

**2008**

**Nebraska/Kansas Regional Special Education Law Conference**

**Parent Issues - Strategies for Securing a FAPE**

**November 6<sup>th</sup> and 7<sup>th</sup>**

**Deborah A. Mattison, Esq.  
Wiggins, Childs, Quinn & Pantazis, LLC  
The Kress Building  
301 19<sup>th</sup> Street North  
Birmingham, Alabama 35203  
(205) 314-0561  
Fax: (205) 254-1500  
dmattison@wcqp.com**

## I. WHAT LAWS MAY APPLY?

- A. **Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400, et seq., and state statues implementing IDEA.**
- B. **' 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. 34 C.F.R. 104.1 et. seq., and Title II of the American's with Disabilities Act, 42 U.S.C. 12131 et seq.,** and, any state statute prohibiting discrimination. **' 504 and the ADA** authorize certain types of remedies, such as **damages**, which may be more readily available than the remedies generally available under IDEA.
- C. **It is important to check State rules regarding any eligibility criteria. Numerous states have separate, and sometimes conflicting, eligibility requirements.** Remember, states are free to broaden the definition of a particular disability. However, states cannot define a disability category more narrowly.

## II. DOES THE STUDENT QUALIFY FOR SERVICES?

- A. **The eligibility requirements contained in IDEA, ' 504 and/or Title II of the ADA are different. The definition of who is Adisabled@ is a legal definition.**
- B. The Federal Regulations implementing **IDEA define "a child with a disability"** as a student who is properly evaluated in accordance with the regulations and who is found to have a disability which results in the need for special education and related services. 34 C.F.R. ' 300.8. The Regulations include several categories of disabilities, each which specifically define the criteria a student must meet in order to be deemed eligible for services under that particular category. It is possible for a student to have a disability and not be entitled to special education services.
- C. **Child Find and Eligibility.** A district has the duty to identify, evaluate and serve children under IDEA, irrespective of the severity of the student=s disability, whether the child is under the jurisdiction of any other entity, whether the student has ever attended school or irrespective of whether the student is advancing from grade to grade. 34 C.F.R. 300.125.
  - 1. *Robertson County School System v. King*, 24 IDELR 1036 (6<sup>th</sup> Cir. 1996) **(A parent who is a Aneophyte@ to special education cannot be expected to appear and say >My child is eligible for special education services under IDEA and I am here to refer my child for an individual assessment.** A request for a special education evaluation and services is implied when a parent informs a district that the child may have special needs. Since the district failed to evaluate a student with disabilities within its jurisdiction, it was responsible for tuition reimbursement).

2. *Scruggs v. Meridian Bd. of Educ.*, 48 IDELR 158 (D.C. Conn. 2007) **A district violated IDEA when it failed to refer a student for special education services, due to the student=s difficulty with behavior and attendance.** Parents could proceed with their claim for damages under 42 USC 1983, as the child committed suicide after a series of bullying incidents).
3. *Peacock v. Little Rock School District*, 46 IDELR 284 (E.D. Ark. 2006). (In granting attorney=s fees to the father as the prevailing party in the action, the court adopted language from the hearing officer=s final order which characterized the district as attempting to Acircumvent the IDEA due process requirements by not identifying the child as eligible for special education services.@ **The child=s psychological evaluation and diagnosis, history of failing grades, history of attendance problems and history of disciplinary actions, (the school itself described the child as having a disability when it provided him with services under Section 504) should clarified the student=s eligibility).**
4. *M.R.I. v. Maine Sch. Admin. Dist. #55*, (1<sup>st</sup> Cir. 2007); 2007 WL 641988 **(Identifies that whether a student is eligible for services under IDEA is dependent upon whether the student=s condition has an adverse effect on educational performance. No significant adverse effect is required.** Great case. Involves a student with autism. The definition of education is not limited to academics and includes socialization. Education is not limited to things which are graded).
5. **District responsible for evaluating students who are chronically absent.** *West Lion*, 48 IDELR 232 (SEA IA 2007).
6. *Draper v. Atlanta Independent School System*, 49 IDELR 211 (11<sup>th</sup> Cir. 2008). (The 11<sup>th</sup> Circuit upheld compensatory education placement at private school for district that allowed student with a reading disability to languish for several years. The district also failed to specifically identify the child=s specific learning disability for several years).
7. *Dept. of Educ. of Hawaii v. Cari*, 158 F.Supp. 2d 1190, 35 IDELR 90 (D. Ha. 2001) (A district is on notice that a child may have a disability if the child=s behavior or performance demonstrates a suspicion of the need for service. AThe Child Find provision applies to, among others, students who are **suspected** of being a child with a disability. . . and in need of special education, even though they are advancing from grade to grade.@). A . . . (T)he threshold for >suspicion= is relatively low, and the inquiry (is) not whether or not she actually *qualified* for services, but

rather, whether she should be referred for an evaluation@).

8. *Wiesenberg v. Board of Education of Salt Lake City, School District 181*. F. Supp. 2d 1307, (D.C. Ut 2002). (Denying a motion to dismiss, the court found that a district should have suspected a student had a disability based on the student=s previous educational records and communications between district staff. Here the student had previously been in special education and had behavior problems.)
9. *Hicks v. Purchase Line School District*, 251 F.Supp. 2d, 1250, 39 IDELR 92 (D.C. Penn. 2003)(A parent did not have a duty to identify, locate or evaluate the student pursuant to IDEA. This obligation falls squarely upon the district. The Court of Appeals has clearly held that **>(a) child=s entitlement to special education should not depend upon the vigilance of parents (who may not be sufficiently sophisticated to comprehend the problem)** nor be a bridge because the district=s behavior did not rise to the level of slothfulness or bad faith).
10. *Scott v. District of Columbia*, 45 IDELR (D. D.C. 2006) (School **district unsuccessfully argued that it was not required to evaluate a student for eligibility for services under IDEA, because a parent Awent along@ with alternative strategies designed to assist the child**).
11. *Inquiry to Barnett*, 18 IDELR 1235 (OSEP 1991) (A district has an affirmative obligation to evaluate a student once it knows or suspects that a child may have a disability under IDEA).
12. *Gerstmyer v. Howard County Public Schools*, 20 IDELR 1327 (D.C. Md. 1994) (A district denied a child a FAPE when it failed to evaluate a student in need of special education services).
13. *Flowers v. Martinez Unified School Dist.*, 19 IDELR 898 (N.D. Cal., 1993) (**District violated IDEA when it failed to diagnosis a student=s dyslexia and then failed to consider an independent educational evaluation when it revised the student=s IEP.**)

**D. Factors which may give rise to the existence of a disability.**

1. Academic failure - a caution against assuming that the student is able to perform at a higher level.
2. Behavior problems - avoid being an Aarmchair psychologist.@
3. Difficulty with socialization and/or making friends.

4. Attendance.
5. History of receiving counseling or psychiatric hospitalization.
6. A medical diagnosis.

**E. Evaluations must be comprehensive. Are the evaluations administered and interpreted in accordance with the evaluator=s manuals? Does the evaluation unfairly test the student=s disability?**

**G. The duty to reevaluate.**

1. A student eligible for IDEA services must be reevaluated at least once every three years, or more often if conditions warrant. 42 U.S.C. 1414(a)(2), 34 CFR 300.536. "Evaluation" is defined as procedures which are used to determine whether a student has a disability and, if so, the nature and extent of her need for special education and related services. 34 CFR 300.500(b)(2). The term "reevaluation" generally means a comprehensive evaluation which is analogous to initial evaluation under 34 CFR 300.532. *See Letter to Tinsley*, 26 IDELR 1076 (OSEP 1990).
2. **A district can compel reevaluation of a student in certain circumstances.** *Shelby S. v. Conroe Indep. Sch. Dist.*, 45 IDELR 269 (5<sup>th</sup> Cir. 2006) (District needed to independently assess student=s medical needs and rejected parents= argument that such violated the student=s privacy rights).

**H. Working with outside evaluators/experts.**

1. **Make sure that the evaluator has sufficient information, including the school records. It is helpful for the evaluator to visit the class and talk with school staff.**
2. **When working with an outside expert, make sure he or she understands the legal concepts embodied in IDEA.** All professionals must adhere to the legal definition of the classification when determining whether a child is eligible for services.
3. **Avoid over reliance on the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*, (hereinafter DSM-IV-TR).**

4. Ask the evaluator to review the protocols.

**I. Evaluations and eligibility under ' 504 and the ADA.**

1. **The eligibility classifications under Section 504 and the ADA are broader.**
2. **A handicapped person means** any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such impairment. The person=s condition must now be examined without considering mitigating circumstances. *Sutton v. United Airlines, Inc.*, 30 IDELR 681 (1999). However, **current users of illegal drugs are excluded from protection.** *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).
3. A "Qualified Handicapped Person" includes:  
  
With respect to preschool, elementary, secondary or adult educational services, a handicapped person (i) of an age during which non-handicapped persons are provided such services, (ii) of an age during which it is mandatory under state law to provide such services to handicapped person, or (iii) to whom a state is required to provide a free appropriate public education under (idea). 34 C.F.R. 104.3(k).
4. The ADA Restoration Act

**III. DOES THE STUDENT=S IEP OFFER A FAPE?**

- A. **The Rowley standard.**
- B. **Some argue that Rowley no longer applies.** See *J.L. and M.L. v. Mercer Island School District*, 46 IDELR 273 (W.D. Wash. 2006).
- C. **Education is defined to include services designed to address mental health and socialization issues.**
  1. *North v. District of Columbia Board of Education*, 471 F. Supp. 136, IDELR 551:157 (D. D.C. 1979) (although it may be possible in some situations to determine whether a student's social, medical, and educational problems may be severable, the school district has a higher duty to provide "treatment" when "all of the student's needs are so intimately intertwined that realistically it is not possible for the court to perform the Solomon-like task of separating them."). See also, *Timothy W. v. Rochester School District*, 875 F.2d. 954, IDELR 441:393 (1st Cir.

1989); *Max M. v. Thompson*, IDELR 556:227 (N.D. Ill., 1984); IDELR 558:108 (N.D. Ill., 1986); *Doe v. Anrig*, IDELR 558:278 (D. Mass. 1989); *Chris D. v. Montgomery Bd. of Ed.*, 16 IDELR 1183 (M.D. Ala., 1990); *Brown v. Wilson Co. School Bd.*, 16 IDELR 718 (M. D. Tenn., 1990); *Taylor v. Honig*, 16 IDELR 1138 (9th Cir. 1990); *Kruelle v. New Castle Co. School Dist.*, IDELR 552:350 (3rd Cir. 1981); *Kirby v. Cabell County Bd. of Educ.*, 46 IDELR 156 (S.D. W.Va. 2006). **(The definition of Aeducation@ embraces more than academic subjects. (A student has not been provided with a FAPE simply because he or she has received passing grades or has shown minimal improvement on standardized tests.)** *Mr. I and Mrs. I. v. Maine School Administrative Decision No. 55*, 47 IDELR 121 (1<sup>st</sup> Cir. 2007) (For a student with autism, the definition of education is not limited to academics and includes socialization.) *Gagliardo v. Arlington Central School Dist.*, 45 IDELR 119 (D. NY 2006) (Student with depression and Aspberger=s, and superior intellectual abilities, required alternate setting which did not tolerate bullying); *Zyas v. Commonwealth of Puerto Rico*, 43 IDELR 246, 378 F.Supp. 2d 13 (D. P.R. 2005) (School was required to meet a student=s social needs due to his brain injury); *Board of Educ. of Montgomery Co. v. S.G., by N.G.*, 45 IDELR 93 (D. Md. 2006) (a therapeutic environment was appropriate for sixth grade student who engaged in self-injurious behavior, heard voices, and had been diagnosed with bipolar disorder); *Goleta Union Elementary Sch. Dist. v. Ordway*, 35 IDELR 246 (D. Cal. 2001).

- D. **Rowley may not apply to students with significant disabilities who are not readily progressing from grade to grade in a mainstream environment;** *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir.1988) (*Rowley* was not applicable to students who are not mainstreamed and have more severe disabilities. IDEA specifically requires that the most severely impaired students are entitled to priority services. IDEA=s goal is to promote self-sufficiency and for students with severe disabilities, this goal is critical. The court rejected the District=s argument that slow progress was sufficient because of the student=s severe disabilities). *See also, Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986); *Cypress-Fairbanks Independent School Dist. v. Michael F.*, 118 F.3d 245 (5<sup>th</sup> Cir.1997).
- E. **Remediation vs. accommodation.** What is the District doing to remediate the student=s disability? Avoid focusing too much on accommodations.
- F. Has the child progressed? Is the progress *de minimus*?
1. *Dept. of Educ., State of Hawaii v. L.K.*, 36 IDELR 36 (D.C. Ha. 2006). (The Department of Education **denied a seventh grade student a FAPE**, who had both a learning disability, as well as a behavior disorder, **when it**

**offered an IEP which addressed only the student=s behavioral deficits.** Accordingly, the court awarded tuition reimbursement. The court also remanded the award of compensatory education to the hearing officer, seeking a justification for the appropriateness of the award).

2. *Independent School District No. 701 v. J.T.*, 45 IDELR 92 (D.C. Minn. 2006). **(A district denied a student a FAPE where it was unable to show that the student had made academic progress. The student=s goals were also too vague.** The court rejected the district=s contention that, the student=s progress, solely in the area of behavior, meant that he had received a FAPE. The court found that district was obligated to provide a program which was reasonably designed to enable the student to progress both behaviorally and academically. Additionally, the student=s Aminimal increase@ in his English score from 64 to 67% did not constitute academic progress).
3. *J.L. and M.L. v. Mercer Island School District*, 46 IDELR 273 (W.D. Wash. 2006) **(Accommodations without remediation do not increase a student=s skill level and, thus, do not provide a FAPE).**
4. *D.H. v. Manheim Township School Dist.*, 45 IDELR 38 (E.D. Penn. 2005) **(A district=s failure to include goals in a certain area equated to a denial of FAPE).**
5. *Cleveland Heights, Univ. Heights v. Boss*, 144 F.3d 391, (6<sup>th</sup> Cir. 1998).(A district=s failure to have IEP in place by first day constituted a denial of FAPE).
6. *Draper v. Atlanta Ind. Sch. System*, 47 IDELR 260 (N.D. Ga. 2007)(**A district=s insistence on using a particular reading program which had not resulted in even a minimal educational benefit for three years did not satisfy the requirements of IDEA. The District failed to make appropriate adjustments to the curriculum after the child failed.** The court held that an appropriate education allows a student to make Ameasurable and adequate gains in the classroom.@ *See also J.S.K.* 941, F.2d 1573. **Further, the district IEPs were not based on accurate up-to-date information, because they were based on evaluations which were approximately four years old.** District also violated IDEA by placing a student in a regular class, which was far above his actual ability, without adequate intervention **The student=s goals and objectives were repeated on several IEPs, demonstrating lack of mastery of the skills).**
7. Failure to name specific school and IEP may force LEA to pay for residential program. A.K. by *J.K. v. Alexandria City Sch. Bd.*, 47 IDELR

245 (4<sup>th</sup> Cir. 2007).

8. *Johnson v. Lancaster-Lebanon Intermediate Unit 13*, Lancaster City School Dist., 757 F. Supp. 606 (E.D.Pa. 1991) (AA child who is regressing and whose regression can be reversed by reasonable means is not receiving sufficient >benefit= under the Act...@ Without the services provided by the parents, the student made two months progress in a year. The court credited the parents= witness over the District=s staff, who essentially just defended themselves).
9. *T.W. by McCulla*, 43 IDELR 187 (10<sup>th</sup> Cir. 1995) (Even though a student with a learning disability was passing from year to year, such did not constitute a FAPE).
10. *D.F. v. Ramapo Central Sch. Dist.*, 430 F.3d 595 (2d Cir. 2005)(Although it was careful to state that it was not ruling on the issue at this time, the court noted that evidence of a child=s progress in a private placement after the creation of the challenged IEP may be useful to consider in determining whether the IEP was Areasonably calculated to confer a meaningful educational benefit@).
11. *J. P. v. County Sch. Bd. of Hanover County, VA.*, 46 IDELR 133 (E.D. VA. 2006). (A **district=s failure to properly document a student=s progress** in that certain therapy notes were sporadic and not sufficiently detailed, meant that the district was unable to demonstrate that a student received a FAPE).
12. *Adams by Adams v. Hansen*, 632 F. Supp. 858 (N.D. Cal. 1985) (A District denied a child with dyslexia a FAPE, when the student failed kindergarten and third grade. In a twenty month period, the student only progressed four months in reading and eight months in math).
13. *Chris C. v. Montgomery County Board of Education*, 757 F. Supp. 922 (M.D. Ala. 1990) (A child had not received a FAPE because the student achieved little academically and he continued to exhibit severely disruptive behavior).
14. *Strabue v. Florida Union Free School District*, 801 F. Supp. 1164 (S.D.N.Y. 1992) (A District denied a FAPE to a student by implementing an IEP similar to those in previous years, when the child continued to read significantly below his grade level).
15. *T.H. v. Bd. of Educ. Of Palatine Community Consolidated School District 15*, 55 F.Supp.2d 830 (N.D. Ill. 1999) (A District was unable to describe

its proposed methodology was for a five-year old with autism).

16. *Board of Educ. Of the County of Kanawha v. Michael M.*, 95 F.Supp.2d 600 (S.D.W.Va. 2000) (Other than conclusory statements, the District offered no substantive proof that its proposed methodology was generally accepted in the educational community).
17. *The Board of Education of the County of Kanawha v. Michael M.*, 95 F. Supp.2d 600 (S.D. W.V., 2000) (District had failed its burden to demonstrate, either through the literature or expert testimony, that the student with autism had made reasonable progress).
18. School=s failure to include a regular education teacher on the IEP team rendered the IEP invalid due to procedural violation. *M.L. v. Federal Way Sch. Dist.*, 42 IDELR 57, 394 F.3d 634 (9<sup>th</sup> Cir. 2005).
19. *Kirby v. Cabell County Bd. of Educ.*, 46 IDELR 156 (S.D. W.Va. 2006). (Kirby involved an 18 year old student who has a learning disability, Asperger=s Syndrome, ADD and a speech and language disorder. Over the last several years, the parents had filed more than thirty complaints or requests for a due process hearing. The court recognized that **the definition of Aeducation@ embraces more than academic subjects. A student has not been provided with a FAPE simply because he or she has received passing grades or has shown minimal improvement on standardized tests.** Here, however, the court found that the student=s IEP was inadequate because it failed to state the child=s present level of academic and functional performance. Such deficiency Agoes to the heart of the IEP.@ **AWithout a clear identification of Robert=s present levels, the IEP cannot set measurable goals, evaluate the child=s progress and determine which educational and related services are needed.**@ The court=s finding was bolstered by the fact that Robert=s performance on objective tests had revealed little progress, although he had advanced Athrough grades well beyond his level of mastery and basic skills.@ Robert=s teachers testified that Robert had made academic progress, despite that he had received poor results on the standardized assessments. This constituted a Afundamental discrepancy@ which the district had failed to address in Robert=s IEPs. The court also criticized the fact that, while Robert had difficulties with written expression and math, the district decided to provide assistive technology rather than remediation in these areas).
20. *Baltimore City Public School System*, 5 ECLPR 11 (SEA MD 2007). (By placing a therapist name on an IEP meeting invitation, the District could not excuse the therapist=s absence without the parent=s consent).

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

**G. Lessons From These Cases**

1. Failure to address both academic and behavior issues.
1. Goals too vague and without goals in certain areas of weakness.
3. 64-67% increase in services or two month progress in one year does not equal progress.
4. No IEP on first day of school.
5. Insistence on same academic program without adjustments.
6. IEPs based on out-dated evaluations.
7. Repeating goals and objectives on several IEP=s.
8. District staff just defended themselves.
9. No evidence district=s methodology was generally accepted in the educational community.
10. Is there an actual methodology or formal program?
11. Compare the student=s IEP with the evaluations upon which it is based.
12. Avoid over reliance on grades to show progress. Generally, standardized assignments and criteria referenced evaluations are more accurate.
13. **Identify the program components before determining the student=s placement** - A hearing officer=s authority is broad enough to identify a placement which is different than what is proposed by either the district or a parent. *Letter to Eig*, 211 IDEA 174 (OSEP 1980).
14. **Put things in writing; but, be careful of what you write. This applies**

to e-mail.

15. **Keep a record of significant events.**
  16. **Carefully consider the decision to tape IEP meetings.**
  17. **Be pleasant. Do not make any Adispute@ be about your conduct.**
  18. Remember, that IDEA generally concerns a **student=s** entitlements. Avoid focusing too much on the parent=s compliance.
  19. *Cleveland Heights, Univ. Heights v. Boss*, 144 F.3d 391, (6<sup>th</sup> Cir. 1998).A district=s failure to have IEP in place by first day constituted a denial of FAPE.
- H. **Harassment and retaliation.** *K.R. v. School Dist. of Penn.*, 48 IDELR 216 (E.D. Penn. 2007) (Allowed a lawsuit to proceed involving harassment allegations involving a nine year old girl with autism. Parent alleged district knew about student=s assault on student and attempted to cover it up. Bad faith or gross misjudgment was not required.)
- I. **Transition Services.**
- A. Transition services defined are defined **as a coordinated set of activities** for a student with a disability that is designed with an outcome oriented process, that promotes movement from school to post school activities, including post school activities, vocational training, integrated employment (including supported employment), continuing an adult education, adult services, independent living, or community participation; 34 C.F.R. 300. 43. Transition services are required for each student beginning at age sixteen, **or younger if appropriate.**
  - B. The importance of transition services for students with disabilities.
    1. *East Penn School District v. Scott B.*, 213 F.3d 628 (3d Cir.2000), (Student=s IEP transition plan which was not based on a transition evaluation. The plan merely placed the student into existing programs with some minor adaptations. **The plan was Awoefully lacking@ in important details, such as how the student would access the community and how he would meet his personal needs).**
    2. *J.B. v. Killingly Bd. of Educ.*, 990 F.Supp. 57 (D.Conn. 1997) (The plan did not provide for a coordinated set of activities that included

instruction, community experiences and the development of employment and other post-school adult living objectives, **such as the student=s need for close supervision should not have prevented these services**).

3. *Yankton School District v. Schramm*, 93 F.3d 1369, 1374 (8<sup>th</sup> Cir.1999) (Such transition services as driver=s education, self-advocacy, and independent living skills are not beyond IDEA=s statutory scope); *San Francisco Unified School Dist.*, 29 IDELR 153 (SEA Ca. 1998) (transition services plan was inadequate where student did not attend IEP meeting, no record of student=s preferences and interests was made, and plan did not appear to be based on the student=s individual and unique needs); *Bonita Unified School District*, 27 IDELR 248 (SEA Ca. 1997) (transition services plan was inadequate as it did not include community experiences or the development of employment and other post-school adult living goals); *Portland School District*, 30 IDELR 836 (SEA Or. 1999) (school district was required to provide compensatory education where the transition services plan failed to incorporate community experiences or a statement of why such services would not be necessary).

**J. The District may have additional duties under Section 504 or the ADA.**

1. **Regardless of whether a student is eligible under IDEA, a district may have a responsibility to assure a non-discriminatory education under Section 504 of the Rehabilitation Act, 29 U.S.C. 794 and Title II of the ADA.**
2. **Under ' 504, both FAPE and accommodations may be required.**
3. Under ' 504, a district must develop due process procedures. 34 C.F.R. 104.36. But, a district must evaluate a student before any significant change in placement.

**IV. RELATED SERVICES AND ASSISTIVE TECHNOLOGY**

**A. The Definition of Arelated services@ is expansive.**

1. Related services includes **a medical evaluation** to determine the existence of a disability and need for a special education program. Otherwise, medical services are excluded. 34 CFR 300.34(a). As a rule, medical services are services required by a licensed physician. *Irving Independent School Dist. Rict. v. Tatro*, 555 IDELR 511 (1984); *Cedar Rapids*

*Community Sch. Dist. v. Garret F.*, 29 IDELR 966 (1999).

2. Under ' 504 Ahealth services@ may be appropriate to assist a child in benefitting from his or her educational program. 34 C.F.R. 104.33.
3. ACounseling@ which includes Aservices provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel," has been deemed a related service to address behavioral issues. *See Papacoda v. State of Connecticut*, 528 F. Supp. 68 (D. Conn. 1981); IDELR 552:495 (D. Conn. 1981) (There is no question that psychological services that are required to assist a student with a disability to benefit from special education are not exempt medical services.) *T.G. v. Piscataway Board of Education*, 576 F. Supp. 420; IDELR 555:391 (D. N.J. 1983), *aff=d* 738 F.2d 425 (3rd Cir., 1984), and *aff=d Appeal of Board of Educ. of Piscataway, N.J.*, 738 F.2d 420 (3rd Cir., 1984), and *aff=d Community Mental Health Center of Rutgers Medical School, College of Medicine and Dentistry of New Jersey v. Prudential Ins. Co. of America*, 738 F.2d 421 (3rd Cir., 1984) (Psychotherapy was a related service, inasmuch as it assisted the child to benefit from his educational program. The court also found that the federal language regarding the definition of related services superseded the inconsistent state which policy limited the availability of the service). *Doe v. Anriq*, IDELR 558:278 (D. Mass. 1987) (Since counseling could assist the child in benefitting from the educational program, it was a related services); *Max M. v. Thompson*, 556 IDELR 227 (N.D. Ill. 1984) (Psychotherapy is a related service only if it can be properly provided by a psychologist, versus a psychiatrist). *See also River Forrest School District No. 90 v. Illinois St. Board of Educ.*, 24 IDELR 36 (N.D. Ill. 1996).

**B. Assistive technology.**

1. *See Letter to Anonymous*, 24 IDELR 854 (OSEP 1996) (The decision as to the appropriateness of assistive technology must be made by an IEP team on a case by case basis; and, the device or service must be identified in the child=s IEP. In certain circumstances, the district may be allowed to allow the child to take the assistive technology device home.
2. *Letter to Culbreath*, 25 IDELR 1212 (OSEP 1997); *Letter to Anonymous*, 21 IDELR 1057 (OSEP 1994) (When a parent has purchased a device which is used by the district to implement a student=s IEP, the district may be required to assume liability for the device.)
3. Examples of assistive technology devices and services include **hearing aid** *Letter to Seiler*, 20 IDELR 1216 (OSEP November 19, 1993), and

**interpretive services.** *Letter to Galloway*, 22 IDELR 373 (OSEP 1994). **Glasses** may be included. *Letter to Bachus*, 22 IDELR 629 (OSEP 1995) (If a child=s IEP specifies that a child with a learning disability requires glasses to receive a FAPE, the school district must provide the glasses at no cost to the child and his or her parents). **Braille or large print documents, personal computers with speech output and optical scanners with speech output** are assistive technology devices. *Policy Guidance on Educating Blind and Visually Impaired Students*, 23 IDELR 377 (OSEP 1995). *Hayward (CA) Unified Sch. Dist.*, 21 IDELR 802 (OCR 1994). Instructions on how to use the computer may also be required, including instructions at home. **Calculators, multiplication tables, and a tape recorder** may also meet the definition. *Richland (WA) Sch. Dist. No. 400*, 22 IDELR 992 (OCR 1995). A **frequency modulated auditory training system**, *Letter to Anonymous*, 18 IDELR 1037 (OSEP 1992), and a **knee switch** to enable a student with limited use of her arms and legs and **professionals** who can provide the student with the skills needed to adapt to his or her new equipment to the IEP meeting may be included. *Colton Joint (CA) Unified Sch. Dist.*, 22 IDELR 895 (OCR 1995). **Augmentative communication** child to receive a FAPE, including an evaluation to determine the necessity of such device. *In re Child with a Disability*, 21 IDELR 749 (SEA 1994). In *Greenwood County Sch. Dist. No. 52*, 19 IDELR 355 (SEA 1992). **Pulmonary nebulizer device.** *Letter to Anonymous*, 24 IDELR 388 (OSEP 1996). Structural changes, such as lighting, cooling, and carpeting, can be assistive technology devices. *Letter to Favorito*, 24 IDELR 295 (OSEP 1996).

## V. THE LEAST RESTRICTIVE ENVIRONMENT

- A. The LRE is a separate issue from the provision of a FAPE.
- B. In *L.B. v. Nebo School District*, 379 F.3d 966, (10th Cir. 2004). The 10<sup>th</sup> Circuit found that a district proposed placement of a student in a preschool program which was attended primarily by students with disabilities, along with the provision of ABA and speech and occupational therapy, violated IDEA=s least restrictive environment mandate. The Court approved the parent=s proposed placement in a mainstream preschool due to the fact that the typical student=s provided for more appropriate role models and was more appropriate to meet these students behavior and social needs. The 10<sup>th</sup> Circuit, however, ordered an examination of whether this child actually needed 40 hours of ABA to succeed in the mainstream preschool and whether the total reimbursement would be unduly expensive. *But see*, *T.W. v. Unified School District No. 259*, 136 F.3d 122 (10<sup>th</sup> Cir. 2005) (Allowing a self contained placement for a first grade student with downs syndrom. Court followed the 5<sup>th</sup> Circuit=s analysis in *Daniel R.*

## VI. DISCIPLINE

### A. Some Preliminary Considerations.

1. Many problems can be prevented with pro-active educational strategies, such as aggressive academic remediation and a well designed behavior management program. Sometimes the problem exists because a student has not been identified as qualifying for services. Other times the student is accurately identified due to behavioral issues; but, the program lacks academic rigor.
2. Most students want to perform well. Some students lack the skills, or the motivation, to control their behavior. Spend a sufficient amount of time identifying (not guessing) what motivates the student.
3. Emotional disabilities are real disabilities. Behavioral problems can result from an emotional or a learning disability.

### B. Recent rulings involving discipline.

1. A teen=s attempt to leave building may have been related to the student=s ADHD/ODD. *Swansea Public Schools*, 47 IDELR 278 (SEA Mass. 2007).
2. Incorrect application of manifestation determination standard stops district from changing placement. *Philadelphia City Sch. Dist.*, 47 IDELR 56 (SEA Pa. 2007).
3. Student=s choking of principal with necktie fails to qualify as weapons offense. *Scituate Public Sch.*, 47 IDELR 113 (SEA Mass. 2007).
4. *Fulton County Sch. Dist.*, 49 IDELR 30 (SEA Ga. 2007) (The fact that a student was qualified under OHI did not excuse the district=s failure to consider the impact of the student=s ODD during a manifestation determination. Schools cannot cherry pick@ which information they will consider).
5. *Montgomery Board of Education*, 49 IDELR 119 (Ala. SEA 2007) (Although the hearing officer determined that the gun free school act overrode the provision in IDEA which limits certain disciplinary removal to 45 days, a hearing officer found that an 8<sup>th</sup> grader=s one year expulsion violated IDEA. The expulsion included procedural regularities and the student was not offered a FAPE).
6. Student with a disability, 49 IDELR 147 (SEA. IN 2008). **(District denied**

**FAPE to a child who had displayed inappropriate behavior due to the implementation of a point system program. The purpose of an FBA is to dissect the student=s behavior** so as to plan the most effective method for eliminating it. District=s BIP and FBA were inadequate).

7. *Belmont Public Schools*, 49 IDELR 209 (SEA MA 2007). (Hearing officer found that a district violated IDEA when it developed a BIP which required a fifth grader to Aearn his way@ back into his mainstream placement. The plan was overly restrictive and failed to include parental input. Hearing officer also found that the student would not learn to make progress on his behavior while isolated at home or in a restrictive setting).
8. *Damian J. v. The School District of Philadelphia*. 49 IDELR. (E. D. PA 2008). **(A district violated IDEAs Ahighly qualified@ teacher requirement when it used a teacher who was unqualified to manage student=s behavior. The teacher had no experience in special education, no degree in education and no teaching certificate. In spite of her lack of qualifications, she received little training at the district).**

C. **In general, OCR adopts IDEA=s procedures relative to the imposition of discipline.** See, *Revised Memorandum of Understanding Between the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS)* 202 IDELR 395 (OSEP 1987); *Gwinnet County (GA) Sch. Dist.*, 46 IDELR 202 (OCR 2006); *Suspension of Handicapped Students B Deciding Whether Misbehavior is Caused by a Child=s Handicapping Condition*, 307 IDELR 07 (OCR 1989). Recent examples where a court found a possible violation of IDEA include: *Colon v. Colonial Intermediate Unit 20*, 46 IDELR 75 (D. Pa. 2006) (student could proceed with suit under 42 U.S.C. 1983; *Waln v. Todd County School District*, 44 IDELR 131 (D. S.D. 2005) (long term suspension); *Jacobelli v. Norwin Area School District*, 45 IDELR 216 (D. Penn. 2006) (special education in alternative educational placement); *Peacock v. Little Rock School District*, 46 IDELR 284 (E.D. Ar. 2006); *R.J. v. McKinney Independent School Dist.*, 45 IDELR 9 (E.D. Tx. 2005).

D. **Practical application considerations.**

1. It may first be necessary to attempt to stabilize the student=s program, even if it does not place student in the best alternative setting. But, utilize homebound placements only as absolutely necessary.
2. Does **data** exist which demonstrates that the IEP and behavior plan were implemented with fidelity?
3. The importance of systemic observations and data collection cannot be

overstated. Include the parent and student in the plan=s development.

4. Understand the nature of positive reinforcement and effect of consequences. 34 C.F.R.300.324. It is often necessary to develop a program **to teach replacement behavior**. *Chris D. v. Montgomery Bd. of Ed.*, 16 IDELR 1183 (M.D. Ala., 1990).
5. (Language deficiencies may exasperate the behavior). When in doubt, secure a diagnostic language assessment. It may be helpful to design the behavior intervention with the input from a speech and language specialist.
6. **Have a contingency plan.** Be sure to develop an individualized behavior management program which anticipates continuing and/or worsening behavior. Programs must be revised, at a minimum, on an annual basis. They should be modified as a student progresses or fails to progress.
7. **Avoid Aone size fits all@ behavior management plans** or classroom rules, having a student sign a behavior contract that the student had no part in designing or cannot read, waiting too long for the provision of a Areward@, selecting reinforcers or consequences without sufficient analysis, abandoning the behavior plan in favor of the school code of conduct.
8. Avoid over reliance on a teacher or Abehavioral specialist@ who does not have the education and training to develop and/or implement a behavioral program.
9. Most people do not respond well when Abacked into a corner@; and this includes children. **It is okay to deliver a message with negative content if the underlying approach of the student is positive and/or respectful.**
10. **Structure the program to provide initial success.**
11. Make sure the program is consistently implemented and **data exists to demonstrate such.**
12. **Carefully examine the provision of FAPE in an alternative setting.** Does it comply with IDEA?
13. Do not assume the student=s behavior constitutes a crime.

## VII. DUE PROCESS CONSIDERATIONS

- A. Parents are entitled to an explanation as to why the district refuses to include any recommendations into a student=s finalized IEP. The district is also required to identify other options it considered and why it rejected the options. *Letter to Faustini* 32 IDELR 2006 (OSEP 1999).
1. 34 CFR 300.502(b)(2) details the steps a district must take when it receives a request for an IEE. IDEA requires that, upon a parent=s request for an IEE at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate, or pay for the IEE. *See Evans v. District No. 17 of Douglas County, Nebraska*, 841 F.2d 824 (8<sup>th</sup> Cir.1988)(**School district that neither initiated hearing nor paid for IEE after receiving IEE report must bear cost of IEE**); *Pajaro Valley Unified Sch. Dist. v. J.S.*, 2006 WL 3734289, \*3 (N.D. Cal. Dec. 15, 2006)(same); *Hyde Park Central School District v. Peter C.*, 21 IDELR 354 (S.D.N.Y. 1994)(district court upheld a state review officer=s order requiring the LEA to pay for an IEE, since the **LEA was required to initiate a hearing to establish the appropriateness of its own evaluation and it failed to do so**); *Houston Indep. Sch. Dist.*, 36 IDELR 268 (Tx. SEA 2002) (parents of a child with a disability have the **unfettered right to obtain an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency, unless the public agency initiates a hearing to show its evaluation is appropriate**); *Kent Sch. Dist.*, 18 IDELR 1324 (Wa. SEA 1992) (since the district did not request a hearing to show that its evaluations were appropriate after receiving a request for an IEE, the **district waived its right to assert any defense of its own evaluations.**) *Los Angeles Unified Sch. Dist.*, 107 LRP 45586 (2007) (**District could not assert that parent=s IEE did not meet agency criteria because the district failed to request an impartial due process hearing.** The district was require to initiate its own due process filing, as IDEA does not recognize any exception to this duty). *Letter to Kerry*, 18 IDELR 527 (OSEP 1991); *Letter to Parker*, 41 IDELR 155 (OSER S 2004) (If the district does not request a hearing, it must pay for the IEE); *Hamptden-Wilbraham Regional Sch. Dist.*, 37 IDELR 20 (Ma. SEA 2002).
  2. **A parent is not required to notify the district of his or her intent to secure an IEE, prior to the evaluation.** *Hudson v. Wilson*, 828 F.2d 1059 (4<sup>th</sup> Cir.1987) (parents are entitled to obtain an IEE and demand payment **without giving prior notice to the school district**); *Raymond S. v. Ramirez*, 918 F.Supp.1280 (N.D. Iowa 1996) (**failure of parents to notify school district prior to obtaining an IEE does not preclude reimbursement for an IEE**); *Board of Educ. of Murphysboro Comm. Unit School Dist. No. 186 v. Illinois State Bd. of Educ.*, 41 F.3d 1162 (7<sup>th</sup> Cir.1994) (parents can initiate an IEE before notifying a school district

**that they disagree with the school district=s evaluation);** *Warren G. v. Cumberland County School Dist.*, 190 F.3d 80 (3d Cir.1999) (parents= failure to express disagreement with the school district=s evaluation prior to obtaining IEE does not foreclose right to reimbursement, **since purpose of parents= obtaining the IEE is to determine whether grounds exist to challenge the school district=s evaluation**). *See also OSEP Policy Letter*, 19 IDELR 352 (1992) (while it is reasonable for a public agency to require prior notification, **it may not refuse to pay for an IEE due to lack of notice**); *OSERS Policy Letter*, 18 IDELR 527 (1991) (parents are not required to notify the LEA that an IEE is being sought, and **LEA cannot refuse to pay for an IEE due to lack of advance notice**).

3. **The fact that an IEE is obtained and used for the purposes of a due process hearing does not preclude reimbursement for the IEE.** *A.S. v. Norwalk Bd. of Educ.*, 183 F.Supp.2d 534 (D.Conn. 2002)(approving reimbursement for an IEE, although obtained in anticipation of a due process hearing, as the school district=s evaluation was shown to be inappropriate at the hearing).

B. In *Santamari v. Dallas Indep. Sch. Dist.*, 106 LRP 32273 (N.D. Tx. 2006), a court **allowed an expert to observe a classroom**, despite a district=s objection that it would violate FERPA. The court allowed the observation, but would not allow the expert access to the student=s records.

C. Effective use of resolution meetings. *D.D. v. Dist. of Columbia*, 47 IDELR 263 (D.C.D.C. 2007)(Parent did not have to accept a settlement offer which omitted attorney fees. IDEA does not preclude discussion of attorney fees at resolution sessions. Resolution session is a proper venue for discussing payment of attorney fees.)

## VIII. RELIEF

A. **The importance of exhaustion of administrative remedies cannot be overstated.** *Long v. Dawson Springs Ind. Sch. Dist.*, 46 IDELR 123 (6<sup>th</sup> Cir. 2006). *Babitz v. School Bd. of Broward County*, 135 F3d 1420 (11<sup>th</sup> Cir. 1998). *Cudjoe v. the Independent School District No. 12*, 297 F.3d 1058, (10<sup>th</sup> Circuit 2006). Parent may not bypass the administrative remedy under IDEA by bringing a claim under Section 504 for discrimination.

B. **One must relate any due process violation with the provision of a FAPE.**

C. **Compensatory education is available upon finding that a district previously denied a student services, at times, even after the student has left the district.** *Letter to Riffell*, 34 IDELR 292 (OSEP 2000) (School was required to provide

compensatory education to a student, assuming a denial of FAPE, even though the student may have left the District via a graduation from the District).

- D. *Board of Educ. of Fayette County v. L.M.*, 107 LRP 10801 (6<sup>th</sup> Cir. 2007). In a case of first impression, the Sixth Circuit held that a student=s **IEP team should not have been allowed to determine the compensatory education services due a student** who had been denied a FAPE.
- E. **The availability of damages depends on the statute relied on, as well as the circuit where the student lives.**
1. Some Circuit=s have held that parents may not utilize 42 U.S.C. 1983, or any other federal statute to secure punitive damages. *L.C. v. Utah State Board of Education*, 43 IDELR 29 (10<sup>th</sup> Cir. 2005).
  2. **Section 504 allows compensatory damages for intentional discrimination.** *Moseley v. Albuquerque Public Schools*, 47 IDELR 211 (10<sup>th</sup> Cir. 2007).