

THE GENERAL EDUCATORS' ROLE IN SPECIAL EDUCATION

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I. LEARNING OBJECTIVES

- A. This outline provides an overview of each school district and charter school's obligation to provide children with disabilities under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) with a free appropriate public education (FAPE).
- B. This outline provides an overview of the general educator's role in special education, including child find obligations, IEP team membership, evaluation process, IEP development, least restrictive environment (LRE) requirements, reporting of student achievement, possible personal liability, and ethical obligations.

II. LEGAL STANDARD FOR THE PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

A. Federal Law Definitions.

- 1. A "free appropriate public education" is statutorily defined as special education and related services that:
 - a. Are provided at public expense, under public supervision and direction, and without charge;
 - b. Meet the standards of the State educational agency, including IDEA Part B requirements;
 - c. Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

- d. Are provided in conformity with an IEP that meets the requirements of 34 CFR §§300.320 through 300.324 [IEP development, review and revision, IEP team, and parent participation]. 20 U.S.C § 1401(9); 34 CFR 300.17
2. “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. 20 U.S.C. § 1402(25); 34 CFR 300.39.
3. “Specially Designed Instruction” is defined as adapting, as appropriate, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child’s disability and to ensure the child’s access to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that applies to all children. 20 U.S.C § 1401(29); 34 CFR 300.39(b)(3).
4. “Related Services” is defined as transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation; early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling; orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. Exception: Services that apply to children with surgically implanted devices, including cochlear implants. 34 C.F.R. § 300.34.

B. Federal Regulations

1. Procedural violations are a violation of a free appropriate public education (FAPE) only if the procedural inadequacies:
 - a. Impeded the child’s right to a FAPE;
 - b. Significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or
 - c. Caused a deprivation of educational benefits. 34 C.F.R. § 300.513.

II. FAPE CASE LAW

- A. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

1. Amy Rowley was a deaf student attending a New York public school. She had minimal residual hearing and was an excellent lip reader. In first grade, an IEP was provided that placed Amy in the regular classroom, provided use of an FM device, and instruction from a tutor for the deaf for an hour a day and from a speech therapist for 3 hours a week.
2. Amy's parents agreed with portions of the IEP but insisted that Amy also needed a qualified sign language interpreter in all her academic classes. An interpreter had been placed in Amy's kindergarten class for a 2-week trial and reported that Amy did not need this service.
3. Amy's parents requested an administrative hearing. The hearing officer held for the school district. The district court, however, found that Amy was not being provided a FAPE; that decision was upheld by the 2nd Circuit Court of Appeals. The case was then appealed to the Supreme Court of the United States (SCOTUS or Court).
4. The Court rejected the lower court's decision that a free appropriate public education consisted of "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." Such a standard would have required "that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children."
5. The Court found that Congress sought primarily to make public education available to children with disabilities but did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Further, Congress recognized that the provision of special education and related services was not a guarantee to produce any particular outcome. The intent of the IDEA was to open the door of public education to children with disabilities on appropriate terms; it did not guarantee any particular level of education once inside.
6. The Court held that "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child."
7. The *Rowley* standard identified by the Court: "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more":
 - a. Has the State [school district/charter school] complied with the procedures set forth in the Act? and
 - b. Is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

8. In assuring that the *Rowley* standard requirements are met, “courts must be careful to avoid imposing their view of preferable educational methods upon the States. 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 guardian of the child.”
 9. The *Rowley* standard did not establish one particular test for educational benefit, which resulted in lower courts applying different tests, including “merely more than *de minimus*” and “meaningful educational benefit.”
- B. *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).
1. Andrew was a child with autism and attended public school from kindergarten through 4th grade. His parents rejected his 5th grade IEP because they felt it was basically the same as the previous IEPs and Andrew’s academic and functional progress had stalled.
 2. Andrew’s parents withdrew him from public school and placed him in a private school that specialized in educating children with autism. Andrew’s behavior improved in the private school. His academic goals were strengthened and he thrived in the new educational environment.
 3. Andrew’s parents sought reimbursement for their private school placement and requested a due process hearing. The hearing officer found for the school district, as did the district court and the 10th Circuit Court of Appeals.
 4. The 10th Circuit of Appeals determined that Andrew was only entitled to an educational program that was calculated to provide “merely more than *de minimis*” educational benefit. The matter was appealed to the SCOTUS.
 5. The SCOTUS further defined the *Rowley* standard: “While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”
 6. “This standard [Rowley standard] is markedly more demanding than the ‘merely more than *de minimis*’ test applied by the Tenth Circuit. It cannot be the case that the Act [IDEA] typically aims for grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than *de minimis* progress for children who cannot.”

7. “[A] student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly...awaiting the time when they were old enough to ‘drop out.’” Rowley, 458 U.S., at 179 (some internal quotation marks omitted). The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”
8. The Court did not attempt to establish a bright-line test on what “appropriate” progress as what it will like may differ from case to case. “The adequacy of a given IEP turns on the unique circumstances of the child for whom it is created.”
9. Courts were instructed not to substitute their own notions of sound educational policy, but rather give deference based on the expertise and the exercise of judgment by school authorities, in consultation with parents. A review of an IEP is to determine whether it is reasonable; not whether the Court regards it as ideal.

III. U.S. DEPARTMENT OF EDUCATION FAPE GUIDANCE

- A. **Question and Answer on U.S. Supreme Court Case Decision *Endrew F. v. Douglas county School District Re-1* (12/7/17).**
 1. Clarification of the standard for determining FAPE and educational benefit: In *Endrew F.*, the SCOTUS clarified that ALL students, including those performing at grade level and those unable to perform at grade level, must be offered an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” This is a more demanding standard than the “merely more than *de minimis*” test. The Department quoted *Endrew F.*, which stated that “every child should have the chance to meet challenging objectives.” Q.7
 2. The *Endrew F.* standard applies to all students: The standard of *Endrew F.* applies regardless of the child’s disability, age, or current placement and must be applied prospectively in all IDEA cases. Q.8-9.
 3. Definition of “reasonably calculated”: This standard recognizes that the development of an appropriate IEP requires prospective judgement by the IEP team. School personnel will make decisions that are informed by their own expertise, the progress of the child, the child’s potential for growth, and the views of the child’s parents. The IEP team should consider:
 - a. How special education and related services, if any, have been provided to the child in the past – including the effectiveness of

- specific instructional strategies and supports and services with the child;
- b. The child's previous rate of academic growth;
 - c. Whether the child is on track to achieve or exceed grade-level proficiency;
 - d. Any behaviors interfering with the child's progress.
4. Definition of "progress appropriate in light of the child's circumstances": An IEP's essential function is to provide a child with meaningful opportunities for appropriate academic and functional advancement, and to enable the child to make progress. Progress must be appropriate in light of the child's 'unique circumstances.' This includes providing instruction that is "specially designed" to meet a child's unique needs through an IEP. Although the Court in *Andrew F.* did not specifically define "in light of the child's circumstances," it did state that the IEP team, which includes the child's parents, must give "careful consideration to the child's present levels of achievement, disability, and potential for growth." Q. 11.
5. Ensuring that every child has the chance to meet challenging objectives: The IEP for each child with a disability must include annual goals aimed at improving educational results and functional performance. "This inherently includes a meaningful opportunity for the child to meet challenging objectives." As stated in *Andrew F.*, "the IEP must aim to enable the child to make progress. The determination of an appropriate and challenging level of progress is an individualized determination unique to each child. The IEP team must consider: The IEP must include, among other information:
- a. The child's present levels of performance;
 - b. Other factors such as the child's previous rate of progress; and
 - c. Any information provided by the parents. Q. 12.
6. Determination of annual goals that are "appropriately ambitious": In *Rowley*, the Court stated that "advancement from grade to grade is appropriately ambitious for most children in the regular classroom." However, the Court also recognized that while these "goals may differ...every child should have the chance to meet challenging objectives." A child's IEP must be designed to enable the child to be involved in, and make progress in, the general education curriculum, defined as the same curriculum as for nondisabled children and is curriculum based on a State's academic standards. "This alignment, however, must guide, not replace, the individualized decision-making required in the IEP process. This decision-making continues to 'require

careful consideration of the child's present levels of achievement, disability, and potential for growth..." Q. 14.

7. Implementing the *Endrew F.* standard for children with the most significant cognitive disabilities: A small number of children with the most significant cognitive disabilities have their performance measured against alternate academic achievement standards which align with the State grade-level content standards. The annual IEP goals for these children should be appropriately ambitious and be 'reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. Q. 14.
8. When a child is not making progress at the level expected by the IEP team: "An IEP is not a guarantee of a specific educational or functional result for a child with a disability." If a child is not making expected progress, the IEP should be revisited at least once a year, and more often throughout the school year, if circumstances warrant it. The child's parents have the right to request an IEP team meeting at any time. If the child is not making progress at the level expected by the IEP team, the team must meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate interventions, special education and related services and supplementary aids and services, and to ensure the IEP's goals are individualized and ambitious. Q. 15.
9. The provision of positive behavioral interventions and supports: If necessary to provide FAPE, a child's IEP must include consideration of behavioral needs, including appropriate behavioral goals and objectives and other services if a child's behavior impedes his learning or the learning of peers. Q. 16.
10. Placement decisions: "There is no 'one-size-fits-all' approach to educating children with disabilities." Placement in regular classes may not be the least restrictive placement for every child with a disability. A continuum of alternative placements must be available. Q. 17.
11. The effect of the *Endrew F.* case on IEP teams: IEP teams should make sure the following are in place to enable a child to make progress appropriate in light of a child's circumstances and enable the child to have the chance to meet challenging objectives:
 - a. Policies, practices and procedures relating to identifying present levels of academic achievement and functional performance;
 - b. Policies, practices and procedures related to the setting of measurable annual goals, including academic and functional goals;

- c. Policies, practices and procedures related to how a child's progress toward meeting annual goals will be measured and reported to meet the *Andrew F.* standard;
- d. Special education and related services and supplementary aids and services;
- e. Program modifications as needed;
- f. Appropriate supports are provided for school personnel;
- g. Allowing for appropriate accommodations. Q. 18.

IV. CHILD FIND REQUIREMENTS

A. Statutory Obligations

- a. Each state is required to have policies and procedures in place to ensure that:
 - a. All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and
 - b. A practical method is developed and implemented to determine which children are currently receiving needed special education and related services. 34 C.F.R. § 300.111
 - c. Child find procedures must include children who are suspected of being a child with a disability and are in need of special education, even though they are advancing from grade to grade.

B. Child find is an affirmative obligation

- 1. Child find is an affirmative obligation; a parent is not required to request that a district identify and evaluate a child. *Robertson Co. Sch. Sys. V. King*, 24 IDELR 1036 (6th Cir. 1996).
- 2. A district may not take a passive approach and wait for others to refer the student for special education services; the district must seek out IDEA-eligible students. *Compton Unified Sch. Dist. v. Addison*, 54 IDELR 91 (9th Cir. 2010; cert. denied, 132 S. Ct. 996, 112 LRP 1321 (2012)).
 - a. The Ninth Circuit Court of Appeals noted that the IDEA allows parents to file complaints for “any matter” relating to a child’s

- identification or evaluation—including a district's failure to act. In addition to failing all her courses, the teenager colored with crayons, played with dolls, and urinated on herself in class.
- b. Since the mother did not want the child "looked at," the district decided not to "push."
 - c. The student's behaviors, coupled with the student's poor grades, should have prompted the district to evaluate the student.
 - d. The Ninth Circuit found that "refuse" means "to show or express an unwillingness to do" and noted that the district's "willful inaction in the face of numerous 'red flags' is more than sufficient to demonstrate its unwillingness and refusal to evaluate" the student.
 - e. The Ninth Circuit concluded that the school district's decision to ignore the student's disability amounted to a child find violation.
 - f. A school district's lack of awareness of a student's possible disability and need for special education and related services will not relieve the district of its child find obligation if it should have suspected that a student might have a disability.
3. Student status: A child is not automatically eligible for services under the IDEA if identified through the child find process. Child find is a location and screening process used to identify those children who are potentially in need of special education and related services. Children so identified must then undergo the initial evaluation to determine eligibility. *See Department of Educ. v. Cari Rae S.*, 35 IDELR 90 (D. Haw. 2001); *Lakin v. Birmingham Pub. Schs.*, 39 IDELR 152 (6th Cir. 2003); *N.G. v. District of Columbia*, 50 IDELR 7 (D.D.C. 2008).
 4. Failure to identify ramifications: Failing to meet child find requirements is a matter of serious concern that can deprive FAPE to a student that a district should have identified. This failure to identify may entitle the student to compensatory education or tuition reimbursement accruing from the time the district first should have suspected the disability. *Lakin v. Birmingham Pub. Schs.*, 39 IDELR 152 (6th Cir. 2003); and *Department of Educ. v. Cari Rae S.*, 35 IDELR 90 (D. Hawaii 2001).

C. Response to Intervention

1. A response to intervention (RTI) process does not replace the need for a comprehensive evaluation, and a child's eligibility for special education services cannot be changed solely on the basis of data from an RTI process.
 - a. "In some instances, local educational agencies (LEAs) may be using Response to Intervention (RTI) strategies to delay or deny a timely initial evaluation for children suspected of having a disability." "States and LEAs have an obligation to ensure that evaluations . . . are not delayed or denied because of implementation of an RTI strategy." *Memorandum to State Directors of Special Educ.*, 111 LRP 4677 (OSEP 01/21/11).
 - b. In *El Paso Indep. Sch. Dist. v. Richard R. ex rel. R.R.*, 50 IDELR 256 (W.D. Tex. 2008) a federal court noted that a Texas district repeatedly referred a student with ADHD for interventions rather than evaluate the student's IDEA needs. The court concluded that the district violated its child find obligations and upheld a due process decision in the student's favor.
 - (1) The IDEA requires districts to evaluate students suspected of having disabilities that require special education services. Thus, when a district has reason to believe a student has a disability, it must evaluate the student within a reasonable time.
 - (2) The district maintained that it fulfilled its child find obligations by providing interventions recommended by its Student Teacher Assessment Team. Those interventions included Section 504 accommodations, additional tutoring, and Saturday tutoring camps.
 - (3) The court pointed out that the interventions did not demonstrate positive academic benefits. Not only did the student continue to struggle in reading, math and science, but he also failed the Texas Assessment of Knowledge Skills test for three years in a row.

D. General Education Teacher Role

1. General education teachers need to fully understand their child find obligations and the requirement to make a student referral, following district policy.
2. General education teachers may not ignore or disregard their child-find obligations.
3. Even though a student may be going through the RTI process, a referral for a special education evaluation can be made. The RTI process and evaluation process can occur simultaneously.

V. EVALUATION TEAM & IEP TEAM PROCESS**A. Ensure Complete IEP/Evaluation Team is in Attendance.**

1. A school district determines the specific personnel to fill the roles of the required school participants at the IEP team meeting. 71 Fed. Reg. 46674 (Aug. 14, 2006).
2. Required IEP Team Members include not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment). 34 CFR 300.321 (a).
 - a. There is no requirement to have all the student's teachers in attendance. Teachers can be rotated into the meeting.
 - b. Districts must ensure that the individual designated to fulfill the role of general education teacher at an IEP meeting has the qualifications to do so. Failure to provide a general education teacher can result in depriving the student FAPE by failing to convene a proper IEP team meeting.
 - c. Look to individual state requirements regarding IEP team composition. In one case, the individual chosen to serve as the general education teacher on a student's IEP team did not need to be the student's current teacher. However, the individual selected must have worked with the student. *A.G. v. Placentia-Yorba Linda Unified Sch. Dist.*, 52 IDELR 63 (9th Cir. 2009, unpublished).
 - d. Although the general education teacher on the student's IEP team had never taught the student, she would be responsible for implementing the student's IEP. As such, the court held that she was an appropriate member of the IEP team. *Hensley v. Colville Sch. Dist.*, 51 IDELR 279 (Wash. Ct. App. 2009), cert. denied, 110 LRP 10834, 130 S. Ct. 1517 (2010).

- e. The failure to include at least one general education teacher on a child's IEP team may result in a deficient IEP. *See, e.g., M.L. v. Federal Way Sch. Dist.*, 42 IDELR 57 (9th Cir. 2004), *cert. denied*, 112 LRP 8049, 545 U.S. 1128 (2005) (Because the student might have been placed in an inclusion classroom, the district erred in holding an IEP meeting without a general education teacher. The court found that failure to have the regular education teacher created a “critical structural defect.”)
- f. The IEP team may excuse the participation of the general education teacher in some unique circumstances. 34 CFR 300.321 (e)(2). *See* discussion of excused IEP team members below.
- g. A California district did not violate the IDEA when it asked an assistant principal who taught a Spanish class to serve as the general education teacher on a high schooler's IEP team. The 9th Circuit Court of Appeals affirmed the District Court's ruling that the student's proposed IEP was procedurally and substantively appropriate. *Z.R. v. Oak Park Unified Sch. Dist.*, 66 IDELR 213 (9th Cir. 2015, *unpublished*)
- h. If a district considers placing a student in regular education, it must invite a general education teacher to the student's IEP team. This rule applies even if the student is not currently taking any regular courses. In *Lincoln County Sch. Dist.*, 65 IDELR 59 (SEA OR 2015), the district allegedly conducted a 15-year-old's IEP meeting without a general education teacher in attendance even though the teen was enrolled in a regular health class after the meeting. Although the district claimed that a learning specialist signed the 10th-grader's IEP as his regular education teacher, she did not have a license to teach general education classes.

B. Excused IEP team members.

1. Excusing an IEP member “in whole or in part” requires a written agreement with the parent. 34 C.F.R. § 300.321(e). Make sure the case manager receives a signature from the parent on the written agreement before the IEP team meeting begins. If the parent refuses to sign a written agreement to excuse a required IEP team member the meeting must be cancelled and rescheduled when a full team can meet.
2. A written summary of input prior to the IEP meeting is required to be provided to the parent when an excused IEP team member's area of the curriculum or related services will be modified or discussed at the IEP meeting. 34 C.F.R. § 300.321(e)(2).

3. The early departure of the teachers from an IEP meeting without the parent's written consent was a violation of the IDEA. *Anoka-Hennepin Independent School District #011*, 114 LRP 37490 (SEA MN 3/3/14).
4. There is no requirement to obtain parental consent to excuse multiple general education teachers from an IEP meeting if at least one regular education teacher of the child remains in attendance. *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 9/1/11).

C. Participation in the development, review and revision of an IEP.

1. To the extent appropriate, general education teachers are required to participate in the development of the IEP of a student, including:
 - a. The determination of appropriate positive behavioral interventions and supports and other strategies for the student; and
 - b. The determination of supplementary aids and services, program modifications and support for school personnel. 34 CFR §300.324(a)(3). These can include:
 - i. Supplementary aids and services based on peer-reviewed research, to the extent practicable;
 - ii. Program modifications or supports for school personnel to enable the student:
 1. To advance appropriately toward attaining the annual goals;
 2. To be involved in and make progress in the general education curriculum;
 3. To participate in extracurricular and other nonacademic activities; and
 4. To be educated and participate with other students with disabilities and nondisabled students in above-mentioned activities. 34 CFR 320(a)(4).

D. General Education Teacher Role.

1. Recognize that in most cases, a general education teacher of the student with disabilities is required to attend all IEP meetings.
2. Have an understanding of the general education teacher's obligations as identified in the student's IEP.

3. If necessary, meet with the special education teacher/case manager before the scheduled IEP meeting to gather information regarding what will be discussed at the upcoming IEP meeting and the teacher's role at the meeting.
4. Come prepared to discuss a student's achievements and progress in the general education classroom.
5. Be prepared to discuss how you have implemented the student's IEP in the classroom.
6. Be prepared to participate in the development of the IEP of a student, including:
 - a. The determination of appropriate positive behavioral interventions and supports and other strategies for the student; and
 - b. The determination of supplementary aids and services, program modifications and support for school personnel.
7. Have a working knowledge of peer-reviewed research that may relate to a particular student's needs.
8. If a regular education teacher is unable to attend a scheduled IEP meeting, the meeting can be held only if the parent signs an agreement excusing the regular education teacher.
9. If the regular education teacher's area will be discussed and the teacher cannot attend, a written report must be provided to the parent prior to the IEP meeting.
10. If there is only one regular education teacher present at the IEP meeting and the teacher wishes to be excused before the end of the meeting, a written agreement must be signed with the parent.

VI. EVALUATION REQUIREMENTS

A. Federal Law Requirements.

1. The Individuals with Disabilities Education Act (IDEA) requires each public agency to conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. 34 CFR 300.301(a).
2. Either a parent or the district may initiate a request for an initial evaluation to determine if the student is a child with a disability. 34 CFR 300.301(b).

3. Informed parental consent for an initial evaluation is required. 34 CFR 300.300.
4. A functional behavioral assessment is an evaluation and requires parental consent. *Questions and Answers on Discipline Procedures*, 52 IDELR 231(OSERS 2009).
5. An initial evaluation is required to be conducted within 60 calendar days of receiving parental consent for the evaluation, or within a state-specific timeline, which cannot exceed 60 calendar days. 34 CFR 300.301(c). This timeline does not exist if:
 - a. A parent repeatedly fails or refuses to produce the student for evaluation; or
 - b. A student enrolls in another school district after the relevant timeframe has begun, and prior to a determination by the prior district regarding whether the student is a child with a disability. 34 CFR 300.301(d).
6. A district is not required to conduct an evaluation for every request. However, if a district refuses to evaluate, parents must be given notice of that decision. 34 CFR 300.503(a)(2).
7. Districts have an affirmative obligation to evaluate under the IDEA when there is reason to suspect that, because of a disability, a child needs special education and related services. See discussion of *N.B. v. Hellgate Elem. Sch. Dist.* below.

B. Selected Case

1. *N.B. v. Hellgate Elem. Sch. Dist.*, 50 IDELR 241 (9th Cir. 2008).
 - a. **Allegation:** The student and his parents alleged that the school district violated the IDEA by failing to meet its procedural obligation under the IDEA to evaluate the student to determine whether he was autistic, resulting in denying the student FAPE.
 - b. **Facts:** The student and his parents moved from New Jersey to Montana in August 2003.
 - c. In January 2003, prior to moving to Montana, the student was examined by a physician, who concluded that an “autistic component appears to be complicating [student’s] performance.” The student was 2 years and 10 months old at the time of the examination.

- d. The New Jersey school district designed an IEP for the student. The IEP provided for 12.5 hours of special education, including speech/language therapy 2 times per week for 30 minutes, plus individual speech/language therapy 2 times per week for 30 minutes.
- e. After the family moved to Montana in the summer of 2003, the parents hand-delivered a copy of the student's medical and educational records to the district's special education director.
- f. The district adopted the New Jersey IEP, but district personnel observed that the plan was not benefiting the student and reduced speech therapy for a 2.5 week period. The school psychologist was of the opinion that the weekly 2 hours of speech/language therapy was causing the student to "shut down" and "refuse to talk" in the classroom.
- g. On September 22, 2003 an IEP meeting was held to develop a new IEP for the student. Personnel stated they lacked sufficient information about the student's educational needs to develop specific IEP goals and objectives. The school staff had read the medical report but did not discuss it at the meeting.
- h. The IEP team determined the student should be evaluated by conducting classroom observations for approximately 6 weeks to assess speech, language, behavior, social and preschool readiness skills.
- i. On November 18, 2003 an IEP meeting was held to create an IEP. During this meeting the parents suggested that the student might be autistic. The IEP team referred the parents to a Child Development Center (CDC), where free autism testing could be performed with parental consent.
- j. On March 3, 2004, the CDC reported that the student exhibited behavior consistent with autism spectrum disorder, including significant speech and language deficits, motor skill deficits, mild cognitive deficits, and atypical behaviors.
- k. The IEP team met on March 22, 2004 in response to the CDC's diagnosis. The student's IEP was revised, increasing preschool instruction time from 5 hours per week to 12.5 hours per week beginning May 24, 2004.
- l. The IEP team met on May 7, 2004 to develop the student's IEP for the following school year and determine the student's need for ESY services. The IEP team determined ESY services were not required.

- m. The parents refused to endorse the proposed IEP and expressed their disagreement with the ESY decision. The parents did not sign the IEP and did not enroll the student in the district in September 2004. The parents then filed for a due process hearing,
- n. **Court holding:** While not every procedural violation is sufficient to support a finding that a child was denied FAPE, “procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, clearly result in the denial of FAPE.”
- o. In September 2003, the student’s IEP team members were on notice that the student likely suffered from some form of autism. “The fact that Hellgate referred the parents to the CDC shows that Hellgate was mindful that an evaluation was necessary.”
- p. “Hellgate did not fulfill its statutory obligation by simply referring [student’s] parents to the CDC. Such an action does not ‘ensure that the child is assessed,’ as required...”
- q. “A school district cannot abdicate its affirmative duties under the IDEA. . . . The failure to obtain critical medical information about whether a child has autism ‘render[s] the accomplishment of the IDEA’s goals – and the achievement of FAPE – impossible.’” [Citation omitted].

C. General Education Teacher Role

- 1. The use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student is required for the evaluation process.
- 2. A teacher or educational specialist may screen a student to determine appropriate educational strategies for curriculum implementation. 34 CFR 300.302.
 - a. A screening is not considered an evaluation and parental consent is not required.
 - b. While a screening is not an evaluation, it can be used in the evaluation process to provide relevant information to the IEP team.
- 3. A general education teacher may be requested to complete various assessments being administered as part of the evaluation process, and to provide academic, behavioral and social information about the student.

4. Parental consent is not required to review existing data or administer a test or other evaluation that is administered to all children without parental consent. 34 CFR 300.300(d).
5. The general education teacher must help the district comply with its 60-calendar day timeline for an evaluation by providing requested information promptly and accurately.

VII. LEAST RESTRICTIVE ENVIRONMENT REQUIREMENTS

A. Federal Law Requirements.

1. The Individuals with Disabilities Education Act (IDEA), provides specific requirements for the “least restrictive environment” (LRE) for students with disabilities.
2. The terms “inclusion” and “mainstreaming” are not found in the IDEA or the implementing regulations but are found in case law interpreting the least restrictive environment (LRE) requirement of the IDEA.
3. The federal statute provides that states must have procedures to ensure that, to the maximum extent appropriate:

[C]hildren with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(5)(A).

4. The federal regulations pertaining to least restrictive environment provides:
 - 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 nondisabled; and
 - (2) That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability 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.

- b. Each public agency shall ensure that -
 - (1) The placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;
- c. The educational placement of each child with a disability –
 - (1) Is determined at least annually;
 - (2) Is based on his or her IEP; and
 - (3) Is as close as possible to the child's home.
- d. Various alternative placements are available to the extent necessary to implement the IEP for each child with a disability.
- e. Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.
- f. 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. 34 C.F.R. § 300.116.
- g. The 1997 Amendments to the IDEA changed the IEP statement requirement concerning LRE from “a statement of . . . the extent that the child will be able to participate in regular education programs” to an “*explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. . . .*” 20 U.S.C. § 1414(d)(1)(A)(iv).
- h. The overriding requirement in this regulation is that placement decisions must be made on an individual basis and consist of the least restrictive environment. The regulation also requires each agency to have various alternative placements available in order to ensure that each child with a disability receives an education that is appropriate to his or her individual needs.
- i. The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 C.F.R. part 104, Appendix, Paragraph 24) includes several points regarding educational placements of children with disabilities that are pertinent to this federal regulation:
 - (1) With respect to determining proper placements, the analysis states: “. . . it should be stressed that, where a handicapped

child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs. . . .”

- (2) With respect to placing a child with a disability in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. School districts are required to take this factor into account in making placement decisions.
- (3) The parents’ right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

j. Nonacademic settings:

- (1) 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 the federal regulation, school districts must ensure that each child with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate to the needs of that child. The school district must ensure that each child with a disability has the supplemental aids and services determined by the IEP team to be appropriate and necessary for the child to participate in nonacademic settings. 34 C.F.R. § 300.117.

B. Selected Cases

1. *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), *cert. denied*, 129 L. Ed. 2d 813 (1994).
 - a. Rachel Holland is 11 years old and is moderately mentally retarded. She was tested with an I.Q. of 44. She attended a variety of special education programs in the District from 1985-89. Her parents sought to increase the time Rachel spent in a regular classroom, and in the fall of 1989, they requested that Rachel be placed full-time in a regular classroom for the 1989-90 school year.

- b. The District rejected the parents' request and proposed a placement that would have divided Rachel's time between a special education class for academic subjects and a regular class for nonacademic activities such as art, music, lunch, and recess. This plan would have required moving Rachel at least 6 times each day between the two classrooms.
- c. The Hollands instead enrolled Rachel in a regular kindergarten class at the Shalom School, a private school. Rachel remained at the Shalom School in regular classes and at the time the district court rendered its opinion, was in the second grade.
- d. In considering whether the District proposed an appropriate placement for Rachel, the district court examined the following factors:
 - (1) The educational benefits available to Rachel in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a special education classroom;
 - (2) The district court found that Rachel received substantial benefits in regular education and that all of her IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide.
 - (3) The nonacademic benefits of interaction with children who were not disabled;
 - (4) The effect of Rachel's presence on the teacher and other children in the classroom;
 - a. The court looked at two aspects:
 - 1. Whether there was detriment because the child was disruptive, distracting, or unruly, and
 - 2. Whether the child would take up so much of the teacher's time that the other students would suffer from lack of attention.
 - b. The witnesses of both parties agreed that Rachel followed directions, was well-behaved and was not a distraction in class.
 - (5) The cost of mainstreaming Rachel in a regular classroom.

- a. The district court found that the school district had not offered any persuasive or credible evidence to support its claim that educating Rachel in a regular classroom with appropriate services would be significantly more expensive than educating her in the school district's proposed setting.
- b. The school district contended that it would cost \$109,000 to educate Rachel full-time in a regular classroom. This figure was based on a full-time aide for Rachel and an estimate that it would cost over \$80,000 to provide school-wide sensitivity training.
- c. The court found that the school district did not establish that such training was necessary, and if it was, the court noted that there was evidence from the state Department of Education that the training could be had at no cost.
- d. Moreover, the court found it would be inappropriate to assign the total cost of the training to Rachel when other children with disabilities would benefit. In addition, the court concluded that the evidence did not suggest that Rachel required a full-time aide. The court found that the comparison should have been between, on the one hand, the cost of placing Rachel in a special class with a full-time special education teacher and two full-time aides with approximately 11 other children, and, on the other hand, the cost of placing her in a regular class with a part-time aide. It noted, however, that the district had provided no evidence of this cost comparison.
- e. The court also was not persuaded by the school district's argument that it would lose significant funding if Rachel did not spend at least 51 percent of her time in a special education class. The court noted that a witness from the state Department of Education testified that waivers were available if a school district sought to adopt a program that did not fit neatly within the funding guidelines. The school district had not applied for a waiver, however.

- e. The analysis in *Rachel H.* directly addresses the issue of the appropriate placement for a child with disabilities under the requirements of 20 U.S.C. § 1412(5)(A). The Ninth Circuit approved and adopted the test employed by the district court.
 - f. The federal district court ruled that the IDEA's preference for mainstreaming "rises to the level of a rebuttable presumption." 786 F. Supp. 874, 877-78 (E.D. Cal.1992).
2. *Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 101 F.3d 691 (3rd Cir. 1996).
- a. The parents of a eight-year-old child with Down Syndrome requested full inclusion for their son in the regular education classroom.
 - b. The school district proposed to place the student in a self-contained special education classroom due to the severity of his disability and allegations of extreme disruptive behavior in prior placements.
 - c. The 3rd Circuit stated: "We construe IDEA's mainstreaming requirement to prohibit a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom, with supplementary aids and support services, can be achieved satisfactorily. In addition, if placement outside of a regular classroom is necessary for the child to receive educational benefit, the school may still be violating IDEA if it has not made sufficient efforts to include the child in school programs with nondisabled children whenever possible."
 - d. To determine whether a student with disabilities can be educated satisfactorily in the regular classroom with supplemental aids and services, the following factors must be considered:
 - 1. Whether the district made reasonable efforts to accommodate the student in the regular classroom;
 - 2. The educational benefits available to the student in the regular classroom, with the use of appropriate supplementary aids and services and the benefits the student will receive in the segregated, special education classroom;
 - a. When making this comparison special attention to the unique benefits a child may obtain from integration in regular classroom which cannot be achieved in a segregated environment, such as the development of social and communication skills

- from interaction with nondisabled peers must be considered.
- b. A determination a student with disabilities might make greater academic progress in a segregated special education class may not warrant excluding that child from a regular classroom environment.
3. The possible negative effects the student's inclusion in the regular classroom might have on the other students in the classroom.
 - a. If a student is causing excessive disruption of the class, the student may not be benefiting educationally in that environment.
 - b. If a child has behavioral problems, the degree to which those problems may disrupt the class should be considered.
 - c. Whether a student's disabilities demand so much of the teacher's attention that the teacher will be required to ignore other students should be considered.
 - e. The 3rd Circuit held that the district improperly reached its placement decision for the student before considering the full range of supplemental aids and services that might have facilitated the student's regular education placement.

C. Relevant Factors to Consider for Regular Classroom Placement

1. Has the student engaged in dangerous behavior that requires intensive counseling and supports?
2. Has the student threatened the safety of himself or others?
3. Has the student caused injury to himself or others?
4. Will the student receive sufficient educational benefit in the general education classroom, with the provision of supplementary aids and services?
5. Does the student require so much of the teacher's time and attention that the student's presence in the regular classroom significantly interferes with the learning of others?

6. Does the student require modifications in the general education curriculum to the point that the curriculum is altered beyond recognition?
7. Does the student receive benefits from social interactions in the regular classroom?

D. Impermissible Factors to Consider for Regular Classroom Placement

1. Administrative convenience, such as scheduling.
2. Availability (or unavailability) of qualified and trained staff.
3. Availability (or unavailability) of educational services or related services.
4. The availability (or unavailability) of classroom space.
5. A regular education teacher's preference, such as a request not to have a particular student assigned to his/her classroom.

VIII. EFFECTIVE AND ACCURATE REPORTING OF ACHIEVEMENT

- A. Reporting of Progress:** The IDEA requires the provision of written information to parents about students' progress toward IEP goals and objectives and establishes the parental right to receive regular reports about their child's progress in special education. 34 CFR 300.320 (a)(3).
- B. Progress reports:** Among the required disclosures that must be contained in the IEP is a description of when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 34 CFR 300.320 (a)(3)(ii).
- C. Report cards:** The primary purpose of report cards is to provide school performance information to parents about their child. It is not a violation of FERPA, the IDEA, or Section 504 to indicate on a report card that the student has a disability or is otherwise receiving special education or related services. Districts can use asterisks on report cards to denote a student's participation in special education classes or accommodations in general education classes. *In re: Report Cards and Transcripts for Students with Disabilities*, 51 IDELR 50 (OCR 2008).
- D. Transcripts:** While report cards can disclose information about a student's disability, transcripts cannot. This is because the fundamental purpose of a transcript is to inform postsecondary schools and employers about the student's credentials and school achievements. Placing information on a transcript indicating that a student has a disability or receives special education services or accommodations is not permitted. It is considered discriminatory; some schools of higher education or prospective employers may base their impressions of the student on his condition rather than on his achievement and other school

performance indicators. *In re: Report Cards and Transcripts for Students with Disabilities*, 51 IDELR 50 (OCR 2008).

1. **Sharing transcripts with 3rd parties:** FERPA requires school districts to obtain the permission of the parent or eligible student before sharing the student's transcript with a third party, such as a prospective employer. 34 C.F.R. §99.31.
 2. **Sharing transcripts with other schools:** FERPA permits the release of a student's transcript to "officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll" without prior consent if the district makes a reasonable attempt to notify the student or parent, unless 1) the parent or eligible student initiated the disclosure; or 2) the district's annual notice indicates that the district forwards a student's education records to any school where the student seeks or intends to enroll. 34 C.F.R. §99.31.
 3. **Practical Tips:** General rule: avoid using designations limited to special education courses. Districts should use terms that could be applied to remedial courses taken by all students, such as "basic," "level 1," or "practical." Other terminology could be "independent study" or "modified curriculum" as long as those designations are not limited to special education students.
- E. Modified Grades:** The grade of a student with a disability who receives special education accommodations in the regular education class can be modified, so long as the decision to give a modified grade is made by the student's IEP team based on his individual needs. *Letter to Runkel*, 25 IDELR 387 (OCR 1996).
- F. General Education Teacher Role:** Teachers need to have a comprehensive understanding of their obligations on reporting grades, as well as their confidentiality obligations under FERPA.

IX. POTENTIAL PERSONAL LIABILITY

A. Failure to follow IDEA mandates could result in individual liability.

1. Selected cases
 - a. *Doe v. Withers*, 20 IDELR 422 (W. Va. Cir. Ct. 1993).
 - (1) A jury returned a verdict in favor of the parents of a student with learning disabilities who brought an action under Section 1983 against two high school teachers, the district superintendent, and the school board, alleging that the teachers and school officials refused to accommodate their son's disability in the classroom.

- (2) At trial, the court granted directed verdicts in favor of the defendants, except one of the teachers. In their complaint against the remaining defendant, the parents specifically alleged that the teacher refused to provide their son with oral testing as required by his IEP. The case against the teacher was then presented to the jury for deliberations.
 - (3) The jury returned a verdict in favor of the parents and awarded \$5,000 in compensatory damages and \$10,000 in punitive damages. The court subsequently entered a final judgment against the teacher pursuant to the jury's verdict and award.
- b. *Sanders v. Issaquah School Dist.*, 117 LRP 48968 (W.D. WA 2017).
- (1) The parents of a student with a disability could pursue IDEA claims not only against a Washington district, but also against the district's superintendent and special education director.
 - (2) The District Court denied the employees' motion to dismiss based on their failure to establish that individual liability is not available under the IDEA.
 - (3) The court based the decision on the lack of definitive rulings from federal circuit courts. The employees did not identify any cases from the 9th Circuit or other federal Circuit Courts stating that educators cannot be held personally liable for IDEA violations. Given the absence of such legal authority, the District Court denied the employees' motion to dismiss.
- c. *Oman v. Portland Public Schools*, 58 IDELR 272 (9th Cir. 2012).
- (1) The 9th Circuit Court of Appeals held that nominal damages are not an available remedy under the IDEA and reversed a lower court's award of \$1 for the parent.
 - (2) The court observed that the plain language of the IDEA does not indicate the availability of compensatory or nominal damages. While the statute does allow district courts to award "appropriate relief," the 9th Circuit pointed out that the phrase refers to the court's jurisdiction rather than a license to award retrospective damages.

- (3) The 9th Circuit rejected the District Court's rationale that awards of nominal damages would promote statutory compliance. Noting that the IDEA is a funding statute, the court pointed out that the remedy for noncompliance is the loss of federal funds.

B. Failure to follow IDEA mandates could result in a violation of the code of ethics of the teaching profession.

1. Model Code of Ethics

- a. The Model Code of Ethics for Educators adopted in 2015 by the National Association of State Directors of Teacher Education and Certification (NASDTEC) provides in part:

- (1) Principle II: The professional educator is committed to the highest levels of professional and ethical practice, including demonstration of the knowledge, skills and dispositions required for professional competence.
- (2) Principle III: The professional educator has a primary obligation to treat students with dignity and respect. The professional educator promotes the health, safety and well-being of students by establishing and maintaining appropriate verbal, physical, emotional and social boundaries.

NOTE: This outline is intended to provide interpretations of law and a summary of selected cases. In using this outline, the presenter is not rendering legal advice. The services of a licensed attorney should be sought in responding to individual situations in a school district or charter school.