district must obtain parental consent. 34 C.F.R. § 300.300(a).
- d. If parents refuse to give consent, district may initiate due process to secure evaluations without consent, but is not required to do so. 34 C.F.R. § 300.300(a)(3).
- e. 34 C.F.R. § 300.300(a)(2): If a child is a ward of the state consent is not needed if the school cannot locate the parent, the parent's rights or educational decision-making rights have been terminated.
 - (1) School does not have to delay an initial evaluation in order to appoint a surrogate parent for the child.
 - (2) The regulations provide that if the rights' of a parent to make educational decisions have been subrogated and the judge has appointed someone to represent the child to provide consent for an initial evaluation, the school does not have to obtain consent from the parent.
 - (3) The Comments state that the requirements of 300.519(c) regarding "surrogate parent qualifications" do not apply to a person appointed in this instance.
- f. 34 C.F.R. § 300.300(d)(4)--if a child is home-schooled or parentally placed in a private school, the public agency may not use mediation or due process to override a parent's denial of consent or failure to respond to consent to an initial evaluation or a reevaluation.

2. Evaluation timeline

- a. Initial request/referral for evaluation must come from parent

or school, not some other person. 34 C.F.R. § 300.301(b); 71 FR 46636.

- b. An evaluation must be conducted within 60 days of receiving parental consent or a timeline established by the state. 34 C.F.R. § 300.301(c).
 - (1) The department's comments decline to place a limit on a State's ability to place a timeline.
 - (2) The comments further indicated that a State could have a timeline that is longer than 60 days. 71 FR 46637.
 - (3) Schools must make and document reasonable efforts to secure parental consent for evaluation. 34 C.F.R. § 300.300(a)(iii), § 300.322.

B. Initial Evaluation Content

1. Developing the IEP begins with a comprehensive, individual evaluation. *East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D. Pa. 1999), *aff'd*, 213 F.3d 628 (3rd Cir. 2000).
2. The evaluation is to assist the IEP Team in determining whether the student has a disability and, if so, to determine the educational needs of the child and develop the IEP. 20 U.S.C. § 1414(a)(1)(B); 34 C.F.R. § 300.304(b)(1).
3. The evaluation is to include a review of existing data by the IEP Team, including that provided by the parent, and current classroom-based assessments, as well as observations by teachers and related services providers. 20 U.S.C. § 1414(c)(1); 34 C.F.R. § 300.305(a).
4. It must assess the relative contribution of cognitive, behavioral, physical and developmental factors and obtain information about the student's prospects for participating in the general curriculum. 20 U.S.C. § 1414(b)(2).
5. No single procedure may be used as the sole criterion for determining the child's needs and evaluations must include those tailored to assess specific areas of educational need and not just those designed to provide a single general intelligence quotient. 34 C.F.R. § 300.304(b)(2) & (c)(2); 20 U.S.C. § 1414(b)(2)(B) and (C).

6. The child must be assessed in all areas of suspected disability to determine the present levels of performance and the educational needs of the child, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 20 U.S.C. §§ 1414(b)(3)(C) and 1414(c)(1)(B)(ii); 34 C.F.R. § 300.304(c)(4).
7. 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. 34 C.F.R. § 300.304(c)(6).
8. The evaluation materials may not be racially or culturally discriminatory. They must be 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 do so." 20 U.S.C. § 1414(b)(3)(A); 34 C.F.R. § 300.304(c)(1).
9. Tests must be selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test 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 those skills are the factors that the test purports to measure). 34 C.F.R. § 300.304(c)(3).
10. A child may not be determined to be eligible if the determinant factor is lack of instruction in reading or math, or limited English proficiency, and the child does not otherwise meet the eligibility criteria under § 300.8(a). 34 C.F.R. § 300.306(b).
11. When interpreting evaluation materials to determine eligibility and educational need, the District must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. 34 C.F.R. § 300.306(c)(1).
12. For an AT evaluation, the district must assess "the student's functional capabilities and whether they may be increased, maintained, or improved through the use of [AT] devices or services." *OSEP Policy Letter to J. Fisher*, 23 IDELR 565

(12/4/95).

C. Independent Evaluation at District Expense

1. If the parents disagree with the evaluation obtained by the school, they may request an independent evaluation at school expense. 34 C.F.R. § 300.502(b)(1).
2. Requests for independent evaluations should be submitted before obtaining the evaluation, but this is not required. *OSEP Policy Letter to Hon. J. Fields*, 2 EHLR 213:259 (1989).
3. Independent means the examiner must be qualified and not employed by the public agency which is responsible for educating the child. 34 C.F.R. § 300.502(a)(3)(i).
4. The evaluation must meet the same criteria used by the public agency when it conducts an evaluation. 34 C.F.R. § 300.502(e).
5. Schools may provide parents with a list of approved independent evaluators, but parents must have the opportunity to choose an evaluator that is not on the list. The evaluator that a parent chooses, must meet agency criteria. *OSEP Policy Letter to Parker*, 41 IDELR 155 (2004)
6. The school is allowed to ask the parents for the reasons they are disagreeing with the school's evaluation, but cannot require it. 34 C.F.R. § 300.502(b)(4).
7. In either event, the school must, without unreasonable delay, either agree to pay for the independent evaluation or initiate a hearing to show its evaluations were appropriate. 34 C.F.R. § 300.502(b)(2).
8. A parent has the right to an independent evaluation, at school expense, if the parent disagrees with the evaluation obtained by the school, and the school fails to show that its evaluations were appropriate. *OSEP Policy Letter to J. Fisher*, 23 IDELR 565 (12/4/95).
9. The 2006 regulations limit a parent's right to an independent evaluation at public expense to one independent evaluation each time the public agency conducts an evaluation with which the parent disagrees. This language was not proposed in the draft regulations, nor do the comments provide any discussion about this section in its discussion about IEE's. This is a change from the

1999 regulations at old § 300.502 which did not set such a limit. 34 C.F.R. § 300.502(b)(5).

10. The 1999 regulation provided that if a parent obtains an IEE at private expense the results of the evaluation must be considered by the public agency and it may be presented as evidence at a hearing.
11. The 2006 regulations require that an IEE obtained at public expense and an IEE obtained at private expense and shared with the public agency must be considered by the public agency and may be presented by any party as evidence at a due process hearing. 34 C.F.R. § 300.502(c).

D. Reevaluations

1. Informed Consent for Reevaluations required. If the parent refuses to consent, the public agency may seek reevaluation through the mediation and due process process, but the agency is not required to do so. Informed consent is not required if the public agency made reasonable efforts to obtain consent and parent failed to respond. In this situation a public agency may proceed with the re-evaluation. 34 C.F.R. § 300.300(d).
2. Reevaluations shall not occur more than once a year unless the parent and LEA agree otherwise. 20 U.S.C. §1414(a)(2)(B)(I); 34 C.F.R. § 300.303(b)(1).
3. Reevaluations shall occur at least once every 3 years unless the parent and LEA determine it is not necessary. 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).
4. Reevaluations of the student must be conducted more frequently if conditions warrant or if the teacher or parent requests, but no more than one time per year. 20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a).
5. "As... part of any reevaluation under Part B of the Act, a group that includes the individuals described in Section 344 [the required individuals for an IEP team], and other qualified professionals, as appropriate shall-
 - a. Review existing evaluation data on the child, including...evaluations and information provided by the parents...Current class-room based assessments and

observations... Observations by teachers and related services providers... and

- b. On the basis of that review and input from the child's parents, identify what additional data, if any, are needed to determine-
- c. Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum." 34 C.F.R. § 300.305(a)(1) and (2)(iv) and 20 U.S.C. § 1414(c)(1)(B)

VII. PLACEMENT/LEAST RESTRICTIVE ENVIRONMENT (LRE)

A. What is an educational "placement" for the purposes of the IDEA?

- 1. "Placement" is defined in *OSEP Letter to Fisher*, 21 IDELR 992 (4/18/94). It is more than the location where special education and related services are provided - it is the student's entire program of services.
- 2. Generally, placement related decisions are made by the placement team--"a group of persons, including the parents, and other persons knowledgeable about the child." 34 C.F.R. § 300.116(a)(1); 20 U.S.C. § 1414(e).
- 3. The IEP team may contain the same individuals as the placement team and the placement decision may also be made at the IEP meeting, if the requirements of 34 C.F.R. 300.116 and other regulatory requirements are met.
- 4. Certain decisions are left to the school district, such as teacher selection and the location where services are provided, unless those decisions are essential to meet the unique needs of the student and, are, therefore included in the IEP.
- 5. The comments to the 2006 regulations indicate that "school administrators should have the flexibility to assign the child to a particular school or classroom, **provided** that determination is consistent with the decision of the group determining placement. 71 FR 46588 (emphasis added).
- 6. "... In determining the educational placement of a child with a

disability, including a preschool child with a disability, each public agency shall ensure that-

- a. 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 this subpart, including §§ 300.114-300.118.
 - b. The child's placement-
 - (1) Is determined at least annually;
 - (2) Is based on the child's IEP; and
 - (3) Is as close as possible to the child's home;
 - c. 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 non-disabled;
 - d. In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
 - e. A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum." 34 C.F.R. § 300.116.
7. Parental consent is required prior to the initial provision of special education services. 34 C.F.R. § 300.300(b)(1).
- a. If the parents refuse to consent, the district may not utilize due process to attempt to provide services without consent. 34 C.F.R. § 300.300(b)(3).
 - b. The Comments note that some public comments stated that public agencies should not be allowed to use the procedural safeguards to continue to provide special education services to a child when a parent withdraws a child from special

education. The Department states that they are considering this issue and anticipate publishing a proposed rule for public comment regarding this issue. 71 FR 46633.

8. Schools must ensure that parents have the opportunity to be involved in placement decisions for their children.
 - a. The school must make attempts to convince the parent to come to a meeting about placement consistent with § 300.322 (document calls to home, letters and home visits).
 - b. However, a placement decision may be made without the parent's participation if the public agency cannot obtain the parent's participation. In this situation the public agency must have a record of its attempt to secure the parent's involvement. 34 C.F.R. § 501(c).

B. Least Restrictive Environment

1. The concept of Least Restrictive Environment (LRE) has been one of the core principles of the IDEA since its inception over twenty-five years ago. It is often referred to as "inclusion," "integration" or "main streaming."
2. The basic premise is that an IDEA eligible student must receive his/her education, including non-academic services and extra curriculars, in the same manner and in the same environment as everyone else, to the maximum extent that is appropriate for the student.
3. The "maximum extent" language makes this a very high standard. The placement team still must balance the student's ability to progress in the setting, and to lesser degree, the impact on classmates.
4. Once the placement team determines where the student is to be placed, it must document this decision in writing. If not fully included, the student must be as included as much as possible. There is a presumption of full inclusion. 34 C.F.R. § 300.114.
5. Any public agency that receives IDEA funding must adhere to the LRE requirement, even the state education agency (SEA). The SEA may not distribute IDEA funds in a way that penalizes any agency for placing students in the least restrictive environment.

6. General LRE requirements:
 - a. "Each public agency shall ensure-
 - (1) 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 non-disabled; and
 - (2) That 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." 34 C.F.R. § 300.114(a)(2).
7. Supplementary aids and services:
 - a. "As used in this part, the term 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 in accordance with §§ 300.114-300.116." 34 C.F.R. § 300.42.
 - b. AT is a supplementary aid and/or service. 34 C.F.R. § 300.105(a)(3) and 20 U.S.C. § 1412(a)(12)(B)(i)
8. Nonacademic settings: "In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency shall ensure that each child with a disability participates with non-disabled children in those services and activities to the maximum extent appropriate to the needs of that child." 34 C.F.R. § 300.117.
9. The first placement considered for a student should always be regular education. *OSEP Letter to Hall*, 30 IDELR 142 (1999).
10. The Full Continuum:
 - a. Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of

children with disabilities for special education and related services.

- b. The continuum required in paragraph (a) of this section must-
 - (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in 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." 34 C.F.R. § 300.115.
- c. That means that a district cannot choose to place a student in a school or program that does not meet all of the requirements of his/her IEP simply because it doesn't have the right program available.
- d. If it does not have the program a student requires, it must create one, alter an existing one, or send the student to another public or private placement that does meet his/her needs. If the student is placed elsewhere, the district must pay the tuition/costs, if necessary.

- 11. The comments to the 2006 regulations provide some very useful information about LRE.
 - a. "We believe the LRE provisions are sufficient to ensure that public agencies provide low-incidence children with disabilities access to appropriate educational programming and services in the educational setting appropriate to meet the needs of the child in the LRE." 71 FR 46586.
 - b. "Public agencies, therefore, must not make placement decisions based on a public agencies' needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff." 71 FR 46587.
 - c. "These options [of the continuum of services] must be available to the extent necessary to implement the IEP of

each child with a disability. The group determining the placement must select the placement option on the continuum in which it determines that the child's IEP can be implemented in the LRE." 71 FR 46588.

- d. "Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate." 71 FR 46588.
- e. "In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience." 71 FR 46588.

12. Examples:

- a. If the student requires a full time aide to participate in the regular classroom and the district does not wish to provide one, it may not place the student in an already existing segregated or remedial classroom for part of the day so that s/he "can receive the intensive services s/he needs." If providing an aide is the only accommodation that will allow the student to be fully integrated within the school system, the district must provide the aide.
- b. If the district claims it does not have the staff available to meet the student's needs it needs to examine its personnel development plans. This is not an excuse it may legally use to avoid providing the staff required by the student's IEP.

VIII. WRITTEN INDIVIDUALIZED EDUCATION PROGRAM (IEP) DEVELOPMENT

A. Definition of Parent--34 C.F.R. § 300.30

- 1. 300.30(a)(1)--means biological or adoptive parent. The 06 regulations use the term biological instead of natural.
- 2. 300.30(a)(2)-- foster parent (unless State law, regulations or

contractual obligations prohibit). There is a substantial change in this section.

- a. The 1999 regulations required that in order for a foster parent to act as parent (1) the natural parents' authority to make educational decisions had to be extinguished and (2) the foster parent had to have an ongoing, long-term parental relationship with the child, willing to make decisions and no conflict of interest.
 - b. The 2006 regulations allow the foster parent to make educational decision unless both the parent and the foster parent are attempting to act as a parent. In that scenario the biological or adoptive parent is the parent for educational purposes. The comments to the regulations state that a biological or adoptive parent is NOT required to affirmatively assert their right to make decisions. The biological or adoptive parent is presumed to be the parent unless there are questions about their legal authority. 71 FR 46566.
3. 300.30(a)(3)—a Guardian is a parent. Except for the State if the child is a ward of the State. Clarifying language is added stating that the guardian must be one who is generally authorized to act as the child's guardian or is authorized to make educational decisions. Avoids Limited Guardians acted outside their power.
 4. 300.30(a)(4)—an individual acting in the place of a biological or adoptive parent (i.e.: grandparent, aunt)—same as 1999 regulations.
 5. 300.30(a)(5)---a surrogate parent—same as 1999 regulations (but see section on Surrogate parents for differences in surrogate parent language).
 6. 300.30(b)—Provides that if more then one person is attempting to act as the "parent" the biological or adoptive parent is deemed the "parent" unless the parent is assigned by judicial decree.

B. Parental Participation

1. Parents are members of the IEP Team
2. Parents are equal participants with district staff in developing the IEP

3. District's must ensure that the parents are present or are afforded the opportunity to participate, including:
 - a. "scheduling the meeting at a mutually agreed on time and place"
 - b. The regulations allow a District to proceed without the parents in attendance only in the following circumstance:
 - (1) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend.
 - (2) In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place." 34 C.F.R. §300.322.
4. The public agency must also now inform parents of the provision in § 300.321(f) which states that at the request of a parent an invitation to the initial IEP meeting under Part B must be sent to the Part C coordinator (or other Part C individuals).
5. If a different group within a district makes the decision about whether a student has a disability or what the student's actual placement will be, the parents must also be members of that group
6. Parents are not entitled to be present at every discussion about their child

C. IEP Team. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321.

1. The IEP Team must be composed of the following members:
 - a. the parents of a child with a disability;
 - b. at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
 - c. at least one special education teacher, or where appropriate, at least one special education provider [such as a speech pathologist] of such child
 - d. A member of the LEA who:

- (1) is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities;
 - (2) is knowledgeable about the general education curriculum; and
 - (3) is knowledgeable about the availability of resources of the LEA
 - e. An individual who can interpret the instructional implications of evaluation results; and
 - f. When appropriate, the child.
2. The purpose of the regular teacher's involvement in the IEP process is, at least in part, to help determine behavioral strategies, supplemental aids and services, program modifications and supports for school personnel
 3. A member of the IEP team may be excused by agreement between the parent and district. If the meeting covers an area of the absent members' involvement with the student, that member must also provide written input into the IEP prior to the meeting. 20 U.S.C. §1414(d)(1)(C); 34 C.F.R. § 300.321(e).
 - a. The Comments to the regulations note that there is a difference between the agreement required in (e)(1) (IEP member excusal for area not discussed during IEP meeting) and parental consent of (e)(2) (IEP member excusal when issue area will be discussed). The Comments state the latter requires informed written consent. 71 FR 46674.
 4. After the annual IEP meeting, the parents and LEA may agree to amend the IEP without re-convening the IEP team. They must develop a written document to amend or modify the IEP. However there is no requirement that the amendment or modification is signed by the parent and/or the school district.
 - a. The regulations also add that if changes are made to the child's IEP, the child's IEP team must be informed of those changes. 34 C.F.R. § 300.324(a)(4).
 - b. The additional requirement of the school personnel to inform the IEP team of IEP changes is beneficial to children. It at

least ensures that if a change is made all team members are aware of the change.

5. Changes to an IEP may be made by the entire IEP team or by agreement (as stated above). A parent must be provided with a copy of the revised IEP if they request it. 20 U.S.C. §1414(d)(3)(D) and (F); 34 C.F.R. § 300.324(a)(6).

D. IEP Content—34 C.F.R. § 300.320

1. The IEP is a written document, setting out in detail the nature of the student's educational needs, the services to be provided and specific goals for the student.
2. The IEP must list the student's present levels of performance of academic and functional performance, including how the child's disability effects the child's involvement and progress in the general curriculum.
3. The IEP must list annual goals.
4. The annual goals must be measurable and relate to meeting each of the child's educational needs that result from the disability, including those which will enable the child to be involved in and progress in the general curriculum.
5. The IEP must list short-term objectives or benchmarks ONLY for those students taking alternative assessments aligned to alternate achievement standards. 20 U.S.C. §1414(d)(1)(A)(i)(I)(cc).
6. When developing an IEP, the team must consider:
 - a. the strengths of the child;
 - b. the concerns of the parents for enhancing the education of their child;
 - c. the results of the initial evaluation or most recent evaluation of the child; and
 - d. the academic, developmental and functional needs of the child.
 - e. The 06 regulations no longer specifically require consideration of the child's performance on state or

district-wide assessments. However, the regulations now specifically require consideration of the academic, developmental and functional needs of the child. The requirement to consider state or district-wide assessments was removed in IDEA 2004, and therefore has been removed from the regulation. However, the Comments to the regulations make clear that consideration of state or district-wide tests would be required to fully consider the child's academic, developmental and functional needs. 34 C.F.R. § 324(a)(1).

7. The IEP must include all special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child based on peer reviewed research to the extent practicable.
8. It must also list all program modifications, and supports for school personnel which will help the child to:
 - a. Attain the annual goals;
 - b. Participate and progress in the general curriculum, if appropriate;
 - c. Be educated with both disabled and non-disabled peers; and
 - d. Participate in extracurricular and nonacademic activities with both disabled and non-disabled peers. 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb).
9. The projected date for initiating all services and modifications, as well as their anticipated frequency, location and duration must be specified. 20 U.S.C. § 1414(d)(1)(A)(i)(VII).
10. Not later than the first IEP to be in effect when a student is 16, measurable, post secondary goals, based upon age appropriate transition assessments, related to training, education, employment, and where appropriate, independent living skills.
11. The transition services, including course of study, needed to assist the student to reach those goals. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII).
12. The IEP must also list the extent the student will not participate with non-disabled students in academic and nonacademic activities. 20 U.S.C. § 1414(d)(1)(A)(i)(V) (emphasis added).

13. A statement of any individual accommodations that are necessary to measure the educational achievement and functional performance of the student on state or district-wide assessments. Options include:
 - a. The regular assessment taken in the same manner as other students,
 - b. The regular assessment with accommodations,
 - c. An alternate assessment that is based on the same educational standards as the regular assessment, or
 - d. An alternate assessment that is based on different educational standards. 20 U.S.C. § 1412(a)(16).
14. If the IEP team determines the student should take an alternate assessment, a statement of why the student cannot participate in the regular assessment and why the alternate assessment selected is appropriate. 20 U.S.C. § 1414(d)(1)(A)(i)(VI).
15. Progress reporting
 - a. There must also be a statement of how the child's progress toward the annual goals will be measured; and
 - b. A statement of when periodic reports on the progress the child is making will be provided (such as quarterly or other periodic reports concurrent with issuance of report cards). 20 U.S.C. § 1414(d)(1)(A)(i)(III).
 - c. However, the requirement that the reporting be “at least as often as parents are informed of their non-disabled children’s progress” is no longer required specifically. Nor is there a specific requirement to state if the progress is sufficient to achieve the goals by the end of the year. specific manner and format to report progress is left to State and local officials. 34 C.F.R. § 300.320(a)(3).
16. Additional considerations:
 - a. When developing the IEP, the team must consider any behavioral interventions needed for students with behavioral needs;

- b. The effect of limited English proficiency on a student's special education needs;
- c. The use of Braille for blind and visually impaired students;
- d. The use of and instruction in the child's language and mode of communication for deaf or hard of hearing students; and,
- e. For all students, whether the child requires AT. 20 U.S.C. § 1414(d)(3)(B).
- f. The comments to the proposed 1999 regulations note that these requirements should not impose a new burden on districts because these are all factors that should have been considered, as appropriate, for all students before enactment of IDEA '97. 62 FR 55056.

17. Signing IEPs

- a. Signing an IEP can have a different effect depending on your state.
- b. If parents disagree with part of the IEP, the undisputed portions of the IEP should be implemented. 34 C.F.R. § 300.300(d)(3).

18. The IEP must be reviewed at least annually to determine that the annual goals for the child are being achieved and that the IEP is revised as needed to:

- a. address any lack of expected progress toward the annual goals and in the general education curriculum;
- b. the results of any reevaluation conducted under this section;
- c. information about the child provided to or by the parents as through the evaluation process;
- d. the child's anticipated needs or
- e. other matters.

E. Other Matters

1. When IEPs must be in effect.
 - a. At the beginning of each school year, each district must have an IEP in effect for each child with a disability. 34 C.F.R. § 300.323(a).
 - b. 300.323(b)--using an IFSP as the IEP for a child who is 3-5 years old. The section is similar to the 1999 regulations at old § 300.342(c). However the 2006 regulations stress that the IFSP contents that must be considered include the natural environment statement and an educational component that promotes school readiness and incorporates pre-literacy, language and numeracy skills for children who are at least 3 years old.
 - c. 300.323(c)
 - (1) In the 1999 regulations there was a requirement which dealt with provision of services that stated an IEP must be in effect before special education services are provided. The comments to the 2006 regulations state that this provision is not needed because it is implicit in the requirement of each public agency to have an IEP in effect at the beginning of each school year for a child that is eligible for services.
 - (2) This section is a combination of the 1999 regulations at old § 300.342 and 343.
 - (3) The 06 regulations require an IEP meeting within 30 days of an eligibility determination just as required in 99, however the requirement is in a different section of the regulations.
 - (4) The 99 regulations require that an IEP is implemented as soon as possible after the IEP meeting. The 06 regulations require that "special education and related services are made available to the child..." as soon as possible after an IEP meeting. The wording is slightly different, but the meaning is the same.
2. 300.323(d): Accessibility of child's IEP to teachers and others.
 - a. This language follows the language in the 99 regulation at

old § 300.342(b)(2).

- b. This section requires the school to make the IEP accessible to teachers and service providers that are responsible to implement the IEP.
 - c. It also requires the school to inform each teacher and service provider with their specific implementation responsibilities. This part of the regulation was absent from the draft regulations.
3. 300.323(e); 300.323(f) and 300.323(g): These three sections address the requirements for children who transfer schools within the same state and transfers to another state.
- a. The 06 regulations follow the meaning of the statute at 20 U.S.C. § 1414(d)(2)(C) with some changes to the wording. The interesting part of this regulation is found in the Department's Comments.
 - b. When a child transfers to a new school, the new public agency must provide the child with services that are "comparable" to the services in the existing IEP. The Department declined to define "comparable" but then goes on to say they interpret "comparable" to have the "plain meaning" of the word, which is "similar" or "equivalent." Therefore, when a child transfers schools, the new public agency must provide services that are similar or equivalent to the services provided by the former school.
 - c. The Department states in its comments that when a child transfers from one state to a new state and the new state determines an evaluation of a child is necessary, the purpose of that evaluation is to determine eligibility.
 - d. Because the purpose is to determine eligibility the testing should be considered an initial evaluation requiring parental consent. However, the school district must provide FAPE to the child until the evaluation is conducted. If the parent and the school disagree with "comparability of services" during the evaluation time "stay-put" does not apply.
 - e. The regulations follow the statute with regard to the transfer of records. The Department declined to set a specific requirement of days to transfer the records finding that it is

an issue left to the States to determine.

F. Multi-year IEP Pilot Program

1. Pilot program of no more than 15 states;
2. States must submit Multi-year IEP proposal to U.S. DOE and U.S. DOE must agree to allow state to implement;
3. Permits states to develop IEPs for children with disabilities at natural transition points in their development, but at least every 3 years. (parents must agree to the multi-year IEP)
4. U.S. DOE released draft proposal request. DOE has not yet published final request for proposals, therefore multi-year IEPs are NOT in place yet in any state.

G. Methodology

1. It has long been assumed that the district has the authority to determine which educational methods will be used to meet a student's education needs, and courts and hearing officers will generally defer to the district's decisions.
2. However, this is based on a misreading of the *Rowley* case.
3. Actual *Rowley* holding:
 - a. "Courts must be careful to avoid imposing their view of preferable educational methods upon the States." *Rowley* at 207.
 - b. The Supreme Court concluded that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Rowley* at 208.
 - c. Buried between the two quotes discussed above, that courts must be careful about imposing educational methodology on states, is a clear statement about how educational methodology is to be determined at IEP Team meetings:
 - d. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was

left by the Act to state and local educational agencies in cooperation with the parents or guardians of the child. *Rowley* at 207.

4. There is no legal prohibition against including instructional methodologies in the IEP. See *Grim v. Rhinebeck Central Sch. Dist.*, 346 F.3d 377 (2nd cir. 2003) (Orton Gillingham); *Ridgewood Bd. of Ed. v. N.E.*, 172 F.3d 283 (3rd Cir. 1999).
5. Moreover, the warning even to courts that they should not second guess a district's choice of methodology does not mean that they cannot ever overturn a district's choice. *Oberti v. Bd. of Ed.*, 995 F.2d 1204, 1214 (3rd Cir. 1999); *East Penn. Sch. Dist. v. Scott B.*, 1999 WL 178363, 29 IDELR 1058 (E.D. Pa. 1999), *aff'd* 213 F.3d 628 (3rd Cir. 2000).
6. 1997 IDEA Amendments
 - a. "Special education" is "specially designed instruction" and specially designed instruction includes adapting the "methodology or delivery of instruction." 34 C.F.R. § 300.39(b)(3).
 - b. The comments to the March 1999 regulations note that including day to day teaching approaches or lesson plans in IEPs would be overly prescriptive.
 - c. But also note that: "...[T]here are circumstances in which the particular teaching methodology that will be used is an integral part of what is "individualized" about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP..." 64 Fed. Reg. 12552.
 - d. Special Factors where methodology must be considered.
 - (1) IEP teams must consider the need for Braille for blind and visually impaired students and the appropriate mode of communication (e.g. American Sign Language) for deaf students and students who are hard of hearing.
 - (2) In these cases, the method to be used must be included in the student's IEP.

- (3) This requirement includes the training of family members in this method of communication when it is necessary for the student to receive FAPE. 34 C.F.R. § 300.324(a)(2); 20 U.S.C. §1414(d)(3)(B).

7. 2006 regulations

- a. The IEP must include a statement of the child's special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable. 34 C.F.R. § 300.320(a)(4).
- b. The comments to the 2006 regulations indicate that nothing requires an IEP to include specific instructional methodology. However, "the Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP." 71 FR 46665.

H. Transition

1. The IDEA contains a clear mandate that districts provide students with "transition services."
2. Transition services are defined as: a "coordinated set of activities for a child with a disability that 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..." 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43.
3. "Post school activities" include such things as: Post secondary education, vocational training, independent living.
4. Transition planning is not just about vocational training or job placement, but about preparing the student for life after special education.
5. Transition services can include (depending upon the needs of the individual student):
 - a. Instruction

- b. Related services
 - c. Community experiences
 - d. The development of employment and other post-school adult living objectives
 - e. Training in daily living skills
 - f. Functional vocational evaluation. 34 C.F.R. §300.43; 20 U.S.C. § 1401(34).
6. Fundamental requirements for transition services
- a. Coordinated - including all of the systems which will be involved with a student when s/he leaves special ed. The public school district leads this coordination.
 - b. Results oriented - transition should be focused on whether or not the student has actually achieved the goals or mastered the skills intended, not simply whether the services were provided.
 - c. Based on the individual's needs, preferences , and interests.
7. The IEP must list the transition services to be provided, including the courses of study, which are needed to assist the student to reach the transition goals. 34 C.F.R. § 300.320(b)(2).
- a. In the 1999 regulations, the Department gave examples of areas of study that might require transition services. These examples are no longer in the regulations, as they were also deleted from the statute.
 - b. However, the comments to the 2006 regulations state that the reference to “course of study” include the specific examples provided in 1999 (vocational education and AP classes) and that such examples are not needed to understand the section. 71 FR 46668.
8. Age when transition services begin
- a. Beginning with the IEP that will be in place when the student turns age 16 the IEP team must also consider what transition services the student will need including, if appropriate, a

statement of the responsibilities of other agencies that will be involved with the student, such as the state vocational rehabilitation agency (VR).

(1) NOTE: The new language in IDEA does not preclude initiating transition services at an earlier age. 20 U.S.C. § 1414(d)(1)(A)(VIII); 34 C.F.R. § 300.320(b).

b. Goal: To prevent a student from arriving at senior year without the course requirements necessary to be accepted into college, or with a job placement but no understanding of how to take a bus to get to work.

9. Transition and AT

- a. What is the effect of the transition requirements for the student who needs an AT device?
- b. First, the vocational rehabilitation (VR) agency may and should participate in the transition planning meetings with the school.
- c. Second, if the graduating student clearly will need the AT device for educational, training or employment purposes, a reasonable approach would be to have the VR agency purchase the device in the first instance or purchase it from the school when the student graduates.
- d. The need for the device would continue to be reflected in the IEP, with reference to the VR agency as payer (or purchaser upon transfer).
- e. The AT device would also appear in the VR individualized plan for employment (IPE), which must be developed by the VR agency before the child finishes school.
- f. Neither the IDEA nor the federal VR laws prohibit the VR agency from purchasing the AT outright for the student while still enrolled in high school or from purchasing it from the school at graduation.
- g. The IDEA regulations envision other agencies providing services to students in transition, including VR agencies. 34 C.F.R. § 300.34(c)(12).

- h. The VR regulations require that the State Plan specify the respective financial responsibility of the various state agencies serving the student. 34 C.F.R. § 361.22(a)(2)(v).
- i. In fact, the U.S. Department of Education has indicated that it is permissible for a school district to transfer an AT device, costing more than \$5,000, to a state VR agency if it will no longer need the device for other students. *OSEP Policy Letter to S. Goodman*, 30 IDELR 611 (6/21/98).
 - (1) The Department envisions that most such devices will be modified for the individual student and, therefore, will no longer be needed by the district when the student graduates.
 - (2) For devices costing less than \$5,000 this limitation does not apply, meaning the district could transfer the device to the VR agency whether or not it was needed for other students.
 - (3) The Department went on to note that it agreed that coordination between school districts "and state VR agencies to enable students with disabilities to continue using assistive technology devices as they move from one program to another is an efficient, cost-effective means of facilitating transition from school to work related services and fully supported this type of cooperation."
- 10. Like the other parts of the IEP, the transition aspects of a student's IEP must be reviewed annually.
- 11. Districts do not have to provide transition services to students convicted as adults and incarcerated in adult prisons, if they will age out of special education before they are released from prison.
- 12. Additional participants at IEP meeting. 34 C.F.R. § 300.321(b).
 - a. The student
 - b. School districts are required to the extent appropriate to invite a representative of other agencies—that are likely to be responsible for providing or paying for transition services—to an IEP meeting.

- (1) Schools must have the consent of the parents (or child of the age of majority) before inviting the other agency personnel.
- (2) This is a change from 1999 which required schools to invite other agencies (without seeking consent of the parent.) If the other agency personnel did not come to the meeting, schools were required to take other steps to obtain the participation of the other agencies.
- (3) The 06 regulations do not require this second step of attempting to obtain participation. The Comments state that because the school districts have no authority to require action or services from the other agencies, it was impossible for the schools to carry-out this provision.

IX. DUE PROCESS

A. Parental notice of due process rights. 20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. 300.504.

1. The district is required to provide notice of the procedural safeguards to parents only 1 time a year, except that a copy shall also be provided:
 - a. At initial referral or parental request for evaluation (for IDEA eligibility)
 - b. First time a party files a due process request. (this is a change from IDEA 97 which required a copy of procedural safeguards much more frequently).
 - c. The regulations clarify that a copy of procedural safeguards must be provided:
 - (1) Upon receipt of the first due process request in a school year;
 - (2) Upon receipt of the first State complaint in a school year; and
 - (3) In accordance with the Discipline procedures (when removal of a child is a change in placement, LEA must provide procedural safeguards to parents)(§

300.530(h)). 34 C.F.R. § 300.504(a).

2. A LEA may place a copy of the procedural safeguards on the internet, however it is not clear from the statute whether this would satisfy the LEA's notice requirement to provide the procedures once a year to parents.
3. This notice must contain information about rights with regard to:
 - a. Independent educational evaluation
 - b. Consent
 - c. Prior written notice
 - d. Access to educational records
 - e. Due process hearings/appeals
 - f. Including the time period to make the complaint
 - g. Opportunity for the agency to resolve the complaint; and
 - h. The availability of mediation
 - i. Stay put
 - j. Interim Alternative Educational Settings
 - k. Unilateral placement
 - l. Requirements for disclosing evaluation results and recommendations
 - m. Civil actions
 - n. State complaints
 - o. Attorney fees
4. The 2006 regulations include a new requirement that explains the difference between due process complaint and state complaint procedures. 34 C.F.R. § 300.504(c)(5)(iii).
5. The notice must be in understandable language. See 34 C.F.R.

300.503(c) for a definition of "understandable language."

6. And in the native language of the parents unless it is clearly not feasible to do so.

B. Parents' options for resolving differences with the district.

1. Parents may:
 - a. Informally negotiate/complain
 - b. Request an independent educational evaluation (IEE)
 - c. Request an Individualized Educational Program (IEP) meeting
 - d. Request mediation
 - e. Request a due process hearing (now includes a resolution meeting)
 - f. File a state level complaint
 - g. File a suit for injunctive relief (if the requirement for exhaustion of administrative remedies has been fulfilled or is inapplicable)
 - h. Unilaterally place the student
2. Mediation. 20 U.S.C. § 1415(e); 34 C.F.R. § 300.506.
 - a. A district cannot require a parent to choose mediation over any other problem solving technique (and vice versa), but it must make the option of mediation available to parents if they so choose.
 - b. 300.506(b): In the 99 regulations the public agency was permitted to require parents who choose not to go to mediation to meet with a disinterested party about the benefits of mediation. The 06 regulations state, consistent with the 2004 statute, that the public agency may establish procedures to offer parents and schools that choose not to go to mediation a chance to talk to a disinterested party about the benefits of mediation.

- c. Prior to IDEA 2004, states only had to provide mediation when a due process request was initiated. Now, states must provide mediation to resolve complaints even if due process has not been requested.
- d. Mediation must be free to the parent and provided by qualified, impartial mediators trained in effective mediation techniques.
- e. 300.506(b)(3): The SEA may now select mediators on a random, rotational or other impartial basis. In 99 regulations if a mediator was not selected on a random basis, both parties had to be involved in the selection of the mediator.
- f. Mediation cannot be used as a means to deny or delay a parent's right to a due process hearing.
- g. Information garnered during the mediation process cannot be used against the parent in a later proceeding, such as a due process hearing.
- h. If a resolution is reached during mediation, the parties must execute a legally binding document that:
 - (1) details the resolution;
 - (2) states that all discussions that occurred in the mediation session were confidential and may not be used in subsequent hearings or other civil proceedings;
 - (3) is signed by the parent and personnel from the LEA with authority to bind the LEA.
 - (4) is enforceable in state or federal Court.

3. State Level Complaint

- a. If a parent feels that the district has violated a provision of the IDEA or its regulations, she or he may request an investigation by the SEA through the State Complaint Process.
- b. State complaints can be used to address substantive as well

as procedural violations – that is, they can address a failure to identify, evaluate, place, or provide FAPE to a student. 34 C.F.R. § 300.151-153; 71 FR 46600-46607.

- c. 300.151: Adoption of State Complaint Procedures.
 - (1) When SEA finds LEA failed to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address—
 - (2) 06 Reg:(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and
 - (3) [99 Reg:(1) How to remediate the denial of those services, including as appropriate the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child; and]
- d. 300.152: Minimum State Complaint Procedures.
 - (1) The SEA must:
 - (2) - give complainant the opportunity to submit additional information about the allegation and
 - (3) -must give the public agency an opportunity to respond.
 - (4) The public agency may present a proposal to resolve the issue and the parties must have the opportunity to engage in mediation about the event.
- e. 300.153 Filing a Complaint.
 - (1) The 1999 regulations at old § 300.662 required the complaint to include a statement that the agency has violated Part B of the Act or of this part and the facts on which the statement is based. It also required the complaint be brought within one year unless longer is reasonable because the issue is ongoing or because the request is for compensatory education, as long as the compensatory education request is within 3 years of the violation.

- (2) The 06 regulation still requires that the complaint include a statement about the violation; and that the facts upon which the statement is based are provided.
 - (3) However the 06 regulations also require: the signature and contact for the complainant; and if alleging violations with respect to a specific child—
 - (a) the name and address for the child
 - (b) name of the school the child attends.
 - (c) if the child is homeless available contact information for the child and the name of the school the child is attending.
 - (d) Description of the nature of the problem, including facts relating to the problem; and
 - (e) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.
 - (4) The Complaint still must be filed within one year. The new regulations do not provide for a longer time for ongoing complaints, nor does it provide for a 3 year time line for compensatory education issues.
4. The U.S. D.O.E., Office of Special Ed. Programs (OSEP) has an independent obligation to monitor and enforce the IDEA, which it does through periodic state monitoring visits.
 - a. After the monitoring visit, OSEP issues a report on the level of compliance for the entire state and its plans to enforce compliance if any violations are found.
 - b. These reports are public information and are available on the OSEP website:
<http://www.ed.gov/about/offices/OSERS/OSEP/index.html>.
5. Unilateral Placement: 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. §300.148.
 - a. If a parent feels that the student's placement does not

provide him/her with FAPE (free appropriate public education), she or he may place the student in a private placement at the parent's expense.

- b. She or he may then request a due process hearing to seek reimbursement for the costs of the private placement.
- c. If the hearing officer determines that the district's placement was in violation of FAPE and that the private placement selected provided FAPE, the officer may grant the parent reimbursement for the tuition expenses.
- d. Parents must provide prior notice to the district (either at the most recent IEP meeting or 10 business days prior to the removal) that they are placing the child because they do not believe she or he is receiving FAPE, or reimbursement may be reduced or denied. This requirement allows the district an opportunity to cure the problem and minimize its liability for tuition expenses.

C. Due Process Hearing/Resolution Session/Settlement Agreement

1. Procedural safeguards notice, must include information about free or low- cost legal services, and the option of mediation. The district must also provide information about free or low cost legal services if the parent requests this information at any other time, even if a hearing has not been requested.
2. Statute of Limitations: Must bring claim within 2 years from the date the parent or agency knew or should have known about the alleged action or the timeline set by the State if the State has an established timeline. There is an exception if the school system specifically misrepresented issues to the parent or if the school system failed to provide information it was required to provide to the parent. 20 U.S.C. § 1415(f)(3)(D).
 - a. The Comments to the regulations state that “nothing in the Act precludes a state from having a time limit for filing a complaint that is shorter or longer [than two years].”
3. Resolution Meeting:
 - a. Once a request for a due process hearing is received the LEA must convene a meeting with the parent and relevant members of the IEP team unless the parent and the LEA

agree in writing to waive the meeting or the parent and LEA agree to the mediation process in lieu of the resolution meeting.

- (1) The meeting must be held within 15 days of notice of the due process complaint;
 - (2) Must include a representative of the agency with decision making authority;
 - (3) The school system may not bring an attorney to the meeting unless the parent brings an attorney.
 - (4) The purpose of the meeting is to give the LEA an opportunity to resolve the complaint. 20 U.S.C. § 1415(f)(1)(B).
- b. If the complaint is not resolved within 30 days from the date the parents filed the due process complaint, the hearing may proceed.
- c. 300.510(b)(2): The 06 regulations make clear that the 45-day due process timeline begins when the 30-day resolution period ends.
- d. 300.510(b)(3): If a parent who filed a due process complaint fails to participate in a resolution meeting the resolution process and the due process hearing timelines will be delayed until the meeting is held. This is not in the statute.
- e. 300.510(b)(4): LEA must document attempts to have parent participate in the resolution session by using the process in §300.322(d) (calls, letters, home visits). If at the end of the 30-day period the parent has not participated in the meeting, the LEA may request that a hearing officer dismiss the parent's due process complaint.
- f. 300.510(b)(5): If the LEA fails to hold the resolution session within 15 days or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.
- (1) This section at least provides an avenue for parents to start the hearing before the 30-day timeline if the school fails to follow-through properly on the

resolution session requirements.

- g. 300.510(c): Adjustments to 30-day resolution period. This section requires the hearing timeline to begin the day after one of the following events occurs (which occurs before the expiration of the 30-day resolution session):
 - (1) When both parties waive the resolution meeting. This is helpful as it clearly states that parties who waive the resolution session go straight to hearing. Parties are not forced to unnecessarily extend the hearing timeline by 30 days if they are not planning to meet to discuss the dispute.
 - (2) The parties engage in mediation or a resolution session, but decided before the end of the 30-day period that an agreement is not possible. This agreement must be in writing.
 - (3) If both parties agree in writing to continue with mediation after the 30-day period, but one of the parties later withdraws from the mediation process.
 - h. Settlement Agreement: If the parties reach an agreement during this resolution process, they must execute a legally binding document signed by the parents and agency personnel with authority to bind the agency and the document must be enforceable in State or Federal Court. However, any party may void an agreement within 3 business days.
4. Due Process hearing
- a. The complaint must include, along with other information, a description of the problem and a proposed resolution to the extent know at the time.
 - (1) Once the complaint has been filed, the non-complaining party must respond within 10 days in a manner that specifically addresses the issues in the complaint. 20 U.S.C. § 1415(c)(2)(B)(ii).
 - (2) If the respondent feels the complaint is insufficient, it may notify the hearing officer within 15 days of receipt of the complaint. Otherwise, its deemed

sufficient. 20 U.S.C. § 1415(c)(2)(A) and (c)(2)(C).

- (3) The hearing officer then has 5 days to rule on the issue of sufficiency. 20 U.S.C. § 1415(c)(2)(D).
 - (4) In some cases, the party will be allowed to amend the complaint. 20 U.S.C. § 1415(c)(2)(E).
 - (5) Parties may not raise issues at hearing that were not addressed in the due process complaint notice, unless the parties agree. 20 U.S.C. § 1415(f)(3)(B).
- b. If the LEA has not provided a prior written notice previously and the parent is requesting the hearing, it must send one within 10 days.
- c. Must disclose documents that parties intend to rely on in the hearing at least 5 business days prior to the hearing. A hearing officer may bar entry of documents at the hearing if they are not provided within the required timeline.
- d. Hearing Officers
- (1) Must not:
 - (a) be an employee of the State Education Agency or an employee of the Local Education Agency involved with the education or care of the child;
 - (b) have an interest that conflicts with the hearing
 - (2) Must:
 - (a) possess knowledge of the IDEA, its implementing regulations, State law and case law;
 - (b) possess knowledge and ability to conduct a proper hearing;
 - (c) possess knowledge and ability to render and draft decision in accordance with proper legal practice. 20 U.S.C. § 1415(f)(3)(A).
 - (3) May not: find a violation of FAPE if the finding is

based only on procedural inadequacies unless the procedural violations:

- (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; or
 - (c) caused a deprivation of educational benefits.
- (4) However... nothing precludes a hearing officer from ordering a LEA to comply with procedural requirements under this section.
- (5) Nothing affects the right of a parent to file a complaint with the State educational agency.
- e. Subject Matter: If the issue was not raised in the due process request, the party may not raise it in the hearing unless agreed to by the opposing party. (IDEA 2004 appears to require a higher level of notice and mere statements like "violated FAPE" will most likely not be sufficient notice. This change follows the trend in case law). 20 U.S.C. § 1415(f)(3)(B).
- f. Parties have the right to-
- (1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
 - (2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;
 - (3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing;
 - (4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing;
 - (5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

- (6) Have the student present at the hearing (parents only)
- (7) Open the hearing to the public (parents only)
- (8) Obtain a free copy of the hearing findings of fact and decision (parents only)
- (9) The hearing officer must issue a decision within 45 days after the expiration of the 30 day resolution session or one of the exceptions noted above. The SEA must complete its review, if applicable, within 30 days of the request for an appeal. 34 C.F.R. § 300.515.
- (10) The district must maintain information about qualifications of the potential hearing officers.
- (11) Each hearing and appeal involving oral argument must be conducted at a time and place that is reasonably convenient to the parents and student.

D. Appeals

1. After the due process hearing and the appeal to the SEA if applicable, the parent's next level of appeal is a suit in state or Federal district court.
2. The District Court decision can then be appealed to the Circuit Court and U.S. Supreme Court (assuming cert. is granted).
3. Federal court suits and appeals are granted without regard to jurisdictional amount.
4. 300.516(b)-This is a new section. It states—consistent with the statutory addition to IDEA 2004—that a party has 90 days to bring a civil action. If a state has a specific timeline the state statute of limitations applies.
 - a. However, the regulations clarify that the 90 days begins after the date of a hearing officer's decision, or the date of a decision of a state review official.
 - b. The statute only refers to a hearing officer's decision. This clarification is useful as it ensures that the 90 day timeline to file an appeal does not expire before the state review

process is completed.

E. Attorney Fees

1. Fees are not allowed for parents if the parents did not respond to a written offer of settlement within 10 days and the relief obtained was not more favorable to the parents than the offer of settlement was.
2. Fees cannot be awarded for services provided at an IEP meeting unless it is convened as a result of a hearing or lawsuit. Fees can only be granted for services at a mediation that took place prior to a due process hearing at the SEA's discretion.
3. Fees can be reduced by the court if the parent or parent's attorney "unreasonably protracted" the proceedings and the district did not. They can also be reduced if the amount of fees unreasonably exceeds the hourly rate prevailing in the community for similar services, the time billed was excessive in light of the nature of the action or proceeding, or, the parent's attorney did not include the appropriate information in the hearing request. 34 C.F.R. § 300.517(c)(4).
4. Fees are not awarded for the resolution meeting sessions. 20 U.S.C. § 1415(i)(3)(D)(iii).
5. The court, in its discretion, may award reasonable attorneys' fees as part of the costs—
 - a. to a prevailing party who is the parent of a child with a disability;
 - b. to a prevailing party who is a SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
 - c. to a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

- d. These last two are additions made by IDEA 2004, but are consistent with prior case law.

F. Placement during appeals. 34 C.F.R. § 300.518.

1. The student remains in the placement she or he was in at the time the request for due process was filed, unless both parties agree differently. This doctrine is called "stay put."
2. This section has one major change from the 1999 regulations at old § 300.514.
 - a. In the 06 regulations at 34 C.F.R. § 300.518(c) the Department adds in a requirement regarding Part C (Early Intervention) students.
 - b. The regulation requires that if a parent files a complaint about initial services under Part B (services for students 3-21) and the child is transitioning from Part C services (0-3 yrs. old) because they are no longer eligible for Part C services (i.e.: turned 3 yrs. old) the child does not stay-put in Part C services. Instead if the child is eligible for Part B services and the parent consents then the public agency is only required to provide services that are not in dispute.
 - c. This regulation was not in the draft regulations and therefore NDRN (and others) did not have the opportunity to comment on this section
3. The exception to this is in the case of a student who has a change in placement as a result of a disciplinary action. IDEA 2004 modifies stay put for discipline cases pending a hearing decision. In that case it will be the interim alternative educational setting (IAES). See below.

X. DISCIPLINE

A. Legal Requirements

1. School districts must follow specific procedures when disciplining all public school students, if the method of discipline they choose to use will restrict the student's access to public education.
2. The legal standards for the discipline of any student have been set out in *Goss v. Lopez*, 419 US 565 (1975) and its progeny.

- a. *Goss* involved a suspension of ten days or less, and the Court held that the student must receive oral or written notice of the charges against him or her, an explanation of the facts against him or her, and an opportunity to present his or her side of the story.
 - b. Later cases have held that a hearing is required for a longer suspension.
3. For students with disabilities, school personnel may consider on a case-by-case basis whether any unique circumstances warrant not pursuing the disciplinary change in placement process for a student who violates the school code of conduct. 34 C.F.R. § 300.530(a).
 - a. According to the Department's comments this section gives school personnel the ability to determine if a change in placement that is otherwise permitted is appropriate.
 - b. If it is not appropriate the school personnel can decide it should not occur.
 - c. The comments say a school may involve the parents or IEP team in this decision.
 - d. However, schools cannot punish a child without going through the due process requirements set out in the law.
4. School officials can remove an IDEA eligible student from his or her regular school placement for up to 10 consecutive school days, if the punishment is appropriate and is administered in the same manner as it would be to non-disabled students. This means that if the student can still legally be punished after the district has completed the due process procedures required by *Goss*; it may suspend him for up to 10 days.
5. For suspensions longer than 10 days:
 - a. The parent must receive immediate notice of the decision to discipline the student and the applicable procedural safeguards. 20 U.S.C. § 1415(k)(1)(H).
 - b. A manifestation determination review (MDR) must occur within ten school days of the date the decision was made to punish the student if a change in placement has occurred.

IDEA 2004 includes only relevant members of the IEP team instead of the entire team.

- c. If the behavior was deemed a manifestation of the disability and the district has not already conducted a functional behavioral assessment and implemented a behavioral intervention plan for the student, it must convene an IEP team meeting to develop an assessment plan.
 - (1) If the student already has a behavioral intervention plan, the school district must convene the IEP team to review and modify the plan as necessary to address the behavior that lead to the removal.
 - (2) The child must be returned to the placement from which he was removed unless the parent and school agree otherwise.
- d. If, after the MDR, the relevant members of the IEP team conclude that the student's behavior was not a manifestation of disability, the student can be disciplined in the same manner as non-disabled students.

6. Calculation of suspensions. 71 FR 46715.

- a. In-school suspension days would not be considered a suspension day only if:
 - (1) The child continues to appropriately participate in the general curriculum;
 - (2) The child continues to receive the services specified in the IEP; and
 - (3) The child continues to participate with nondisabled children to the extent they would have in their current placement.
- b. Bus suspensions
 - (1) A bus suspension is considered a suspension day if bus transportation is on the IEP and the district does not make alternate arrangements to get the student to school.

- (2) If bus transportation is not on the IEP, it would not be a suspension day and the parents would have the right to provide alternate transportation to the school.
- (3) If bus behavior is similar to school behavior that is addressed in the IEP, the district should consider whether to address bus behavior in the IEP.

7. The Manifestation Determination Review:

- a. First the MDR team must review all relevant information about the student, including, observations of the student, and the student's IEP, and any relevant information from the parent.
- b. Then it must determine whether: 1) the conduct was caused by or a direct and substantial relationship to the child's disability; or 2) if the conduct was a direct result of the agency's failure to implement the IEP. (This appears to be a much higher standard than in IDEA 97.)
- c. If the LEA, parent and relevant members of the IEP team determine that the child's behavior was a direct result of the LEA's failure to implement the IEP, the LEA must take immediate steps to remedy the deficiencies in the IEP. 34 C.F.R. § 300.530(e).

8. FAPE services for students who have been disciplined.

- a. 20 U.S.C. § 1412(a) requires FAPE for students who have been suspended or expelled.
- b. Suspensions for less than 10 days.
 - (1) A school is not required to provide services to a child with disabilities until removed from school for 10-days. However, if the public agency provides services to non-disabled children when they are removed from school for less than 10 days, public agency must provide services to students with disabilities who are similarly removed. 34 C.F.R. §§ 300.530(b)(2), 300.530(d)(3).
 - (2) This is how schools were typically proceeding in practice, even though 20 U.S.C. § 1412(a) requires

FAPE when a child is suspended or expelled. This reference makes no distinction for suspensions of less than or greater than 10 days. However, this 2006 regulation mirrors the 1999 regulations at old § 300.121(d).

- c. Suspensions for greater than 10 days.
 - (1) If a child is removed from school for more than 10 consecutive days and the behavior was NOT a manifestation of the child's disability the child may be disciplined in the same manner the school would discipline a child without disabilities except that some level of special education services must be provided. 34 C.F.R. § 300.530(c).
 - (2) Section 300.530(d) requires schools to provide FAPE to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.
 - (a) This clause mirrors 20 U.S.C. § 1415(k)(1)(D)(i) and (ii) is arguably something less than FAPE.
 - (b) The comments to the regulations acknowledge that 300.530(d) is a modified FAPE standard which requires that students receive those services that are necessary to enable them to continue to participate in the general curriculum and to progress toward meeting the goals set out in the IEP. 71 FR 46716.
- d. Suspensions for less than 10 days, but where the total number of days a student has been suspended exceeds 10 days in a given school year.
 - (1) 300.530(d)(4): Even after a child has been removed from school for 10 school days, if the current removal (day 11 removal) is less than 10 consecutive school

days and is not a change in placement, the school personnel along with a teacher determine the extent to which services are needed to enable the child to continue to participate in the general curriculum and to progress toward meeting the IEP goals.

- (2) The 1999 regulation at old § 300.121(d) states that if a child is removed for more than 10 consecutive days and the current removal is NOT a change in placement the public agency must provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP.
 - (3) Comments to the 2006 regulations indicate that such children are still entitled to some services. The extent of services is to be based on the length of the current removal, other prior removals and the child's needs and goals. 71 FR 46717.
- e. When do a series of short term disciplinary removals become a change in placement.
- (1) The 1999 regulations at old § 300.519 stated that a change in placement occurs when the removal is for more than 10 consecutive school dates in a school year or because the child has been removed from school a series of times that result in a pattern because: the removals total more than 10 school days and because the length of each removal, total amount of time the child has been removed and the proximity of the removals to one another results in a change of placement.
 - (2) The 06 regulations require all of the above, but also add that the behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals. 34 C.F.R. § 536.
9. Under IDEA 2004 a student who is not yet IDEA eligible may have some protection.
- a. The student is protected in the same manner as a student who is IDEA eligible, if the district knew that the child was a

child with a disability before the behavior that precipitated the disciplinary action occurred.

- b. The district had knowledge if:
 - (1) The parent expressed concern in writing to district personnel, or
 - (2) The parent has requested an eligibility evaluation, or
 - (3) A teacher, or other district staff have expressed specific concerns about the student's pattern of behavior to the director of special education or other supervisory personnel.
 - (4) Exception: LEA attempted to evaluate the child and the parent refused.
- c. If the LEA does not have knowledge that the child is a child with a disability the discipline procedures applicable to all students apply to the student with a disability.
- d. If the behavior occurs during the evaluation process, the process must be expedited and then the evaluations considered when reviewing the discipline proceeding. During the interim when the evaluations are continuing the child remains in the educational placement of the school system's choice.

10. Weapons, Drugs and Dangerous Behavior

- a. The district has more flexibility when removing a student when:
 - (1) The child carries or possess a weapon to school or to a school function, or
 - (2) The child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function, or
 - (3) The child has inflicted serious bodily injury upon another person while at school or a school function.
- b. The district can simply move the student to an interim

alternative educational setting that meets certain requirements.

- c. What are the requirements for these interim alternative educational settings (IAES)?
 - (1) An IAES must be selected by the student's IEP team and must enable the student to continue to participate in the general curriculum and to receive the services and modifications in the current IEP, so that he or she can progress towards meeting the IEP goals.
 - (2) It must also include services and modifications to address the behavior that lead to the placement, which are designed to prevent the behavior from recurring.
 - (3) The IAES placement can last for no more than 45 days (if the IAES is a result of removal because of drugs, weapons or bodily injury), unless the extension is reviewed and renewed by a hearing officer.

B. Appeals in Discipline Cases

- 1. Parents may request a hearing if they:
 - a. disagree with placement decision;
 - b. disagree with manifestation determination
- 2. School District may request a hearing if they believe the child is "substantially likely to injure him/herself or others"
- 3. Authority of Hearing Officers:
 - a. Have the general authority to hear the case and make a determination about the appeal.
 - b. If the issue involves a change of placement, the hearing officer may
 - (1) return child to setting from which he/she was removed; or
 - (2) remove the child to an IAES for up to 45 days if the

hearing officer deems that the child is "substantially likely to injury him/herself or others" if he/she remains in the current placement. 20 U.S.C. § 1415(k)(3)(A) and (B).

- (3) This is a change from IDEA 97 which permitted the hearing officer to place a child in an IAES only after considering several factors, including the school's reasonable efforts to minimize the risk of harm. IDEA 2004 does not require this level of scrutiny.
- (4) The regulation gives the hearing officer the same authority to remove a child. However, the regulation qualifies the authority of a hearing officer to return a child back to his or her placement. The regulations state that a hearing officer can return a child if there was a violation of §300.530 (authority of school personnel to discipline students) or the child's behavior was a manifestation of the child's disability. 34 C.F.R. § 300.532(b).

4. Hearings re: Placement and Manifestation Review

- a. The SEA or LEA must arrange an expedited hearing.
- b. The due process procedures in an expedited hearing must follow those in a typical due process hearing. (requirements of 300.507 and 300.508), except that the sufficiency provision of 300.508(d) do not apply in expedited due process hearings. The rights and requirements of sections 300.510-514 apply as well (resolution sessions, due process hearing process—impartial hearing officer, timelines, hearing rights, hearing decisions and appeal rights). The other exception is that the timeline for the hearing is different in expedited hearings (20 school days as per statute) and the regulations set out a resolution process for discipline hearings. 34 C.F.R. 300.532(c).
- c. 300.532(c)(3)- A resolution meeting must occur within 7 days of when the due process complaint was received unless the parties agree to waive it or agree to go to mediation. If the issue is not resolved within 15 days of receipt of the complaint the hearing may proceed. However, the hearing must occur within 20 school days of filing the complaint (the statute says the hearing takes place 20 days

from the date the hearing is requested, so to be consistent with the statute the term filed in the regulations must mean the “date the hearing was requested.”).

- d. The Comments to the regulation appear to modify the timeline for the expedited hearing. The Comments state that after 15 days, if there is no agreement a hearing may commence. However, because the statute requires that the hearing must take place within 20 school days, the regulation may not change that time frame. Therefore, the expedited hearing must take place within 20 school days of filing.
- e. The child remains in the IAES during the pendency of the hearing unless the hearing process is longer than the time period of suspension or the LEA and the parent otherwise agree. 20 U.S.C. § 1415(k)(4).

C. BIP/FBA's

- 1. A behavior management plan is used to pro-actively address the student's appropriate behaviors.
- 2. It is based on a functional behavioral assessment (FBA).
- 3. A FBA is an assessment that attempts to determine what purpose the behavior serves for the student and to find alternative ways for the student to fulfill the same need.
- 4. Repeated suspensions not only fail to teach the student appropriate alternatives-- they can also cause the student to fall behind academically, resulting in lowered self esteem and the increased likelihood that the student will either stop trying or drop out of school.
- 5. Behavioral intervention plans (BIPs) may be created for any student upon the direction of the IEP team.
 - a. In fact, the regulations require that FBA/BIP be considered if the child has behavior problems.
 - b. They are also required for all students who have been excluded from school for more than ten days or have had a change of placement.