FUNDING OF ASSISTIVE TECHNOLOGY SERIES

The Public School's Special Education System as an Assistive Technology Funding Source: The Cutting Edge

National Assistive Technology Advocacy Project
Neighborhood Legal Services, Inc. - Buffalo, N.Y.

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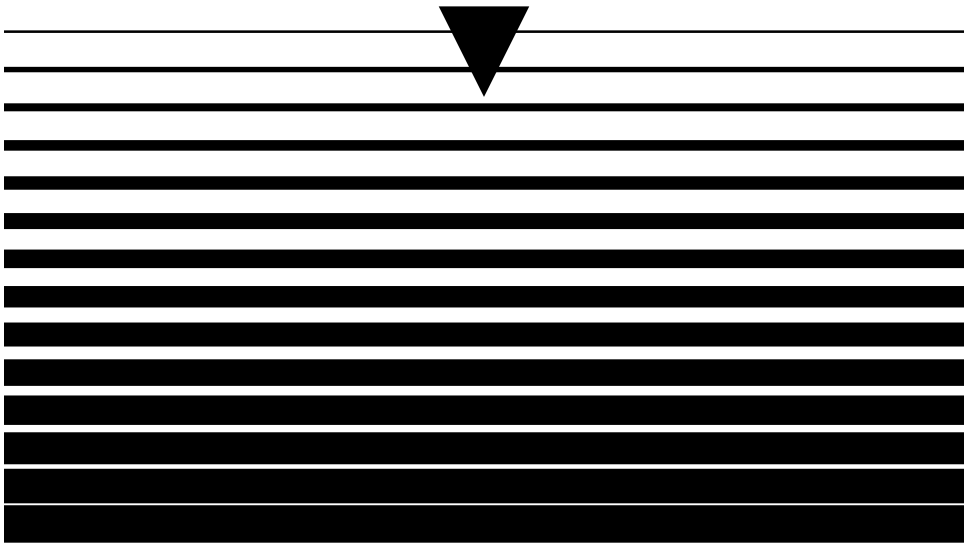

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Preface

This version of the publication, *The Public School's Special Education System as an Assistive Technology Funding Source: The Cutting Edge*, is published through the National Assistive Technology (AT) Advocacy Project as part of its Funding of AT booklet series. Information about the AT Advocacy Project, and the federal grant which supports it, appears in the Publication Credits and Disclaimer on page iii, below.

The public school's special education system is a source of a wide range of educational services, special supports, and even AT that may be needed by children with disabilities to benefit from the public school's educational system. These rights to educational services and supports are grounded in two federal statutes, the Individuals with Disabilities Education Act (IDEA) and section 504 of the Rehabilitation Act, that have each been in place for more than 20 years. Both the IDEA and section 504's educational mandates have been implemented by a comprehensive set of federal regulations and through a number of policy interpretations issued through the U.S. Department of Education. The IDEA and section 504 educational mandates have also been interpreted in numerous court decisions and administrative decisions, with the overwhelming majority of these involving the IDEA mandates.

This booklet was originally published by the National AT Advocacy Project in 1999. Since then, more than 5,000 hard copies of the booklet have been disseminated, nationwide, with many thousands more accessed by visitors to the National AT Advocacy Project's website, *www.nls.org/natmain.htm*. The edits to this 2003 version of the booklet represent both an updating and expansion of the original text.

Although this booklet is published to reach a primary audience of attorneys and advocates who assist persons with disabilities who need AT to succeed in their public school experience, the publication should also be viewed as a comprehensive treatise on the rights of students with disabilities under the IDEA and section 504. Since so much of AT-related advocacy will deal with core special education law concepts, we go through all the core issues in great detail, referencing the federal law and regulations, case law, and federal policy letters as relevant. In each section, we analyze how the concepts discussed have implications for AT advocacy. In the AT-specific sections of this booklet (see section III.), our analysis is very comprehensive, referencing nearly every policy letter to come out of the U.S. Department of Education that specifically relates to AT.

Our analysis challenges the reader to think beyond the historical "educational benefit" test provided by the U.S. Supreme Court in the 1982 *Rowley* decision when students are seeking specialized services, including AT devices and services. Throughout the booklet we encourage the reader to: rethink what the Supreme Court did and did not say in *Rowley*; consider the separate emphasis in recent IDEA amendments on preparation for work and independent living; to consider the need for AT to ensure that a student can participate, educationally, in the least restrictive environment; and consider the special needs for AT and other services to allow the student to meet goals in the student's transition plan (i.e., to pave the way toward successful outcomes as an adult). With an expanded analysis on each of these issues in this 2003 version of the booklet, this publication seeks to put the reader at the "cutting edge" of this analysis.

Publication Credits and Disclaimer

This publication or booklet, *The Public School's Special Education System as an Assistive Technology Funding Source: The Cutting Edge*, was originally published in 1999. The 2003 version of this booklet fully replaces the version produced in June 1999 for the National Assistive Technology (AT) Advocacy Project, a special project of Neighborhood Legal Services, Inc. (NLS) in Buffalo, New York.* The author of the 1999 version and a co-author of this publication is Ronald M. Hager, a staff attorney at NLS. Joining Mr. Hager as a co-author on this publication is Diane Smith, a staff attorney with the National Association of Protection and Advocacy Systems in Washington, D.C. Both authors work part-time with the National AT Advocacy Project and both are national experts on the legal issues associated with special education, in general and funding AT through the special education system, specifically. Both authors have presented on this topic to many audiences at national conferences and throughout the country.

The current version of this publication is published and distributed through the National AT Advocacy Project. That project is fully funded under contract number H224B020004 from the National Institute on Disability and Rehabilitation Research, U.S. Department of Education, to Neighborhood Legal Services, Inc. and its subcontractors. The opinions expressed herein do not necessarily reflect the position of the U.S. Department of Education, and no official endorsement by the U.S. Department of Education of the opinions expressed herein should be inferred.

**The National AT Advocacy Project provides technical assistance, training, and a range of other support services, nationwide, to attorneys and advocates who work at Protection and Advocacy programs and specialize in assistive technology issues. For access to our many publications, you can go to our website at www.nls.org/natmain.htm.*

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A Listing Of Acronyms And Abbreviations

AT	Assistive technology
EHLR	Education for the Handicapped Law Reports
FAPE	Free appropriate public education
IDEA	Individuals with Disabilities Education Act
IDEA '97	The 1997 amendments to the Individuals with Disabilities Education Act
IDELR	Individuals with Disabilities Education Law Reports (formerly EHLR)
IEP	Individualized education program
IEP Team	The group of people, including the parent(s), responsible for developing the IEP
LRE	Least restrictive environment
OCR	The U.S. Department of Education's Office for Civil Rights
OSEP	The U.S. Department of Education's Office of Special Education Programs
VR	Vocational rehabilitation

The Public School's Special Education System as an Assistive Technology Funding Source: The Cutting Edge

I. Introduction

Assistive technology (AT) offers children with disabilities the ability to meet their full potential. Specialized computer keyboards, screen magnification systems and specially-designed software offer children with physical, visual or cognitive impairments the adaptations they need to allow them to benefit from the 21st century technology that we take for granted. Similarly, items like augmentative communication devices and FM systems offer students with speech or hearing impairments the ability to fully participate in the educational experience. Other AT devices, and the training needed to understand their use, will help prepare students as they transition from special education programs to adult activities.

Most of the AT that is available today did not even exist when the federal special education mandates first took effect in the late 1970s. In fact, many of the AT devices that are available to children today were not available when the United States Supreme Court issued its landmark decision in the *Rowley*[1] case in 1982.

How will school districts, state educational agencies, the United States Department of Education and the courts interpret the mandates of the Individuals with Disabilities Act (the IDEA)[2] in light of what AT now offers to students with disabilities? Did these answers change under the 1997 amendments to the IDEA and the Department of Education's regulations, which were issued on March 12, 1999? Is the *Rowley* decision still good law and how does it apply in the AT context? Are there special mandates, under section 504 of the Rehabilitation Act of 1973 (section 504)[3] that apply when a school-aged student needs AT?

These and other issues, which arise in the context of using AT to benefit a student with a disability in the public school setting, are clearly "at the cutting edge" of the law. As explained below, many of these issues are addressed, at least in part, in the 1997 amendments to the IDEA and the 1999 regulations. They are also addressed in United States Department of Education policy letters that have been issued over the past 20 years.

The focus of this booklet is on the IDEA and section 504 as funding sources or enforcement tools to ensure that children with disabilities get needed AT. Our intent is to provide the reader with a working knowledge of the relevant laws, regulations and interpretations of them as they relate to a school's obligation. Armed with this knowledge, attorneys and advocates who specialize in special education law should be well - prepared to advocate for AT.

Since the IDEA is a very comprehen-

[1] *Board of Ed. of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

[2] 20 U.S.C. §§ 1400, *et seq.*

[3] 29 U.S.C. § 794.

sive statute, the first section of this booklet is devoted to a detailed analysis of its legal framework. That is followed by a similarly comprehensive analysis of how the IDEA can be used as a tool for obtaining AT. We then go through some of the major, "cutting edge" issues involving maximization of a student's potential and uses of educational methodology. We will follow a similar approach with section 504. Finally, we go through remedies available to parents who disagree with a decision made by the school, and the remedies available when attorneys or advocates seek to address more systemic problems.

II. Overview Of The Individuals With Disabilities Education Act

Historically known as The Education for all Handicapped Children Act of 1975 (EHCA) and Public Law 94-142,[4] the IDEA was initially passed in 1975 and was effective on September 1, 1978.[5] Although the statute has been amended several times during this period, the basic provisions have remained the same. The IDEA is a sweeping statute. States are given extra money from the federal government to help meet the costs of educating students with disabilities, but in turn they must agree to comply with the terms of the law.

In June 1997, there were significant amendments to the IDEA (IDEA '97). The law, which passed both houses of Congress with near unanimous support, followed several years of debate. Several proposals that emerged during this period suggested significant limits on the rights of children. However, the final product, on balance, enhanced the services available to children with disabilities, strengthened the role of parents and increased the reliance on AT to ensure that students receive an appropriate education.

The tenor of the changes can best be captured by the Congressional finding that education of children with disabilities can be made more effective by: (1) having high expectations and ensuring access to the general curriculum to the maximum extent possible, (2) strengthening the role of parents and ensuring that families "have meaningful opportunities to participate in the education of their children," (3) coordinating the IDEA requirements with other school improvement efforts to ensure that students benefit from those efforts and that special education becomes a service for children rather than a place where they are sent, (4) "providing appropriate special education and related services and *aids* and *supports* in the regular classroom" whenever appropriate, (5) "supporting high-quality, intensive professional development for all personnel working" with children, (6) "providing incentives for whole-school approaches and pre-referral interventions to reduce the need to label children" to obtain services, and (7) "focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results."[6]

On March 12, 1999, the U.S. Department of Education issued final regulations implementing IDEA '97.[7] The regulations incorporate changes made by IDEA '97, as well as longstanding interpretations of the IDEA by the U.S. Department of Education's Office of Special Education Programs (OSEP). All notes have been eliminated. Their content has either been incorporated into the text of the regulation, added within Appendix A (which replaces Appendix C), or included in the "Analysis of Changes and Comments," Attachment 1. Attachment 3 indicates what happened to each note. Attachments will not be included in the Code of Federal Regulations.

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[4] 89 Stat. 773.

[5] EHCA § 612(2)(B), 89 Stat. 780.

[6] 20 U.S.C. § 1400(c)(5) (emphasis added).

[7] 64 Fed. Reg. 12406, *et seq.*

A. Free Appropriate Public Education

1. General Standards

Part B of the IDEA guarantees that all students with disabilities aged 3 through 21 have the right to a "free appropriate public education" (FAPE).[8] (The concept of FAPE is both a term of art used in the IDEA and the standard by which a student's educational program is measured for legal adequacy.) However, state law may exempt students between the ages of three and five and 18 to 21 from coverage.[9] All services provided under the IDEA must be at no cost to the parents or student.[10] To be eligible, the student must meet the definition of one of several enumerated disabilities and, "by reason thereof," need special education and related services.[11]

The IDEA also includes a concept known as "zero reject." All children are entitled to a FAPE "regardless of the severity of their disabilities."[12] In *Timothy W. v. Rochester N.H. School Dist.*,[13] the First Circuit held that a school district must provide special education to a child with complex developmental disabilities, spastic quadriplegia, cerebral palsy, a seizure disorder, and cortical blindness, without requiring a demonstration that the child could benefit from special education. The court stated: "The Act mandates an appropriate public education for all handicapped children, regardless of the level of achievement that such children might obtain." In fact, the Act states a priority for providing services "to those children with the most severe handicaps." See also *Williams v. Gering Public Schools*,[14] where a student with profound retardation, who had a current developmental age of six months or less and who also suffered from congenital blindness and spastic quadriplegia was found not to require a residential placement, although the child could only receive a FAPE if placed in a 12-month program. While the district did not directly contest whether it was required to serve her, as in *Timothy W.*, it contested the level of service it was required to provide her, given her disabilities.

For children between the ages of three and five, additional grants are available for preschool education, if the state meets the eligibility requirements for school aged children and has an approved plan which assures "a free appropriate public education for all children with disabilities aged three to five, inclusive" in the state.[15]

The statute now allows a state to exclude from the requirements of the IDEA individuals between the ages of 18 and 21 who are incarcerated in adult correctional facilities and who had not been classified or had an individualized education program (IEP) in the last educational placement prior to being incarcerated.[16] The right to a FAPE also ends when a student graduates with a regular high school diploma. This does not include students who have received a certificate of attendance or of graduation that is not a regular high school diploma. However, graduation is considered a change of placement, requiring notice and the right to

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[8] 20 U.S.C. §§ 1401(8), 1412(a)(1)(B) and 1419(b)(2).

[9] *Id.* § 1412(a)(1)(B)(i).

[10] *Id.* § 1401(8)(A).

[11] *Id.* § 1401(3).

[12] *Id.* §1412(a)(3)(A)

[13] 875 F.2d 954 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 (1989).

[14] 236 Neb. 722, 463 N.W.2d 799 (Supreme Court of Nebraska, 1990).

[15] 20 U.S.C. § 1419(b)(1).

[16] *Id.* § 1412(a)(1)(B)(ii).

due process.[17] It does not require a reevaluation.[18]

Pursuant to what is referred to as the "child find" requirement, schools must identify, locate and evaluate all children with disabilities within their jurisdiction, including those attending private schools.[19] The new regulations specifically mention that this requirement applies to highly mobile children such as migrant and homeless students and to students suspected of having a disability who are advancing from grade to grade.[20]

The 1999 regulations add provisions for services during the summer months, called "extended school year (ESY) services." Eligibility must be determined on an individual basis and ESY services must be provided, if needed to ensure the student receives a FAPE. ESY services cannot be limited to particular categories of disability and schools may not "unilaterally limit the type, amount or duration" of ESY services.[21] The comments note that states are free to establish their own standards for ESY services as long as the standard does not deny ESY services to children who need them to receive a FAPE.[22]

In most cases, it will be appropriate to look at a variety of factors "(e.g., likelihood of regression, slow recoupment, and predictive data based on the opinions of professionals)", "but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor."[23] In any event, to receive AT during the summer, a student need not be in a full-day educational program. A single special education service (including AT) may be provided during the summer as the sole component of a summer program.[24]

2. The Supreme Court's Decision in *Rowley*

When Congress enacted the IDEA, it did not use an objective measure to determine whether a student was receiving an appropriate education (one aspect of the FAPE standard). In other words, Congress did not say that all children with disabilities have the right to services in a special education class or all students have the right to AT or all students will make one year of progress each school year. Because every child's needs are different, these measures are not helpful. Instead, Congress used a very general and subjective term, "appropriate." However, in the *Rowley* case,[25] the United States Supreme Court set forth the standard for determining whether a student was receiving the appropriate education required by the IDEA.

The parents of Amy Rowley, a deaf student with minimal residual hearing and excellent lip reading skills, sought the services of a full-time interpreter in her regular classes. Amy had been provided with an FM trainer, a teacher of the deaf for one hour per day and speech for three hours per week. Even though Amy was missing about half of what was being discussed in class, she was very well adjusted, was performing better than the average child in the class and was "advancing easily from grade to grade."[26] Based on these facts, the Supreme Court

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[17]34 C.F.R. § 300.121(a)(3).

[18]*Id.* § 300.534(c)(2).

[19]20 U.S.C. § 1412(a)(3)(A).

[20]34 C.F.R. § 300.125(a)(2).

[21]*Id.* § 300.309.

[22]64 Fed. Reg. 12576.

[23]*Id.*

[24]*See OSEP Policy Letter to Hon. T. Libous*, 17 EHLR 419 (11/15/90).

[25]*See* note 1, above.

[26]458 U.S. at 184 - 185.

determined that Amy was receiving an "appropriate" education without the sign interpreter. In reaching this opinion, the Court concluded that the obligation to provide an appropriate education does not mean a district must provide the "best" education or one designed to maximize a student's potential.[27]

However, the program must be based on the student's unique individual needs and be designed to enable the student to benefit from an education. In other words, the student must be making progress.[28] More than a minimal benefit is required for the program to be appropriate. The IEP must confer "meaningful benefit," which means that it must provide for "significant learning." In determining how much benefit is enough, the student's intellectual potential must be considered.[29] In the case of a student being educated in regular classes, the Court determined that in most cases, if the student was advancing from grade to grade with the benefit of supportive services, the student was receiving an appropriate education.[30]

Noting the importance of procedural safeguards in developing a student's program, the Court developed a two-part test to determine whether a program is appropriate. The test comes down to these questions. First, did the district comply with the IDEA's procedures? Second, was the IEP reasonably calculated to enable the child to benefit? In answering this second question, the Supreme Court cautioned that lower courts should not substitute their view of appropriate educational methodology for that of the educational experts. The Court noted that "the primary responsibility for formulating the education to be accorded to [a child with a disability], 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."[31] It then ruled that once a lower court "determines that the requirements of the [IDEA] have been met, questions of methodology are for resolution by the states."[32]

Not surprisingly, these standards on maximization of potential and educational methodology set by the Supreme Court have been the subject of an incredible amount of litigation. The Appendix lists the standards developed by most of the Circuit Courts in the country for determining whether the IEP is appropriate. A separate section of this booklet will more fully analyze the impact of *Rowley* in obtaining services from the school system.

B. Least Restrictive Environment

The IDEA requires that all students receive their educational services in the least restrictive environment (LRE).[33] Removal from regular education classes is to occur only when the student cannot be successfully educated in that setting even with supplemental aids and services.[34]

However, in determining the LRE for a student, the program must still be appropriate to meet the student's individual needs.[35] Accordingly, districts must have available a continuum of alternative place-

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[27] *Id*. at 199.

[28] *Id*. at 188, 189.

[29] *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); s*ee Ridgewood Board of Ed. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

[30] *Rowley* at 203.

[31] *Id*. at 207 (emphasis added).

[32] *Id*. at 206 - 208.

[33] 20 U.S.C. § 1412(a)(5).

[34] 34 C.F.R. § 300.550(b)(2).

[35] *Id.* § 300.550(b)(1).

ments, ranging from services in regular classes to separate classes, separate schools and even residential programs.[36] Moreover, in determining the student's actual placement, it should be as close as possible to the child's home and, unless the IEP calls for some other arrangement, the child should attend the school he or she would attend if not disabled.[37] For cases addressing when it is appropriate to place a student in the neighborhood school see the Appendix.

As will be noted below, IDEA '97 strengthened the LRE mandate. Prior to this, although the language in the statute had remained unchanged, several courts interpreted the LRE provisions to open the door for increased inclusion of students with more severe disabilities in the regular education classroom than ever before.

1. Judicial Standard for LRE

Daniel R.R. v. State Board of Education[38] is one of the leading cases opening the door to increased inclusion of children with disabilities in regular education classes. The U.S. Court of Appeals for the Fifth Circuit noted that Congress created a strong preference in favor of "mainstreaming," educating the student in the regular education classroom with supports. Ironically, the court determined in that case that it was not appropriate to include the child in full time regular education. However, the court's analysis of the LRE requirement, especially its interpretation of what is meant by providing supplementary aids and services in the regular classroom, has been followed by a number of other courts.

In determining whether it is appropriate to place a student with disabilities in regular education, the student need not be expected to learn at the same rate as the other students in the class. In other words, part of the required supplementary aids and services must be the modification of the regular educational curriculum for the student, when needed. The court noted, however, that the district need not modify the program "beyond recognition." Also, in looking at whether it is "appropriate" for the child to be in regular education, in other words, whether the student can benefit educationally from regular class placement, the district must consider the broader educational benefit of contact with non-disabled students, such as opportunities for modeling appropriate behavior and socialization.

A district may consider the demands on the regular classroom, such as discipline problems the student may have or the extent of time the regular education teacher may need to spend with the student. However, the court stressed that the supplementary services a student may need to be successful in a regular education placement can include the assignment of an aide to minimize these concerns. Finally, the court emphasized that if full-time placement in regular education cannot be achieved satisfactorily, the district must ensure that the child is educated with non-disabled students to the maximum extent appropriate during the school day.

In *Oberti v. Board of Educ.*,[39] the Third Circuit applied the test established in *Daniel R.R.* and determined that the district did not comply with the LRE mandate. It noted that even though the student had significant behavioral difficulties the last time he was placed in the regular education environment, these difficulties were exacerbated by the inadequate level of services provided in that environment. The court found that he could be successfully educated in the regular education

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[36] *Id.* § 300.551.

[37] *Id.* § 300.552.

[38] 874 F.2d 1036 (5th Cir. 1989).

[39] 995 F.2d 1204 (3rd Cir. 1993).

environment with supplementary aids and services such as:

> [t]he assistance of an itinerant instructor with special education training, special education training for the regular teacher, modification of some of the academic curriculum to accommodate [the student's] disabilities, parallel instruction to allow him to learn at his academic level, and use of a resource room.[40]

The Ninth Circuit, in *Sacramento City School Dist. v. Rachel H.*,[41] determined that the appropriate placement for a child with an IQ of 44 was full-time regular education with some supplementary aids and services. The court found that the academic and non-academic benefits weighed in favor of placing the student in full-time regular education classes. The court noted that "all of her IEP goals could be implemented in a regular education classroom with some modification to the curriculum and with the assistance of a part time aide."[42] For cases addressing the issue of whether the student has been placed in the least restrictive environment, please see the Appendix.

2. LRE Requirements Mandated by IDEA '97

IDEA '97 fosters increased efforts to educate students with disabilities in the LRE. For example, as noted below, the IEP Team must consider whether and how the child can participate in the general curriculum[43] and the IEP must indicate the extent to which the student will not be educated with non-disabled peers.[44] Prior to this, the IEP was to indicate the opposite – the extent the student would be educated with non-disabled peers.

The 1999 regulations emphasize that students with disabilities cannot be removed from age-appropriate regular classrooms "solely because of needed modifications in the general curriculum."[45] Additionally, a student cannot be required to demonstrate a specific level of performance before being considered for regular class placement. However, the strong preference for placement in regular education does not mean that a student must fail in the regular education environment before a more restrictive setting may be considered. Placement decisions must be based on the needs of the student and not on such factors as the classification of the student, availability of services, "configuration of the service delivery system, availability of space, or administrative convenience."[46]

States with a funding system that distributes money based on the type of setting in which a student is placed must have policies and procedures to ensure that the funding system does not result in placements which violate the LRE requirement. States with no such policies and procedures must assure the Secretary of Education that they will revise their funding mechanism as soon as feasible.[47]

The law also reduces the reliance on labeling when placing students in the special education system. The IDEA still requires that a student meet one of several listed conditions and, by reason thereof, require special education services in order to be found

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[40] *Id*. at 1222.

[41] 14 F.3d 1398 (9th Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994).

[42] *Id*. at 1401.

[43] The regulations define the "general curriculum" as the "same curriculum as for non-disabled children." 34 C.F.R. §300.347(a)(1)(i).

[44] 20 U.S.C. §1414(d)(1)(A)(iv).

[45] 34 C.F.R. § 300.552(e).

[46] *Id*. Part 300, Appendix (App.) A, Question (Quest.) 1.

[47] 20 U.S.C. § 1412(a)(5)(B).

eligible under the IDEA. However, IDEA '97 gives states some options to reduce the use of labels when identifying students who are eligible for services. First, for students aged three through nine, an additional, more broad based category is available. Students with "developmental delays" in physical, cognitive, communication, social/emotional or adaptive development, who need special education, are also eligible for services.[48] (This definition had previously applied to children aged three through five.) Second, states are now allowed to provide services to students with disabilities without labeling them at all, as long as all eligible students receive the services to which they are entitled.[49]

The statute also, for the first time, contains a definition of "supplementary aids and services." These services include aids, services and other supports, and are to be made available in regular education classes and "other education-related settings" to enable children with disabilities to be educated with their non-disabled peers to the maximum extent appropriate.[50] It clarifies that these supports are to be provided in other settings, in addition to the classroom, such as extracurricular activities.[51] As discussed below, AT devices and services are included in this definition. Therefore, it is now even more clear that a student who needs an alternative communication system, for example, should be able to use that system in after school and other nonacademic functions.

Based on the court cases discussed above, and other factors, an increasing number of children with more severe disabilities are being educated in regular classes. Regular education teachers have raised concerns that they do not have the training or support to meet the needs of these students. Parents are often concerned because much of the discussion at IEP Team meetings about the services and supports that are needed to make the program successful do not end up on the IEP. IDEA '97 attempts to remedy this situation, at least to some degree.

The IEP Team must now include at least one regular education teacher of the child, if the child is or may be participating in "the regular education environment."[52] The purpose of the regular education teacher's involvement in the IEP process is, at least in part, to help determine the necessary behavioral strategies, supplemental aids and services, program modifications and supports for school personnel.[53]

As noted below, any supplemental aids and services, and program modifications and supports for the *school personnel* must be listed on the IEP.[54] Prior to this amendment, many parents were told that the IEP was designed to set forth the services and goals for the student and there was simply no spot on the IEP, nor any obligation to include services to be provided to the teacher. Many times, because agreed to supports such as in-service training to the teaching staff were not on the IEP, there were problems with implementation.

Because the IEP was silent, parents were also left with fewer legal safeguards. There is a remedy under the IDEA for the failure to provide a service set out in the IEP.[55] As will be discussed later, section

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[48] *Id.* § 1401(3).

[49] *Id.* § 1412(a)(3)(B).

[50] *Id.* § 1401(29).

[51] *See* 34 C.F.R. § 300.306.

[52] 20 U.S.C. § 1414(d)(1)(B)(ii).

[53] *Id.* § 1414(d)(3)(C).

[54] *Id.* 1414(d)(1)(A)(iii) (emphasis added).

[55] *See* 34 C.F.R. § 300.350(c).

504 also provides rights to students with disabilities in the school setting. Based on the definition of disability under section 504, any student classified under the IDEA is also protected by section 504. The U.S. Education Department's Office for Civil Rights (OCR), which enforces section 504, has held that the failure to implement the services agreed to in an IEP under the IDEA is also a violation of section 504, which it will enforce.[56] However, if the supports are not included in the IEP, none of these protections will readily apply.

C. Written Individualized Education Program

The IEP is the focal point of the IDEA. In *Rowley*, the Supreme Court noted the importance of parental participation and compliance with proper procedures in developing a child's IEP. It stated:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard. We think that the Congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.[57]

In another decision, the Supreme Court called the IEP the "centerpiece of the [IDEA's] education delivery system."[58] It is obvious that the process of developing the IEP and the resulting document itself are more than mere technicalities. The Supreme Court quote underscores the role that Congress envisioned for the IEP.

1. Parental Participation in Developing the IEP

From the beginning, the IDEA has given parents a critical role in the IEP process. In *Rowley*, the Supreme Court also noted that Congress intended to maximize parental involvement in the education of each child with a disability.[59] Districts must ensure that the parents are present or are afforded the opportunity to participate, including: (1) "notifying parents early enough to ensure that they will have an opportunity to attend"; (2) "scheduling the meeting at a *mutually agreed on time* and place"; and (3) indicating "the purpose, time, and location of the meeting and who will be in attendance."[60] The regulations allow a district to proceed without the parents in attendance *only* in the following circumstance:

> A meeting may be conducted without a parent in attendance if the public agency is *unable to convince* the parents that they should attend. In this case

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[56] *See OSEP Policy Letter to Anonymous*, 18 IDELR 1037 (4/6/92). IDEA '97 limits the use of opinion letters from the U.S. Department of Education. Policy letters cannot be used to establish rules for compliance. 20 U.S.C. § 1406. Nevertheless, the policy letters, as an official interpretation of the Department of Education, should carry considerable weight as to the proper interpretation of the IDEA. Courts and others charged with enforcing the law must give considerable deference to an agency's interpretation of a statute that it administers, and may "not substitute its own reading unless the agency's interpretation is unreasonable." *Skandalis v. Rowe*, 14 F.3d 173, 178 (2nd Cir. 1994)(citing *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984). Accordingly, this booklet will regularly refer to opinions from the U.S. Department of Education.

[57] 458 U.S. at 204.

[58] *Honig v. Doe*, 484 U.S. 305, 311 (1988).

[59] 458 U.S. at 182, n.6.

[60] 34 C.F.R. § 300.345(a) and (b) (emphasis added).

the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as–

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

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

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.[61]

The district may ensure parental participation by using individual or conference telephone calls.[62] At the meeting, the district must take whatever action is necessary to ensure that the parents understand the proceedings, including arranging for an interpreter for parents with deafness or whose native language is other than English.[63]

When the IDEA regulations were first developed, the U.S. Department of Education included Appendix C, a series of questions and answers concerning the IEP.[64] This is the answer to the question of the role of parents at IEP meetings:

> The parents of a child with a disability are expected to be *equal participants* along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in state and district-wide assessments and what services the agency will provide to the child and in what setting.[65]

Notwithstanding these powerful requirements for full parental participation in the IEP process and the comments from the Supreme Court in *Rowley*, many parents found that the district did not view them as equal participants in the IEP process.[66]

IDEA '97 strengthened the parents' role even further. Perhaps only making explicit what should already have been obvious, districts must now consider the results of evaluations, the strengths of the child and the *concerns of the parents* for enhancing their child's education when developing the IEP.[67] Finally, parents are now members of the IEP Team.[68] If a different group within a district makes the decision about whether a student has a disability or what the student's actual placement will be, the parents must also be members of that group.[69]

The regulations make it clear, however, that parents do not have the right to be present every time school officials

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[61] *Id.* § 300.345(d) (emphasis added).

[62] *Id.* § 300.345(c).

[63] *Id.* § 300.345(e).

[64] Under the new regulations, Appendix C has been moved to Appendix A, and this particular question and answer has been retained, with some modifications. The quote is from the new regulations.

[65] 34 C.F.R. Part 300, App. A, Quest. 5 (emphasis added).

[66] Engel, "Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference," 1991 Duke Law Journal 166 (1991).

[67] 20 U.S.C. § 1414(d)(3)(A) (emphasis added).

[68] *Id.* § 1414(d)(1)(B).

[69] *Id.* § 1414(a)(4)(A) and (f).

discuss their child. The regulations seem to make a distinction between informal discussions and decision-making. Accordingly, a meeting, at which the parents have the right to be present, is defined to exclude certain discussions.

> A meeting does not include informal or unscheduled conversations involving [school] personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that [school] personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.[70]

The 1999 regulations also make clear that in light of the parents' role as equal partners with the school, decisions about the IEP should, as much as possible, be reached by consensus. Taking a vote is not considered to be an appropriate way to make decisions. Since the ultimate responsibility to provide a FAPE rests with the school, if consensus cannot be reached the school must make a decision, which the parents have the right to appeal through use of an impartial hearing or mediation, which are discussed later in this booklet.[71]

2. Evaluating the Child

Developing the IEP begins with a comprehensive, individual evaluation. As one court has noted, the evaluation provides the foundation for the IEP. If the evaluation is incomplete, the IEP cannot be appropriate.[72] Either the parents or the school staff may initiate an evaluation. In either event, before the district may evaluate a student for the first time, it must obtain parental consent to the evaluation. The evaluation is to assist the IEP Team in determining whether the student has a disability and, if so, to determine the educational needs of the child. Evaluations must be conducted before the initial provision of services.[73]

The evaluation must include a review of existing data, including that provided by the parent, and current classroom-based assessments, as well as observations by teachers and related services providers.[74] The evaluation is to be designed to assist in developing the IEP. It must assess the relative contribution of cognitive, behavioral, physical and developmental factors and obtain information about the student's prospects for participating in the general curriculum.[75] The child must be assessed in all areas of suspected disability to determine the present levels of performance and the educational needs of the child.[76]

No single procedure or criterion may be used.[77] The evaluation materials may not be racially or culturally discriminatory. They must be administered in the child's native language or other mode of communication "unless it is clearly not feasible to do so."[78]

If the parents disagree with the evaluation obtained by the district, they may request an independent evaluation at district

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[70] 34 C.F.R. § 300.501(b)(2).

[71] *Id.* Part 300, App. A, Quest. 9.

[72] *East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D.Pa. 1999), *aff'd*, 213 F.3d 628 (3rd Cir. 2000)

[73] 20 U.S.C. § 1414(a)(1).

[74] *Id.* § 1414(c)(1).

[75] *Id.* § 1414(b)(2).

[76] *Id.* § 1414(b)(3)(C) and (c)(1)(B)(ii).

[77] *Id.* § 1414(b)(2)(B).

[78] *Id.* § 1414(b)(3)(A).

expense.[79] Parents should submit their request prior to obtaining the evaluation, but this is not required.[80] The district is allowed to ask the parents for the reasons they are disagreeing with the district's evaluation, but cannot require that the parent answer the question.[81] In either event, the district must, without unreasonable delay, either agree to pay for the independent evaluation or initiate a hearing to show its evaluations were appropriate.[82]

Reevaluations of the student must be conducted at least every three years, and more frequently if conditions warrant or if the teacher *or parent* requests.[83] Prior to any reevaluation, the district is now required to seek parental consent.[84] The district may proceed with the reevaluation without the parents' consent if it takes reasonable steps to obtain consent and the parents do not respond.[85]

Reevaluations must also be conducted before a student is declassified.[86] If the district determines, with input from the parents, that no additional assessments are needed to determine whether the child continues to have a disability, it must notify the parents of the basis for that decision and of the parents' right to request an assessment.[87] Note that the regulations under section 504, which also cover all students identified under the IDEA, require a reevaluation before any significant change in placement.[88]

3. The IEP Team

The IDEA requires that the IEP be developed at meeting with a specified group of people, including the parents.[89] The IEP Team must now be composed of the following members:

> (i) the parents of a child with a disability;
>
> (ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
>
> (iii) at least one special education teacher, or where appropriate, at least one special education provider [such as a speech pathologist] of such child;
>
> (iv) a representative of the local educational agency who–
>
> > (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
> >
> > (II) is knowledgeable about the general curriculum; and
> >
> > (III) is knowledgeable about the availability of resources of the local educational agency;
>
> (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
>
> (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise

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[79] 34 C.F.R. § 300.503(b).

[80] *OSEP Policy Letter to Hon. J. Fields*, 2 EHLR 213:259 (EHA 1989).

[81] 34 C.F.R. § 300.502(b)(4).

[82] *Id.* § 300.502(b)(2).

[83] 20 U.S.C. § 1414(a)(2)(A) (emphasis added).

[84] *Id.* § 1414(c)(3).

[85] 34 C.F.R. § 300.505(c).

[86] 20 U.S.C. § 1414(c)(5).

[87] *Id.* § 1414(c)(1) and (4).

[88] 34 C.F.R. § 104.35(d).

[89] *Id.* § 300.344.

regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.[90]

As noted above, the purpose of the regular teacher's involvement in the IEP process is, at least in part, to help determine behavioral strategies, supplemental aids and services, program modifications and supports for school personnel.[91] Depending on the student's needs and the purpose of the meeting, the regular education teacher is not required to attend the entire meeting or be at every single IEP Team meeting.

For example, if the purpose of the meeting is to discuss the physical therapy needs of the student, the regular education teacher may not need to attend if the teacher will not be responsible for implementing that portion of the student's IEP. The school and parents are encouraged to reach agreement, in advance, concerning the regular education teacher's involvement.[92] However, it is anticipated that it will be extremely rare for the regular education teacher not to be in attendance.[93]

The comments provide extensive guidance regarding which teacher should attend the meeting. For students with more than one regular education teacher, the school can determine which teacher attends, taking into account the best interests of the student.[94] The teacher:

> [S]hould be a teacher who is, or may be responsible for implementing a portion of the IEP so that the teacher can participate in discussions about how *best* to teach the child.[95]

The school is strongly encouraged to obtain input from any teachers who will not be attending the meeting.[96]

The regulations also clarify that the school representative on the IEP Team must be someone with the authority to commit school resources and who can ensure that the services set out in the IEP will actually be provided.[97]

4. IEP Content

The IEP is a written document, setting out in detail the nature of the student's educational needs, the services to be provided and specific goals for the student. The IEP must list the student's present levels of performance, including how the child's disability effects the child's involvement and progress in the general curriculum. The IEP must also list annual goals and short-term objectives or benchmarks. They must be measurable and relate to meeting each of the child's educational needs that result from the disability, including those which will enable the child to be involved in and progress in the general curriculum.[98]

The IEP must include all special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child. It must also list all program modifications, and supports for school personnel which will help the child to: (1) attain the annual goals; (2) participate and progress in the general curriculum, if appropriate; (3) be educated with

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[90] 20 U.S.C. § 1414(d)(1)(B).

[91] *Id.* § 1414(d)(3)(C).

[92] 34 C.F.R. Part 300, App. A, Quest. 24.

[93] 64 Fed. Reg. 12583.

[94] 34 C.F.R. Part 300, App. A, Quest. 26.

[95] *Id.* (emphasis added).

[96] *Id.*

[97] *Id.*, Quest. 22.

[98] 20 U.S.C. § 1414(d)(1)(A)(i) and (ii).

both disabled and non-disabled peers; and (4) participate in extracurricular and nonacademic activities with both disabled and non-disabled peers.[99] The projected date for initiating all services and modifications, as well as their anticipated frequency, location and duration must be specified.[100]

Beginning at age 14, the IEP must include the transition service needs related to the child's course of study under each of the applicable sections of the IEP, such as "participation in advanced-placement courses or a vocational education program." Beginning at 16, or younger if appropriate, actual transition services are to begin, including any responsibilities of other agencies to provide services. The IEP must list all such services. At least one year before a student reaches the age of majority under state law, the IEP must include a statement that the student has been informed of any rights that would normally be exercised by the parents that will transfer to the student at the age of majority.[101]

The IEP must also list the extent the student will *not* participate with non-disabled students in academic and nonacademic activities.[102] If the student is to participate in state or district-wide assessments of student achievement, the IEP must specify any modifications in the administration of those tests to be given to the student. Modifications could include such things as extra time, having the test read, recording answers in an alternative format (dictating into a tape recorder or to another person, or using a computer), use of a calculator, use of an electronic spell checker or other appropriate modifications, based on the needs of the student and subject area being tested. If the student will not be participating, the IEP must give the basis for that decision, as well as indicate how the student will be assessed.[103]

There must be a statement of how the child's progress toward the annual goals will be measured, how the parents will be informed about the child's progress, and the extent to which the child's progress to date is sufficient to enable the child to meet the goals by the end of the year. These progress reports must be at least as frequent as progress reports parents of non-disabled students receive.[104] Therefore, if a school sends out report cards every 10 weeks, the parents should be notified of their child's progress at least that often. If a school sends out notices when regular education students are in danger of failing at five-week intervals, they should also send out five-week notices to parents of students with disabilities when the student is not performing as expected.

The comments indicate that a written report will normally be sufficient, but there may be instances where a meeting may be more effective. Generally, these reports "are not expected to be lengthy or burdensome."[105]

The IEP must then be reviewed at least annually to determine whether the annual goals are being achieved. It must be revised as necessary.[106] If problems arise during the year or if there is any other need to meet to review the student's

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[99] *Id.* § 1414(d)(1)(A)(iii).

[100] *Id.* § 1414(d)(1)(A)(vi).

[101] *Id.* § 1414(d)(1)(A)(vii).

[102] *Id.* § 1414(d)(1)(A)(iv).

[103] *Id.* § 1414(d)(1)(A)(v); See *Chapman v. Calif Dept. of Ed.*, 36 IDELR 91, (N.D.C.A. 2002), *aff'd in part, reversed in part*, *Smiley v. Calif. Dept. of Ed.*, 2002 WL 31856343, 37 IDELR 219 (9th Cir. 2002).

[104] 20 U.S.C. § 1414(d)(1)(A)(viii).

[105] 64 Fed. Reg. 12594.

[106] 20 U.S.C. § 1414(d)(4)(A).

program, the parents or school may request a meeting before the year is up.[107] In other words, the parents do not have to wait for the annual review to request a meeting with the IEP Team.

When developing the IEP, the Team must consider any behavioral interventions needed for students with behavioral needs; the effect of limited English proficiency on a student's special education needs; the use of Braille for blind and visually impaired students; the use of and instruction in the child's language and mode of communication for deaf or hard of hearing students; and, *for all students*, whether or not the child requires AT.[108]

A copy of the IEP must be accessible to each regular or special education teacher, as well as any others who are responsible for implementing the IEP.[109] Additionally, everyone providing services must be informed of their specific responsibilities as well as the specific accommodations, modifications and supports required for the student.[110] The parents must also be given a copy of the IEP, at no charge.[111]

D. Transition from Special Education to Adult Life

1. Introduction

As noted above, schools must begin planning for a student's transition to the adult world beginning at age 14, when curricular options within the school are considered. No later than age 16, a full-blown transition services plan must be included in the IEP.

Transition planning was not part of the IDEA when it was first enacted. It was not added until 1990. However, the legislative history adding the transition planning requirements specifically noted that they "do not constitute new provisions of law. Rather, these inclusions provide a clarification and focus to already existing requirements of law dating back to the enactment of P.L. 94-142."[112] Nevertheless, there was strong sentiment that students were not being adequately prepared for the adult world. The legislative history cited statistics that of the 250,000 students 16 years or older who exit the educational system, less than one half graduate with a high school diploma and nearly 60,000 drop out.[113] Noting that students who exit the special education system without a diploma meet with varying degrees of success, the legislative history cautions that there will be those who:

> …will exit our nation's schools into nothing. Years of special education will be wasted while these individuals languish at home, their ability to become independent and self-sufficient (therefore making a positive contribution to society) placed at significant risk.[114]

Accordingly, transition planning requires that schools develop a long-range plan for students to prepare them for post-school life, begin to make connections with adult service providers while students are still in school, and look to others, such as the VR system, to provide services. Despite adding these transition requirements in 1990, statistics for the 1996 through 1998 school years indicate that only about 27 percent of the students 14 years or older who exit school each year have a diploma, and that about one third of these students either

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[107] 64 Fed. Reg. 12592.

[108] 20 U.S.C. § 1414(d)(3)(B).

[109] 34 C.F.R. § 300.342(b)(2).

[110] *Id.* § 300.342(b)(3).

[111] *Id.* § 300.345(f).

[112] H.R. No. 101-544 at 11, U.S. Code Cong. & Admin. News 1990, p. 1733.

[113] *Id.* at 1731.

[114] *Id.*

dropped out of school or moved and were not known to continue in school.[115]

2. A Case Scenario

To help understand the principles discussed in this section, a hypothetical case study, borrowed from Cornell University's Participant Manual, "The Right Start: Working Together with Public Schools," (1998)[116] (Participant Manual) will be used.

Case Study: Sam

Sam received special education services from age three onward. As a high school student classified for special education as having mental retardation, he was in a pre-vocational "shop" and worked as a dishwasher in the high school cafeteria for one hour of each school day. When asked what sort of job he would like to have as an adult, he responded, "computer."

One year prior to aging out of school, he was referred by his special education teacher to the state vocational rehabilitation (VR) agency for an assessment and employment services. The VR counselor contracted with a local rehabilitation agency for the assessment. Sam spent one month out of his last year in school traveling to a sheltered workshop, where he sampled tasks in food service, light manufacturing and janitorial areas for a $5.00 per week stipend.

The results of that assessment indicated that Sam would be ready for employment after six months of "personal adjustment" training, followed by six months of "work adjustment" training. Sam went back to school to complete his academic course work, and left school at age 21 without a high school diploma.

In July, after he had left school, Sam began his 12 months of training, funded by the state VR agency, as a dishwasher. He increased his productivity from 30 percent to 55 percent of competitive norms. Because the local threshold for entry into supported employment (community job placement and job coaching) services was 65 percent productivity, it was decided that Sam would be placed on a waiting list for the sheltered workshop. At that time, the waiting list for the sheltered workshop was estimated to be three years long.

Sam began receiving SSI at the age of 18 because of the nature of his disability and because his parents' income was no longer counted as available (or "deemed") to him. Since he is living in a state where Medicaid is automatic for SSI recipients, he also became eligible for Medicaid at the same time.

Because Sam received Medicaid, he was provided with Medicaid Home and Community Based Waiver services that included weekly outings to practice shopping skills and to go bowling. Medicaid also paid for a services coordinator who managed Sam's referral paperwork, kept track of Sam's place on various waiting lists, and spent 30 minutes of time per month visiting with Sam.

Sam's parents are very concerned with Sam's long-term support and are equally concerned with the potential loss of SSI and Medicaid if he begins to work. Therefore, they are very hesitant to have Sam work in any setting other than a sheltered workshop, as they have been assured that his earnings will never be high enough to disqualify him for SSI and Medicaid.

The specific transition planning re-

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[115]Transition and Post-School Outcomes for Youths with Disabilities: Closing the Gap to Post-Secondary Education and Employment," National Council on Disability, Social Security Administration, pp. 7-8 (November 1, 2000), available at www.ncd.gov.newsroom/publications/oopublications/transition 11-1-00.html.

[116]This case example is reproduced with permission and has been slightly modified.

quirements under the IDEA will now be reviewed in detail, using the facts from the hypothetical to provide concrete examples. The section will conclude with an analysis of how the IDEA and VR laws are intended to work together to ensure the smooth transition of students with disabilities from school to post-school activities. Again, the facts of Sam's case will be used to emphasize the importance of these principles.

3. Transition Services

Transition services are defined in the IDEA as a coordinated set of activities for a student, designed within an *outcome-oriented* process, that promotes movement from school to post-school activities. The areas of adult living to be considered include preparation for postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, and community participation.

Services are to be based on the individual student's needs, taking into account the *student's* preferences and interests.[117] Right at the outset, given this requirement, how did Sam, who expressed an interest in computers, end up in a training program to become a dishwasher? The importance of considering the student's preferences when planning transition services cannot be underestimated.

A 1998 study looked at the relationship between self-determined behavior and positive adult outcomes. It found that 80 percent of the students contacted one year after graduation who were rated highly self-determined were "working for pay, compared to 43 percent of the students who were rated low." Of those working, the "students who were rated as highly self-determined averaged $4.26 per hour, while those in the low group averaged $1.93 per hour."[118]

While one may be tempted to wonder how someone with a disability such as Sam's could be involved in a career such as computing, this should not preclude an individualized inquiry, as required by the statute. Might there not be some aspect of the computer field where Sam could be successful? He certainly has not achieved a high degree of success as a dishwasher. And, wouldn't Sam's interests be the best place to start when preparing his transition plan?

The specific services to be offered in a transition plan include: (1) instruction, (2) related services, (3) community experiences, (4) development of employment and other post-school adult living objectives, and (5) if appropriate, acquisition of daily living skills and a functional vocational evaluation.[119] The list of activities is not intended to be exhaustive.[120] One court noted that specially designed instruction in driver's education, self-advocacy, and independent living skills such as cooking and cleaning were appropriate transition services for a student with an orthopedic impairment who wanted to attend college.[121]

Here, Sam began receiving Medicaid waiver services, including trips to practice shopping skills and to go bowling, after he exited school. There is no indication that he had these experiences while still a student, even though the transition guidelines specifically include community experiences and, if appropriate, acquisition of daily living skills.

While the law does not specifically mention financial planning, as noted above, the comments to the regulations indicate that

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[117] 20 U.S.C. § 1401(30); 34 C.F.R. § 300.29(a).

[118] Participant Manual, p. 12.

[119] 20 U.S.C. § 1401(30); 34 C.F.R. § 300.29(a).

[120] See, comments to the 1999 special education regulations at 64 Fed. Reg. 12553.

[121] *Yankton School Dist. v. Schramm*, 93 F.3d 1369,1374 (8th Cir. 1996).

the enumerated services are not intended to be exhaustive. Moreover, financial planning might be a critical part of adult life. Therefore, these services should have been considered when developing Sam's transition plan, especially given the concerns expressed by his parents about how the services Sam would require as an adult would be funded.

The 1990 amendments to the IDEA, which incorporated transition services, added "social work services" to the definition of related services.[122] The stated reason for this addition was to encourage educational agencies "to utilize social work services where needed," and to "base the IEP recommendation on the individual student's need for social work services, rather than on the perceived availability of such services." The legislative history noted the role social work services could play in preparing students and their families, including helping to "develop linkages to other community supports, and providing counseling, assessment, and case management services."[123]

Although Sam began to receive case management services after he left the educational system, there is no indication that he received these services while still in school. Had he begun to receive these services while still a student, perhaps there would have been an earlier and smoother linkage to adult service providers, and he would not now be on a three-year waiting list for services. Additionally, his need for case management services may have been diminished.

The 1990 amendments to the IDEA also added rehabilitation counseling services to the definition of related services.[124] Rehabilitation counseling services are to be provided by qualified personnel in individual or group sessions. They are to focus specifically on career development, employment preparation, and achieving independence and integration in the workplace and community. They include VR services provided to students with disabilities by state VR agencies funded under the Rehabilitation Act.[125]

The legislative history to the IDEA again emphasizes the critical importance of rehabilitation counseling in the transition process:

> School rehabilitation counseling is an important component of transition services because none of the other professionals involved in special education have the clear responsibility for transition planning and preparation. Furthermore, the rehabilitation counseling discipline embodies the wide range of knowledge needed for successful school to work transition, i.e., vocational implications of disability, career development, career counseling for individuals with disabilities, job placement, and job modification. Therefore, rehabilitation counselors are professionally prepared to provide the appropriate counseling services as well as to coordinate the services of the special education disciplines, adult services providers, and postsecondary education agencies to ensure effective, planned transition services for students with disabilities.[126]

The legislative history also notes that not all students with disabilities may be eligible for rehabilitation counseling services from the VR system and that rehabilitation counselors may be employed by school districts. Moreover, the addition of rehabilitation counseling to the definition of related services does not "relieve state [VR] agencies or special education programs of their responsibilities of co-

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[122]20 U.S.C. § 1401(22).

[123]H.R. Rep. No. 101-544 at 7, U.S. Code Cong. & Admin. News 1990, p. 1729.

[124]20 U.S.C. § 1401(22).

[125]34 C.F.R. § 300.24(b)(11).

[126]H.R. Rep. No. 101-54 at 7-8, U.S. Code Cong. & Admin. News 1990, 1729-30.

operative transition planning and programming."[127]

For Sam, the effect of the failure to provide rehabilitation counseling early in his transition years is quite apparent. There is no indication that he ever received any sort of vocational evaluation of his interests and abilities prior to being placed in his dishwashing program while a student. Nor is there any indication of any attempt to provide career counseling concerning his stated interest in a career in computing. Even if his desired goal within the computing field was unrealistic, this counseling could have identified a goal within the field that would have been appropriate, or could have helped Sam develop another viable career goal in which he was interested.

4. Developing a Transition Services IEP

If an IEP meeting is to consider transition services for a student, the school must invite the student and a representative of any other agency that is likely to be responsible for providing or paying for transition services. If the student does not attend, the school must take other steps to ensure that the student's preferences and interests are considered. If an invited representative does not attend, the school must take other steps to obtain the participation of that agency in the planning of any transition services.[128] Here, again, we have no indication of whether Sam was involved in developing his transition plan. Furthermore, since he did not begin to receive services from community agencies until after he left school, it is highly unlikely that any of these agencies were involved in the planning process, at least not in any meaningful way.

As noted above, beginning at least by age 14, the IEP must include the transition service needs related to the child's course of study under each of the applicable sections of the IEP, such as "participation in advanced-placement courses or a vocational education program."[129] Sam did begin a prevocational "shop" program while a high school student and also worked as a dishwasher in the cafeteria for one hour per day. Although these are examples of the types of curricular options to be considered in transition planning, there is no indication that the shop program and the dishwashing experience were interrelated.

Additionally, even after the training in high school and for a year after leaving school, Sam was still not able to perform at a level sufficient for entry into a supported employment program. It is precisely for students like Sam that schools must consider the possibility of providing services before age 14. The legislative history to the IDEA indicates that transition services may be considered for some students even before age 14, especially where, because of the nature of their disabilities, they may need more "time to develop the essential skills which will be critical for them throughout their lives."[130]

The legislative history refers to another group of students for whom transition services may need to be provided before age 14: those at risk of dropping out.[131] For this group of students, the school district's curriculum should be analyzed to "help reduce the number of students with disabilities who drop out." The IEP Team should "work with each student with a disability and the student's family to select courses of study that will be *meaningful* to the student's fu-

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[127] *Id.* (emphasis added).

[128] 34 C.F.R. § 300.344(b).

[129] 20 U.S.C. § 1414(d)(1)(A)(vii)(I).

[130] H.R. Rep. No. 101-544 at 10, U.S. Code Cong. & Admin. News 1990, p. 1732-33.

[131] *Id.*

ture and *motivate* the student to complete his or her education."[132]

Beginning at age 16, or younger if appropriate, actual transition services are to begin. The IEP must list all needed services under each area of transition, including responsibilities of other agencies to provide services and any linkages to be developed with other agencies."[133] The IDEA's legislative history underscores two key principles behind these requirements. First, "the preparation of students with disabilities for movement from school to post-school environments [is] not ... the sole responsibility of public education."[134] On the one hand, "schools are not expected to become job placement centers." On the other hand, "there are many employment and employment related activities which are appropriately provided by and funded through the" school districts.[135] The specific ways in which the special education and VR systems are to interact with one another will be discussed below.

Second, schools will need to become familiar with the services available to students with disabilities in their communities and "make use of this information in the transition planning for individual students."[136] The result:

> [S]chools can facilitate linkage with agencies when needed by students, can ascertain requirements for access to, and participation in, the opportunities offered by these agencies, and thus can effectively communicate this information to students and their families, and identify ways in which they can prepare students with disabilities to take advantage of these opportunities.[137]

Recall that Sam ended up on a three-year waiting list for services. Had linkages been made while Sam was still a student this delay could have been avoided. Additionally, recall that Sam's parents were very concerned about Sam losing SSI and Medicaid. As a result, they were hesitant for Sam to be employed in any setting other than a sheltered workshop.

Indeed, Sam's parents are not alone. Fear of loss of benefits creates a significant barrier to people with disabilities who contemplate work. However, these concerns were based on false, or at least misleading, information. The comments referred to above make it clear that the school district staff would not necessarily need to become experts in the work incentives available for SSI recipients. However, they should become familiar with community resources which could provide this information, and to whom they could refer the family. It is highly unlikely that many school districts will be aware of which agency could provide this information. This would, therefore, provide an excellent opportunity for the advocacy community, as part of its outreach efforts. For example, a Protection and Advocacy agency could determine the transition coordinators for the school districts in its area and offer to meet with them to explain the services that the agency can provide. It could also provide project brochures to the transition coordinators for distribution to school age students and families or offer to provide workshops to students, families and school staff.

As with other parts of the IEP, the transition planning requirements are much more than mere technicalities. The court in the *Scott B.* case, discussed above, also found that a school district, which

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[132]34 C.F.R. Part 300, App. A, Quest. 11. (emphasis added).

[133]20 U.S.C. § 1414(d)(1)(A)(vii)(II); 34 C.F.R. § 300.347(b).

[134]H.R. Rep. No. 101-544 at 12, U.S. Code Cong. & Admin. News 1990, p. 1734.

[135]*Id.* at 11, p. 1733.

[136]*Id.*

[137]*Id.*

only provided for the vocational needs of the student, failed to meet its transition obligations to him. The district did not develop a plan to help the student "survive an adult life." In other words, the plan was not functional. The court noted the school: (1) did not identify any goals for the student for after he left school; (2) did not perform any transition evaluations, other than a vocational evaluation; (3) did not provide "the full panoply of services that transition planning envisions" to prepare him for life outside of school in such areas as personal needs, getting around the community and recreation; and (4) failed to meet his individual, unique needs and instead placed him in an existing generic program with minor adaptations.[138]

It appears Sam's school district made some of the same errors as the district in the *Scott B.* case. Sam's district did not provide linkages to community service agencies while he was still in school. It also looks like it placed Sam in a pre-existing, generic, shop and dishwashing training program without considering his unique needs and interests.

E. Special Education and Vocational Rehabilitation Services: How do the Two Systems Work Together?

As noted above, the VR system also has a role to play in preparing students for the world of work. In fact, VR agencies must now be actively involved, in collaboration with school officials, to plan for and provide services to students with disabilities during their transition years. However, in our experience, all too many state VR agencies are still unwilling to get involved until very late in a student's transition to post-school activities. Where AT is involved, this can be a significant problem. Schools do not normally consider AT devices purchased to ensure an appropriate education to be the student's property.[139] If the AT device will also be essential for college or employment, significant delays will result if the VR process does not begin until after a student leaves school. It also makes little fiscal sense for a school to provide AT, merely to be surrendered upon graduation with the student then seeking another device from the VR agency. What is the VR agency's responsibility while students are still in school?

1. Obligations Under the IDEA

It is clear from the language of the IDEA that VR agencies are intended to be involved both in the planning process with schools and in the actual provision of services. The comments to the IDEA regulations note that "because many students receiving services under the IDEA will also receive services under the Rehabilitation Act, it is important, in planning for their future, to consider the impact of both statutes."[140]

State VR agencies are specifically referred to in the IDEA regulations. As noted above, rehabilitation counseling includes services provided by the VR agency.[141] The definition of AT services includes coordinating other services with AT devices "such as those associated with existing education and *rehabilitation* plans and programs."[142] The IDEA regulations also note that nothing in the transition services requirements relieves any participating agency, "including a state [VR] agency," of the responsibility to provide or pay for any transition service that the agency would otherwise provide.[143] A "participating agency" means a state or local agency, other than the school, that is fi-

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[138] *East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D. Pa. 1999), *aff'd* 213 F.3d 628 (3rd Cir. 2000).

[139] *See* 64 Fed. Reg. 12540; *OSEP Letter to S. Goodman*, 30 IDELR 611 (6/21/98).

[140] 34 C.F.R. Part 300, App. A, Sect. III.

[141] *Id.* § 300.24(b)(11).

[142] 20 U.S.C. § 1401(2)(D)(emphasis added).

[143] 34 C.F.R. § 300.348(b).

nancially and legally responsible for providing transition services to the student.[144] If a participating agency fails to provide agreed upon transition services contained in the IEP, the school must initiate a meeting as soon as possible to identify alternative strategies to meet the transition objectives and, if necessary, revise the IEP.[145]

IDEA '97 strengthened the obligations of other public agencies to provide services to students while they are still in school. All states must now have interagency agreements to ensure that all public agencies that are responsible for providing services that are also considered special education services, fulfill their responsibilities. Agencies that would meet this definition would include both Medicaid and the state VR agency. The financial responsibility of these public agencies must precede that of the school. If an agency does not fulfill its obligation, the school must provide the needed services, but has the right to seek reimbursement from the public agency. The agreement must also specify how the various agencies will cooperate to ensure the timely and appropriate delivery of services to the students.[146]

2. Obligations Under the VR Laws

Title I of the federal Rehabilitation Act, which governs state VR agencies, contemplates that VR agencies will play an active role in special education transition planning.[147] Title I was amended in 1998 and final regulations implementing the changes were published on January 17, 2001. The comments to the regulations note that the 1998 law requires state VR agencies to "*increase* their participation in transition planning and related activities."[148] Accordingly, the state VR Plan must include policies for coordination between the VR agency and education officials to facilitate the transition from the special education system to the VR system, including development of a formal interagency agreement. The agreement must include: (1) provisions for consultation and assistance to, and planning with, the educational agencies in preparing students for transition and in developing the transition plan in the IEP; (2) the relative roles and financial responsibilities of the special education and VR systems to provide services; and (3) provisions for outreach to and identification of students with disabilities who need transition services.[149]

The regulations make it clear that state VR agencies are to be actively involved in the transition planning process with the school districts, including: (1) outreach to and identification of students with disabilities who may need transition services, as early as possible during the process; (2) consultation and technical assistance to assist school personnel in transition planning; and (3) involvement in transition planning with school personnel that facilitates development of the special education IEP.[150] In discussing the importance of the early involvement of the VR system in the transition planning process, the comments to the regulations stress that the VR agency should "participate actively throughout the transition planning process, not just when the student is nearing graduation."[151]

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[144] *Id.* § 300.340(b).

[145] *Id.* § 300.348(a).

[146] 20 U.S.C. § 1412(a)(12); *OSERS Policy Letter to McMurdo*, 35 IDELR 161 (12/27/00).

[147] For a fuller discussion, see our 1999 booklet "Funding of Assistive Technology, State Vocational Rehabilitation Agencies and Their Obligation to Maximize Employment" (second edition to be published in 2003).

[148] 66 Fed. Reg. 4424 (emphasis added).

[149] 20 U.S.C. § 721(a)(11)(D); *OSERS Policy Letter to McMurdo*, 35 IDELR 161 (12/27/00).

[150] 34 C.F.R. § 361.22(b).

[151] 66 Fed. Reg. 4424.

Recall that Sam was not referred to the VR agency until his last year in school and that, as a result of the VR assessment, he was identified for job training as a dishwasher. While this matched the program he received as a student, it did not match his stated interest in the computer field. As discussed above, had the VR agency been involved earlier in the transition planning process, perhaps the VR staff could have assisted the school and family in locating a job that met his stated employment objective and his abilities. If not, they could have assisted in identifying an employment objective and training program that matched his stated interests and abilities as closely as possible.

The VR system is also expected to provide services to at least some students with disabilities while they are still in school. The legislative history to the 1998 amendments to Title I emphasizes that, subject to the state VR Plan, the VR agency is required to provide services to students to facilitate achievement of the employment outcome as spelled out in the individualized plan for employment (IPE).[152] Transition services are specifically listed in the VR regulations as an available VR service.[153]

Moreover, as noted above, one of the obligations of the VR system is to provide outreach to students with disabilities. As part of the mandated outreach, the VR agency must:

> …inform these students of the purpose of the VR program, the application procedures, the eligibility requirements, and the potential scope of services that may be available ... as early as possible during the transition planning process.

The stated reason for this requirement is "to enable students with disabilities to make an informed choice on whether to apply for VR services while still in school."[154] In other words, it is the student's, and family's, choice about whether to apply for VR services while still in school.

Of course, when transition services are provided by the VR system, as with any other VR service, they must be designed to "promote or facilitate the achievement of the employment outcome identified in the student's [IPE]."[155] As with any other person with a disability who is receiving services from the VR system, VR transition services will only be provided to "students who have been determined eligible under the VR program and who have an approved IPE."[156] What services the VR agency will provide to students with disabilities and the circumstances under which they will be provided must be consistent with the mandated state interagency agreement between the state VR and special education systems.[157] "However, state [VR] agencies should not interpret the 'interagency agreement' provisions as shifting the obligation for paying for specific transition services normally provided by those agencies to local school districts. State [VR] agencies still have that responsibility."[158] Additionally, "the IPE for a student with a disability who is receiving special education services must be coordinated with the IEP for the individual in terms of the goals, objectives, and services identified in the IEP."[159]

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[152]Congressional Record–House, H6693, July 29, 1998.

[153]34 C.F.R. § 361.48(r).

[154]66 Fed. Reg. 4424.

[155]34 C.F.R. § 361.5(b)(55).

[156]66 Fed. Reg. 4424.

[157]34 C.F.R. § 361.45(d)(8)(ii).

[158]Congressional Record–House, H6693, July 29, 1998.

[159]34 C.F.R. § 361.46(d).

How would all of this play out for Sam? First, an appropriate employment objective must be identified for him as part of the special education transition planning. Then, once this is done, potential locations to receive his training must be identified. Will it be a school program or one operated by a community agency? Will he need additional support services to make his experience a success? Once the location and types of services are identified, the next question is, "Who will be responsible for paying for which services"?

In answering this question, several factors must be considered. Assuming the student is eligible for VR services, the VR laws make it clear that the student and family have the right to decide whether to apply for VR services while the student is still in school. Second, since both the IDEA and VR laws require these systems to develop a state interagency plan, the substance of the interagency plan, if any, must be considered. Third, is the identified service provider one with which the school district can enter into a contract? If not, perhaps the VR system will be responsible.

Finally, for those students who have not received VR services while still in school, the VR regulations require the VR system to determine eligibility and to develop an IPE for students eligible for VR services. This must occur as soon as possible during transition planning but, at the latest, by the time the student leaves the public school setting.[160] The comments to the VR regulations explain, again, how critical this is:

> Requiring the IPE to be in place before the student exits school is *essential* toward ensuring a smooth transition process, one in which students do not suffer *unnecessary* delays in services and can continue the progress toward employment that they began making while in school.[161]

For Sam, although there was no delay in receiving his initial VR services, once he completed his first year of VR services, he was placed on a three-year waiting list for any additional services. Given the severity of his disability and the amount of training he apparently needed to be job ready, he should have begun to receive VR services earlier in the process, and the school should have anticipated the follow-up he might need after his first year of preparation.

3. Transition and AT

What is the effect of all of these requirements for the student who needs an AT device? First, the VR agency may and should participate in the transition planning meetings with the school. Second, if the graduating student clearly will need the AT device for educational, training or employment purposes, a reasonable approach would be to have the VR agency purchase the device in the first instance or purchase it from the school when the student graduates. The need for the device would continue to be reflected in the IEP, with reference to the VR agency as payer (or purchaser upon transfer). The AT device would also appear in the IPE, which must be developed by the VR agency before the child finishes school.

Neither the IDEA nor the federal VR laws prohibit the VR agency from purchasing the AT outright for the student while still enrolled in high school or from purchasing it from the school at graduation. The IDEA regulations envision other agencies providing services to students in transition, including VR agencies.[162] The VR regulations require that the State Plan specify the respective financial responsibility of the various state agencies serving the student.[163]

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[160] *Id.* § 361.22(a)(2).

[161] 66 Fed. Reg. 4424 (emphasis added).

[162] 34 C.F.R. § 300.348.

[163] *Id.* § 361.22(a)(2)(v).

In fact, the U.S. Department of Education has indicated that it is permissible for a school district to transfer an AT device, costing more than $5,000, to a state VR agency if it will no longer need the device for other students. The Department envisions that most such devices will be modified for the individual student and, therefore, will no longer be needed by the district when the student graduates. For devices costing less than $5,000 this limitation does not apply, meaning the district could transfer the device to the VR agency whether or not it was needed for other students. The Department went on to note that it agreed that coordination between school districts "and state VR agencies to enable students with disabilities to continue using assistive technology devices as they move from one program to another is an efficient, cost-effective means of facilitating transition from school to work related services and fully" supported this type of cooperation.[164]

F. Private School Placements

1. School District Placements

As noted above, as part of the continuum of services, school districts must ensure that the option of placing students in special (or private) schools is available.[165] When districts place a student in a private school to meet their obligation to provide a FAPE, the services are to be at no cost to the family and an IEP must be developed.[166]

The regulations also authorize placements in public or private residential programs to meet the needs of children with disabilities, and if required, "the program, including non-medical care and room and board, must be at no cost to the parents of the child."[167] Whether a residential placement is for educational or non-educational reasons can be a difficult question, but the courts have tended to presume that a placement is educational when there are mixed reasons for the placement.[168]

2. Parental Placements

What are a district's obligations when parents place students in private or parochial schools? Must districts pay for the tuition costs; must the district provide services to all students enrolled in private schools; may a district refuse to provide services on the site of a parochial school because of the Establishment Clause of the First Amendment; are there circumstances where parents will be reimbursed for private school costs?

a. Services to Students in Private and Parochial Schools

If the district offers a FAPE to the student but the parents decide to enroll the student in a private or parochial school, the district is not responsible for the tuition.[169] The next question is: "May a district provide services on the site of a parochial school, which by definition is run by a religious entity, or does that violate the Establishment Clause of the First Amendment, which prohibits government support of religion? IDEA '97 includes a provision that special education and related services (which can, of course, include AT) may be provided on the site of a parochial school "to the extent consistent with law."[170] What is "consistent with law?"

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[164] *OSEP Policy Letter to S. Goodman*, 30 IDELR 611 (6/21/98).

[165] 34 C.F.R. § 300.551.

[166] *Id.* §§ 300.348 and 300.401.

[167] *Id.* § 300.302.

[168] *See*, *e.g.*, *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985)*; Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687 (3rd Cir. 1981); and *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136 (D.D.C. 1979).

[169] 34 C.F.R. § 300.403(a).

[170] 20 U.S.C. § 1412(a)(10)(A)(i)(II).

The leading case in this field is *Zobrest v. Catalina Foothills School District*.[171] In that case, the Supreme Court held that providing a sign language interpreter to a deaf student attending a parochial high school did not violate the Establishment Clause. Relying on the Supreme Court's analysis, the Second Circuit ruled that the Establishment Clause did not prohibit the provision of a teacher's aide and special education "consultant" teacher on the grounds of a parochial school.[172]

However, IDEA '97 placed limits on the amount districts must spend on providing services to students enrolled by their parents in private schools. A district must spend a "proportionate share" of its IDEA dollars for students enrolled in private schools.[173] Following the passage of IDEA '97, the Supreme Court ordered that the Second Circuit (and several other circuits) reconsider their decisions in the light of this language.[174]

The Second Circuit reaffirmed its position that the Establishment Clause is not violated when services are provided on a parochial school site. However, the court determined that IDEA '97 does not require a district to provide services on site. Moreover, the district is only required to spend a proportionate share of its federal dollars on services to students enrolled in private schools. Districts need not spend their own funds on these students.[175] The other courts to address this question have ruled similarly.[176]

The regulations make it clear that students voluntarily enrolled in private schools by their parents have no individual right to services. The districts must meet with private school representatives to determine the number and needs of private school children and how those needs will be met, but the district itself does not necessarily have to provide them. Instead of an IEP, a services plan will be developed by the IEP Team for those students who will receive services.[177] If the parents wish to appeal the decision of the IEP Team, they cannot use the impartial hearing process (discussed below). They must use the complaint resolution procedure (CRP), which is also discussed below.[178]

The IDEA regulations reaffirm that services may be provided on-site "to the extent consistent with law."[179] The comments note that providing services on-site is preferred, "to cause the least disruption in the children's education." They also note there must be flexibility to take into account local conditions.[180] If services are not provided on-site, the school district must provide transportation to and from the site, if needed for the student to benefit from or participate in the service.[181]

The comments also make clear that states and local school districts "are not prohibited from providing services to private school children with disabilities be-

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[171]509 U.S. 1 (1993).

[172]*Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997).

[173]20 U.S.C. § 1412(a)(10)(A)(i)(I).

[174]*See Board of Educ. v. Russman*, 521 U.S. 1114 (1997).

[175]*Russman By Russman v. Mills*, 150 F3d 219 (2nd Cir. 1998).

[176]*See, e.g.*, *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998); *Foley v. Special School Dist. of St. Louis County*, 153 F.3d 863 (8th Cir. 1998); *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431 (10th Cir. 1997); *K.R. v. Anderson Community Sch. Corp.*, 125 F.3d 1017 (7th Cir. 1997); *Cefalu v. East Baton Rouge Parish School Bd.*, 117 F.3d 231 (5th Cir. 1997).

[177]34 C.F.R. § 300.454.

[178]*Id.* § 300.457.

[179]*Id.* § 300.456(a).

[180]64 Fed. Reg. 12604.

[181]34 C.F.R. § 300.456(b).

yond those required by this part, consistent with state law or local policy."[182] Therefore, a state or school district could choose to mandate services to all students in these schools. For example, New York creates a right to a FAPE for all students attending private or parochial schools.[183] Services may be provided on site, at a neutral site or at a school site, depending on what is appropriate.[184] Of course, it is virtually impossible to envision any AT that could be appropriately provided anywhere other than on site. Kansas law also provides services for students with disabilities attending private schools.[185] In *John T. v. Marion Ind. Sch. Dist.*,[186] the court held that Iowa law required a school district to provide a full-time aide to a student attending a parochial school.

b. Unilateral Private School Placements

What if a parent contends that the district did not offer a FAPE? As will be noted below, in such circumstances, the parents have the right to request an impartial hearing, but the child is to remain in the current educational setting pending completion of this process. Must the child remain in what the parents maintain is an inappropriate setting? If the parents can afford to move the student to a different setting may they obtain reimbursement?

Since 1985, when the Supreme Court decided *Burlington Sch. Comm. v. Department of Educ.*,[187] in certain circumstances, parents are able to obtain reimbursement for unilateral placements in private schools when the district did not offer a FAPE. The Court set up a three-part test. The parents must establish: (1) that the district did not offer an appropriate placement; (2) that the program selected by the parents is appropriate, and (3) that equity factors favor reimbursement. In *Florence County School Dist. Four v. Carter*,[188] the Supreme Court held that if the other parts of the test were met, the parents could obtain reimbursement even if the program was not approved by the state's educational agency.

IDEA '97 codifies, with some modifications, these decisions. Parents may obtain reimbursement from a court or hearing officer if the district did not offer a FAPE in a timely manner and the private placement selected by the parents is appropriate. The private placement can be appropriate even if it does not meet state standards applicable to school districts.[189] However, the parents must first inform the district, at either the IEP meeting or by letter: (1) of their concerns with the district's proposal, (2) that they are rejecting the district's proposed placement, and (3) that they intend to place their child in a private school at district expense. The parents' request for reimbursement may also be denied if they refuse to make their child available for an evaluation by the district or if a court finds that they otherwise acted unreasonably. The prior notice requirement is not required if: (1) the parents are illiterate, (2) compliance would endanger the child, or (3) the school prevented the parents from providing the notice or the district did not notify the parents of their

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[182]64 Fed. Reg. 12410, regarding 34 C.F.R. § 300.453(d).

[183]N.Y. Educ. Law § 3602-c.

[184]*See* N.Y. State Education Department Memo from Kathy Ahearn, Counsel and Deputy Commissioner for Legal Affairs (September 1998).

[185]Kan. Stat. Ann. § 72-5393; *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1439 (10th Cir. 1997).

[186]173 F.3d 684 (8th Cir. 1999).

[187]471 U.S. 359 (1985).

[188]510 U.S. 7 (1993).

[189]34 C.F.R. § 300.403(c); 64 Fed. Reg. 12602.

rights.[190]

Applying the principles behind the Supreme Court's decisions in *Burlington* and *Carter*, a federal district court granted a preliminary injunction directing a school district to place a student in a college program. The court noted that:

> It is important not to get overly concerned with semantics. What matters is not that plaintiffs seek funds to allow Aaron to attend a college, but rather the ultimate purpose for doing so: for Aaron to obtain a high school diploma.[191]

G. Due Process Protections

1. General Due Process Requirements

As noted in the IEP section above, the Supreme Court emphasized the importance of the procedures set up by the IDEA. Indeed, the rights given to parents of students with disabilities by the IDEA are significantly greater than the rights of parents of regular education students. Parents of students with disabilities are co-partners with district personnel in determining the goals and services to be provided. If they disagree with the decision, they have the right to a formal, impartial review of the district's recommendations. These rights, which are referred to as "procedural safeguards" in the IDEA, come from the Due Process Clause of the U.S. Constitution.

Districts must regularly and fully inform parents of their due process rights.[192] Prior to taking any action regarding the student, they must also notify the parents of the basis for their action. This notice must include: (1) a description of the action proposed or refused; (2) an explanation of why the district made the decision to take that action; (3) a description of any other options considered and an explanation of why they were rejected; (4) a description of the records, reports or evaluations used as a basis for the decision; and (5) a description of any other factors that are relevant to the decision.[193]

All parents have the right to review copies of their children's educational records and to request that false, misleading or personally invasive records be amended or removed pursuant to the Family Educational Rights and Privacy Act.[194] The parents of children with disabilities also have the right to a copy of the evaluations conducted by the district.[195] Finally, when the records relating to a student's special education are no longer needed, the parents have the right to have them destroyed.[196]

Under the IDEA, parents have the right to request an impartial hearing to appeal all actions taken by a district.[197] At the hearing, the parents have the right to be represented by an attorney or other person with specialized training, to compel the attendance of witnesses, to present evidence and to cross-examine witnesses.[198] Impartial hearings have become extremely technical and complicated. Therefore, it is highly advisable for parents to contact an attorney or trained advocate if they believe it is necessary to request a hearing.

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[190] 20 U.S.C. § 1412(a)(10)(C).

[191] *Sabatini v. Corning-Painted Post School District*, 78 F. Supp. 2d 138, 145 (W.D.N.Y. 1999).

[192] U.S.C. § 1415(b)(3), (c) and (d)(2).

[193] *Id.* § 1415(c).

[194] *Id.* § 1232g.

[195] *Id.* § 1414(b)(4)(B).

[196] 34 C.F.R. § 300.573.

[197] 20 U.S.C. § 1415(b)(6).

[198] *Id.* § 1415(f).

The decision of the hearing officer is final, unless there is an appeal.[199] States have the option to create a second, state level of administrative review. In that case either the parents or district have the right to file an appeal to the state.[200] Following the hearing decision or state level decision, if applicable, either the parents or the district have the right to appeal to state or federal court.[201]

2. Status Quo: The Right to Retain Existing Services Pending Appeal

The child remains in the current educational placement during all of the above proceedings, unless the parent and school or state agree otherwise.[202] This is referred to as "pendency," "stay put," or "status quo." Status quo applies to the services listed in the IEP as well as "the setting in which the IEP is implemented, such as a regular" or self-contained classroom.[203] However, a school may change the location of a child's classroom within the school district.[204] Status quo is not intended to require that a student remain in the same grade pending an appeal.[205] Status quo also applies to children moving from one school to another within the state.[206] However, status quo does not apply when a student moves from one state to another.[207]

For the purposes of status quo, what constitutes the student's current educational placement. The U.S. Department of Education has indicated that the following factors constitute a child's placement: (1) the educational program set out in the IEP, (2) the specific option on the continuum of services in which the IEP will be implemented (regular class, self-contained class, etc.), (3) the actual location, i.e., the specific school or facility where services will be provided.[208]

What if a parent is only challenging part of the IEP? Let's say the parent and school agree that the student should have a computer in school to work on written assignments, but disagree on whether the student may have the computer for use at home on homework. May the school refuse to provide the computer at school, while the hearing on the use of the computer at home proceeds? The regulations clarify that a school cannot use a parent's refusal to consent to one service or benefit as a basis to deny another service or benefit.[209] Therefore, the school should implement agreed upon services, such as the computer for use at school, pending resolution of a disagreement about other services.[210]

What if the parents prevail at a state level impartial hearing or at the state review office and the school is ordered to provide the computer for use in the home? If the school appeals to court, may it refuse to implement the state's decision based on the

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[199] *Id.* § 1415(i)(1)(B).

[200] *Id.* § 1415(g).

[201] *Id.* § 1415(i)(2).

[202] *Id.* § 1415(j); 34 C.F.R. § 300.514(a).

[203] 64 Fed. Reg. 12616.

[204] *Id.*; *Concerned Parents v. N.Y.C. Bd. of Ed.*, 629 F.2d 751 (2nd Cir. 1980).

[205] 64 Fed. Reg. 12616.

[206] *OSEP Policy Letter to L. Rieser*, EHLR 211:403 (7/17/86).

[207] *Michael C. v. Radnor Township School District*, 1999 WL 89675, 29 IDELR 958 (E.D.Pa. 1999); *aff'd*, 202 F.3d 642 (3rd Cir. 2002), *cert. denied.* 531 U.S. 813 (2000); *OSEP Policy Memorandum 96-5*, 24 IDELR 320 (12/6/95).

[208] *OSEP Policy Letter to J. Fisher*, 21 IDELR 992 (7/6/94).

[209] 34 C.F.R. § 300.505(e).

[210] *See* 64 Fed. Reg. 12610.

status quo requirements? Again, the regulations clarify that if the state level hearing or review officer rules in the parents' favor, that decision constitutes an agreement between the parents and state for purposes of status quo.[211] Accordingly, the school would have to provide the computer during any subsequent appeals.

Status quo can be a real "two-edged" sword for parents. If the parents like the services or program and the school seeks to make a change, the parents can maintain the student in the program while the review procedures take place. If the parents are seeking a change, say to add AT, and the school refuses, then the student's program would not change while the review proceeds. As noted above, however, the parents can be reimbursed if they change the student's program unilaterally and they meet the criteria set up by the Supreme Court in *Burlington* and *Carter*.

3. Compensatory Education

What if the school fails to implement the IEP or fails to provide a FAPE in some other way, and the parents are unable to provide the services at their own expense? In such a case, the right to get reimbursed does not help. Is there any other remedy available, if, for example, the school does not obtain the AT device called for in the IEP? As noted above, the right to a FAPE ends at the age of 21. Can a student receive special education services after the age of 21 as a remedy to compensate for the failure to provide services earlier?

In *Burr v. Ambach*,[212] the student, who was 20 at the time of the decision, was without any educational programming for almost two years because of unnecessary delays in the impartial hearing and review process. The court noted that even though the IDEA limited the right to a FAPE until the age of 21, there needed to be some way to provide a remedy for the clear deprivation of his right to a FAPE. Accordingly, the court approved the provision of special education services beyond his 21st birthday. Another form of compensatory education can be to provide special education services during the summer, even though the student might not have been entitled to summer services, instead of waiting until after the student reached the age of 21.[214]

In *M.C. on Behalf of J.C. v. Central Regional School*,[213] the court rejected a requirement that there be a "gross" violation to the right to a FAPE, as occurred in *Burr*. The court held that the right to compensatory education is based simply on whether the IEP is appropriate. The right to compensatory education begins when the school knows or should know that the student is not receiving a FAPE.[215]

Applying these standards, a district was ordered to provide two years of compensatory education because it failed to provide appropriate AT devices and services to a student. The court noted that the school "dragged its feet" in acquiring the AT device, a laptop computer with a word prediction program, and in training the staff so the student "could realize some benefit from the technology."[216]

In *Pihl v. Massachusetts DOE*,[217] the First Circuit joined the Second and Third Circuits, in allowing compensatory education to be used to remedy past violations and to extend its use to cases where the student is past the age of entitlement when the claim is made.

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[211] 34 C.F.R. § 300.514(c).

[212] 863 F.2d 1071 (2nd Cir. 1988).

[213] 81 F.3d 389 (3rd Cir. 1996).

[214] *See Johnson v. Bismark Pub. Sch. Dist.*, 949 F.2d 1000 (8th Cir. 1991).

[215] *Id.* at 396; *see* Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA*, 95 Ed. Law Rep. 483 (1995).

[216] *East Penn Sch. Dist. v. Scott B.*, 29 IDELR 1058, 1063 (E.D. Pa. 1999) *aff'd*, 213 F.3d.628 (3rd Cir. 2000).

[217] 9 F.3d 184, 188-189 (1st Cir 1993).

4. Mediation

The statute now mandates that states and districts have a mediation process available to resolve any and all complaints, at least whenever an impartial hearing is requested. Mediation is to be voluntary and cannot be used to deny or delay a parent's right to an impartial hearing. But, if a parent does not choose to use mediation, a district or state may establish a procedure requiring the parent to meet with a specified disinterested party to explain the benefits of mediation.

The state shall bear the costs of mediation. The mediators are to be impartial, trained in mediation techniques and knowledgeable of special education law. All discussions during mediation sessions are to be confidential.[218]

5. Attorney's Fees are Available When the Student Wins an Appeal

When parents request an impartial due process hearing, they are entitled to reasonable attorney's fees if they ultimately prevail at the hearing, on review or in court. There is no reciprocal arrangement for the state or school district's attorneys. The amount of fees must be based on the prevailing rates in the community. The parents'attorney's fees may be reduced if they reject an offer of settlement made by the district, in writing and received at least 10 days before the hearing, if the relief they obtain is not more favorable than the district's offer of settlement.[219]

IDEA '97 places some new restrictions on the availability of parents' attorney's fees. With a request for an impartial hearing there must be a statement listing the student's name, address and school attended, as well as a description of the problem that gave rise to the hearing request, as well as a proposed resolution of the problem to the extent known and available.[220] If this statement was not submitted, attorney's fees can be limited.[221]

Attorney's fees are also not available to parents for IEP Team meetings unless the meeting has been convened as a result of an impartial hearing or court decision. However, states may authorize attorney's fees for participation in pre-hearing mediation.[222]

The world of plaintiff's attorney's fees changed dramatically in May 2001 when the U.S. Supreme Court decided *Buckhannon Board & Care Home, Inc., et al. v. West Virginia Department of Health and Human Resources et al.*[223] Prior to the *Buckhannon* decision, plaintiffs in a number of different types of civil rights suits, including IDEA cases, were able to obtain attorney's fees when their actions (e.g., filing a lawsuit or request for due process hearing) were the "catalyst" for a change in the defendant's behavior, even if the issue was never formally decided by a court or administrative tribunal. This method for obtaining fees is known as the "catalyst theory."

In *Buckhannon*, the Court held that the catalyst theory is not a permissible method for obtaining fees, unless the change in defendant's behavior has been ratified in a written document formally approved by the court, such as a settlement agreement that has been reduced to a consent decree. Although the decision in *Buckhannon* specifically addressed the use of the catalyst theory in Americans with Disabilities Act and Fair Housing Act cases, at the time of this writing it is commonly assumed that the hold-

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[218] 20 U.S.C. § 1415(e).

[219] *Id.* § 1415(i)(3).

[220] *Id.* § 1415(b)(7).

[221] *Id.* § 1415(i)(3)(F)(iv).

[222] *Id.* § 1415(i)(3)(D)(ii).

[223] 532 U.S. 598 (2001).

ing applies in IDEA cases as well. As this issue is on the fast track through the federal court system, we recommend that you take a moment to research the current impact of *Buckhannon* in your circuit to see how it will be applied to your work in an IDEA case.

H. Discipline

1. Introduction

To what extent do the rights of students with disabilities differ from those of non-disabled students in the disciplinary process? As noted above, the program for a student with a disability is supposed to be developed by the IEP Team and if the parents request an impartial hearing, the student must remain in the current placement pending review. How do these rights come into play when the district suspends a student? Does it make a difference if the suspension is for a long or short period?

All public school students who live in a state that has chosen to provide for free, compulsory public education,[224] retain certain rights when they are accused of misconduct by a school district. In *Goss vs. Lopez,*[225] the Supreme Court held that such students (both with and without disabilities) have certain rights to public education of which they cannot be deprived without procedural due process. In *Goss*, the Court held that at minimum, public school students facing suspension must be given some type of notice and hearing.[226] The holding was specifically limited to a relatively simple suspension of 10 days or less. The Court left open the possibility that expulsions, long term suspensions or complex cases might require additional due process protections (e.g., the opportunity to cross examine witnesses or have access to counsel), explaining that the reviewing court would need to carefully balance the competing interests.

In *Honig v. Doe*,[227] the United States Supreme Court provided some answers to questions about discipline of students with disabilities specifically. The Court held that suspensions for greater than 10 days constitute a "change in placement." Accordingly, the IEP Team must be involved in long-term suspensions. Moreover, if the parents request an impartial hearing to appeal any decisions of the IEP Team, the status quo provisions apply and the student must be returned to his or her prior placement while the hearing proceeds. The Court did allow for an exception for dangerous students. Districts may obtain a court order to change a dangerous student's placement during the review process.

2. IDEA '97

IDEA '97 makes several changes in the procedures for disciplining students with disabilities. States must determine if there are discrepancies between the long-term suspension or expulsion rates of students with disabilities across districts in the state or when compared to non-disabled students within districts. If so, the state must review and, if necessary, order the revision of policies in the district relating to developing and implementing IEPs, use of behavioral interventions, and procedural safeguards.[228]

The statute also codifies *Honig v. Doe*, with some twists. Since *Honig v. Doe* is

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[224]Presumably all 50 states.

[225]419 U.S. 565 (1975)

[226]Suspensions of 10 days or less require: oral or written notice of charge(s) and, if the student denies the charge, an explanation of the evidence the authorities have and an opportunity for the student to present his or her side of the story. This interchange should occur prior to the student's suspension. However, in some cases (e.g., students whose presence imposes a continuing danger) the student may be immediately removed from school and the necessary procedures should follow as soon thereafter as practicable.

[227]484 U.S. 305 (1988).

[228]20 U.S.C. § 1412(a)(22).

an interpretation of the IDEA, now that the IDEA has been amended, the new procedures must be followed. The U.S. Department of Education has stated, however, that in addition to using the hearing officer process discussed below to change a student's placement, districts may still go to court to change the status quo of a dangerous student, as set out in *Honig v. Doe*.[229] A case, *Doe by Doe v. Board of Educ. Of Elyria City Schools*,[230] examines the specific steps a district must take to meet the new procedural due process requirements in an expulsion case.[231]

Regarding short-term suspensions (those of fewer than 10 consecutive school days), the 1999 regulations make it clear that these suspensions are not a "change in placement."[232] Therefore, the IEP Team need not be convened to review a short-term suspension. During the course of a short-term suspension, and up to the time a student has been removed for 10 days during the school year, the school does not have to provide educational services to the student, unless state law requires that non-disabled students receive educational services during that time. Once a student has been suspended for a total of 10 days, however, educational services must be provided during any subsequent short-term suspensions.[233]

If a student is subjected to a series of short-term suspensions, this may be considered a "change in placement," requiring the involvement of the IEP Team, as discussed below. The 1999 regulations indicate that a change in placement occurs if the short-term suspensions constitute a pattern because they cumulate to more than 10 school days and because of other factors such as their length and proximity to one another.[234]

Before a student may be suspended for more than 10 days, there must be an IEP Team meeting to determine whether or not the student's misconduct is a "manifestation" of his or her disability.[235] The parent may appeal this manifestation determination. If it is a manifestation of the disability, the student's placement, including classroom setting must not change unless a change is agreed to by the IEP Team (including the parent). If, however, drugs or weapons are involved (as narrowly defined by the statute) the district may choose on its own to place the student in an interim alternative educational setting (IAES) for up to 45 days.[236] In all other discipline cases however, "stay put" applies, unless a hearing officer determines that the student's current placement is "substantially likely to result in injury to the student or others," in which case the student may also be placed in an IAES. Unlike drug or weapon cases, however, in a "dangerousness" case the district

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[229]*OSEP Memorandum 97-7*, 26 IDELR 981 (9/19/97).

[230]149 F.3d 1182 (6th Cir. 1998)

[231]See also, *Gasden City Board of Ed. v. L.H.*, 3 F Supp. 2d 1299 (ND Alabama, Middle Div., 1998), which stresses that *Honig* is alive and well post IDEA '97 and its interpreting regulations. In this case, the district sought an injunction in court to remove two students who fought at school. The district did not seek an expedited due process hearing as required per 20 U.S.C. §§1415(k)(2)(A), 1415(k)(7)(C). After the students complained that the district failed to exhaust administrative remedies when it sought an injunction without first seeking an expedited due process hearing, the district argued that the case was moot and the injunction was no longer necessary as the student's placement had changed to homebound with the parties' permission, and, as a result the students no longer caused a substantial threat of injury or harm. The court held that *Honig* injunctions are still available in IDEA cases, even though IDEA '97 created the expedited due process hearing for use in certain discipline cases, and exhaustion is still not required where available administrative remedies would prove futile.

[232]34 C.F.R. § 300.520(a)(1)(i).

[233]*Id.* § 300.520(a)(1)(ii).

[234]*Id.* § 300.519(b).

[235]20 U.S.C. § 1415(k)(4)(A).

[236]*Id.* §§ 1415(k)(1)(A)(ii), (k)(2) and (k)(3)(A).

may not change the student's placement until the hearing officer or judge has ruled in its favor.

Expedited due process hearings are provided in "dangerousness" cases or the district may go to court for a *Honig* injunction. The IAES must enable the child to receive the services specified on the IEP and include services to ensure that the behavior does not recur.[237] *Independent School District No. 279, Osseo Area Schools*,[238] addressed the question of whether the IAES was "inappropriate" because the district allowed administrators, rather than the IEP Team, to select it.

In any IDEA discipline case, if there is no connection between the student's misconduct and his or her disability, the student may be disciplined in the same way as any other student.[239] This means the student could be suspended or expelled for as long as other students are. However, the district must continue to provide a FAPE (which includes AT), even if there is no connection between the misconduct and the disability.[240] The student's education may take place in a different setting than he or she was in prior to the misconduct, as long as FAPE is provided (e.g., an alternative school or at home).

In making the "manifestation" decision, the district must look at all relevant information, including evaluations, observations, and the student's IEP and placement, and consider the following: (1) whether the IEP and placement were appropriate, including whether behavior intervention strategies were provided consistent with the IEP; (2) whether the student's disability *impaired* the ability to understand the consequences of his or her conduct; and (3) whether the disability *impaired* the student's ability to control the behavior in question.[241] In *Eaves Ind. S.D.*,[242] procedural violations invalidated the student's assignment to an alternative program because the district had reason to know the student was potentially IDEA eligible. In *Searcy Public Schools*,[243] the student successfully appealed the manifestation determination review because not all members of the IEP Team had been present – there had been no regular education teacher at the meeting. *But* see*, In Re: Student With A Disability*.[244]

Parents may also challenge the imposition of discipline in the first place (e.g., "my child didn't do what you said he did"), through the school district's internal hearing process or school board expulsion hearing, per *Goss v. Lopez*. Parents may request an impartial hearing to review the decision to place the student in an IAES as well as the "manifestation" decision itself. However, during the appeal the student would remain in the IAES, at least for 45 days.[245] Also, in a case of a long term suspension that does not involve weapons, drugs or dangerousness (e.g., a chronically truant student), if a change of placement is recommended by the district at an IEP meeting and the parent does not agree with that recommendation, the parent may appeal that IEP through the due process hearing procedure, as he or she could in the case of any other disputed IEP.

Students who have not been classified may avail themselves of these proce-

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[237] *Id.* § 1415(k)(3)(B).

[238] State Educational Agency (SEA), MN 1999, 30 IDELR 645.

[239] 20 U.S.C. § 1415(k)(5)(A).

[240] *Id.* §§ 1412(a)(1)(A) and 1415(k)(5)(A).

[241] *Id.* § 1415(k)(4)(C).

[242] SEA TX 1998, 29 IDELR 647.

[243] SEA AR 1999, 30 IDELR 825.

[244] SEA CT 1999, 30 IDELR 113.

[245] 20 U.S.C. § 1415(k)(7).

dural safeguards if the district knew that they were disabled before the behavior giving rise to the discipline occurred. The district will be deemed to have known the student was disabled if: (1) the parents expressed concern, in writing, that the student may need special education, or they had referred the student for a special education evaluation; (2) the behavior or performance of the student demonstrated a need for special education assistance; or (3) a district employee expressed concern about the student's behavior or performance to the school's special education director or other school personnel in accordance with the school's child find or special education referral system.[246]

III. Assistive Technology Requirements Under the IDEA

A. History

1. Technology-Related Assistance for Individuals with Disabilities Act of 1988

Interest in AT grew with the passage of the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act).[247] The Tech Act defined both AT "devices" and "services." In 1998, Congress re-authorized this legislation as the Assistive Technology Act of 1998 and retained these definitions.[248]

> The term "assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.[249]
>
> The term "assistive technology service" means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes–
>
> (A) the evaluation of the needs of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;
>
> (B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;
>
> (C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;
>
> (D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
>
> (E) training or technical assistance for an individual with disabilities, or, where appropriate, the family members, guardians, advocates, or authorized representatives of such an individual; and
>
> (F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities.[250]

The legislative history to the Tech Act indicates the broad range of AT devices that were contemplated:

> The Committee includes this broad definition to provide maximum flexibility

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[246] *Id.* § 1415(k)(8), 34 C.F.R. § 300.567(b)(4).

[247] P.L. 100-407, 102 Stat. 1044, former 29 U.S.C. §§ 2201 *et seq*.

[248] 29 U.S.C. §§ 3001 *et seq*.

[249] *Id.* § 3002(a)(3).

[250] *Id.* § 3002(a)(4).

to enable States to address the varying needs of individuals of all ages with all categories of disabilities and to make it clear that simple adaptations to equipment are included under the definition as are low and high technology items and *software*.[251]

2. The IDEA Amendments of 1990

The definitions of AT devices and services were added to the IDEA by the Education of the Handicapped Act Amendments of 1990.[252] This statute adopted, virtually verbatim, the definitions of AT devices and services from the Tech Act.

The legislative history underscored Congress' view of the role AT could play in the education of students with disabilities. Congress noted that advances in AT have provided new opportunities for students with disabilities to participate in educational programs. For many, the provision of AT "will redefine an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity."[253] AT was added in order:

> (1) to clarify the *broad range* of assistive technology devices and related services that are available, and (2) to increase the awareness of assistive technology as an *important component* of meeting the special education and related service needs of many students with disabilities, and thus enable them to participate in, and benefit from, educational programs.[254]

3. IDEA '97

With the passage of IDEA '97, Congress again emphasized AT. As noted above, the need for AT must now be considered for *all* students when developing the IEP.[255] The comments to the 1999 regulations make it clear that it is "mandatory for the IEP Team to consider each child's AT needs." In doing so, however, the school is not required to document in writing its consideration of AT for each student.[256]

The comments to the 1999 regulations also make it clear that AT encompasses the individual student's own personal needs for AT, such as "electronic note takers, cassette recorders, etc.," as well as access to AT devices used by all students. If a student needs accommodations to use an AT device used by all students, the school "must ensure that the necessary accommodation is provided."[257]

Orientation and mobility (O&M) services were added to the definition of related services.[258] O&M services can involve, in appropriate cases, the use of AT. O&M services are to be provided to blind or visually impaired students to enable them to "attain systematic orientation to and safe movement within their environments in school, *home* and *community*."[259]

The 1999 regulations add "travel training" to the definition of special education.[260] Travel training may be provided, as needed, to any student with a disability to teach the student to move effectively

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[251]Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405 (emphasis added).

[252]P.L. 101-476, 104 Stat. 1103.

[253]House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News, p. 1730.

[254]*Id.*, p. 1731 (emphasis added).

[255]20 U.S.C. § 1414(d)(3)(B)(v).

[256]64 Fed. Reg. 12590-91.

[257]*Id.*, p. 12540.

[258]20 U.S.C. § 1401(22).

[259]34 C.F.R. § 300.24(b)(6).

[260]*Id.* § 300.26(a)(1)(ii).

and safely within the student's environment "(e.g., in school, in the *home*, at *work*, and in the *community*)."[261]

Finally, the regulations note the importance of AT to allow students with disabilities to be transported with their non-disabled peers:

> For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on *regular* school transportation vehicles.[262]

The comments to the 1999 regulations emphasize that it is assumed that most children with disabilities will receive the same transportation provided to non-disabled children. If the child needs transportation to receive a FAPE or needs "accommodations or modifications to participate in integrated transportation with non-disabled children, the child *must* receive the necessary transportation or accommodations at no cost to the parents."[263]

The IDEA defines an assistive technology device[264] and an assistive technology service.[265] In *In the Matter of the Adoption of Amendments to N.J.A.C. 6:28-2.10, 3.6 and 4.3*,[266] the court invalidated New Jersey's AT regulations covering "any specialized equipment and materials" because they failed to define the term to ensure compliance with the definitions in the IDEA.

B. General standards

1. Basic Eligibility Criteria

The first major policy announcement from the U.S. Department of Education's Office of Special Education Programs (OSEP) concerning AT was actually published before the AT definitions were added to the IDEA.[267] Over the years, OSEP has issued a number of other policy letters interpreting districts' obligations to provide AT. A number of them will be summarized here.

As with any other special education service, the need for AT must be determined on a case-by-case basis considering the unique needs of each child.[268] The regulations require that AT devices and services are made available to any student with a disability, "if required."[269] The basic standard to be met is whether or not the student needs the AT to receive a FAPE.[270]

In *Sch. Bd. of Ind. Sch. Dist. No. 11, Anoka-Hennepin v. Pachl*,[271] the court determined that a student needed compensatory education because of district delays in arranging for an AT evaluation and in providing an augmentative communication device, namely a TechSpeak. Because the district agreed the student needed the device, the issues were who was responsible for the delays, and whether the student received a FAPE while waiting for it. Affirming the administrative decisions, the court found that the student did not receive a FAPE be-

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[261] *Id.* § 300.26(b)(4)(emphasis added).

[262] *Id.* Part 300, App. A, Quest. 33 (emphasis added).

[263] 64 Fed. Reg. 12551 (emphasis added).

[264] 20 U.S.C. § 1401(1) and 34 C.F.R. § 300.5.

[265] 20 U.S.C. § 1401(2) and 34 C.F.R. § 300.6.

[266] 27 IDELR 27 (N.J. Sup. Ct., App. Div. 1997).

[267] *See OSEP Policy Letter to Hamilton*, EHLR 213:269 (7/10/81) (Although computers and other technological equipment are not specifically included in the definition of related services, for some children they may be necessary to provide FAPE).

[268] *OSEP Policy Letter to Anonymous*, 29 IDELR 1089 (11/6/97).

[269] 34 C.F.R. § 300.308.

[270] *OSEP Policy Letter to S. Goodman*, 16 EHLR 1317 (8/10/90); 34 C.F.R. § 300.308.

[271] 36 IDELR 263 (D. Minn. 2002).

cause she was "bereft of the ability to communicate" without the device. Therefore, the district failed to confer more than a de minimus educational benefit on her. While making it clear that this was the reason she was denied a FAPE, the court also noted that the student made little progress, if any, in other areas.

The question to be considered is the relationship between the educational needs of the student and the AT device or service.[272] As noted above, "supplementary aids and services," can be used to assist a student in nonacademic, educationally-related settings. Therefore, when looking at the AT needs for a student, the "educational" needs must also include these nonacademic settings.[273]

AT may be considered as either special education and related services, or "supplementary aids and services" to maintain a student in the LRE.[274] A 1997 OSEP Policy Letter had this to say about the decision making process for AT and including AT on the IEP:

> The IEP Team's decision about any assistive technology needs is made on a case-by-case basis, taking into consideration the unique needs of each individual child. If the IEP Team determines that a student with disabilities requires assistive technology, such as a personal computer, in order to receive FAPE, and designates such assistive technology as either special education or related service, the IEP must include a specific statement describing such service, including the nature and amount of such services.[275]

Note that because IDEA '97 now defines "supplementary aids and services" and requires that those services also appear on the IEP, the above quote should be modified to indicate that if the AT is considered a supplemental aid or service, it still must be included on the IEP.[276]

2. Evaluations

As with any other component of a student's program, providing appropriate AT begins with a good, comprehensive assessment. The IEP Team must assess "the student's functional capabilities and whether they may be increased, maintained, or improved through the use of [AT] devices or services."[277] Hearing, vision, communication and motor abilities are properly included in the district's AT assessment.[278] A parent has the right to an independent AT evaluation, at district expense, if the parent disagrees with the evaluation obtained by the district, and the district fails to show that its evaluations were appropriate.[279]

3. Examples

There is no federal "approved list" of AT devices and services covered by the IDEA.[280] AT can be quite simple and inexpensive, such as a calculator,[281] large

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[272] *OSEP Policy Letter to D. Naon*, 22 IDELR 888 (1/26/95).

[273] *See* 20 U.S.C. § 1401(29) and 34 C.F.R. § 300.306.

[274] 34 C.F.R. § 300.308(a). For a student with a disability whose only need is for AT, this distinction is important. The comments to the federal regulations indicate that to be eligible under the IDEA, a student must need special education, not just related services (unless the state defines related services as special education). 34 C.F.R. § 300.7(a)(2). Because AT may be special education, the student needing only AT will meet this standard.

[275] *OSEP Policy Letter to* Anonymous, 29 IDELR 1089 (1/6/97). *See OSEP Policy Letter to S. Goodman*, 16 EHLR 1317 (8/10/90); *OSEP Policy Letter to B. Orenich*, EHLR 213:166 (8/9/88); *OSEP Policy Letter to R. Shelby*, 21 IDELR 61 (1/26/95).

[276] *See* 20 U.S.C. § 1414(d)(1)(A)(iii).

[277] *OSEP Policy Letter to J. Fisher*, 23 IDELR 565 (12/4/95).

[278] *OSEP Policy Letter to T. Bachus*, 22 IDELR 629 (1/13/95).

[279] *OSEP Policy Letter to J. Fisher*, 23 IDELR 565 (12/4/95).

[280] *OSEP Policy Letter to D. Naon*, 22 IDELR 888 (1/26/95).

[281] *OSEP Policy Letter to C. Lambert*, 18 IDELR 1039 (4/24/92).

print books, or adapted spoons.[282] It can also include more sophisticated devices, such as an auditory FM trainer for a student who is hearing impaired,[283] or a closed circuit TV for a student who is visually impaired.[284] As noted above, IDEA '97 also includes O&M services.[285]

The comments to the 1999 regulations indicate that it is not appropriate to give examples of covered AT devices in the regulations. However, the comments note that captioning, computer software, FM systems and hearing aids are appropriate AT devices for students with hearing impairments. The comments also note other examples of AT devices include electronic note takers, cassette recorders, word prediction software, adapted keyboards, voice recognition and synthesis software, head pointers, and enlarged print.[286] Additional examples come from a court case concerning whether or not a student needed a residential placement. Although it was not an issue in the case, the district was providing the student with an Alpha Smart ProWriting device, a Franklin Spell Checking device, and two types of word processing software.[287]

4. Least Restrictive Environment and AT

The legislative history adding AT to the IDEA, referred to above, also stresses how AT can assist a student to be educated in the LRE. To ensure meaningful integration with non-disabled peers, a federal court has ruled that a child who could not regulate his body temperature was entitled to a fully air-conditioned classroom, not an air-conditioned plexiglass cubicle where he would be isolated from his peers.[288]

As noted above, the use of O&M services and travel training, which can include AT, should be designed to promote more independent travel within the school, home and community.[289] The comments to the regulations also indicate that AT may allow a student in a wheelchair, for example, to be transported on a regular bus.[290]

5. Implementation

The comments to the 1999 regulations, noting that each student's need for AT must be made on an individual basis, indicate that:

> [D]eterminations regarding the provision of AT must be made when the child's IEP for the upcoming school year is finalized so that the AT can be implemented with the IEP at the beginning of the next school year.[291]

To support implementation of AT goals, the definition of AT services includes training for the student with a disability, as well as the family, if appropriate.[292] The regulations strengthen this concept by adding to the definition of "parent counseling and training." The definition now includes "[h]elping parents to acquire the necessary skills that will enable them to support implementation of their child's IEP."[293] The com-

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[282] *OSEP Policy Letter to Hon. W. Teague*, 20 IDELR 1462 (2/15/94).

[283] *OSEP Policy Letter to Anonymous*, 18 IDELR 1037 (4/6/92).

[284] *OSEP Policy Letter to Anonymous*, 18 IDELR 627 (11/21/91).

[285] *See also OSEP Policy Letter to Anonymous*, 13 EHLR 213:198 (2/13/89).

[286] 64 Fed. Reg. 12540, 12575.

[287] *Coale v. State Dept. of Ed. and Brandywine Sch. Dist.*, 162 F. Supp. 2d 316 (D. Del. 2001).

[288] *Espino v. Besteiro*, 520 F.Supp. 905 (S.D.Tex. 1981).

[289] 34 C.F.R. § 300.24(b)(4) and (6).

[290] *Id.* Part 300, App. A, Quest. 33.

[291] 64 Fed. Reg. 12591 (emphasis added).

[292] 34 C.F.R. § 300.6(e).

[293] *Id.* § 300.24(b)(7)(iii).

ments note that this change is consistent with "the more active role acknowledged for parents" by IDEA '97.[294] It is hoped that teaching parents the skills to help their children reach their IEP goals will:

> [A]ssist in furthering the education of their children, and will aid the schools as it will create opportunities to build reinforcing relationships between each child's educational program and out-of-school learning.[295]

One federal court has determined that a school did not provide appropriate AT to a student with multiple disabilities. It was agreed that the student needed a laptop computer with a word prediction program. The court found, however, that the school did not properly implement this recommendation.[296]

To support its conclusion, the court found that the school: (1) took a year to obtain the computer and an additional semester to get the computer up and running; (2) took another semester before the teacher and some of the other staff were trained; (3) never trained the aide or the parents; (4) inadequately adapted the keyboarding instruction to the student's physical needs; (5) did not design the use of the AT device so it would permeate the student's day; and (6) chose a software program that would not provide meaningful educational benefit to the student.[297]

C. Special Issues

1. Home Use

What if a student using AT needs the device at home? Say a learning disabled high school student uses a computer to do written work. Can the student take the computer home (if it is a laptop) or ask the district to provide a computer or software for home use?

The U.S. Department of Education has stated that if the IEP Team determines that an AT device is needed for home use for a student to receive a FAPE, the technology must be provided. The example given by the Department of Education was a closed circuit TV for a student who is visually impaired and needs to use the device at home to complete homework assignments.[298] The regulations state that schools may be responsible for providing AT in the home, or in other settings, if the IEP Team determines, on a case-by-case basis, that the student will need the AT in that setting to receive a FAPE.[299]

2. Personally Prescribed Devices

Historically, the U.S. Department of Education has ruled that districts are not required to provide a personal device that a student would require whether or not he or she were in school.[300] However, because the definition of AT device does not include this limitation, the Department has changed its position. It has stated that a hearing aid is covered under the definition of "AT device." Therefore, if the child requires a hearing aid in order to receive a FAPE, the district must provide it at no cost to the child or parents.[301] Similarly, if a student requires eyeglasses in order to receive a FAPE, the district must provide the eyeglasses at no cost to the par-

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[294] 64 Fed. Reg. 12549.

[295] *Id.*

[296] *East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D.Pa. 1999), *aff'd*, 213 F.3d 628 (3rd Cir. 2000).

[297] *Id.*

[298] *OSEP Policy Letter to Anonymous*, 18 IDELR 627 (11/21/91).

[299] 34 C.F.R. § 300.308(b).

[300] *Policy Letter to Minsky*, EHLR 211:19 (4/7/78).

[301] *OSEP Policy Letter to P. Seiler*, 20 IDELR 1216 (11/19/93), *OSEP Policy Letter to J. Galloway*, 22 IDELR 373 (12/22/94).

ents.[302] The same analysis would apply to a pulmonary nebulizer.[303] The comments to the regulations confirm this position.[304]

The definition of related services includes transportation in and around school buildings and can involve specialized equipment.[305] Based on this definition, the Department of Education has issued an opinion that if a wheelchair is required, the district must provide the service at public expense and without charge, regardless of whether the parents possess a wheelchair or can obtain one through private insurance. However, the district is not required to provide the wheelchair for personal use while the student is not in school.[306]

3. Private Insurance and Medicaid

IDEA '97 specifically authorizes the use of Medicaid. The regulations also authorize the use of a parent's private insurance.[307] May a district compel a parent to use Medicaid or private insurance when it is available to the family? The U.S. Department of Education has stated that this use must be voluntary. A district cannot deny services if parents refuse to authorize the use of Medicaid or private insurance. Moreover, such use must not result in any cost to the parents, such as: co-payment, deductible, or reduction of an annual or lifetime cap on coverage.[308]

The district can eliminate the possibility of cost to the parents by paying for the deductible or co-payment. Nevertheless, there may be circumstances where parents will still not want to use the private insurance policy, or Medicaid. For some students with significant needs, even a very substantial lifetime cap could be quickly used up, requiring the family to be very careful about when the insurance policy is used. Both Medicaid and private insurance companies may limit how frequently they will pay for an item. Therefore, a parent's use of insurance or Medicaid to pay for special education and related services is voluntary. If the parent refuses to consent to their use, special education services cannot be denied.[309]

The regulations codify these principles. A school may use parents' private insurance only with the parents' informed consent, each time the school seeks to use their insurance. The school must tell parents that their refusal to consent to the use of their private insurance does not relieve the school of its obligation to provide services.[310] The comments add that parents may not be aware of potential future consequences resulting from the use of their insurance. Accordingly, schools should inform parents of potential consequences, such as exceeding a cap on benefits, and encourage parents to check with their insurance provider before giving consent.[311]

Unlike private insurance, a school is not required by the IDEA to obtain advance consent each time it uses a public insurance program, such as Medicaid.[312] But, a school

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[302] *OSEP Policy Letter to T. Bachus*, 22 IDELR 629 (1/13/95).

[303] *See OSEP Policy Letter to Anonymous*, 24 IDELR 388 (1/23/96).

[304] 64 Fed. Reg. 12540.

[305] 34 C.F.R. § 300.16(b)(14).

[306] *OSEP Policy Letter to J. Stohrer*, 13 EHLR 213:211, 212 (4/20/89).

[307] 34 C.F.R. § 300.301(b).

[308] *OSERS Policy Letter to Rose*, 18 IDELR 531 (4/19/91).

[309] *OSEP Policy Letter to Dr. O. Spann*, 20 IDELR 627 (9/10/93), *OSEP Policy Letter to W. Cohen*, 19 IDELR 278 (7/9/92).

[310] 34 C.F.R. § 300.142(f).

[311] 64 Fed. Reg. 12567.

[312] *Id.* 12569.

may not require parents to sign up for public insurance. Nor can the school require the parents to use public insurance where there is "financial cost." Financial cost includes: (1) out-of-pocket expenses such as deductibles or co-payments; (2) a decease in available lifetime coverage or any other benefit, including the family paying for services that would otherwise have been covered; (3) risk of loss of eligibility for home and community-based waiver programs; and (4) an increase in premiums or the discontinuation of the insurance.[313]

A school may pay the costs of accessing the private or public insurance for parents who would otherwise have consented to the use of the insurance.[314] However, as with private insurance, a child's right to a FAPE is not dependent upon whether parents consent to the use of public insurance, such as Medicaid.[315] If the parents refuse to give consent to using Medicaid, the school is still responsible for providing the recommended services.

4. Repairs/Damages

The definition of AT services includes repairing, maintaining and replacing AT devices.[316] Therefore, if an AT device is damaged during the course of its use, the district should be responsible for any repairs. Accordingly, the U.S. Department of Education has stated that if parents agree to use family-owned AT to fulfill the IEP, the district is responsible for maintenance and repair if it was damaged on the school bus or at school. The Department of Education reasoned that if the district did not use the family-owned device, it would be responsible for providing and maintaining a needed device itself.[317]

Nevertheless, the Department of Education made the following observations in a policy letter on repairs and maintenance of AT devices: If the IEP Team determines that a student needs an AT device at home to receive a FAPE, the device must be provided at no cost to the parents. This means a district cannot charge parents for normal use and wear and tear. However, state laws govern "whether parents are liable for loss, theft, or damage due to negligence or misuse of publicly-owned equipment used at home in accordance with a student's IEP." This policy letter does not discuss how the definition of AT service, which includes maintenance and repair, applies. It did, however, note that any state laws must still be implemented consistently with the IDEA and the right to a FAPE.[318] The comments to the regulations restate this proposition: that parents cannot be charged for normal use, and wear and tear, but that state law, not the IDEA, will generally govern parent liability for theft, loss, or damage due to negligence or misuse of AT at home or in other settings.[319]

D. AT Used with School Health Services

The IDEA allows for the provision of "medical services," but they are limited to diagnosis and evaluation.[320] The regulations define "medical services" as those "provided by a licensed physician to determine a child's medically related disability."[321] The regulations also include "school health services," which are to be provided by "a qualified school nurse or

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[313] 34 C.F.R. § 300.142(e).

[314] *Id.* § 300.142(g)(2).

[315] 64 Fed. Reg. 12569.

[316] 20 U.S.C. § 1401(2); 34 C.F.R. § 300.6(c).

[317] *OSEP Policy Letter to Anonymous*, 21 IDELR 1057 (8/9/94).

[318] *OSEP Policy Letter to S. Culbreath*, 25 IDELR 1212 (2/7/97).

[319] 64 Fed. Reg. 12540.

[320] 20 U.S.C. § 1401(22).

[321] 34 C.F.R. § 300.24(b)(4).

other qualified person."[322] Therefore, according to the regulations, the services a physician is authorized to perform are limited to evaluations and diagnoses. On the other hand, direct medical types of services by non-physicians, such as nurses and trained laypersons are permitted.

1. The *Tatro* Decision

This regulatory scheme was upheld by the Supreme Court in *Irving Independent Sch. Dist. v. Tatro*.[323] Amber Tatro was, at the time of the decision, an eight year old with spina bifida. As a result, she needed to be catheterized every three to four hours. Clean intermittent catheterization (CIC) is a simple procedure that can be performed by a layperson with less than an hour's training. It was expected that Amber would soon be able to perform the procedure herself. The district, nevertheless, refused to provide this service to her.

The Court ruled that CIC is a permissible related service for students with disabilities. The Court reasoned that catheterization is a related service because it "enables a handicapped child to remain at school during the day . . . [similar to] services that enabled the child to reach, enter or exit the school."[324] In determining whether a medically related service is permissible as a "school health service" or excluded as a "medical service," the Court stated that the service must be required to be performed during the school day and must be able to be performed by someone other than a physician.[325]

The Court rejected the district's concern about increased liability if it performed this service as not relevant to whether CIC is a related service. The Court went on to note that:

> The [IDEA] creates numerous new possibilities for injury and liability. ... Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks. Whether [the District] decides to purchase more liability insurance or to persuade the state to extend the limitation on liability, the risks posed by CIC should not prove to be a large burden.[326]

Based on *dicta* in *Tatro*, several courts had adopted a multi-factor test to determine whether the IDEA required a school to provide health services to students.[327]

2. The *Garret F.* Decision

In 1999, the Supreme Court reaffirmed its decision in *Tatro*. The Court adopted a "bright line" test for determining whether health services are required under the IDEA and ordered a school district to provide a ventilator-dependent student with one-to-one school health services. It rejected a multi-factor test to determine the need for school health services.[328]

Garret is described as a "friendly, creative, intelligent young man" who is successfully attending regular education classes.[329] He is paralyzed from the neck down because of a motorcycle accident when he was four years old. He operates his motorized wheelchair through a puff and suck straw and operates a computer with a device that responds to head movements. He is ventila-

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[322] *Id.* § 300.24(b)(12).

[323] 468 U.S. 883 (1984).

[324] *Id.* at 891.

[325] *Id.* at 894.

[326] *Id.* at fn. 12, p 893.

[327] *See Neely v. Rutherford County School*, 68 F.3d 965 (6th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Detsel v. Bd. of Ed. of Auburn Enlarged City School Dist.*, 820 F.2d 587 (2nd Cir. 1987), *cert. denied*, 484 U.S. 981 (1987).

[328] *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999).

[329] *Id.* at 69.

tor dependent for breathing and requires additional assistance for several health care needs during the school day. Garret needs someone to assist with CIC, suctioning his tracheotomy tube, food and drink at lunch, getting him into a reclining position for five minutes every hour and manually pumping an air bag for him to breath while his electric ventilator is being maintained.[330] Garret's needs were attended to by an 18-year–old aunt for one year and then by a licensed practical nurse whom the parents hired with proceeds from the accident settlement. When the family asked the school to begin paying for this service, it refused, stating it was not required to provide continuous one-on-one nursing care.[331]

In *Garret F.*, the school urged the adoption of a multi-factor test that would look at whether the care was continuous or intermittent, whether existing school health personnel could provide the service, the cost of the service, and the potential risk if the service was not performed properly. The Supreme Court, noting that all of the school's factors really boil down to cost, rejected them as a basis for determining whether a student needs health related services. The Court stated the school's multi-factor test "is not supported by any recognized source of legal authority." Moreover, while more extensive than the services at issue in *Tatro*, Garret's needs were no more "medical."[332]

The Court reaffirmed the use of its two-part test developed in *Tatro* and referred to above (i.e., whether the service must be performed during the school day and will be provided by a non-physician). It was conceded that Garret required the requested services, during the school day, in order to be able to attend school and that the services did not need to be performed by a physician. Therefore, the Court affirmed the responsibility of the school to provide the services.

Finally, in a comment that can be extended beyond the issues involved in Garret's case, the Court noted that schools "cannot limit educational access simply by pointing to the limitations of existing staff." "[T]he IDEA requires school districts to hire specially trained personnel to meet disabled student needs."[333] A U.S. Department of Education policy letter reinforces this principle:

> IDEA does not provide parents a specific right to be informed of the qualifications of individuals providing services to their children. If, however, an IEP team determines that it is necessary for the individual providing special education or related services to a child with a disability to have specific training, experience and/or knowledge in order for the child to receive FAPE, then it would be appropriate for the team to include those specifications in the child's IEP. The [school district] is responsible for ensuring that the child's IEP is implemented.[334]

The IDEA requires that states have what is referred to as a comprehensive system of personnel development to ensure there are sufficient qualified personnel to meet the needs of its students with disabilities.[333] In keeping with the theme raised in *Garret F.*, the comments to the regulations note that "each state must have a mechanism for serving children with disabilities if instructional needs exceed available (qualified) personnel, including addressing those shortages in its comprehensive system of personnel

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[330] *Id.* and fn.3.

[331] *Id.* at 70.

[332] *Id.* at 75-76.

[333] *Id.* at fn.8, p. 76 (citations omitted).

[334] *OSEP Letter to Dickman*, 37 IDELR 284 (4/2/02).

[335] 34 C.F.R. § 300.135.

development if the shortages continue."[336]

3. Mapping of a Cochlear Implant

Relying on the reasoning in *Garett F.*, the court in *Stratham Sch. Dist. v. Beth & David P.*,[337] held that programming the speech processor, called "mapping," following a cochlear implant, was a related service under the IDEA. The court's decision will not be reported, but its reasoning is very helpful. The court found that mapping services fit within the definition of audiological services. It also found that mapping was required for the student to enable him to have meaningful access to his education. Citing the Supreme Court's decision in *Rowley*, the court noted that

> the educational method to be used in each case is left "to state and local educational agencies in cooperation with the parents." ... The IEP provides the mechanism for determining the appropriate educational methods and goals to achieve a free appropriate public education and requires that the parents are included in the process. ... There is no dispute that, at present, Hunter's mode of communication involves the use of his cochlear implant and that the cochlear implant must be mapped for him to benefit from the instruction provided by the District.[338]

Although the decision did not mention AT, there is no question that mapping the cochlear implant would also fit within the definition of an AT service.

IV. Maximization Of A Student's Potential

As with any other specialized services a student with a disability will receive under the IDEA, the basic question will always be: "is this AT device or service necessary to enable the student to receive a FAPE"? Therefore, the definition of "appropriate" is critical in determining the availability of AT. What, if any, arguments can be made to limit the impact of the *Rowley* case when looking at the AT needs of a student?

A. The *Rowley* Decision

As stated above, in 1982 the United States Supreme Court determined that the obligation to provide a FAPE did not mean a district was required to "maximize" a student's potential or provide the best education possible. The Court noted that the program must be based on the student's unique individual needs and be designed to enable the student to benefit from an education. In other words, the student must be making progress.[339] However, more than a minimal benefit is required for the program to be appropriate.[340]

In the case of a student being educated in regular classes, the Court determined that in most cases, if the student was advancing from grade to grade with the benefit of supportive services, the student was receiving an appropriate education.[341] The Court cautioned, however, that not "every child who is advancing from grade to grade in a regular public school system is *automatically* receiving a [FAPE]."[342] Consistent

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[336]64 Fed. Reg. 12408, regarding 34 C.F.R. § 300.136(g)(3).

[337] 2003 WL 260728, 38 IDELR 121 (D.N.H. 2003).

[338] *Id.* at *5.

[339]*Rowley* at 188, 189.

[340]*Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989); *See Ridgewood Board of Ed. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

[341]*Rowley* at 203.

[342]*Id.* at fn. 25, p. 203 (emphasis added).

with this comment, the regulations make clear that schools are not relieved of their obligation to provide a FAPE to students even though they are advancing from grade to grade. The decision of whether a student is still in need of services is to be made by the IEP Team.[343]

Accordingly, one court has found that a student with an orthopedic impairment, who desired transition services to assist her move from high school to independent living at college, was still eligible for services even though she was an "A" student.[344] The court stressed that the student received shortened and modified writing assignments, instruction on how to type, copies of class notes, related services to address her slowness in walking and hand strength, special transportation to school on a lift bus and mobility assistance within the school building.[345] In reaching its conclusion, the court noted that all of these services were necessary because of her impairment and that but for this specialized instruction and services, her educational performance would be adversely affected.[346]

B. LRE and Uses of AT

The IDEA requires that students are educated in the LRE to the "maximum" extent appropriate. Unlike the IDEA in general, in the case of LRE, we are looking at maximizing something – the placement of a student in the regular education environment. Accordingly, the *Rowley* test for determining whether a program is appropriate is not particularly helpful when LRE is at issue.[347]

This is even more true when the issue is LRE combined with AT. The legislative history adding AT to the IDEA emphatically recognized the role AT might play in implementing the LRE requirement: AT "will redefine an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity."[348] In LRE cases, therefore, the question to be answered is, again, not the degree of academic progress being made, but the need for the AT in order for the student to be successful in the regular education setting. Recall that in *Espino v. Besteiro*,[349] the court ordered the school to provide an air-conditioned classroom for a student to enable him to interact with his peers in the classroom.

C. Students in Transition

Transition planning requirements were first added to the IDEA in 1990. Transition services were defined as a coordinated set of activities, designed within an *outcome-oriented process*, which promotes movement from school to adult living.[350] Transition services were to begin no later than age 16.[351] Therefore, since 1990, when considering transition services for students, the analysis regarding the "appropriateness of a student's program should not have been limited solely to issues of academic progress. Rather, the issues should have been: What will the goal be for this student as an adult? Where is the student now in reaching that goal? What will the student need between now and when the student ages out in order to be ready to meet that goal? This is what

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[343] 34 C.F.R. § 300.121(e).

[344] *Yankton School Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996).

[345] *Id.* at 1374.

[346] *Id.* at 1375.

[347] *See Daniel R.R.* at 1045 ("The *Rowley* test thus assumes the answer to the question presented in a mainstreaming case.").

[348] House Report No. 101-544, 1990 U.S. Code Cong. & Admin. News, p. 1730.

[349] 520 F.Supp. 905 (S.D.Tex. 1981).

[350] 20 U.S.C. § 1401(30) (emphasis added).

[351] *Id.* § 1414(d)(1)(A)(vii)(II).

an "outcome oriented approach" means.

Of even greater significance is the change to transition planning made by IDEA '97. As noted above, beginning at age 14, districts are to begin considering the transition needs related to a student's course of study such as "participation in *advanced placement courses* or a vocational education program."[352] In Amy Rowley's case, Amy was advancing from grade to grade even though she was missing about half of what was being said in her classes.[353] How would she have faired in an advanced placement (AP) class if she missed half of what was occurring? What if she needed the sign language interpreter or real time captioning to *pass* AP History? Since transition planning now includes, where applicable, AP courses, if she did need one of those services to pass the class, she should be entitled to it.

D. Effect of IDEA '97

When passing IDEA '97, Congress did not specifically modify the definition of FAPE itself.[354] However, Congress did make some profound statements that undercut the Supreme Court's analysis in *Rowley*. First, in its statement of findings, Congress found that the education of students with disabilities can be made more effective by supporting the professional development of those working with them to ensure that students with disabilities:

> [H]ave the skills and knowledge necessary to enable them—
>
> (i) [T]o meet developmental goals and, to the *maximum* extent possible, those challenging expectations that have been established for all children; and
>
> (ii) [T]o be prepared to lead productive, independent, adult lives, to the *maximum* extent possible ... .[355]

More importantly, in delineating the purposes of the IDEA, Congress also enlarged the scope of an appropriate education by requiring that not only should it meet students' unique needs, it should also "prepare them for employment and independent living."[356] This addition is more than mere window dressing, as states must develop goals for the performance of children with disabilities that will promote meeting this requirement.[357]

The U.S. Department of Education, in the commentary to its proposed regulations implementing IDEA '97, stressed:

> This change represents a *significant* shift in the emphasis of [the IDEA]–to an *outcome oriented approach* that focuses on better results for children with disabilities rather than on simply ensuring their access to education.[358]

The comments to the final regulations reaffirm this position:

> Therefore, it is correct to state that the 1997 amendments [to the IDEA] place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law.[359]

Nevertheless, because the phrase "appropriate" is still used in the definition, it is unlikely that these comments mean that *Rowley* has been effectively overruled by Congress in all circumstances. However, in

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[352] *Id.* § 1414(d)(1)(A)(vii)(I) (emphasis added).

[353] *Rowley* at 184 - 85.

[354] *See* 20 U.S.C. § 1401(8).

[355] *Id.* § 1400(c)(5)(E) (emphasis added).

[356] *Id.* § 1400(d)(1)(A).

[357] *Id.* § 1412(a)(16)(A)(i).

[358] 62 Fed. Reg. 55029.

[359] 64 Fed. Reg. 12538.

determining whether a student is benefitting from an education, the analysis cannot be limited solely to academic achievement. Even if a student is making academic progress, that determination can no longer be the end of the inquiry.

By adding that the purpose of the IDEA is to prepare students for employment and independent living, Congress simply took what already applied to students during the transition years and applied it to students of all ages. IDEA '97 expands the answer to the question, "What is the purpose of an education?" Therefore, if a student will need AT to prepare for adult living, even if he or she is making academic progress, the AT should be provided.

V. Educational Methodology

A. Implications of the *Rowley* Decision

In *Rowley*, the Supreme Court also stated that courts should not substitute their judgement about particular types of educational methodology for that of education officials. The Court commented: "…*courts* must be careful to avoid imposing their view of preferable educational methods upon the states."[360] The Supreme Court concluded: "…once a *court* determines that the requirements of the Act have been met, questions of methodology are for resolution by the states."[361]

Citing this language, school districts across the country have rejected parents' requests for a particular educational methodology at IEP Team meetings. Looking at this same language, advocates have acquiesced and looked for ways around this apparent restriction. This analysis ignores, however, the Supreme Court's actual words regarding the subject of this restriction. By its express terms, the restriction does not apply to IEP Team meetings or to IEP Team members themselves, but only to courts reviewing decisions of IEP Teams, hearing officers and state review officers. But, many erroneously assumed that if you could not ask for a particular educational methodology from a reviewing court, you could not ask for it at the IEP Team meeting.

However, this assumption ignores the Supreme Court's view of the role of the parents at IEP Team meetings. The Supreme Court made it clear that their participation is critical:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage or the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon *full* participation of concerned parties throughout the development of the IEP ... demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.[362]

Yet, how far does "full participation" go? Does it extend to discussions of appropriate methodology at IEP Team meetings?

The answer the Supreme Court gave is a resounding yes! Buried between the two quotes discussed above, that *courts* must be careful about imposing educational methodology on states, is a clear statement about how educational methodology is to be determined at IEP Team meetings:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing

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[360] *Rowley* at 207 (emphasis added).

[361] *Id.* at 208 (emphasis added).

[362] *Id.* at 205 -206 (emphasis added).

> the educational method *most suitable* to the child's needs, was left by the Act to state and local educational agencies *in cooperation with the parents* or guardians of the child.[363]

This means that at the IEP Team meeting, the goals and objectives are to be established for the student. Once those goals have been developed, the IEP Team is to select the best possible method to achieve those goals. The parents are to be joint participants, with the other IEP Team members, in discussing and deciding what that educational method should be.

This interpretation has been endorsed by the U.S. Department of Education, in a policy letter, which emphasizes the importance of providing services to meet the unique needs of each child. In determining how to address those needs, the parent, as a member of the IEP Team, "and through the IEP process ... can also discuss with school officials different approaches that would appropriately meet their child's unique needs."[364] Additionally, in *Stratham Sch. Dist. v. Beth & David P.*,[365] discussed above, the court relied on the language in *Rowley* for the proposition that educational methodology is to be determined at IEP meetings, involving the parents.

Moreover, since this is an IEP Team decision, it is subject to review at an impartial hearing and, if available, state level review. It is only when the case gets to *court* that *Rowley's* discussion of the reviewing court's deference to the decision of the local and state educational agencies comes into play.

Even when the case is in court, there is no language in the statute *prohibiting* the inclusion of an instructional method on an IEP.[366] In addition, districts must still ensure that the IEP is appropriate for the student.[367] Moreover, the warning to courts not to second guess a district's choice of educational methodology does not mean that the court should ignore its obligation to enforce the IDEA.[368]

B. IDEA '97

The regulations implementing IDEA '97 amend the definition of special education to include a definition of "specially-designed instruction." Specially-designed instruction includes adapting "methodology or delivery of instruction" to meet the unique needs of a student with a disability and to ensure access to the general curriculum.[369] The comments to the regulations note a concern that was raised in the legislative history to IDEA '97, that IEPs should not be overly-prescriptive (e.g., including a day-to-day teaching approach or lesson plan). They also note that while case law has recognized the important role instructional methodology can play in providing a FAPE, courts "will not substitute a parentally preferred methodology for sound educational programs developed by" the school.[370]

In discussing the importance of adding "methodology" to the definition of specially-designed instruction, however, and consistent with the statements in *Rowley* of the role of the IEP Team in determining educational methodology, the comments note:

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[363] *Id.* at 207 (emphasis added).

[364] *OSEP Policy Letter to Anonymous,* 37 IDELR 126 (2/12/02).

[365] 2003 WL 260728, 38 IDELR 121 (D.N.H. 2003).

[366] *Ridgewood Board of Ed. v. N.E.*-, 172 F.3d 238 (3rd Cir. 1999) (IEPs included Orton-Gillingham and Wilson reading methods).

[367] *Rowley* at 207.

[368] *Oberti v. Board of Education*, 995 F.2d 1204, 1214 (3rd Cir. 1993).

[369] 34 C.F.R. § 300.26(b)(3)(emphasis added).

[370] 64 Fed. Reg. 12552.

> [T]here are circumstances in which the particular teaching methodology that will be used is an integral part of what is "individualized" about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy. ... There is nothing in the definition of "specially designed instruction" that would require instructional methodology to be addressed in the IEPs of students who do not need a particular instructional methodology in order to receive educational benefit. In all cases, whether methodology would be addressed in an IEP would be an IEP Team decision.[371]

C. Rowley Revisited

The discussion of educational methodology in the *Rowley* case arose in the context of a deaf student with minimal residual hearing and excellent lip reading skills.[372] At issue in the case was whether Amy Rowley needed a full-time sign language interpreter to augment her lip reading and other accommodations. As noted above, IDEA '97 now requires that the IEP Team consider the use of Braille for blind and visually impaired students and the use of and instruction in the child's language and mode of communication for deaf or hard of hearing students.[373] This same reasoning was used by the court in *Stratham Sch. Dist. v. Beth & David P.*,[374] discussed above, for a student whose mode of communication involved use of a cochlear implant.

The comments to the regulations make it clear that IDEA '97 effectively overrules the *Rowley* decision in this specific context. They note that if the IEP Team determines that a student who is deaf requires a sign language interpreter in order to participate in the general curriculum, those needs must be addressed in the IEP. The comments go on to add that if the student needs to expand his or her vocabulary in sign language, that need must be addressed, and that the IEP Team may want to consider training family members in sign language, if necessary for the student to receive a FAPE.[375]

D. Methodology and AT

The IDEA defines AT devices and services as either special education, related services or supplementary aids and services.[376] As noted above, IDEA '97 requires that the IEP include the special education, related services and supplementary aids and services the student will receive.[377] Accordingly, as with any other special services a student may receive, the IEP must include a specific statement describing such service, including the nature and amount of such services.[378]

What about a student's need for computer software? Will the choice of software be akin to educational methodology and be limited by the *Rowley* decision? As noted above, the AT definitions under the IDEA were taken from the Tech Act. The legislative history to the Tech Act noted that computer software is included in the definition of an AT device.[379] As noted

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[371] *Id.*

[372] *Rowley*, 458 U.S. at 207, fn. 29.

[373] 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2).

[374] 2003 WL 260728, 38 IDELR 121 (D.N.H. 2003).

[375] 34 C.F.R. Part 300, App. A, Quest. 2.

[376] *Id.* § 300.308(a).

[377] 20 U.S.C. § 1414(d)(1)(A)(iii).

[378] *OSEP Policy Letter to* Anonymous, 29 IDELR 1089 (1/6/97).

[379] Senate Report No. 100-438, 1988 U.S. Code Cong. & Admin. News, p. 1405.

above, the comments to the regulations also include computer software in the examples of AT devices.[380] Therefore, computer software would also be included in the definition of an AT device under the IDEA, to be included in the IEP as would any other AT device or service.

This is not to say that schools have no discretion in selecting a particular brand of AT hardware or software. However, the AT selected by the school must be appropriate to the needs of the student, and the parents are entitled to pursue an impartial hearing to appeal the school's choice. For example, in *East Penn School District v. Scott B.*,[381] it was agreed that the student needed a laptop computer with a word prediction program. The school selected a word prediction program called Telepathic. The parents appealed and the court found that this program was not appropriate because it would not provide meaningful educational benefit to the student. The court found that the student needed a program which would also provide word recognition and grammar prediction, such as Co:Writer.

VI. Obligations Of School Districts Under Section 504

A. Introduction

Section 504 was included in the Rehabilitation Act of 1973. The major thrust of the Rehabilitation Act of 1973 was to provide federal funding and a mandate for vocational rehabilitation services for people with disabilities. Section 504,[382] however, which prohibits discrimination on the basis of disability in any program receiving federal funds, was modeled after the Civil Rights Act of 1964 and also served as the foundation for the Americans with Disabilities Act (ADA).[383]

The ADA basically extends the provisions of section 504 to other entities that do not receive federal funds. The ADA has five titles, two of which specifically apply to the rights of children with disabilities who are in school. Title II prohibits discrimination of the basis of disability by state and local governmental services, which includes public schools.[384] Title III prohibits discrimination on the basis of disability by places of public accommodation.[385] Private schools are specifically covered by Title III,[386] except private schools run by religious organizations, which are exempt.[387] This section will not discuss the ADA, however, because the ADA does not provide any rights to students with disabilities beyond what are included in section 504. The U.S. Department of Education's Office for Civil Rights enforces both section 504 and the ADA.

Section 504 is a very broad statute. It prohibits discrimination in any program or activity receiving federal financial assistance. It also applies to any programs run by the U.S. government. The relevant part of the law is:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or ac-

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[380] 64 Fed. Reg. 12540, 12575.

[381] 29 IDELR 1058 (E.D.Pa. 1999), *aff'd*, 213 F.3d 628 (3rd Cir. 2000).

[382] 29 U.S.C. § 794; 34 C.F.R. Part 104.

[383] 42 U.S.C. §§ 12101 *et seq*.

[384] *Id.* §§ 12131-12165.

[385] *Id.* §§ 12181-12189.

[386] *Id.* § 12181(7)(J).

[387] *Id.* § 12187.

[388] 29 U.S.C. § 794(a).

tivity conducted by [the U.S. government].[388]

Since, as far as we know, all public school districts receive federal funds, they are required to comply with section 504. Additionally, any private schools, which receive federal funds, including those run by religious organizations, are also covered, even if they receive the money indirectly.[389] For instance, many private schools may receive federal funds from the local school district in which they are located, in the form of textbook aid or aid for school breakfast or lunch and, are therefore, covered by section 504. However, there is no separate funding available under section 504 to assist schools in meeting their responsibilities under it. By receiving federal money for other programs, such as the IDEA, they are required to comply.

To be eligible for services under the IDEA, a student's disability must meet the definition of one of several listed disabilities and, as a result, the student must require special education services.[390] The definition of disability under section 504 is much broader. The statute defines an "individual with a disability" as:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[391]

Additionally, under section 504, students with disabilities are eligible even if they do not need any special education services. A student would be eligible if the only services received were modifications in the regular education program.[392]

Therefore, students whose disabilities do not meet the criteria under the IDEA, but who still may need some specialized assistance, including AT, are covered by section 504.[393] Furthermore, if a school determines that a student with a disability is not eligible for services under the IDEA, it must have a process in place to determine whether the student is covered by section 504.[394]

In keeping with the basic tenor of section 504, to prevent discrimination, schools must take all reasonable steps to ensure that students with disabilities have access to the full range of programs and activities offered by the school.[395] A school district is not required to make every part of every building it owns fully accessible. However, it is responsible for ensuring that all of its programs are accessible to students with disabilities.[396] In meeting this program accessibility mandate, a school does not need to make structural changes to existing facilities if other effective methods are available. However, the school must give priority to those methods which enable students with dis-

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[389] 34 C.F.R. § 104.3(f).

[390] 20 U.S.C. § 1401(3)(A).

[391] 29 U.S.C. § 706(8)(b).

[392] *See* 34 C.F.R. § 104.33(b)(1).

[393] *U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116 (9/16/91); *OSEP Policy Letter to Teague*, 20 IDELR 1462 (2/15/94).

[394] *See U.S. Dep't of Ed., Joint Policy Memorandum*, 18 IDELR 116 (9/16/91).

[395] 34 C.F.R. §§ 104.4, 104.21, 104.22, 104.34, 104.37. *See Eldon (MO) R-I School District*, EHLR 352:145 (OCR, 1/16/86); *Beaver Dam (WI) Unified Sch. Dist.*, 26 IDELR 761 (OCR, 2/27/97)(access to chorus room and auditorium); *Saddleback Valley (CA) Unified Sch. Dist.*, 27 IDELR 376 (OCR, 5/5/97); *Wisconsin Heights (WI) Sch. Dist.*, 30 IDELR 619 (OCR 11/5/98) (accessible restroom); *Shiloh (IL) Village Sch. Dist. 85*, 37 IDELR 188 (OCR 7/3/02) (access to playground).

[396] 34 C.F.R. § 104.21; *Puerto Rico (PR) Department of Education*, 38 IDELR 103 (OCR 9/30/02).

abilities to participate "in the most integrated setting appropriate."[397]

Section 504 applies not just to students with disabilities, but also to parents with disabilities. A district was charged with a violation of section 504 because it failed to provide the parents of a student with a disability with important educational records and notices in an alternative format (Braille), thereby "denying the Parents the opportunity to effectively participate in the Student's education." To resolve the complaint, the district agreed to obtain its own Braille embosser, scanner, and related software to format material in Braille. The district agreed to provide the parents with Braille copies of all IEPs, records, evaluations, notices and correspondence.[398]

B. Free Appropriate Public Education

As with the IDEA, section 504 guarantees that students with disabilities receive a FAPE. However, section 504 defines FAPE a little differently than the IDEA. Under section 504, a FAPE is defined as regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of non-disabled students are met.[399] All services are to be without cost to the students or their parents, except for those fees that are imposed on non-disabled students or their parents.[400]

As noted above, anyone who has sought AT from the special education system has had to confront the Supreme Court's decision in *Board of Ed. of the Hendrick Hudson Sch. Dist. v. Rowley*,[401] which interpreted the meaning of a FAPE under the IDEA.

The parents of Amy Rowley, a deaf student with minimal residual hearing and excellent lip reading skills, sought the services of a full-time sign interpreter in her regular classes. Amy had been provided with an FM trainer, a teacher of the deaf for one hour per day and speech for three hours per week. Even though Amy was missing about half of what was being discussed in class, she was very well adjusted, was performing better than the average child in the class and was "advancing easily from grade to grade."[402] The Supreme Court held that the IDEA's obligation to provide an appropriate education to students with disabilities did not mean that school districts must maximize a student's potential or provide the best education possible.[403] The Court determined that in most cases, when a child, such as Amy, is being educated in regular classes, the student was receiving an appropriate education if the student was advancing from grade to grade with the benefit of supportive services.[404]

What if the Rowleys had brought their case under section 504? Would the family have been able to obtain the interpreter?

1. Davis and *Choate*

Any case under section 504 must begin with the Supreme Court's decision in *Southeastern Community College v. Davis*,[405] which could be viewed as the section 504 equivalent of *Rowley*. *Davis* upheld a college's decision not to allow an individual with a hear-

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[397] 34 C.F.R § 104.22(b).

[398] *Ann Arbor (MI) Public Schools*, 37 IDELR 44 (OCR 4/29/02).

[399] 34 C.F.R. § 104.33(b)(1).

[400] *Id.* § 104.33(c)(1).

[401] 458 U.S. 176 (1982).

[402] *Id.* at 184-185, 215.

[403] *Id.* at 199.

[404] *Id.* at 203.

[405] 442 U.S. 397 (1979).

ing impairment to enroll in an associate's degree program in nursing. The Supreme Court agreed with the college that the individual was not a qualified individual with a disability because she could not meet the technical standards for admission into the college's program, as required by 34 C.F.R. § 104.3(k)(2).

At issue was the Court's interpretation of the section 504 regulations applicable to colleges, not those applicable to elementary and secondary schools. Dicta in the Court's decision, however, has been read by many to build in a reasonable accommodation requirement (or limitation) to all of the provisions of section 504. The relevant language from the Court's opinion is:

> If [the section 504] regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of section 504. Instead they would constitute an unauthorized extension of the obligations imposed by [section 504].[406]

A subsequent decision by the Supreme Court, *Alexander v. Choate*,[407] reaffirmed this perception. There, the Court found that reducing annual inpatient hospital stays under Medicaid did not violate section 504, even though individuals with disabilities were disproportionately affected by the action. The Court relied on *Davis* for the proposition that "[s]uch a 'fundamental alteration [advocated by plaintiffs] in the nature of the program' was far more than the reasonable modifications the statute or the regulations required."[408]

2. OCR's Interpretation of FAPE

The U.S. Department of Education's Office of Civil Rights (OCR) was confronted head on with this interpretation in an inquiry several years ago. *OCR Policy Letter to Zirkel*.[409] OCR was asked whether it recognized that the FAPE standard under section 504 "implicitly incorporates a reasonable accommodation, reasonable modification, or other such cost-conscious limitation."[410] If not, how does such an interpretation square with the Supreme Court's decisions in *Davis* and *Alexander*? OCR was urged to read such a limitation into section 504's FAPE requirements to more accurately reflect Congressional intent "as decided by appropriate judicial authority."[411] OCR's response was a surprise:

> The key question in your letter is whether OCR reads into that Section 504 regulatory requirement for a free appropriate public education (FAPE) a "reasonable accommodation" standard, or other similar limitation. The clear and unequivocal answer to that is no.[412]

As support for its position, OCR reviewed the regulatory history and noted that the regulation was subject to Congressional review and received no objections. Accordingly, it is OCR's opinion:

> that the FAPE requirement in the Section 504 regulation does reflect congressional intent. Since that time there have been no actions by the Congress, the Federal courts, or the agencies and administrative tribunals of the executive branch that would require OCR to modify § 104.33, or its interpretation thereof, to allow for some limitation of the FAPE guarantee.[413]

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[406] *Id.* at 410 (emphasis added).

[407] 469 U.S. 287 (1985).

[408] *Id.* at 300 (quoting *Davis*, 442 U.S. at 410).

[409] 20 IDELR 134 (8/23/93).

[410] *Id.* at 135.

[411] *Id.* at 136.

[412] *Id.* (emphasis added).

[413] *Id.*

OCR then reviewed other sections of this regulation, noting the provisions governing employment, as well as those governing higher education and vocational education, include a "reasonable accommodation" limitation. The provisions governing elementary and secondary education do not. OCR concluded that this was intentional:

> We conclude therefore that the regulation writers intended to create a different standard for elementary and secondary students than for employees or postsecondary/vocational students.[414]

OCR went on to carefully distinguish both the *Davis* and *Alexander* decisions. First, it noted that the provisions being interpreted in those cases were not those applicable to elementary and secondary education. And, as noted above, those provisions do not include the reasonable accommodation limitation. Second, and more importantly, OCR concluded that the caution in *Davis* that the section 504 regulations should not "require substantial adjustments to existing programs beyond those necessary to eliminate discrimination,"[415] "has no impact on 34 C.F.R. § 104.33(a) because that section does not require changes beyond those necessary to eliminate discrimination."[416] OCR continued:

> If a school district is meeting the needs of children without disabilities to a greater extent than it is meeting the needs of children with disabilities, discrimination is occurring. By meeting the educational needs of children with disabilities as adequately as it meets the needs of other children, the school district is eliminating discrimination, and even *substantial modifications* required to bring about this result are not suspect under the *Davis* decision.[417]

Similarly, OCR distinguished a series of lower court cases:

> Those cases that determine what a school district must provide to an elementary or secondary student with a disability under Section 504 restate the *Davis* interpretation: Section 504 is a statute that prohibits discrimination, rather than requiring affirmative action to overcome a student's disability. If particular educational services requested by the plaintiffs in these cases are denied by the courts, it is almost uniformly because the courts found that discrimination was not occurring; that is, those services requested were not necessary to prevent or eliminate discrimination because the services currently being provided were not discriminatory. This coincides with OCR's interpretation set forth above that the FAPE regulation requires school districts to meet the individual needs of all students to the same extent, though not necessarily by providing the same programs or services.[418]

Finally, OCR determined that its investigations under Title II of the ADA would be governed by the same standard. Its reasoning is as follows:

> Title II's relationship to Section 504 is covered by 28 C.F.R. § 35.103 of the regulation. That section of the regulation states that Title II shall not be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (which includes Section 504) or other regulations issued by Federal agencies pursuant to Title V. "[C]ongress did not intend to displace any of the rights or remedies provided by the other Federal

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[414] *Id.*

[415] 442 U.S. at 410.

[416] *Zirkel* at 137.

[417] *Id.* (emphasis added).

[418] *Id.*

> laws (including Section 504). . .that provide greater or equal protection to individuals with disabilities." 28 C.F.R. § 35.103(b) and 28 C.F.R. ch. 1, pt. 35, app. A., at 430 (1992). Since the Department has developed the specific FAPE standard for compliance for elementary and secondary schools under Section 504 the Title II regulation in this instance is not intended to be applied to weaken the existing Section 504 standards.[419]

3. Analysis of the *Rowley* Decision in Light of this Section 504 Standard

How does all of this apply to our analysis of *Rowley*? The district court in *Rowley* ruled in the family's favor.[420] It found that the school district did not provide an appropriate education to Amy. Even though the case was brought under the IDEA, the court relied on the definition of FAPE found in the special education regulations under section 504. Under section 504, an appropriate education is defined as:

> The provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based on adherence to procedures [under these provisions].[421]

This definition is significantly different from the IDEA definition of FAPE because it is drawn from section 504's anti-discrimination background.

The court set up three possible tests to determine whether a student was receiving an appropriate education under this definition. The first two tests were:

> An "appropriate education" could mean an "adequate" education that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential.[422]

Notably, the first standard sounds very similar to the standard ultimately adopted by the Supreme Court under the IDEA. The district court rejected these two options and found a middle ground:

> Between those two extremes, however, is a standard, which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.[423]

The court went on to note that using this standard would not be easy.

> It requires 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 non-handicapped children.[424]

This standard sounds remarkably similar to OCR's interpretation of the meaning of FAPE under section 504, discussed above.

> Applying this standard to Amy's facts,

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[419] *Id.* at 137-38.

[420] *Rowley v. Bd. Of Education of the Hendrick Hudson School District*, 483 F. Supp. 528 (S.D.N.Y. 1980).

[421] 34 C.F.R. § 104.33(b)(1).

[422] *Rowley*, 483 F.Supp. at 534.

[423] *Id.*

[424] *Id.*

the district court held that the school district had not provided Amy with an appropriate education. The court found that the district had established that while "Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade," it established little more.[425] Again, for the Supreme Court, this was enough under the IDEA.

However, the district court noted that Amy, who was very bright, understood considerably less of what went on in class than she could if she were not deaf. Accordingly, she was "not learning as much, or performing as well academically, as she would without" her disability.[426] The court went on to note that Amy's educational shortfall is greater than that of her peers and is inherent in her disability. "It is precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education."[427] Therefore, the court ordered that Amy receive the services of an interpreter.

Noting that "this case is about Amy," the Second Circuit affirmed, but limited its decision to the facts of her case. The Second Circuit agreed with the district court that Amy needed "a sign language interpreter in her classroom to enable her to have the same educational opportunity as her classmates."[428] Again, this standard is very similar to the interpretation of section 504 by OCR. Holding that the IDEA had its own definition of appropriate, the Supreme Court reversed. The Supreme Court refused to follow the analysis of appropriate based on section 504, which was established by the lower courts, and set out its own test for appropriate based on the language found in the IDEA, outlined above. However, why wouldn't the lower courts' interpretation of the section 504 definition of FAPE still be good law in a case brought under section 504 instead of the IDEA?

Given the similarities between the standard established by the district court and the Second Circuit, based on their interpretation of the section 504 regulations, and that established by OCR, it is very likely that Amy would be entitled to her interpreter under section 504. The test established under section 504 is to eliminate discrimination, which is defined as equalizing educational opportunity based on one's disability. In such cases, even substantial modifications to a program may be required. For a student such as Amy, therefore, who is missing a significant amount of material each day because of her disability, whether she is receiving passing grades would be irrelevant to whether she was receiving a FAPE under section 504.

4. Available Services Under Section 504

The U.S. Department of Education, in a policy memorandum about attention deficit disorders (ADD),[429] indicated that the following services are available under section 504:[430]

> State educational agencies and local education agencies should take the necessary steps to promote coordination between special and regular education programs. Steps also should be taken to train regular education teachers and

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[425] *Id.* at 534.

[426] *Id.* at 532.

[427] *Id* at 535.

[428] *Rowley v. Bd. of Ed. of Hendrick Hudson*, 632 F.2d 945 (2nd Cir. 1980).

[429] Note that all students with disabilities who are eligible under the IDEA are also covered by §504, so these comments would apply to students classified under the IDEA as well. Also, although the policy memo is explicitly discussing students with ADD, there is no reason that these services could not be made available, as appropriate, to a student with any other disability.

[430] *U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116 at 118 (9/16/91).

other personnel to develop their awareness about ADD and its manifestations and the adaptations that can be implemented in regular education programs to address the instructional needs of these children. Examples of adaptations in regular education programs could include the following:

a. Providing a structured learning environment

b. Repeating and simplifying instructions about in-class and homework assignments

c. Supplementing verbal instructions with visual instructions

d. Using behavioral management techniques

e. Adjusting class schedules and modifying test delivery

f. Using tape recorders, computer-aided instruction, and other audio-visual equipment

g. Selecting modified textbooks or workbooks

h. Tailoring homework assignments.

Other provisions range from consultation to special resources and may include reducing class size; use of one-on-one tutorials; classroom aides and note takers; involvement of a "services coordinator" to oversee implementation of special programs and services; and possible modification of nonacademic times such as lunchroom, recess and physical education.

C. Least Restrictive Environment

As with the IDEA, section 504 requires that each student with a disability is to be educated with students who are not disabled, to the maximum extent appropriate. There is also a similar preference for educating students in the regular education setting. Students are to be placed in the regular educational environment unless it is demonstrated by the school that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. For students placed in a setting other than the regular educational environment, the school shall take into account the proximity of the alternate setting to the person's home.[431]

D. Due Process and Procedural Safeguards

Districts are required to develop a procedure to determine the student's needs. Districts may choose to simply use the IEP procedures under the IDEA to determine a student's needs under section 504.[432] However, because most of the services under section 504 will be provided by regular education staff within the school, many schools have set up building level teams to implement section 504. In such cases, the procedures developed must conform to section 504. Most of the requirements are similar but not identical to the IDEA's requirements.

Prior to providing any services under section 504, the student must be provided with a comprehensive, individualized evaluation of his or her needs. Once the student begins receiving services, there must be regular reevaluations. There must also be a comprehensive reevaluation before any significant change in placement.[433] Decisions about the services the student will receive must be made by a group of people, knowledgeable about the child, the evaluation information and the placement options.[434] The

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[431] 34 C.F.R. § 104.34(a).

[432] *Id.* §§ 104.33(b)(2), 104.36.

[433] *Id.* § 104.35(a), (b) and (d).

[434] *Id.* § 104.35(c).

parents must be involved in the process.[435] There is no requirement that the school develop an IEP for the student. However, the student's needs and the services to be provided must be specifically identified, in writing.[436]

Parents have due process rights if they disagree with the school's recommendations under section 504, including the right to an impartial hearing and a review procedure. The school may use the due process procedures under the IDEA to satisfy the section 504 mandates, but is not required to do so.[437] The due process regulations under section 504 do not specifically mention the right to an independent evaluation at school expense. However, OCR has indicated that parents have the right to request a hearing to challenge the district's evaluation (or refusal to conduct an evaluation).[438] In this case, the district did actually pay for an independent AT evaluation of the student. OCR has also determined that an impartial hearing process must include "status quo," i.e., the right to continued services pending an appeal.[439]

E. Assistive Technology

If a student with a disability, who is not receiving special education services, needs an AT device to fully participate in school activities, section 504 may require that the school provide the device, as well as any training needed to effectively use the device.[440] Because services under section 504 are to be provided for free, the school should, as under the IDEA, be responsible for repairs and maintenance.

Over the years, OCR has issued a number of rulings concerning the use of AT. In many of these cases, OCR found that there was no violation of section 504 because the school was providing the AT device in question. For example, OCR determined that there was no violation of section 504 where the school purchased a MacIntosh computer for the student to use while in school. The student could use his IBM compatible computer at home for homework, store the work on disk, bring the disk in and have the work converted to MacIntosh format at school.[441] The following cases serve as an illustrative list of AT devices that have been funded by schools under section 504:

1. Modification and adaptation of a computer to enable a student with quadriplegia to use the computer without assistance.[442]
2. Classroom hearing assistive device and reduction of noise levels for student with hearing impairment.[443]
3. Use of computer for student with mobility impairment to access library (district was not required to install an elevator to make the library accessible).[444]
4. Use of closed caption decoder for student with a hearing impairment while viewing videotapes.[445]

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[435] *See id.* § 104.36.

[436] *OCR Senior Staff Memorandum*, EHLR 307:01 (10/24/88).

[437] 34 C.F.R. § 104.36.

[438] *Bradley County (TN) Sch. Dist.*, 34 IDELR 239 (OCR 12/15/00).

[439] *OCR Policy Letter to P. Zirkel*, 22 IDELR 667 (5/15/95).

[440] *U.S. Dept. of Ed., Joint Policy Memorandum*, 18 IDELR 116, 118 (9/16/91); *Colton Joint (CA) Unified Sch. Dist.*, (OCR 4/7/95).

[441] *Glendale (AZ) High Sch. Dist.*, 30 IDELR 62 (OCR 8/28/98).

[442] *Colton Joint (CA) Unified Sch. Dist.*, 22 IDELR 895 (OCR 4/7/95).

[443] *Cobb County (GA) Sch. Dist.*, 27 IDELR 229 (OCR 5/22/97).

[444] *Newton (MA) Pub. Schs.*, 27 IDELR 233 (OCR 5/30/97).

[445] *Chapel Hill-Carrboro (NC) City Schs.*, 27 IDELR 606 (OCR undated).

5. Use of tutorial software and lap top computer for student with narcolepsy.[446]

6. Use of Arkenstone scanner to scan and read text for a learning disabled student. However, OCR determined that there was no violation of section 504 when the student was not allowed to use the device for a state reading exam.[447]

7. Use of an Alpha Smart.[448]

8. Use of a computer with a keyboarding program for written assignments for a student with ADHD.[449]

VII. Systemic Enforcement of Rights Under the IDEA And Section 504

Anyone who has been a special education advocate for long is likely to encounter issues that go beyond the needs of the individual student. Whether it is a school policy applying to all students or a lack of resources affecting a large number of students, the use of an impartial hearing for one student is not likely to resolve the larger issue. Are there less adversarial or more efficient ways to address these concerns?

A. Complaint to the Office for Civil Rights

As noted above, the OCR enforces section 504. Complaints may be filed concerning individual students or groups of students. However, OCR will not investigate complaints that question the decision of the section 504 Team on such matters as the accommodations or services to be provided. Those cases will need to go through the impartial hearing process.[450] OCR will accept complaints alleging procedural violations, lack of accessibility, failure to provide agreed upon services and claims of discriminatory treatment. Additionally, because all students classified under the IDEA are also covered by section 504, a failure to provide services identified in an IEP is also a violation of section 504, which OCR will investigate.[451]

From the parents' perspective, one of the advantages of an OCR complaint is that OCR will conduct the investigation. On the other hand, as a result, the process is not within the parents' direct control. Of benefit to both parents and schools, OCR will attempt to resolve the complaint through early dispute resolution.

B. Complaint Resolution Procedure

The Complaint Resolution Procedure (CRP) is now under the IDEA Part B regulations.[452] Until 1992, the process was set out in the Education Division General Administrative Regulations (EDGAR),[453] and, therefore, was known as the EDGAR complaint process.

Each state must establish procedures for investigating and resolving complaints concerning the provision of special education services under the IDEA.[454] An or-

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[446] *Bacon County (GA) Sch. Dist.*, 29 IDELR 78 (OCR 3/13/98).

[447] *Alabama Dept. of Educ.*, 29 IDELR 249 (OCR 4/10/98). Note that the IDEA has a different approach to "high stakes testing." See text accompanying footnote 103 above.

[448] *Bradley County (TN) Sch. Dist.*, 34 IDELR 239 (OCR 12/15/00).

[449] *Kent (WA) Sch. Dist. No. 415*, 29 IDELR 978 (OCR 7/2/98).

[450] *See Beverly (MA) Pub. Schs.*, 29 IDELR 981 (OCR 7/21/98); *Glendale (AZ) High Sch. Dist.*, 30 IDELR 62 (OCR 8/28/98).

[451] *See OSEP Policy Letter to Anonymous*, 18 IDELR 1037 (4/6/92).

[452] 34 C.F.R. §§ 300.660 - 300.662.

[453] *Id.* §§ 76.1 - 76.902.

[454] *Id.* § 300.660(a).

ganization or individual may file a complaint. The complaint must be signed and in writing. It must include a statement that the school has violated the IDEA and the facts upon which that statement is based. The complaint must be filed within one year, unless the violation is ongoing. If the complaint is requesting compensatory services, it must be filed within three years.[455]

The state educational agency must conduct an independent on-site investigation, if necessary. It must allow the complaining party the opportunity to submit additional information, and issue a written decision within 60 days.[456] But, there must be a procedure to allow for extensions of time in exceptional circumstances.[457] The CRP cannot be used for issues where there is an impartial hearing pending or an impartial hearing decision, unless the complaint concerns implementation of the decision.[458]

The advantage of the CRP is that if the state finds a violation of the IDEA, it must not only fashion a remedy for the individual student, it must also address the future provision of services for all children in the school district. On the other hand, as with OCR complaints, the process is out of the parents' direct control. Appropriate remedies for individual students can include monetary reimbursement and compensatory services.[459] For example, after finding several violations of the IDEA, one state's Education Department ordered the following compensatory services:

(1) counseling services provided one time a week for two years;

(2) tutoring services for ten hours per week for two years;

(3) provision of a note taker for Megan C.'s college courses for two years; and

(4) continued use of a district-loaned computer and software for two years.[460]

One court has determined that the CRP was an administrative proceeding for which attorney's fees are available under the IDEA.[461] The court's reasoning is consistent with cases which have required the exhaustion of the EDGAR (now CRP) process before bringing a court action under the IDEA for some systemic violations, if that process will be effective in resolving the issue.[462] But, in *Megan C. v. Independent Sch. Dist. No. 625*,[463] the court went through a careful review of the historical and current basis for the CRP to conclude that it was not an administrative proceeding for which attorney's fees were available under the IDEA, and it was not a procedure that must be exhausted prior to proceeding in court.

C. Class Action or Other Litigation

As noted in the section on due process, the IDEA includes an administrative procedure to follow prior to filing a court action. Courts have consistently required that these procedures be exhausted before a court action

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[455] *Id.* § 300.662.

[456] *Id.* § 300.361(a).

[457] *Id.* § 300.361(b).

[458] *Id.* § 300.361(c).

[459] *Id.* §§ 300.360(b) and 300.362(c).

[460] *Megan C. v. Independent Sch. Dist. No. 625*, 57 F.Supp.2d 776, 780 (D. Minn. 1999).

[461] *Upper Valley Association for Handicapped Citizens v. Blue Mountain Union School District No. 21*, 973 F. Supp. 429 (D.Vt. 1997).

[462] *See Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298 (9th Cir. 1992); *Emma C. v. Eastin*, 26 IDELR 1279 (N.D.Cal. 1997).

[463] 57 F.Supp.2d 776 (D. Minn. 1999).

can be filed.[464] Parents cannot by-pass the exhaustion requirements under the IDEA by attempting to file a court action under section 504, or any other federal law, if the case is one that could be brought under the IDEA.[465]

However, courts have recognized that there are circumstances in which exhaustion is not required under the IDEA. In *Riley v. Ambach*, the court recognized that exhaustion would not be required if it would be "plainly inadequate." It gave the following examples: (1) exhaustion would cause delay which would effectively deny the relief sought; (2) the agency may not have the authority to grant effective relief; (3) the administrative body predetermined the issue; and (4) exhaustion would otherwise prove futile.[466] Courts have also held that where schools have denied access to the IDEA's procedural safeguards, a separate action could be maintained under 42 U.S.C. § 1983 to enforce the rights that were denied under the IDEA.[467]

Courts have used these concepts in class actions. In class actions that allege widespread systemic failure to comply with the IDEA, particularly where there had been some attempt to exhaust for at least some students, courts have excused the failure to exhaust.[468]

VIII. Conclusion

Assistive technology offers many students with disabilities the ability to meet their potential. With the appropriate AT available, even students with very severe disabilities can often participate fully in educational activities to prepare them for employment and independent living.

The issues involving AT and students with disabilities are clearly at the "cutting edge." The AT devices now sought for students often did not even exist a few years ago. And the legal requirements regarding AT have, in many cases, emerged only very recently. It is our hope that this booklet will ensure that the attorney or advocate will be well-prepared to advocate for AT under both the IDEA and section 504.

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[464] *Riley v. Ambach*, 668 F.2d 635 (2nd Cir. 1981); *Thomas v. East Baton Rouge Parish Sch. Bd.*, 29 IDELR 954 (M.D. La. 1998).

[466] 20 U.S.C. § 1415(l).

[466] *Riley* at 640-641; *A.W. v. Jersey City Public Schools*, 2002 WL1065685, 37 IDELR 8 (D.N.J. 2002).

[467] *See Quackenbush v. Johnson City School Dist.*, 716 F.2d 141 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984).

[468] *Jose P. v. Ambach*, 669 F.2d 865 (2nd Cir. 1982); *Blackman v. District of Columbia*, 28 IDELR 1053 (D.D.C. 1998); *A.A. v. Bd. of Ed., Central Islip Union Free Sch. Dist.*, 196 F.Supp.2d 259 (E.D.N.Y. 2002).

IX. Appendix

Case Lists by Subject

Note: These case lists are intended to be used a starting place for legal research. They have not been kept up to date and must be updated (using "Key Cite," "Shepard's," etc.) prior to use.

A. Zero Reject

All children are entitled to FAPE "regardless of the severity of their disabilities." 20 U.S.C. §1412(a)(3)(A); *Timothy W. v. Rochester N.H. School Dist.*, 875 F.2d 954, *cert. denied*, 493 U.S. 983 (1989).

Timothy W. is a child with complex developmental disabilities, spastic quadriplegia, cerebral palsy, seizure disorder, and cortical blindness. In that case, the First Circuit held that a school district must provide special education to a *child* without requiring a demonstration that the child could benefit from special education. "The Act mandates an appropriate public education for all handicapped children, regardless of the level of achievement that such children might obtain." In fact, the Act states a priority for providing services "... to those children with the most severe handicaps..." See also *Williams v. Gering Public Schools,* 236 Neb. 722, 463 NW2d 799 (Supreme Court of Nebraska, 1990). A student with profound retardation, who had a current developmental age of six months or less and who also suffered from congenital blindness and spastic quadriplegia could only receive FAPE if placed in 12 month program, but did not require a residential placement. While the district did not directly contest whether it was required to serve the student as in *Timothy W.*, it contested the level of service it was required to provide given the student's disabilities.

B. Cases Interpreting the Second (Is the IEP Appropriate?) Prong of the Rowley Educational Benefit Test

1st Cir.

Lenn v Portland School Committee, 998 F2d 1083, 1086 (1st Cir. 1993).

"The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate rather than ideal, education; it requires an adequate rather than optimal, IEP... It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential..."

2nd Cir.

Walczak v. Florida Union Free School District, 142 F.3d 119, 130 (2nd Cir. 1998).

The IDEA does not require states to "...maximize the potential of handicapped children..." however the "door of public education must be opened in a 'meaningful' way..." "This is not done if an IEP affords only the opportunity for only 'trivial advancement'..." An appropriate education under the IDEA is one that is "likely to produce progress, not regression."

See also: *M.S. Board of Ed of City School Dist. of Yonkers*, 231 F.3d 96 (2nd Cir. 2000).

3rd Cir.

T.R. v. Kingwood Township Board of Education, 205 F.3d 572, 576 (3rd Cir. 2000).

In the 3rd Circuit, the IEP must provide more than "trivial or *de minimus* educational benefit" but is not required to "maximize the potential of handicapped children." The IEP must provide "significant learning" and "meaningful educational benefit." See also *Ridgewood Board of Educ. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999).

4th Cir.

Carter v. Florence County School District No. 4, 950 F.2d 156, 159-60 (4th Cir. 1991), *aff'd*, 510 U.S. (1993). The 4th Circuit Court reiterated (and the U.S. Supreme Court later affirmed) the *Rowley* language re: the educational standards, but added that the 4th Circuit has noted in prior cases that "...Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial. In light of these principles, we cannot say that the district court's conclusion was clearly erroneous. The school district drafted the IEP to apply to a learning disabled tenth - grade student whose reading and mathematics skills were at a fifth and sixth grade level, respectively. Although the amount of appropriate advancement will necessarily vary depending on the abilities of individual students ... the district court did not err in finding that a goal of four months' progress over a period of more than one year was rather modest for a student such as Shannon and was unlikely to permit her to advance from grade to grade with passing marks. Thus, it was proper for the district court to conclude that the itinerant program failed to satisfy the Act's requirement of more than minimal or trivial progress. "

5th Cir.

Christopher M. v. Corpus Christi Ind. School Dist., 933 F.2d 1285, 1289-129 (5th Cir. 1991).

The school district proposed limiting the school day of a student with profound mental retardation and physical disabilities to four hours, presumably due to physical distress resulting from prolonged sensory stimulation. While access to special education is determined without analysis of the student's ability to benefit from special education (see discussion of "zero tolerance" above) the content of the student's IEP is not. The court balanced the student's limited ability to benefit from more than a four-hour school day against the physical distress resulting from a longer day in determining the four-hour day was appropriate; placing the burden on the student, as the party "attacking" the IEP, to show that a four hour day would not "provide him any meaningful benefit." The district is not required under the [IDEA] to provide." "...the maximum benefit possible, but only to provide a meaningful education."

See also: *Houston I.S.D. v. Bobby R.*, 220 F.3d 341 (5th Cir. 2000).

6th Cir.

Knable ex. Re. Knable v Bexley City School Dist., 238 F.3d 755 (6th Cir. 2001).

After district failed to convene an IEP meeting for student, parents unilaterally withdrew child with behavior disorder from school, enrolled in a private school and sued for reimburse-

ment. Court held that *s*ubstantive harm, resulting in a denial of a FAPE under IDEA, occurs when the procedural violations of IDEA seriously infringe upon the parents' opportunity to participate in the IEP process, and procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE. Also, the proposed IEP failed to provide a FAPE where, *inter alia*, it required the parents to exhaust their own insurance coverage before it would pay for tuition at the private school.

7th Cir.

Beth B. v Van Clay, 282 F.3d 493 (7th Cir. 2002).

Addresses the intersection of LRE and *Rowley*. School district's recommendation that student with Rett Syndrome be placed in special education ("life skills") classroom, with reverse mainstreaming opportunities, satisfied provision of IDEA requiring FAPE, and LRE provision of IDEA, requiring that district mainstream disabled student to greatest extent appropriate; although regular classroom would be less restrictive than special education classroom, disabled student was only in regular class for about half the day, and her academic and developmental progress was limited, so that student did not receive satisfactory education in regular classroom, and thus, recommended placement did not violate IDEA.

See also: *Todd v. Duneland School Corp*., 299 F.3d 899 (7th Cir. 2002); *Peter G. v. Chicago Public School Dist.,* 2003 WL 121932 (N.D.Ill. 2003) (only the Westlaw cite is currently available).

8th Cir.

Legares v. Camdenton R-III School District, 68 S.W. 3d 518 (Mo. App. W.D. 2001), rehearing and/or transfer denied (Jan 29, 2002), transfer denied (Mar 19, 2002). The *Legares* court held that Missouri has a higher standard for special education services per state law, than is required by the "appropriateness" standard of the IDEA. This decision was overturned by a statute passed months after the decision was rendered. The statute clarified that in Missouri, the FAPE standard does not go beyond what is federally required.

See also, *Reese ex rel. Reese*, 225 F. Supp. 2d 1149 (E.D. MO, 2002).

9th Cir.

*Capistrano Unified School Dist. v. Wartenberg By and Through Wartenberg***,** 59 F.3d 884 (9th Cir. 1995).

The district appealed a hearing officer's decision requiring it to reimburse the parents of a student with a learning disability for a private placement. "As construed by *Rowley,* a child receives a free appropriate public education if the program (1) addresses the child's unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the individualized education program… If Jeremy was eligible for assistance under the terms of the Act, these provisions applied to him, and the school district was bound to address his unique needs in a manner that would afford him an opportunity to benefit educationally." The court ultimately determined that the district's proposed placement was inappropriate based on the facts and that… "[it]also fails to meet the

third part of the *Rowley* test. The third part of the *Rowley* test requires that the instruction and services included in the District's proposed placement comport with the goals and objectives on Jeremy's [individualized education program]." The proposed placement did not provide sufficient time in school to meet these goals and objectives.

10th Cir.

O'Toole v. Olathe District Schools, 144 F.3d 692 (10th Cir. 1998).

In this case, the student attempted to show that the Kansas state standard was higher than the federal IDEA standard. This attempt was not successful and the court reiterated that the standard in the 10th Circuit, from *Urban v. Jefferson County School District, R-1*, 89 F.3d 720, 726 (10th Cir. 1996), *citation omitted,* is whether "the IEP is reasonably calculated to enable [the student] to achieve educational benefits."

11th Cir.

JSK By and Through JK v. Hendry County School Bd., 941 F.2d 1563 (11th Cir. 1991).

"J.S.K.'s parents argue that, to satisfy the second part of *Rowley,* the Board must have provided J.S.K. with what his parents call 'meaningful' educational benefits. We are not sure what 'meaningful' is intended to signify; but as we understand J.S.K.'s parents, we disagree with this characterization…We disagree to the extent that 'meaningful' means anything more than 'some' or 'adequate' educational benefit. In *Drew P.* we held that '[t]he state must provide a child only with a "basic floor of opportunity."' …Our decision in *Drew P.* was not based on whether Drew P. was receiving 'meaningful' educational benefits, but was based on whether he was receiving *any* educational benefits… Following *Rowley,* we hold today that the state must provide to the handicapped child personalized instruction and services that meet state educational standards and that comport with the child's IEP, which must be formulated according to EAHCA requirements…We also stress that, when measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity...This opportunity provides significant value to the handicapped child who, before EAHCA, might otherwise have been excluded from *any* educational opportunity. …If the educational benefits are adequate based on surrounding and supporting facts, EAHCA requirements have been satisfied. While a trifle might not represent 'adequate' benefits, … maximum improvement is never required. Adequacy must be determined on a case-by-case basis in the light of the child's individual needs."

See also: *Weiss by Weiss v. School Bd. of Hillsborough County,* 141 F.3d 990 (11th Cir. 1998).

D.C. Cir.

Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988), *appeal after remand, Kerkam by Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84 (D.C. Cir. 1991).

Parents of a student with severe mental retardation sued for reimbursement of costs for a private placement. The Circuit Court remanded for a ruling on "appropriateness" finding that the lower court had applied a "maximizing" standard in its initial opinion. The District Court

again ruled that the district's offering did not meet FAPE and the district again appealed. The Circuit Court held that, "On examining the record before the district court, we reluctantly conclude that its decision on remand turned on its understandable concern for Alexander's best interests rather than on the appropriateness of the educational program proposed by the DCPS. There seems to be little doubt that Alexander would have made less progress under the District of Columbia program, but *Rowley* precludes our taking that factor into account so long as the public-school alternative confers some educational benefit.…The district court nevertheless focused on the desirability of residential placement, and stated that it 'cannot ignore that Alexander has made substantial progress at Willow/Keystone.' … Compelling though that consideration is, the inquiry as to the appropriateness of the State's program is not comparative. … The benefit that Alexander has received from his placement at Willow/Keystone thus has no bearing on whether the District must reimburse the Kerkams for its cost. The DCPS need only show that its alternative program confers some educational benefit, and the record demonstrates that the DCPS has done so."

See also: *Dawkins by Dawkins v. District of Columbia*, 872 F.2d 496 (D.C. Cir. 1989).

C. Least Restrictive Environment

Note: The following are listed as string cites only because the decisions vary greatly by circuit and there is not a recent decision in every circuit.

3rd Circuit

T.R. v. Kingwood Tp. Bd. of Edu. 205 F.3d 572 (3rd Cir. 2000).

Oberti by Oberti v. Board of Edu. of Borough of Clementon School Dist., 995 F.2d 1204 (3rd Cir. 1993).

4th Circuit

Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, (4th Cir. 1997).

5th Circuit

Daniel R.R. v. State Board of Educ., 874 F.2d 1036 (5th Cir. 1989).

6th Circuit

Ronker v. Walter, 700 F.2d 1058 (6th Cir. 1983), *cert denied*, 464 U.S. 864 (1983)

Metropolitan Board of Public Educ. v. Guest, 193 F.3d 457 (6th Cir. 1999).

9th Circuit

Sacramento City Unified School Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994), *cert denied*, 512 US. 1207 (1994).

Poolaw v. Bishop et al, 67 F.3d 830 (9th Cir. 1995).

D. When Is It Appropriate To Place a Student in the Neighborhood School?

Note: The following are listed as string cites only because they vary greatly by circuit and there is not a recent decision in every circuit.

1st Circuit

Kevin G. v. Cranston School Comm., 130 F.3d 481 (1st Cir. 1997).

3rd Circuit

Oberti by Oberti v. Board of Educ. of Borough of Clementon School Dist., 995 F.2d 1204 (3rd Cir. 1993).

5th Circuit

Flour Bluff Ind. School Dist. v. Katherine M., 91 F.3d 689 (5th Cir. 1996).

6th Circuit

Hudson v. Bloomfield Hills Public Schools, 108 F.3d 112 (6th Cir. 1997).

8th Circuit

Schuldt v. Mankato Ind. School Dist., 937 F.2d 1357 (8th Cir. 1991).

10th Circuit

Urban v. Jefferson County School Dist. R-1, 89 F.3d 720 (10th Cir. 1996).

Murray v. Montrose County School Dist. Re-1J, 51 F.3d 921 (10th Cir, 1995).

E. Transition

Board of Educ. of Oak Park v. Nathan R., 199 F.3d 377 (11th Cir. 2000).

Not a transition case but important in that the court held that if a student graduates from high school and doesn't contest his graduation, then the case is moot and the student cannot challenge the adequacy of educational services.

T.S. v. Independent School District, 265 F.3d 1090 (10th Cir. 2001).

The Court held that the student's post-graduation request for more transition services was a request for prospective relief. As such, those services were no longer the responsibility of the school district.

Chuhran v. Walled Lake Consolidated Schools, 839 F. Supp. 465 (E.D. MI. 1993) *aff'd by* 51 F.3d 271 (6th Cir. 1995) (Table).

District Court applied the Supreme Court's *Rowley* test with respect to transition services. Student with muscular dystrophy stayed on an additional two years after he was slated to graduate, and IEP team recommended graduating him and termination of services. Plaintiff argued that the IEP team's failure to develop a written plan for transition services amounted to a procedural violation of the IDEA that entitled him to compensatory education. The court rejected violation of the IDEA that entitled him to compensatory education. The court rejected the Plaintiff's claim, holding that procedural non-compliance with the IDEA will only be deemed violative if it results in substantive deprivation of education opportunity. Here, there was no substantive deprivation because, even though there was no written plan for transition services, such services were provided.

Daugherty v. Hamilton City Schools, 21 F. Supp.2d 765 (E.D. TN. 1998).

After graduation, Plaintiff found that he couldn't function outside of a structured/supervised environment, and so argued that the school district should pay for his restricted residential placement in a program to help him with psychiatric, social, and emotional problems. The District Court found for the school district on three grounds: first, the services requested were not necessary for educational purposes; second, the student didn't contest the adequacy of his transition services before graduation; and finally, the need for continued placement rested on medical considerations outside the scope of IDEA.

Pace v. Bogalusa City School Board, 137 F.Supp.2d 711 (E.D. LA. 2001), *aff'd* 325 F.3d 609 (5th Cir. 2003).

Note: This case is currently on appeal to the U.S. Supreme Court on a different issue. A decision is expected in June 2003.

School district satisfied its transition services responsibilities when it discussed such services in reports and evaluations, developed Individual Transition Plans (ITPs) in association with student's IEP, and contacted appropriate state and local agencies to assist student in providing transition services.

Browell v. Lemahieu, 127 F.Supp.2d 1117 (D.Hawai'i 2000).

Bi-polar student forced to get home tutor challenged adequacy of transition services, arguing that the Dept. of Education took no responsibility for his transition services in his IEP and that the Dept. abandoned him to provide his own transition services. The court disagreed, holding that the Dept. had clearly listed itself in the "agency responsible" category. The court also found that the Dept. actually provided adequate transition services, in that they gave the student a career test, took him to two community colleges, and gave him information on how to contact a vocational counselor.

Mandy S. v. Fulton County School District, 205 F.Supp.2d 1358 (N.D. GA. 2000), *aff'd* 273 F.3d 1114 (11th Cir. 2001) (Table).

Student contended that the transition services in his IEP were deficient because there was no community-based program in the IEP. The court ruled against the student, finding that the student's own desire to attend business preparation classes made it impossible to implement such a program. In addition, the student argued that no outside agencies were invited to the IEP meeting to discuss transition services. The court ruled that failing to invite such agencies amounted to nothing more than "procedural noncompliance." As such, the court said, there is only a violation if the conduct resulted in "substantive deprivation" to the student, which was not the case here; the school district was capable of discussing the programs offered by outside agencies, so the student suffered no substantive harm.

Baer v. Klagholz, 771 A.2d 603 (N.J. Super. Ct. App. Div. 2001), c*ert. denied* 174 N.J. 193, 803 A.2d 1165 (N.J. Jul 16, 2002).

State Department of Education eliminated regulations requiring that evaluations include assessments to determine appropriate post-secondary outcomes for students with disabilities. Parents of students with disabilities and advocacy organizations argued that the federal government's requirement for outcome-oriented transition services and for assessment-based IEPs together dictate that the evaluation of students 14 and over must include assessments to determine appropriate post-secondary outcomes. The New Jersey Superior Court agreed with the parents and found that the Dept.'s regulations violated the IDEA.

School Board of Lee County v. S.W., 789 So.2d 1162 (Fla. Dist. Ct. App. 2001).

School board appealed final order of ALJ compelling attendance of another agency at the transition service meeting for the next IEP. The court found that the ALJ abused his discretion, in that he could have taken any number of other steps to obtain participation of the other agency, short of compelling its attendance.

Livermore Valley Joint Unified School District, 33 IDELR 288 (SEA CA 2000).

Despite finding by student's IEP team that he needed more transition services and so should not be forced to graduate, the school district's program specialist declared that the student met proficiency standards and so must be give his diploma and cut off from any further services. The IHO said that, when deciding such a case, one must determine 1) whether student met proficiency standards as designated in the IEP; and 2) whether student completed prescribed course of study, including transition services. While IHO found that the first prong was satisfied, the second was not; the student was unable to communicate with others at the level necessary to function outside of high school. The IHO held that the school district's failure on the second prong entitled the student to additional transition services and compensatory education.

Houston Indep. School District, 32 IDELR 79 (SEA TX 1999).

Student with autism sued school district for their failure to provide transition services. The hearing officer found that the student had received academic and non-academic benefits from the school's programs and was headed to college, and therefore had received FAPE. While the hearing officer strongly urged the school district to begin providing transition services, she did not require it.

Portland School District, 30 IDELR 836 (SEA OR).

Student with Down Syndrome and her parents alleged that school district failed to provide adequate transition services where it did not instruct the student on how to use the city bus system, as outlined in the student's IEP. The hearing officer ruled that the school district had to provide compensatory services to instruct the student in using the bus system.

Wisconsin Dells Sch. Dist. 35 IDELR 145 (SEA WI 2001)

Transition services adequate, as evidenced by student's successful transition into the community through employment in a sheltered workshop.

Caribou Sch. Dept., 35 IDELR 118, (SEA ME 2001)

Student received extensive compensatory education because district failed to abide by procedural requirements, including (among others) failing to consider services prior to 16th birthday, failure to involve student and parents in planning process, resulting in inadequate delivery of services.

But see: *Bd. of Educ. of the Arlington Cent. Sch. Dist*. 36 IDELR 193 (SEA NY 2001)

San Diego Unified Sch. Dist., 36 IDELR 172 (SEA CA 2002)

District's failure to provide 18 year-old student with reading goals and objectives geared toward employment and independent living in the community denied student FAPE.