A Discussion of Special Education in Illinois

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Brooke Whitted Background Information

BROOKE R. WHITTED is a partner in the law firm of Whitted Takiff + Hansen, LLC. His practice focuses on areas of mental health (confidentiality, procedures, and representation of mental health providers and institutions), education, and select criminal and juvenile matters, usually when disability is involved. Prior to forming his firm, Brooke was an equity partner at the Chicago litigation firm of Foran & Schultz for six years and, from 1980 to 1995, majority partner in his own firm. Prior to entering private law practice in 1978, he was a Field Probation Officer for the Cook County Juvenile Court.

Brooke is currently the President of the Leslie Shankman School Corporation, which operates two well-known private schools for disabled students. Both schools are in the process of moving into their new home. He also chairs, and is a cofounder of, the Board of Directors for the Harold and Rose Marie Marx Memorial Fund, Inc., which has been helping Cook County Juvenile Court wards for almost 25 years. Brooke is a former member of the board of directors of the National Runaway Switchboard, Heartspring/Wichita, Glenview Youth Services and a founding board member of Shelter, Inc. He is a current faculty member of the UIC Medical School Department of Psychiatry (teaching "Law and Psychiatry" to child fellow candidates from UIC and Rush for over 20 years). He is the Private Provider gubernatorial appointee to the Illinois Community & Residential Services Authority, a unique small state agency helping Illinois children with complex emotional challenges locate the services they need. There is no other state agency like the CRSA in the country.

Brooke was also appointed by the State Superintendent of Education to serve on a statutorily created Anti-Bullying/Harassment Task Force, which presented its report to the Illinois Legislature on March 1, 2011. He was also appointed by the Speaker of the Illinois House to membership on the Task Force on Prevention of Sexual Abuse of Children, which has since presented its report to the legislature. Brooke and his partner, Neal E. Takiff, coauthored revisions to the current statute on school residency, which the Governor signed in 2009.

Brooke has represented child, family, mental health and educational agencies in the Chicago metropolitan area, such as the National Runaway Switchboard and Jewish Child and Family Services, also including scores of fine nonpublic schools for disabled children. He has also represented out of state schools serving Illinois students. Brooke also represents related professional associations including the Illinois Psychological Association. Sample clients include the Francis Parker School, the Chicago City Day School, the Science and Arts Academy, and many other fine private schools.

Brooke has been published or interviewed on a variety of topics related to education, child welfare, juvenile law, and mental health. Brooke appeared on WBEZ on December 13 and 16, 2013 to discuss the serious and shocking shortage of services in Illinois for mentally ill children. He was also featured in a front page Tribune article on March 26, 2014 on residential placement. His firm website has abundant research on related and developing areas of law: www.wthlawfirm.com. Those who are interested can freely use them. Attribution is appreciated, but not required.

CREATIVE SOLUTIONS FOR COMPLEX ORGANIZATIONAL ISSUES

In recent years, we have been asked to work with governing bodies in both public and private schools, as well as mental health agencies, to creatively resolve complex conflicts while avoiding litigation. We have, for example, been asked to independently look into the following situations:

PUBLIC SCHOOLS/ORGANIZATIONS

- ✓ On behalf of an elementary school district, arrange to appear in court as a special assistant state's attorney for the purpose of prosecuting truancy charges against parents who kept their special education children out of school in excess of 100 days in one year; consequence for one of the parents was two weeks in jail;

- ✓ On behalf of an elementary school district, file a guardianship petition for an elementary school girl whose mother abandoned her, but who was doing well in school and needed an Illinois family to be her guardians; established guardianship so that the student could continue to shine academically;

- ✓ Investigation of a public school board member alleged to be engaged in a situation involving a potential conflict of interest or appearance of impropriety;

- ✓ Investigation into whether a public school board member violated confidentiality laws by releasing information concerning a fellow school board member's special education child to members of the public;

- ✓ Investigation concerning a public school superintendent as to whether a potential violation of law occurred when election related materials were sent home in students' backpacks;

- ✓ Retained by a school district acting as ASO for the Phil Rock Center to address a complex pension shortfall and work with all involved stakeholders in creating a legislative remedy that was eventually signed into law;

- ✓ Investigation of the conduct of a public school board member in sending out negative and possibly defamatory e-mails concerning another board member, including a forensic investigation of the location where the e-mails originated; and

- ✓ Investigation of a statutorily created education task force and whether the task force failed to achieve the requisite degree of independence, with subsequent advice and effort to change the direction of the task force and its final report.

PRIVATE SCHOOLS/ORGANIZATIONS

- ✓ Investigation for a private, non-profit school board into whether a student's inconsistent allegation of improper touching rose to the level of a mandated DCFS report;

- ✓ Investigation on behalf of a nonprofit special needs school of certain anonymous letters sent to the board of directors and others with respect to alleged improprieties on the part of administration, as well as disclosure of the chief administrator's personal tax return information to others;

- ✓ Investigation on behalf of out of state residential facility, as to whether their unique program fell within certain exceptions for them to be approved as a special education placement site for students from Illinois school districts;

- ✓ On behalf of a large publicly held schools company, research of the complicated law of school residency in Illinois, formulation of solutions for simplifying school residency legal analysis, and work with various groups to achieve consensus on statutory amendments, draft amendments, and assist in getting the amendments passed, with the new provisions significantly simplifying school residency analysis and enforcement signed into law;

- ✓ Investigation for private school of an allegation of improper relationships and touching between a staff member and students;

- ✓ Emergency investigation and intervention on behalf of a freestanding psychiatric hospital, when an independent contractor/vendor failed to provide services and, when asked to leave, refused to do so. Managed public relations issues, coordination with the police, and eviction of provider;

- ✓ Retained by a large publicly held psychiatric care company to respond to an adverse DCFS audit of one of their facilities and manage legislative and public relations responses; and

- ✓ On behalf of a large nonprofit school targeted by the Illinois Department of children and Family Services, manage all responses to DCFS; board conflicts; and work with state political figures, others involved with the school, and the press during a very high velocity crisis situation.

In light of the recent national spotlight on harassment, bullying and school shootings:

- ✓ Investigation of an ongoing bullying situation between two public elementary school students in which one or both parents were also on the governing board of the school district; and

- ✓ Involvement in numerous matters where we are called upon to develop an objective opinion as to whether harassment allegations have merit, and suggesting responses to eliminate systemic harassment problems in public and private settings.

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Special Education In a Nutshell

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I. Referral for Initial Case Study Evaluation ("CSE")

A. A referral for a CSE may be made for any child suspected of having a disability. Every school district must develop and publicize procedures by which an evaluation may be made ("child find" procedures"). 34 C.F.R. § 300.111 (2006); 23 Ill. Admin. Code § 226.100 (2007).

B. Referrals may be made by "any concerned person", however, referrals are typically made by school district personnel, parents, other persons having primary care and custody of the child, other professional persons having knowledge of the child's problems, the Illinois State Board of Education ("ISBE"), and even the child themself. 34 C.F.R. § 300.301 (2006); 23 Ill. Admin. Code § 226.110(b) (2007).

C. Parent is defined as a natural, adoptive, or foster parent; A guardian (but not the State if the child is a ward of the State.); An individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or an individual assigned by the State Board of Education as a "surrogate" parent. 34 C.F.R. § 300.30 (2006).

D. Parental safeguards notification should always be provided to parents upon initial referral. 34 C.F.R. § 300.504 (2006).

II. Decision Whether to Conduct a CSE

A. The school district must decide whether or not to conduct the CSE within 14 school days of receiving a referral for the CSE. It may use screening data and conduct preliminary procedures to assist in making this determination. If the district decides not to conduct a CSE, it must notify the parents, in writing, and explain its reasoning. A parent may request a due process hearing to contest the district's refusal to conduct the CSE. 34 C.F.R. § 300.503(b) (2006); 34 C.F.R. § 300.507 (2006); 23 Ill. Admin. Code § 226.110(c)(3) (2007).

III. Parental Consent

A. **Parental consent for initial CSE is required prior to CSE**. 34 C.F.R. § 300.300 (2006).

B. "Consent" is defined to acknowledge that parents can revoke consent, but such revocation is not retroactive. This means that revocation does not negate an action that occurred after the consent was given before it was revoked. Revocation of consent can be done either verbally or in writing. If done verbally, the district must confirm the request in writing by letter to the parents within five days. 23 Ill. Admin. Code § 226.540 (2010).

D. If a child is a ward of the State and is not residing with the child's parent, the school district shall make "reasonable efforts" to obtain the informed consent from the parent of the child for an initial evaluation. Following "reasonable efforts," however, the district is not required to obtain consent from the parent if the district cannot discover the parent's whereabouts. Also, a district does not need to obtain informed consent if the parent's rights have been terminated by state law or if a judge has lawfully given the parent's rights to make educational decisions for the child "to an individual appointed by the judge to represent the child." 34 C.F.R. § 300.300(a)(2) (2006).

IV. CSE and Eligibility Determination Conference

A. The current federal IEP Regulations state that the "IEP Team" determines both the relevant "domains" that must be evaluated and the actual assessments to be utilized. Existing data must be considered. All IEP meetings must be scheduled at a mutually convenient time for both the school and the parents. 34 C.F.R. § 300.304 (2006); 34 C.F.R. § 300.305 (2006); 34 C.F.R. § 300.322 (2006).

B. The initial CSE and CSE review conference to determine eligibility must be completed within 60 school days from the date of referral. The "date of referral" that starts the 60-day timeline is the date on which the parent(s) sign consent for the CSE. 34 C.F.R. § 300.301(c) (2006); 23 Ill. Admin. Code § 226.110(d) (2007).

D. According to the Illinois School Code, when a student is referred for an evaluation with less than 60 days left in the school year, eligibility must be determined and, if necessary, an IEP developed prior to the first day of the next school year. 105 ILCS 5/14-8.02 (2008).

E. Parent shall be provided with a copy of the team's report at the conclusion of the IEP meeting. A separate written statement may be provided by a team participant who wishes to be on record as disagreeing with the conclusions of the team. Within 10 days of the conference, parents shall receive written notice from the district as to the eligibility determination reached for the child. 23 Ill. Admin. Code § 226.110 (e) & (f) (2007).

V. Initial Special Education Eligibility Determination

A. Eligibility is based on the federal and state definitions of a disability and is determined by a majority of team members. The existence of a DSM[1] disability will not necessarily mean the child has a special education disability, unless the disability impacts the child's education. 34 C.F.R. § 300.8 (2006); 34 C.F.R. § 300.306 (2006); 23 Ill. Admin. Code § 226.75 (2007).

[1] Diagnostic and Statistical Manual of Mental Disorders is a manual published by the American Psychiatric Association that includes all currently recognized mental health disorders.

VI. Initial IEP Development by IEP Team

A. If the child is eligible for special education service under a disability category, then an IEP is drafted. The IDEA requires that specific individuals be present at the IEP team including the parent, a regular education teacher, a special education teacher an individual from the school district capable of making decisions and committing district resources. 34 C.F.R. § 300.306(c)(2) (2006); 34 C.F.R. § 300.321 (2006).

B. An IEP must be developed within 30 days of the eligibility determination. 34 C.F.R. § 300.323(c) (2006).

VII. Special Education Services

A. The IEP *must* be based on measurable goals. The 2004 IDEA reauthorization no longer requires districts to draft objectives with goals, except for children with disabilities who take alternate assessments aligned to alternate academic achievement standards. District *may* choose to draft objectives with goals. 34 C.F.R. § 300.320(a)(2) (2006).

B. **Parental consent must be obtained by the school district prior to providing special education and related services**. According to the new IDEA reauthorized statute, School Districts may not file for a due process hearing to override a parents' lack of consent for implementing services. Current Illinois rules are unclear whether a District may file for a due process hearing if a parent did initially provide consent for implementing services and then revoked consent. 34 C.F.R. § 300.300(b) (2006); 23 Ill. Admin. Code § 226.540 (2010).

C. The school district must wait 10 days before placement may occur, although parents may waive this waiting period. In no case should placement occur later than the beginning of the next school semester. 105 ILCS 5/14-8.02 (2008); 23 Ill. Admin. Code § 226.520 (2007).

VIII. Annual Review of IEP

A. A review of the IEP must be held at least annually. 34 C.F.R. § 300.324(b) (2006).

B. 10-day parental notification required for all IEP meetings, or a record of reasonable attempts to notify parent required by the district prior to any IEP meeting. Parents may waive 10-day notice. 23 Ill. Admin. Code § 226.530 (2010).

C. A parent may request an IEP meeting at anytime (within reason) if desired. The district has 10 days after receipt of such a request to either agree to convene

the meeting or notify the parents in writing of its refusal. 23 Ill. Admin. Code § 226.220 (2010).

IX. Three-Year Reevaluation

A. A reevaluation of the student may be conducted at anytime, but must be conducted at least every three years. 34 C.F.R. § 300.303(b) (2006).

B. Parental consent for all reevaluations must be obtained. If a school district is unable to obtain parental consent for a reevaluation, it may file for a due process hearing in order to obtain consent. 34 C.F.R. § 300.300(c)(1)(i) & (ii) (2006).

C. Upon receiving parental consent, the IEP team is now authorized to review the child's existing record in order to determine whether any new evaluations are unnecessary or whether the team may rely on existing data. 34 C.F.R. § 300.305 (2006).

D. The domain determinations completed for initial evaluations must also be done for reevaluations. 34 C.F.R. § 300.305 (2006).

X. Transfer Students

A. Same state: A transfer student enrolling in a school district with an IEP must be enrolled immediately. The new district must provide services comparable to those in the existing IEP, in consultation with the parents, until the new district either adopts the existing IEP or develops and adopts a new IEP. Presumably, the new IEP should be based on the student's previous needs and evaluations. 34 C.F.R. § 300.323(e) (2006).

B. Out-of-state: As with in-sate transfers, transfer student enrolling in a school district with an out-of-state IEP must be enrolled immediately. The new district must provide services comparable to those in the existing IEP, in consultation with the parents, until the new district conducts its own evaluation of the student and develops a new IEP. 34 C.F.R. § 300.323(f) (2006).

XI. Miscellaneous

A. The IDEA requires prior written notice to parents whenever a district proposes to change, or refuses to change, a child's evaluation, identification, placement or the provision of the free and appropriate public education ("FAPE") program. 23 Ill. Admin. Code § 226.520 (2007).

B. Parents are entitled to request a due process hearing whenever they have a complaint regarding the evaluation, identification, placement, or the provision of FAPE of the child. 34 C.F.R. § 300.507(a)(1) (2006).

C. The new IDEA establishes a two-year statute of limitations for filing a due process hearing following the date the parent or district knew or should have known of a violation. 34 C.F.R. § 300.507(a)(2) (2006).

The Rowley Case: What Does it Really Mean?

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INTRODUCTION

The case of Rowley v. Hendrick Hudson School District[1] was the U.S. Supreme Court's first interpretation of what was then called the Education for All Handicapped Children Act (now the Individuals with Disabilities Education Act, "IDEA"). This important decision is required reading for anyone working in special education. The case concerned a hearing impaired girl named Amy Rowley, who was a student at the Furnace Woods School in Hendrick Hudson Central School District, Peekskill, N.Y. Amy had minimal residual hearing and was an excellent lip reader. During the year before she began attending school, a meeting between her parents and the school administrator resulted in a decision to place her in a regular kindergarten class. Several administrators prepared for Amy's arrival by attending a course in sign language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents, who were also deaf. At the end of the trial placement it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM transmitter. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first grade year. The IEP provided that Amy should be educated in a regular classroom, should continue to use the FM device, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP, but insisted that Amy also be provided a qualified sign language interpreter in **all her academic classes** in lieu of the assistance proposed in other parts of the IEP. Such an interpreter had been placed in Amy's kindergarten class for a two-week experimental period, but it was reported that Amy had no need for this service. This conclusion was reached after consultation with the school district's "Committee on the Handicapped," which had received expert evidence from Amy's parents on the importance of an interpreter. The Committee also received information from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf. When their request for an interpreter was denied, the Rowleys demanded and received an administrative hearing. After receiving evidence from both sides, the hearing officer agreed with the administrators' determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. The examiner's decision was affirmed on appeal by the New York Commissioner of Education. The Rowleys then brought an action in the United State District Court for the Southern District of New York, claiming that the administrators' denial of the sign language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act. (Excerpt from the court's own description at 458 US 176 at 183)

The holdings in the Rowley case have become the standard of analysis for **every subsequent special education case** arising in the Federal and State courts. Consequently, a working knowledge of the fundamental analysis developed by the Supreme Court justices is important when evaluating **any special education matter**. In this paper, this analysis will be examined in detail. Any practitioner or educator looking at a special education file should keep

[1] Board of Education of the Hendrick Hudson Central School District, et. al. v. Amy Rowley, et. al., 458 U.S. 176, 102S.Ct.3034 (1982).

this analysis in mind at all times. Since all other courts do this as well, the questions asked by the Rowley court are instructive even today, well over twenty years later.

The Rowley Questions:

These are best presented in the form originally developed by the Supreme Court:

> *Therefore, a court's inquiry in suits brought under §1415(e)(2) is twofold.* ***First, has the State complied with the procedures set forth in the Act?*** *[FN27] And* ***second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits****? [FN28] If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. (458 US 176, 204) (Emphasis added.)*

As the analysis goes, if the school district has not complied with the Federally mandated *procedures*, and if the violation resulted in some form of *significant harm* to the student, all educational decision making from the point of the violation forward is suspect. What this means is that judges will be more likely to step in and substitute their judgment for that of the educators, given a significant procedural violation. If, on the other hand, the school district has complied with all of the procedures in the Act, then the analysis requires asking the second "Rowley question."

The Supreme Court, however, first examines the priorities assigned by Congress to procedural requirements:

> *But although we find that this grant of authority is broader than claimed by petitioners, we think the fact that it is found in §1415, which is entitled "Procedural Safeguards," is not without significance****. When the elaborate and highly specific procedural safeguards embodied in §1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid****. 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, see, e.g. §§1415(a)-(d), 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, as well as the requirements that state and local plans be submitted to the Secretary for approval,* ***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***. *(458 US 176, 204; emphasis added.)*

"Significant" Violations:

A recurrent problem is whether a procedural violation under Rowley is "significant." In 2002, a district was held (at 38 IDELR 85) to have violated "several" procedural requirements of the IDEA but even so, the student received all of his IEP services. The court therefore concluded that there was no resulting denial of a free appropriate public education under IDEA. The procedural violation, therefore, must *actually result in some harm* to the student before it becomes "significant."

Adverse Educational Impact:

Another recurrent problem is the issue of a student passing from grade to grade and still remaining eligible for services. Amy Rowley herself got good grades, and the court held that she was not entitled to a sign language interpreter as requested by her parents. **This did not mean that she was ineligible for other special education services**, as she was still hearing impaired and met the definitional requirements. In fact, the court itself in Rowley said:

> *We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.* ***Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system,*** *we confine our analysis to this situation. (458 US 176 at 202; emphasis added.)*

In the Cornwall case (17 EHLR 10239/1991) the court held that there was a significant impact on educational performance even though the child had not failed any courses. In Yankton (93 F. 3rd 1369, 8th Cir. 1996), a cerebral palsy child was getting high grades but was still entitled to specially designed instruction and related services. In Schoenfield (8th Cir. 1998) the court held that academic performance at or above age level does not necessarily mean a child is not "disabled," or that the education satisfied the standard of appropriateness under Rowley.

It can be seen, then, that while Rowley holds that passage from grade to grade is one important indicator of whether an educational benefit has been conferred, it is not the sole criterion but should be "in the mix" of other considerations. **It is a fatal mistake for a school district to declare that a child is ineligible solely because he or she is receiving passing grades.**

Educational Benefits:

The court's own language serves to explain this prong of the Rowley test with the greatest skill:

> *Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from education. The statutory definition of "free appropriate public education," in addition to requiring the States to provide each child with "specially designed instruction," expressly requires the provision of "such…supportive services…as may be required to assist a handicapped child to benefit from special education." §1401(17). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. [FN23] (458 US 176 at 200, emphasis added).*

And this analysis is extended to the provision of a FAPE for eligible children:

> *When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education,"* ***we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP****. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. [FN26] (458 US 176 at 202, emphasis added.)*

The question of how to deal with students who are not capable of obtaining passing grades under any circumstances is not clearly answered by the Supreme Court in Rowley. However, the footnotes make reference to the required full continuum of alternative settings, and the need for some students to be placed in settings other than the mainstream. It is clear, especially in light of decisional case law subsequent to Rowley, that when a child is placed in a more restrictive setting, the decision must be driven by the unique need of the student and not by administrative convenience or other factors (see, e.g., Beth B. v. Mark VanClay and School District #65 (Federal Appellate Case Decided March 5, 2002) [2002 WL 341017, 36 IDELR 121 (7th Cir.).

Selected Case Footnotes

(Emphasis is Added)

(73 L.Ed.2d 710)	25. **We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education."** In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods School administrators, to be dispositive.
But see footnote 23! (73 L.Ed.2d 712)	28. **When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor** in determining educational benefit. See Part III, *supra*.
This note is from the Dissent: Justices White, Brennan, and Marshall	1. The Court's opinion relies heavily on the statement, which occurs throughout the legislative history, that, at the time of enactment, one million of the roughly eight million handicapped children in the United States were excluded entirely from the public school system and more than half were receiving an inappropriate education. See, e.g., ante, at 189, 195, 196-197, 73 L Ed 2d, at 701, 705, 706. But this statement was often likened to statements urging equal educational opportunity. See, e.g., 121 Cong Rec 19502 (1975) (remarks of Sen. Cranston); id., at 23702 (remarks of Rep. Brademas). **That is, Congress wanted not only to bring handicapped children into the schoolhouse, but also to benefit them once they had entered**.

(Footnote 23) THIS NOTE devotes substantial space and time to the concept of **self-sufficiency** and this should be pointed out to any hearing officer, administrator, or attorney who insists that the opinion stands for the rigid proposition that "any" satisfactory grade record will do. Moreover, the presence of 'relaxed' grading standards (i.e., giving passing grades just for trying) does not assist the pupil in the permanent and long-range development of self-sufficiency skills.	**"With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society."** S. Rep, at 9. See also HR Rep, at 11. Similarly, one of the principal Senate sponsors of the Act stated that "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and **they will not have to depend on subsistence payments from public funds**." 121 Cong Rec 19492 (1975) (remarks of Sen. Williams). See also id., at 25541 (remarks of Rep. Harkin); id., at 37024-37025 (remarks of Rep. Brademas); id., at 37027 (remarks of Rep. Gude); id., at 37410 (remarks of Sen. Randolph); id., at 37416 (remarks of Sen. Williams). The desire to provide handicapped children with an **attainable degree of personal independence** obviously anticipated that state educational programs would confer educational benefits upon such children. But at the same time, the goal of achieving some degrees of self-sufficiency in most cases is a good deal more modest than the potential maximizing goal adopted by the lower courts. Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self-sufficiency was itself the substantive standard, which Congress imposed upon the States. Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for severely handicapped may be an unreachable goal, **"self-sufficiency" as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress' intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.**

(Footnote 21) The second recognition herein that some "mainstream" settings, while less restrictive, are simply <u>not</u> **appropriate** for the education of some handicapped children. Again in opposition to reflexive LRE and "full inclusion" arguments used by management attorneys.	The use of "appropriate" in the language of the Act, although by no means definitive, suggests that Congress used the word as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education. For example, § 1412(5) requires that handicapped children be educated in classrooms with non-handicapped children "to the maximum extent **appropriate**." Similarly, § 1401(19) provides that, "**whenever appropriate**," handicapped children should attend and participate in the meeting at which their IEP is drafted. In addition, the definition of "free appropriate public education" itself states that instruction given handicapped children should be at an "**appropriate** preschool, elementary, or secondary school" level. § 1401(18)(C). **The Act's use of the word "appropriate" thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children.**
73 L.Ed.2d 708 – **from the body of the opinion:** This Note is one of the most significant parts of the opinion, as it explains what the Court IS and IS NOT deciding. While "self-sufficiency" is not **the** exclusive factor, it is an important factor in determining if an educational benefit has been "conferred." (73 L.Ed.2d 709)	**We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.** [23] 23. This view is supported by the congressional intention, frequently expressed in the legislative history that **handicapped children be enabled to achieve a reasonable degree of self-sufficiency**. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states: *"The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle."*

The language of "educational benefit." The root of this language is not just that the child must receive "any" benefit: the benefit must be "received" within the context of the child's unique needs, **not the needs of the agency**. The **origin** of the language is explained in this note – as a way of providing handicapped children with an **inviolable access** to educational services, which provision this court, reads very strictly (see Honig v. Doe, 484 U.S. 305, 308 (1988)). (73 L.Ed.2d 704)	15. The only substantive standard, which can be implied from these cases, comports with the standard implicit in the Act. PARC states that each child must receive "access to a free public program of education and training *appropriate to his learning capabilities*," 334 F. Supp, at 1258 (emphasis added), and that further state action is required when it appears that "the needs of the mentally retarded child are not being *adequately* served," id., at 1266 (emphasis added). Mills also speaks in terms of "adequate" educational services, 348 F Supp, at 878, and **sets a realistic standard of providing some educational services to each child when every need cannot be met**. *The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." Id., at 876.*
While the EHA does not mandate 'maximization' of benefits under this decision, note that settled decisional case law provides that states which choose to grant greater rights than the Federal mandate requires **must do so uniformly** – and the state standard will in such cases prevail. (73 L.Ed.2d 706)	21. In seeking to read more into the Act than its language or legislative history will permit, the United States focuses upon the word "appropriate," arguing that "the statutory definitions do not adequately explain what [it means]." Brief for United States as Amicus Curiae 13. **Whatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential maximizing education.** The term as used in reference to educating the handicapped appears to have originated in the PARC decision, where the District Court required that handicapped children be provided with "education and training appropriate to [their] learning capabilities." 334 F Supp, at 1258. The word appears again in the Mills decision, the District Court at one point referring to the need for "an

	appropriate education program," 348 F Supp, at 879, and at another point speaking of a "suitable publicly supported education," id., at 878. Both cases also refer to the need for an "adequate" education. See 334 F Supp, at 1266; 348 F Supp, at 878.

Independence and Self Sufficiency:

At 20 U.S.C. 1400 (c)5(E)ii, it is indicated that 20 years of research under the old IDEA has demonstrated that training people through high quality intensive professional development ensures that these personnel have the skills to enable children to **be prepared to lead productive, independent, adult lives to the maximum extent possible.** This language in the "purposes" clause of Rowley appears to provide a potential argument that the Rowley standard of requiring districts to provide "adequate" services might have been elevated. In addition, at Section 1400(d), under purposes (1)A, one of the purposes of the IDEA is to **enable individuals to meet their unique needs and prepare them for employment and independent living**. This is reminiscent of the footnote discussion in the Rowley case. It is clear that one of the purposes of the Act is to prepare students for independence to the extent that their abilities permit.

Conclusion:

Special educators should take special notice of the Rowley case, as it is still good law and it acts as the blueprint for all cases to follow. The two Rowley questions emphasizing procedural compliance and the benefits of the IEP should be committed to memory. Finally, the focus of the decision on what is "appropriate" for special education students should be given special emphasis, especially in light of the social emphasis on so-called "inclusion" in recent years.

IEP Regulations (Highlighted)

Other Forms and Their Purpose

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CONSENT TO PROCEED WITH CASE STUDY

THE 60 SCHOOL DAY CLOCK **DOES NOT START** UNTIL THIS FORM IS SIGNED!!

PARENT/GUARDIAN CONSENT FOR INITIAL EVALUATION

DATE: _____ STUDENT'S NAME: _____ STUDENT'S DATE OF BIRTH: _____

Dear _____
(Parent(s)/Guardian(s) Name)

Each school district shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services. The purpose of an evaluation is to determine:

- Whether the child has one or more disabilities;
- The present levels of academic achievement and functional performance of the child;
- Whether the disability is adversely affecting the child's education; and,
- Whether the child needs special education and related services.

An evaluation considers domains (areas related to the suspected disability) that may be relevant to the educational problems experienced by the individual child under consideration. The nature and intensity of the evaluation, including which domains will be addressed, will vary depending on the needs of your child and the type of existing information already available. The IEP Team, of which you are a member, determines the specific assessments needed to evaluate the individual needs of your child. Within 60 school days from the date of parent/guardian consent, a conference will be scheduled with you to discuss the findings and determine eligibility for special education and related services.

The IEP team must complete page 2 of this form prior to obtaining parental consent for evaluation.

PARENT/GUARDIAN CONSENT FOR INITIAL EVALUATION

I understand the school district must have my consent for the initial evaluation. If I refuse consent for an initial evaluation, the school district may, but is not required to, pursue override procedures through due process. If the school district chooses not to pursue such procedures, the school district is not in violation of the required evaluation procedures. I understand my rights as explained to me and contained in the **Explanation of Procedural Safeguards**. I understand the scope of the evaluation as described on page 2 of this form.

☒ **I give consent** ☐ **I do not give consent to collect and/or review the evaluation data as described on page 2 of this form.**

Date: _____ Parent/Guardian Signature: _____

WHITTED + TAKIFF + HANSEN LLC
3000 Dundee Road, Suite 303, Northbrook, Illinois 60062
office | 847.564.8662
fax | 847.564.8419
web | wthlawfirm.com

"DOMAIN REVIEW FORM"

Student Name: _____ Date: ___/___/___

PARENT/GUARDIAN CONSENT FOR EVALUATION
Identification of Needed Assessments

This form must be completed by the IEP Team

DOMAIN	RELEVANT		EXISTING INFORMATION ABOUT THE CHILD	ADDITIONAL EVALUATION DATA NEEDED	SOURCES FROM WHICH DATA WILL BE OBTAINED
	YES	NO			
Academic Achievement Current or past academic achievement data pertinent to current educational performance.	☐	☐			
Functional Performance Current or past functional performance data pertinent to current functional performance.	☐	☐			
Cognitive Functioning Data regarding cognitive ability, how the child takes in information, understands information and expresses information.	☐	☐			
Communication Status Information regarding communicative abilities (language, articulation, voice, fluency) affecting educational performance.	☐	☐			
Health Current or past medical difficulties affecting educational performance.	☐	☐			
Hearing/Vision Auditory/visual problems that would interfere with testing or educational performance. Dates and results of last hearing/ visual test.	☐	☐			
Motor Abilities Fine and gross motor coordiation difficulties, functional mobility, or strength and endurance issues affecting educational performance.	☐	☐			
Social/Emotional Status Information regarding how the environment affects educational performance (life history, adaptive behavior, independent function, personal and social responsibility, cultural background).	☐	☐			

Ill. Admin. Code tit. 23, § 226.230

West's Illinois Administrative Code Currentness
Title 23: Education and Cultural Resources
Subtitle A: Education
Chapter I: State Board of Education
Subchapter F: Instruction for Specific Student Populations
Part 226: Special Education
Subpart C: The Individualized Education Program (Iep) (Refs & Annos)
➡➡ **226.230 Content of the IEP**

The content of each child's IEP shall conform to the requirements of 34 CFR 300.320. The additional requirements of this Section shall also apply.

a) Each IEP shall include:

1) A statement of measurable annual goals that reflect consideration of the State Goals for Learning and the Illinois Learning Standards (see 23 Ill. Adm. Code 1), as well as benchmarks or short-term objectives developed in accordance with the child's present levels of educational performance.

2) A statement regarding the child's ability to participate in State and district-wide assessments.

3) A statement as to the languages or modes of communication in which special education and related services will be provided, if other than or in addition to English.

4) A statement as to whether the child requires the provision of services beyond the district's normal school year in order to receive FAPE ("extended school year services") and, if so, a description of those services that includes their amount, frequency, duration, and location.

b) The IEP of a student who requires a behavioral intervention plan shall:

1) Summarize the findings of the functional behavioral assessment;

2) Summarize prior interventions implemented;

3) Describe any behavioral interventions to be used, including those aimed at developing or strengthening alternative or more appropriate behaviors;

4) Identify the measurable behavioral changes expected and methods of evaluation;

5) Identify a schedule for a review of the interventions' effectiveness; and

6) Identify provisions for communicating with the parents about their child's behavior and coordinating school-based and home-based interventions.

Ill. Admin. Code tit. 23, § 226.230

c) Beginning not later than the first IEP to be in effect when the child turns 14 1/2, and updated annually thereafter, the IEP shall include:

1) appropriate, measurable, postsecondary goals based upon age-appropriate assessments related to employment, education or training, and, as needed, independent living;

2) the transition services that are needed to assist the child in reaching those goals, including courses of study and any other needed services to be provided by entities other than the school district; and

3) any additional requirements set forth in Section 14-8.03 of the School Code [105 ILCS 5/14-8.03].

d) For purposes of 34 CFR 300.320(c), the age of majority under Illinois law is 18. The IEP of a student who may, after reaching age 18, become eligible to participate in the home-based support services program for adults with cognitive disabilities that is authorized by the Developmental Disability and Mental Disability Services Act [405 ILCS 80] shall set forth specific plans related to that program that conform to the requirements of Section 14-8.02 of the School Code.

(Source: Amended at 31 Ill. Reg. 9915, effective June 28, 2007)

23 ILAC § 226.230, 23 IL ADC 226.230

Current through rules published in the Illinois Register dated October 4, 2013

END OF DOCUMENT

the local educational agency--

(A) shall notify the child's parents of--

(i) that determination and the reasons for the determination; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

(A) In general

Except as provided in subparagraph (B), a local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(B) Exception

(i) In general

The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this subchapter due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.

(ii) Summary of performance

For a child whose eligibility under this subchapter terminates under circumstances described in clause (i), a local educational agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

(I) a statement of the child's present levels of academic achievement and functional performance, including--

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to--

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why--

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter--

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

(ii) Rule of construction

Nothing in this section shall be construed to require--

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of--

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider 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 education 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 regarding the child, including related services personnel as appropriate; and

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

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if--

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP Team transition

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and the individualized family service plan may serve as the IEP of the

SUBPART D: PLACEMENT

Section 226.300 Continuum of Placement Options

Each local school district shall, in conformance with the requirements of 34 CFR 300.39 and 300.115, ensure that a continuum of placements is available to meet the needs of children with disabilities for special education and related services. With respect to the home instruction and instruction in hospitals and institutions referenced in 34 CFR 300.39 and 300.115:

a) The child receives services at home or in a hospital or other setting because he or she is unable to attend school elsewhere due to a medical condition.

b) When an eligible student has a medical condition that will cause an absence for two or more consecutive weeks of school or ongoing intermittent absences, the IEP Team for that child shall consider the need for home or hospital services. Such consideration shall be based upon a written statement from a physician licensed to practice medicine in all its branches which specifies:

1) the child's condition;

2) the impact on the child's ability to participate in education (the child's physical and mental level of tolerance for receiving educational services); and

3) the anticipated duration or nature of the child's absence from school.

c) If an IEP Team determines that home or hospital services are medically necessary, the team shall develop or revise the child's IEP accordingly.

d) The amount of instructional or related service time provided through the home or hospital program shall be determined in relation to the child's educational needs and physical and mental health needs. The amount of instructional time shall not be less than five hours per week unless the physician has certified in writing that the child should not receive as many as five hours of instruction in a school week.

e) A child whose home or hospital instruction is being provided via telephone or other technological device shall receive not less than two hours per week of direct instructional services.

f) Instructional time shall be scheduled only on days when school is regularly in session, unless otherwise agreed to by all parties.

g) Services required by the IEP shall be implemented as soon as possible after the district receives the physician's statement.

services cannot be achieved satisfactorily.

(b) *Additional requirement—State funding mechanism*—(1) *General.* (i) A State funding mechanism must not result in placements that violate the requirements of paragraph (a) of this section; and

(ii) A State must not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child, as described in the child's IEP.

(2) *Assurance.* If the State does not have policies and procedures to ensure compliance with paragraph (b)(1) of this section, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate that paragraph.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.115 Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

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

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.116 Placements.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—

(a) The placement decision—

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement—

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

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

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

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

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.117 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.118 Children in public or private institutions.

Except as provided in § 300.149(d) (regarding agency responsibility for general supervision for some individuals in adult prisons), an SEA must ensure that § 300.114 is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

(Approved by the Office of Management and Budget under control number

(Authority: 20 U.S.C. 1412

§ 300.119 Technical assistance and training activities.

Each SEA must carry out activities to ensure that teachers and administrators in all public agencies—

(a) Are fully informed about their responsibilities for implementing § 300.114; and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(5))

§ 300.120 Monitoring activities.

(a) The SEA must carry out activities to ensure that § 300.114 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 300.114, the SEA must—

(1) Review the public agency's justification for its actions; and

(2) Assist in planning and implementing any necessary corrective action.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(5))

Additional Eligibility Requirements

§ 300.121 Procedural safeguards.

(a) *General.* The State must have procedural safeguards in effect to ensure that each public agency in the State meets the requirements of §§ 300.500 through 300.536.

(b) *Procedural safeguards identified.* Children with disabilities and their parents must be afforded the procedural safeguards identified in paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(6)(A))

§ 300.122 Evaluation.

Children with disabilities must be evaluated in accordance with §§ 300.300 through 300.311 of subpart D of this part.

(Approved by the Office of Management and Budget under control number 1820–0030)

(Authority: 20 U.S.C. 1412(a)(7))

§ 300.123 Confidentiality of personally identifiable information.

The State must have policies and procedures in effect to ensure that

THE MANDATED CONTINUUM OF SERVICES

Comment: One commenter suggested clarifying in § 300.101 that F/ be available to children with in the least restrictive environment.

Discussion: We do not believe further clarification is needed in § 300.101, as the matter is adequately covered elsewhere in the regulations. Section 300.101 clarifies that, in order to be eligible to receive funds under Part B of the Act, States must, among other conditions, ensure that FAPE is made available to all children with specified disabilities in mandated age ranges. The term *FAPE* is defined in § 300.17 and section 602(9)(D) of the Act as including, among other elements, special education and related services, provided at no cost to parents, in conformity with an individualized education program (IEP). Sections 300.114 through 300.118, consistent with section 612(a)(5) of the Act, implement the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports. Specifically, § 300.114 provides that States must have in effect policies and procedures ensuring that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Changes: None.

Comment: A few commenters recommended including language in § 300.101(a) specifying that children with disabilities expelled or suspended from the general education classroom must be provided FAPE in the least restrictive environment.

Discussion: The Department believes it would not be appropriate to include the requested language in this section because services in these circumstances are provided under somewhat different criteria than is normally the case. Section 300.530 clarifies the procedures school personnel must follow when removing a child with a disability who violates a code of student conduct from their current placement (e.g., suspension and expulsion). This includes how decisions are made regarding the educational services the child receives and the location in which they will be provided. School officials need some reasonable amount of flexibility in providing services to children with disabilities who have violated school conduct rules, and

THIS IS A MYTH

settings, to these children. Therefore, we decline to regulate further in this regard.

Changes: None.

Comment: Some commenters expressed concern that children with disabilities have to fail or be retained in a grade or course in order to be considered eligible for special education and related services.

Discussion: Section 300.101(c) provides that a child is eligible to receive special education and related services even though the child is advancing from grade to grade. Further, it is implicit from paragraph (c) of this section that a child should not have to fail a course or be retained in a grade in order to be considered for special education and related services. A public agency must provide a child with a disability special education and related services to enable him or her to progress in the general curriculum, thus making clear that a child is not ineligible to receive special education and related services just because the child is, with the support of those individually designed services, progressing in the general curriculum from grade-to-grade or failing a course or grade. The group determining the eligibility of a child for special education and related services must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services. However, to provide additional clarity we will revise paragraph (c)(1) of this section to explicitly state that children do not have to fail or be retained in a course or grade in order to be considered eligible for special education and related services.

Changes: Section 300.101(c)(1) has been revised to provide that children do not have to fail or be retained in a course or grade in order to be considered eligible for special education and related services.

Limitation—Exception to FAPE for Certain Ages (§ 300.102)

Comment: One commenter requested that the regulations clarify that children with disabilities who do not receive a regular high school diploma continue to be eligible for special education and related services. O expressed concern § 300.102(a)(3)(ii) with disabilities w awarded a regular could result in the services in the con

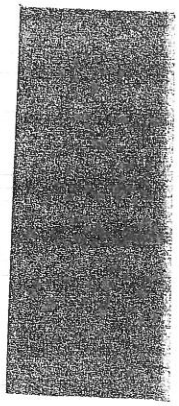
ıdary goals.

sion: We believe that § 300.102(a)(3) is sufficiently clear that public agencies need not make FAPE available to children with disabilities who have graduated with a regular high school diploma and that no change is needed to the regulations. Children with disabilities who have not graduated with a regular high school diploma still have an entitlement to FAPE until the child reaches the age at which eligibility ceases under the age requirements within the State. However, we have reviewed the regulations and believe that it is important for these regulations to define "regular diploma" consistent with the ESEA regulations in 34 CFR § 200.19(a)(1)(i). Therefore, we will add language to clarify that a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or general educational development (GED) credential.

We do not believe § 300.102 could be interpreted to permit public agencies to delay implementation of transition services, as stated by one commenter because transition services must be provided based on a child's age, not the number of years the child has remaining in the child's high school career. Section 300.320(b), consistent with section 614(d)(1)(A)(i)(VIII) of the Act, requires each child's IEP to include, beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, appropriate measurable postsecondary goals and the transition services needed to assist the child in reaching those goals.

Changes: A new paragraph (iv) has been added in § 300.102(a)(3) stating that a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or GED.

Comment: One commenter requested clarification as to how States should include children with disabilities who require special education services through age 21 in calculating, for adequate yearly progress (AYP) purposes, the percentage of children who graduate with a regular high school diploma in the standard number of years. The commenter suggested



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PROVIDED FOR YOUR INFORMATION
BROOKE R. WHITTED

Subj: **Re: RTI Crisis is Coming**
Date: 5/18/2010 6:36:15 A.M. Central Daylight Time
From: bwhitted@wct-law.com
To: bevjohns@juno.com

THE PLAGUE OF RTI: A PREDICTION OF ITS REAL PURPOSE

Good Morning,

We now have a case of a family at Hyde Park Day School involving a student who has been there for two years. The goal at HPDS is ALWAYS reintegration into the mainstream. As usual, the staff encouraged the family to obtain an IEP for the child before reintegrating into the mainstream with supports. Chicago did an eval and, as I predicted in my first rant about the ISBE RTI "guidance" memo, they have concluded that **since the kid is doing OK with respect to his peers *at Hyde Park Day School*, he is not eligible for special education services at all.** This is not what the law was meant to do. The net effect is that kids doing well in private facilities *because of the comprehensive supports at those facilities* must now go back to Chicago, fail, go through the ridiculous 3 tiers, and then they might get an IEP, regressing all the while and destroying their gains made at the private facility. My guess is that the US Supreme Court would do a Burlington type analysis of this and conclude that such an approach renders the law meaningless -- but now, parents will have to push it that high to get that interpretation and the kids will suffer in the process.

The individuals making all those grandiose claims for RTI need to be held accountable -- this will happen, I believe, as the pendulum swings back, but in the meantime they are doing significant damage. Those in Chicago Public Schools using RTI in such monumental bad faith (I know other districts that actually use RTI to identify, not deflect -- the way it should be used) need to be neutralized somehow, or there will be a lot of kids hurt. I have suggested a strategy meeting of all of you working in this area before, but it has been hard to get people together. At the very minimum, the AG's disability committee should bring this to the attention of Lisa Madigan -- maybe an aggressive letter from her office to CPS might have an effect.

At HPDS, and the Orthogenic School, we have retained legal counsel (not me) to develop an aggressive strategy to deal with this Chicago trend. I suggest that those of you who represent private facilities advise your clients to do the same. I pointed out some months ago that private facilities should go to "condition red" on this issue and the time has come.

Brooke

Brooke R. Whitted, President
Leslie Shankman School Corporation
operating the Sonia Shankman Orthogenic School at the University of Chicago and the Hyde Park Day School at the University of Chicago (Hyde Park and Northfield)

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

RTI **CANNOT** BE USED TO DENY OR DELAY A CASE STUDY EVAL!

JAN 2 1 2010

Contact Persons:

Name:	Ruth Ryder
Telephone:	202-245-7513
Name:	Deborah Morrow
Telephone:	202-245-7456

OSEP 11-07

MEMORANDUM

TO: State Directors of Special Education

FROM: Melody Musgrove, Ed.D
Director
Office of Special Education Programs

SUBJECT: A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)

The provisions related to child find in section 612(a)(3) of the Individuals with Disabilities Education Act (IDEA), require that a State have in effect policies and procedures to ensure that the State identifies, locates and evaluates all children with disabilities residing in the State, including children with disabilities who are homeless or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services. It is critical that this identification occur in a timely manner and that no procedures or practices result in delaying or denying this identification. It has come to the attention of the Office of Special Education Programs (OSEP) that, in some instances, local educational agencies (LEAs) may be using Response to Intervention (RTI) strategies to delay or deny a timely initial evaluation for children suspected of having a disability. States and LEAs have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of an RTI strategy.

A multi-tiered instructional framework, often referred to as RTI, is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities,

and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors. With a multi-tiered instructional framework, schools identify students at-risk for poor learning outcomes, monitor student progress, provide evidence-based interventions, and adjust the intensity and nature of those interventions depending on a student's responsiveness.

While the Department of Education does not subscribe to a particular RTI framework, the core characteristics that underpin all RTI models are: (1) students receive high quality research-based instruction in their general education setting; (2) continuous monitoring of student performance; (3) all students are screened for academic and behavioral problems; and (4) multiple levels (tiers) of instruction that are progressively more intense, based on the student's response to instruction. OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner. Many LEAs have implemented successful RTI strategies, thus ensuring that children who do not respond to interventions and are potentially eligible for special education and related services are referred for evaluation; and those children who simply need intense short-term interventions are provided those interventions.

The regulations implementing the 2004 Amendments to the IDEA include a provision mandating that States allow, as part of their criteria for determining whether a child has a specific learning disability (SLD), the use of a process based on the child's response to scientific, research-based intervention[1]. See 34 CFR §300.307(a)(2). OSEP continues to receive questions regarding the relationship of RTI to the evaluation provisions of the regulations. In particular, OSEP has heard that some LEAs may be using RTI to delay or deny a timely initial evaluation to determine if a child is a child with a disability and, therefore, eligible for special education and related services pursuant to an individualized education program.

Under 34 CFR §300.307, a State must adopt, consistent with 34 CFR §300.309, criteria for determining whether a child has a specific learning disability as defined in 34 CFR §300.8(c)(10). In addition, the criteria adopted by the State: (1) must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD; (2) must permit the use of a process based on the child's response to scientific, research-based intervention; and (3) may permit the use of other alternative research-based procedures for determining whether a child has an SLD. Although the regulations specifically address using the process based on the child's response to scientific, research-based interventions (i.e., RTI) for determining if a child has an SLD, information obtained through RTI strategies may also be used as a component of evaluations for children suspected of having other disabilities, if appropriate.

The regulations at 34 CFR §300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§300.304-

[1] The Department has provided guidance regarding the use of RTI in the identification of specific learning disabilities in its letters to: Zirkel - 3-6-07, 8-15-07, 4-8-08, and 12-11-08; Clarke - 5-28-08; and Copenhaver - 10-19-07. Guidance related to the use of RTI for children ages 3 through 5 was provided in the letter to Brekken - 6-2-10. These letters can be found at http://www2.ed.gov/policy/speced/guid/idea/index.html.

300.311, to a child suspected of having a disability under 34 CFR §300.8. If the LEA agrees with a parent who refers their child for evaluation that the child may be a child who is eligible for special education and related services, the LEA must evaluate the child. The LEA must provide the parent with notice under 34 CFR §§300.503 and 300.504 and obtain informed parental consent, consistent with 34 CFR §300.9, before conducting the evaluation. Although the IDEA and its implementing regulations do not prescribe a specific timeframe from referral for evaluation to parental consent, it has been the Department's longstanding policy that the LEA must seek parental consent within a reasonable period of time after the referral for evaluation, if the LEA agrees that an initial evaluation is needed. See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, 71 Fed. Reg., 46540, 46637 (August 14, 2006). An LEA must conduct the initial evaluation within 60 days of receiving parental consent for the evaluation or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe. 34 CFR §300.301(c).

If, however, the LEA does not suspect that the child has a disability, and denies the request for an initial evaluation, the LEA must provide written notice to parents explaining why the public agency refuses to conduct an initial evaluation and the information that was used as the basis for this decision. 34 CFR §300.503(a) and (b). The parent can challenge this decision by requesting a due process hearing under 34 CFR §300.507 or filing a State complaint under 34 CFR §300.153 to resolve the dispute regarding the child's need for an evaluation. It would be inconsistent with the evaluation provisions at 34 CFR §§300.301 through 300.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework.

We hope this information is helpful in clarifying the relationship between RTI and evaluations pursuant to the IDEA. Please examine the procedures and practices in your State to ensure that any LEA implementing RTI strategies is appropriately using RTI, and that the use of RTI is not delaying or denying timely initial evaluations to children suspected of having a disability. If you have further questions, please do not hesitate to contact me or Ruth Ryder at 202-245-7513.

References:
Questions and Answers on RTI and Coordinated Early Intervening Services (CEIS), January 2007
Letter to Brekken, 6-2-2010
Letter to Clarke, 4-28-08
Letter to Copenhaver, 10-19-07
Letters to Zirkel, 3-6-07, 8-15-07, 4-8-08 and 12-11-08

cc: Chief State School Officers
Regional Resource Centers
Parent Training Centers
Protection and Advocacy Agencies
Section 619 Coordinators

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Care of Students with Diabetes Act

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Introduction

On December 1, 2010, the Illinois School Code was amended pursuant to Public Act 096-1485, which created the *Care of Students with Diabetes Act* (the "Act"), 105 ILCS 145/1 *et seq.* . This Act contains a variety of requirements with which Illinois school districts must comply regarding the care of their diabetic students. Namely, the Act allows children with Type 1 or Type 2 diabetes to independently manage their diabetes while at school – in the classroom, around the school building, and on school grounds.

The Diabetes Care Plan (105 ILCS 145/15)

A 504 Plan is Automatic

This Act provides that students with Type 1 or Type 2 diabetes are entitled to receive a Section 504 plan. Specifically, Section 15(a) of the Act states that a diabetes care plan "shall serve as the basis of a student's Section 504 plan (20 U.S.C. Sec. 794) and shall be signed by the student's parent or guardian and submitted to the school for any student with diabetes who seeks assistance with diabetes care in the school setting, unless the student has been managing his or her care in the school setting before the effective date of this Act, in which case the student's parent or guardian may sign and submit a diabetes care plan under this Act."

Requirement to Invoke 504 Plan

A parent or guardian is required to submit a **diabetes care plan** to the school at the beginning of the school year, upon enrollment, as soon as possible following a child's diagnosis of Type 1 or Type 2 diabetes, or when a student's care needs change during the school year.

The diabetes care plan is a document that specifies that the student requires diabetes-related services at school and at school-sponsored activities, and identifies the appropriate staff to provide and supervise these services. 105 ILCS 145/10. The care plan must include authorization from a health care provider for diabetes-related services as well as the health care provider's instructions concerning the student's diabetes management while at school or school-sponsored activities. The diabetes care plan must include a uniform record of glucometer readings and insulin administered by the school nurse or delegated care aide during the school day using a standardized format provided by ISBE, which is attached hereto. The diabetes care plan must also include procedures regarding when to consult with the parent or guardian, school nurse, or health care provider to confirm that an insulin dosage is appropriate. Additionally, a copy of the signed prescription and the methods of insulin administration must be included. *See* 105 ILCS 145/15(a).

Delegated Care Aides (105 ILCS 145/20)

A *delegated care aide* is a school employee who has agreed to receive training in the care of a student with diabetes and to assist students in the implementation of their diabetes care plan. 105 ILCS 145/10. Pursuant to Section 20, the delegated care aides must perform the necessary tasks to assist students with the implementation of their diabetes care plan and in compliance with the guidelines provided during the required training under Section 25, described below. The delegated care aide is required to consult with the parent or guardian, school nurse, or health care provider to confirm that the insulin dosage is appropriate given the

number of carbohydrates to be taken and the student's blood glucose level as determined by the glucometer reading in accordance with the diabetes care plan or when an unanticipated dosage of insulin is required by the student.

Training for School Personnel (105 ILCS 145/25)

Section 25(a) requires that during a regular in-service training coordinated by the school district, *all school employees shall* receive training in the basics of diabetes care, how to identify when a diabetic student requires immediate or emergency attention, and whom to contact in case of an emergency. Such training shall be provided by a *licensed healthcare provider* with expertise in diabetes or a certified diabetic education and individualized by a student's parent or guardian. The training shall conform to federal guidelines and be updated when the diabetes care plan is changed and *at least annually*. A delegated care aide that assists a diabetic student, must be trained to do the following in accordance with the student's diabetes care plan: 1) check blood glucose and record results; 2) recognize and respond to symptoms of both hypoglycemia and hyperglycemia; 3) estimate the number of carbohydrates in a snack or lunch; 4) administer insulin and record the administered amount; and 5) respond in an emergency and know how to administer glucagon.

This Section further requires that an information sheet shall be provided to those school employees who transport a student for school-sponsored activities, and shall identify the diabetic student(s), potential emergencies and the appropriate responses to them, and emergency contact information.

Student Self-Management (105 ILCS 145/30)[1]

As long as the diabetes care plan authorizes a student to self-manage his/her diabetes, the student may do the following: 1) check blood glucose when and wherever needed; 2) administer insulin with the insulin delivery system used by the student; 3) treat hypoglycemia and hyperglycemia and otherwise attend to the care and management of his/her diabetes in the classroom, in any area of the school or school grounds and at any school-related activity or event in accordance with the diabetes care plan; and 4) possess on his/her person, at all times, the supplies and equipment necessary to monitor and treat diabetes, including, but not limited to, glucometers, lancets, test strips, insulin, syringes, insulin pens and needle tips, insulin pumps, infusion sets, alcohol swabs, a glucagon injection kit, glucose tables, and food and drink, in accordance with the diabetes care plan.

Restricting Access to School Prohibited (105 ILCS 145/35)

A school district cannot restrict the assignment of a student with diabetes to a particular school simply because a school does not have a full-time nurse on staff. In addition, a school district cannot deny a child with diabetes access to any school or school-related activities simply because the student has diabetes.

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[1] *See also* 105 ILCS 5/22-30 (allows for a student's self-administration of asthma medication and/or epinephrine auto-injector pursuant to written authorization and statement by the parent or guardians and health care provider).

Protections & Civil Immunity (105 ILCS 145/40 and 145/45)

Both Sections 40 and 45 provide school personnel with protections. Section 40 specifically provides protections against retaliation and prohibits subjecting a school employee who declines to serve as a delegated care aide to any penalty, sanction, reprimand, demotion, disciplinary action, etc.

Section 45, 'Civil Immunity', provides that a school or a school employee is not liable for civil or other damages as a result of conduct related to the care of a student with diabetes and shall not be subject to any disciplinary proceeding resulting from an action taken under this Act, with the exception of willful or wanton misconduct,.

Student Name															**Date of Birth**
Type of Device	☐ Insulin Syringe ☐ Insulin Pen ☐ Insulin Pump														**Type of Insulin**
Month/Year															
Date	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**	**14**	**15**
Glucometer Reading															
Carbohydrate Intake															
Insulin Dose Administered															
Time															
Initials															
Date	**16**	**17**	**18**	**19**	**20**	**21**	**22**	**23**	**24**	**25**	**26**	**27**	**28**	**29**	**30**
Glucometer Reading															
Carbohydrate Intake															
Insulin Dose Administered															
Time															
Initials															
Date	**31**	Notes:													
Glucometer Reading															
Carbohydrate Intake															
		Initials and Signature:													
Insulin Dose Administered															
Time															
Initials															

The calculated carbohydrate intake for the meal eaten is to be used in calculating the insulin dose, per the child's Medical Order. If the child's Medical Order does not include a formula for determining insulin to be given based on carbohydrate intake, enter "N/A" in the spaces following "**Carbohydrate Intake.**" Public Act 96-1485

Food Allergies in Schools

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Sending a child to school who has food allergies can be a scary proposition for a parent, but there are both federal and state laws that give rights to children with allergies; especially for those children whose allergies are severe.

I. Federal Laws

A.504 Plan

If a child has a food allergy that is severe and interferes with a major life activity[1] the allergy would qualify as a disability and the child would be eligible for a 504 plan. A 504 plan should be requested and once written should include what foods the child is not allowed to eat and a list alternative or substitute snacks that can be eaten when there are school events or projects that include food. Also, an Emergency Action Plan (EAP) should be developed with the school nurse and attached to the 504 plan.

If food service (i.e. school provided lunch and breakfast) modifications or substitutions are needed they must be requested and supported by a licensed physician. This can be done with a statement from a physician that should include the child's disability, an explanation of why the disability restricts the child's diet, the major life activity that is affected by the allergy, the food or foods that are to be omitted from the child's diet, and a choice of foods that may be submitted.

B. Individuals with Disabilities Education Act (IDEA)

A food allergy that affects the way a child learns could make the child eligible for an IEP plan under the category "other health impaired". IDEA defines other health impairments as:

> Having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and (ii) Adversely affects a child's educational performance."[2]

Under this definition, there are four requirements that must be met to be eligible for an IEP under other health impairment category for food allergies. First, the child must suffer from a chronic or acute condition. Second, the condition must affect the child's access to the educational environment due to limited strength, vitality, or alertness. Third, the child's educational performance must be adversely affected by the food allergy, and lastly, the condition must create the need for educational services. [3] If the child meets these criteria then IEP would be put into place. It would stipulate what educational services the child would need, and strategies that would be specific to the child.

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[1] This is defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." For children with allergies the interruption of a major life activity would be the result of severe, life threatening (anaphylactic) reactions caused by the food allergy.

[2] 34 Code of Federal Regulations §300.7(c)(9).

[3] Kara Grice, Eligibility Under IDEA for Other Health Impaired Children, Institute for Government (2002).

Modifications and substitutions to school meals may be one of the allergy specific needs of the child listed in the IEP. USDA regulations 7 CFR 15b require that substitutions or modifications be made to school meals for children whose disabilities restrict their diets.[4] In order to have the substitutions or modifications made a statement by a licensed physician must be provided. According to the United States Department of Agriculture Food and Nutrition Service, this statement must include: the child's disability, an explanation of why the disability restricts the child's diet, the major life activity that is affected by the allergy, and the food or foods that are to be omitted from the child's diet or a choice of foods that must be submitted.[5] However, each specific school district may have their own protocol that should be followed by the parent.

C. Title 7 of the Code of Federal Regulation

Title 7 of the Code of Federal Regulation is the section that is governed by the Department of Agriculture. It addresses "Education programs or activities receiving or benefitting from Federal financial assistance" and "Nondiscrimination on the basis of handicap in programs or activities receiving Federal financial assistance."[6] Food services that provide breakfast and lunch in public schools are programs that receive federal financial assistance and are therefore governed by Title 7.
Section 15(b).40 states:

> (a) Recipients which provide food services shall serve special meals, at no extra charge, to persons whose handicap restricts their diet. *Recipients may require handicapped persons to provide medical certification that special meals are needed because of their handicap.*
> (b) Where existing food service facilities are not completely accessible and usable, recipients may provide aides or use other equally effective methods to serve food to handicapped persons. Recipients shall provide all food services in the most integrated setting appropriate to the needs of handicapped persons.[7]

Because meal services in schools are considered a federal program, schools cannot discriminate against individuals with disabilities if they are recipients of federal funds. If modifications or substitutions of school meals are necessary for a child with a disability, as determined by a licensed physician, the school is required to accommodate them at no additional cost to the parents.

II. Illinois Laws

In addition to federal laws that give rights to children with food allergies, the state of Illinois also has laws that apply to children with allergies in schools.

A. Public Act 094-0792

[4] 7 CFR 15(a)(b)
[5] States Department of Agriculture Food and Nutrition Service, Accommodating Children with Special Dietary Needs in the School Nutrition Programs: Guidance for School Staff (2001).
[6] 7 CFR 15(a)(b)
[7] 7 CRF 15(b).40. Emphasis added.

Public Act 094-0792 was made effective on May 19, 2006. This law mandates that schools must permit a child to self administer medication through an epinephrine auto-injector, also commonly known as an EpiPen, provided that the parents provide written authorization for the self administration of medication and a physician's statement that includes the name and purpose of the medication, the prescribed dosage, and the appropriate times the EpiPen is to be administered.

B. Proposed Amendment to HB 0281

HB 0281, a bill, is currently sitting on the governor's desk awaiting approval. The proposed amendments to HB 0281 would require that the State Board of education along with the Department of Public Health "create and make available to each school board guidelines for the management of students with life threatening food allergies."[8] The guidelines would include a plan for the education and training of school personnel, procedures for responding to allergic reactions, the process for the creation and implementation of individual health care and emergency action plans, and protocols for the prevention of exposure to food allergens.[9] Currently only one school district has such a plan in place[10], but if/when this law is signed by the governor all school districts will have to implement similar guidelines.

What if the food allergy is not considered a disability?

If a child has a food allergy but it is not considered severe enough to interfere with a major life activity it would not qualify as a disability and the child would not be eligible for a 504 plan or an IEP. However, the parent may still request that food modifications or substitutions be made to school lunches but the school would not be required to make the substitutions.[11] The school may, however, consider making the modifications and if so would need documentation by a licensed. The child would also be allowed to carry an EpiPen, as stated in Illinois law, once the proper documentation is given to the school district.[12] It is also important that the school be made aware of the allergy and an Emergency Action Plan be written and on file with the school nurse, classroom teacher, and lunchroom staff.

For an example of an Individual Health Care Plan, Emergency Action Plan, and medical statement see the attached Appendixes.

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[8] Illinois General Assembly HB0281
[9] Id.
[10] See, Wilmette School District 39's Allergy Guide available at www.wilmette39.org/specialservices/D39allergyguide.pdf.
[11] Accommodating Children with Special Dietary Needs *Supra* n.5 at 9.
[12] Documentation required includes: written authorization by the parent for the self administration of medication, and a physician's statement that includes the name and purpose of the medication, the prescribed dosage, and the appropriate times the EpiPen is to be administered.

Home – Hospital

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On July 14, 2011, pursuant to Public Act 97-0123, the 97th General Assembly effectively amended Section 14-13.01(a) of the Illinois School Code ("School Code"), which concerns personnel reimbursement for children in hospital or home instruction.[1] With regard to the qualification of a child for home or hospital instruction, Section 14-13.01(a) now reads in part:

> *A child qualifies for home or hospital instruction if it is **anticipated** that, due to a medical condition, the child will be unable to attend school, and instead must be instructed at home or in the hospital, for a period of 2 or more consecutive weeks or on an ongoing intermittent basis. . . . There **shall be no requirement** that a child be absent from school a minimum number of days before the child qualifies for home or hospital instruction.*

10 ILCS 5/14-13.01(a) (Emphasis added.) Previously, to qualify for home or hospital instruction, a child "must" due to a medical condition be unable to attend school. Public Act 97-0123 also added the definition of "ongoing intermittent basis". For purposes of this Section, "ongoing intermittent basis" means:

> *[T]he child's medical condition is of such a nature or severity that it is anticipated that the child will be absent from school due to the medical condition for periods of at least 2 days at a time multiple times during the school year totaling at least 10 days or more of absences.*

Furthermore, it is important for school districts to note that pursuant to Public Act 97-0123, Section 14-13.01(a) now requires the school district to commence home or hospital instruction ***not later than 5 school days*** after receipt of the requisite written physician's statement.[2] In addition, the school district is not excused from providing special education services as provided for in the student's IEP or federal Section 504 plan. Specifically, the Section now includes the following language:

> *Special education and related services required by a the child's IEP or services and accommodations required by the child's federal Section 504 plan **must** be implemented as part of the child's home or hospital instruction, **unless** the IEP team or federal Section 504 plan team determines that modifications are necessary during the home or hospital instruction due to the child's condition.*

[1] *Note*: Personnel reimbursement for home or hospital instruction has remained unchanged by Public Act 97-0123. Personnel reimbursement continues to be "1/2 of the teacher's salary but not more than $1,000 annually per child or $9,000 per teacher, whichever is less." 105 ILCS 5/14-13.01(a).

[2] *Note*: A parent must submit to its resident school district a written statement from "a physician licensed to practice medicine in all of its branches stating the existence of such medical condition, the impact on the child's ability to participate in education, and the anticipated duration or nature of the child's absence from school" 104 ILCS 5/14-13.01(a).

HOME/HOSPITAL SERVICES FORM LETTER

_____ ___, 2012

To: (School District Superintendent)
(Address)
(City), Illinois (zip)

Re: (Patient Name, D.O.B.)

Dear Superintendent _____:

The purpose of this correspondence is to inform you that your above-named student is under my care. My diagnosis for this student is _____, and based on this diagnosis and current circumstances surrounding this student's illness, pursuant to Public Act 97-0123, the student's medical condition is of such nature or severity that it is anticipated the child will be absent from school due to said medical condition for a period of 2 or more consecutive weeks or for periods of at least two days at a time, multiple times during the school year, totaling at least 10 days or more of absences.

It is my sincere hope that your staff can implement home/hospital services within the statutorily-required time period of no later than five school days from receipt of this letter. In addition, I am hopeful that my young patient will be able to continue receiving 504 Accommodations or IEP services, whichever is applicable.

Sincerely,

_____, M.D.

MEDICAL CERTIFICATION
For Home and Hospital Instruction

It is hereby certified by the undersigned physician, pursuant to Section 14-13.01(a) of the Illinois School Code, that due to a medical condition, it is anticipated that the student identified below will be unable to attend school, and instead must be instructed at home or in the hospital for a period of two or more consecutive weeks or on an intermittent basis, as described herein.

1. STUDENT INFORMATION

Name: _____

Gender (Circle One): **M** **F** Birth Date: _____ Age: _____ Grade: _____

Home Address: _____

School: _____

School District: _____

2. STUDENT ELIGIBILITY

Medical Condition/Diagnosis Affecting School Attendance: _____

_____

Impact of Medical Condition/Diagnosis on Ability to Participate in Education: _____

_____

_____

Recommended Instruction (Circle One): **HOME** **HOSPITAL** **OTHER**

If 'Other', describe: _____

_____

Anticipated Duration for Recommended Instruction or Nature of Anticipated Absence: _____

_____

3. PHYSICIAN INFORMATION

Physician's Name: _____

Office/Hospital Name & Address: _____

Phone: _____ Fax: _____

4. OTHER INFORMATION

_____

_____

_____

Physician Signature: _____ **Date: _____**

Note: The abovementioned School District is required to commence home or hospital instruction as recommended by the above-signing physician no later than five school days from receipt of this Medical Certification.

Illinois Prevent School Violence Act

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The general assembly has recently enacted an anti-bullying law which is fairly comprehensive. The law defines "bullying" as:

> *Any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students that has or can be reasonably predicted to have the effect of one or more of the following:*
>
> 1. *Placing the student or students in reasonable fear of harm to the students personal property;*
>
> 2. *Causing a substantially detrimental effect on the students physical or mental health;*
>
> 3. *Substantially interfering with the student's academic performance; or*
>
> 4. *Substantially interfering with the students ability to participate in/or benefit from the services, activities, or privileges provided by a school.*

Bullying is also generally described as taking certain forms, including without limitation one or more of the following: harassment, threats, intimidation, stalking, physical violence, sexual harassment, sexual violence, theft, public humiliation, destruction of property, or retaliation for asserting or alleging an act of bullying. The statute goes on to say that this is not an exclusive list.

Applicable to Private Schools

The general assembly has found that school district and non-public, non-sectarian elementary and secondary schools should educate students, parents, and school district or non-public, non-sectarian elementary or secondary school personnel about what behaviors constitute prohibited bullying.

When Prohibited

All bullying is prohibited during any school sponsored education program or activity, while in school and on school property or school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school sponsored or school sanctioned events or activities or through the transmission of information from a school computer or computer network or other similar electronic school equipment.

Basis of Harassment

Bullying on the basis of actual or perceived race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender related identity or expression, unfavorable discharge from military service, association with a person or group with one or more of the mentioned actual or perceived characteristics, or any other distinguishing characteristic, is prohibited in all school districts and non-public, non-sectarian elementary and secondary schools.

Written Policy Required

Each school district and non-public, non-sectarian elementary or secondary school must create and maintain a policy on bullying which must be filed with the State Board of Education. Each school district and private school must communicate its policy on bullying to students and their parent or guardian on an annual basis and said policies have to be updated every two years and re-filed with the State Board of Education.

The Task Force

The section at 105 ILCS 5-27-23.9 creates a school bullying prevention task force.[1]

The task force is charged with the job of exploring the causes and consequences of bullying in schools, identifying promising practices that reduce incident of bullying, highlighting training and technical assistance opportunities for schools to effectively address bullying, evaluating the effectiveness of schools' current anti-bullying policies and other bullying prevention programs, and other related issues.

The state superintendent must appoint fifteen members to the task force within sixty days of the effective date of this Act or by approximately the end of August of this year.

The task force must submit a report to the governor and the general assembly on any recommendations for preventing and addressing bullying in schools in the state of Illinois, as well as a proposed timeline for meeting the task forces charges identified in the section.

[1] Brooke Whitted has been appointed by the State Superintendent as a member of the Task Force.

AN ACT concerning education.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The School Code is amended by changing Section 27-23.7 and by adding Sections 27-23.9 and 27-23.10 as follows:

(105 ILCS 5/27-23.7)

Sec. 27-23.7. Bullying prevention ~~education; gang resistance education and training~~.

(a) The General Assembly finds that a safe and civil school environment is necessary for students to learn and achieve and that bullying causes physical, psychological, and emotional harm to students and interferes with students' ability to learn and participate in school activities. The General Assembly further finds that bullying ~~has a negative effect on the social environment of schools, creates a climate of fear among students, inhibits their ability to learn, and leads to other antisocial behavior. Bullying behavior~~ has been linked to other forms of antisocial behavior, such as vandalism, shoplifting, skipping and dropping out of school, fighting, using drugs and alcohol, sexual harassment, and sexual violence. Because of the negative outcomes associated with bullying in schools, the General Assembly finds that school districts and non-public, non-sectarian elementary and secondary schools should educate

students, parents, and school district or non-public, non-sectarian elementary or secondary school personnel about what behaviors constitute prohibited bullying.

Bullying on the basis of actual or perceived race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, unfavorable discharge from military service, association with a person or group with one or more of the aforementioned actual or perceived characteristics, or any other distinguishing characteristic is prohibited in all school districts and non-public, non-sectarian elementary and secondary schools. No student shall be subjected to bullying:

(1) during any school-sponsored education program or activity;

(2) while in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities; or

(3) through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment.

~~The General Assembly further finds that the instance of youth delinquent gangs continues to rise on a statewide basis. Given the higher rates of criminal offending among gang members, as well as the availability of increasingly lethal~~

~~weapons, the level of criminal activity by gang members has taken on new importance for law enforcement agencies, schools, the community, and prevention efforts.~~

(b) In this Section:

"Bullying" means any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students that has or can be reasonably predicted to have the effect of one or more of the following:

(1) placing the student or students in reasonable fear of harm to the student's or students' person or property;

(2) causing a substantially detrimental effect on the student's or students' physical or mental health;

(3) substantially interfering with the student's or students' academic performance; or

(4) substantially interfering with the student's or students' ability to participate in or benefit from the services, activities, or privileges provided by a school.

Bullying, as defined in this subsection (b), may take various forms, including without limitation one or more of the following: harassment, threats, intimidation, stalking, physical violence, sexual harassment, sexual violence, theft, public humiliation, destruction of property, or retaliation for asserting or alleging an act of bullying. This list is meant to be illustrative and non-exhaustive.

"School personnel" means persons employed by, on contract

with, or who volunteer in a school district or non-public, non-sectarian elementary or secondary school, including without limitation school and school district administrators, teachers, school guidance counselors, school social workers, school counselors, school psychologists, school nurses, cafeteria workers, custodians, bus drivers, school resource officers, and security guards.

~~"Bullying prevention" means and includes instruction in all of the following:~~

~~(1) Intimidation.~~

~~(2) Student victimization.~~

~~(3) Sexual harassment.~~

~~(4) Sexual violence.~~

~~(5) Strategies for student centered problem solving regarding bullying.~~

~~"Gang resistance education and training" means and includes instruction in, without limitation, each of the following subject matters when accompanied by a stated objective of reducing gang activity and educating children in grades K through 12 about the consequences of gang involvement:~~

~~(1) Conflict resolution.~~

~~(2) Cultural sensitivity.~~

~~(3) Personal goal setting.~~

~~(4) Resisting peer pressure.~~

(c) (Blank). ~~Each school district may make suitable provisions for instruction in bullying prevention and gang~~

~~resistance education and training in all grades and include such instruction in the courses of study regularly taught therein. A school board may collaborate with a community based agency providing specialized curricula in bullying prevention whose ultimate outcome is to prevent sexual violence. For the purposes of gang resistance education and training, a school board must collaborate with State and local law enforcement agencies. The State Board of Education may assist in the development of instructional materials and teacher training in relation to bullying prevention and gang resistance education and training.~~

(d) Each ~~Beginning 180 days after August 23, 2007 (the effective date of Public Act 95-349), each~~ school district and non-public, non-sectarian elementary or secondary school shall create and maintain a policy on bullying, which policy must be filed with the State Board of Education. Each school district and non-public, non-sectarian elementary or secondary school must communicate its policy on bullying to its students and their parent or guardian on an annual basis. The policy must be updated every 2 years and filed with the State Board of Education after being updated. The State Board of Education shall monitor the implementation of policies created under this subsection (d).

(e) This Section shall not be interpreted to prevent a victim from seeking redress under any other available civil or criminal law. Nothing in this Section is intended to infringe

upon any right to exercise free expression or the free exercise of religion or religiously based views protected under the First Amendment to the United States Constitution or under Section 3 or 4 of Article 1 of the Illinois Constitution.

(Source: P.A. 94-937, eff. 6-26-06; 95-198, eff. 1-1-08; 95-349, eff. 8-23-07; 95-876, eff. 8-21-08.)

(105 ILCS 5/27-23.9 new)

(Section scheduled to be repealed on March 2, 2011)

Sec. 27-23.9. School Bullying Prevention Task Force.

(a) In this Section, "Task Force" means the School Bullying Prevention Task Force.

(b) The Task Force is created and charged with exploring the causes and consequences of bullying in schools in this State, identifying promising practices that reduce incidences of bullying, highlighting training and technical assistance opportunities for schools to effectively address bullying, evaluating the effectiveness of schools' current anti-bullying policies and other bullying prevention programs, and other related issues.

(c) Within 60 days after the effective date of this amendatory Act of the 96th General Assembly, the State Superintendent of Education shall appoint 15 members to the Task Force. The membership of the Task Force shall include representatives of State agencies whose work includes bullying prevention or intervention; statewide organizations that focus

on violence or bullying prevention or intervention; teachers and management personnel from at least 3 school districts; academics who conduct research on bullying, its consequences to students in grades K through 12, or effective strategies for preventing or addressing bullying; a current high school or college student who has experienced bullying; and others at the State Superintendent's discretion. Members of the Task Force shall serve without compensation.

(d) The State Board of Education shall provide technical assistance for the work of the Task Force.

(e) No later than March 1, 2011, the Task Force shall submit a report to the Governor and the General Assembly on any recommendations for preventing and addressing bullying in schools in this State and a proposed timeline for meeting the Task Force's charges identified in this Section.

(f) This Section is repealed on March 2, 2011.

(105 ILCS 5/27-23.10 new)

Sec. 27-23.10. Gang resistance education and training.

(a) The General Assembly finds that the instance of youth delinquent gangs continues to rise on a statewide basis. Given the higher rates of criminal offending among gang members, as well as the availability of increasingly lethal weapons, the level of criminal activity by gang members has taken on new importance for law enforcement agencies, schools, the community, and prevention efforts.

(b) As used in this Section:

"Gang resistance education and training" means and includes instruction in, without limitation, each of the following subject matters when accompanied by a stated objective of reducing gang activity and educating children in grades K through 12 about the consequences of gang involvement:

(1) conflict resolution;

(2) cultural sensitivity;

(3) personal goal setting; and

(4) resisting peer pressure.

(c) Each school district and non-public, non-sectarian elementary or secondary school in this State may make suitable provisions for instruction in gang resistance education and training in all grades and include that instruction in the courses of study regularly taught in those grades. For the purposes of gang resistance education and training, a school board or the governing body of a non-public, non-sectarian elementary or secondary school must collaborate with State and local law enforcement agencies. The State Board of Education may assist in the development of instructional materials and teacher training in relation to gang resistance education and training.

Section 90. The State Mandates Act is amended by adding Section 8.34 as follows:

(30 ILCS 805/8.34 new)

Sec. 8.34. Exempt mandate. Notwithstanding Sections 6 and 8 of this Act, no reimbursement by the State is required for the implementation of any mandate created by this amendatory Act of the 96th General Assembly.

Section 99. Effective date. This Act takes effect upon becoming law.

Bullying and School Liability Case Summaries

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INTRODUCTION

Bullying and student-on-student harassment is a pervasive problem in the U.S. and has reached schoolchildren of all ages, genders, and races. According to an Associated Press report in *Education Week*, a study was conducted by the Josephson Institute of Ethics of 43,000 high school students, in which 43% of students reported being bullied in the past year and 50% reported bullying someone else.[1] In that same article's Editor's Note, another survey conducted by the Olweus Bullying Prevention Program reported that 17% of boy and girl students report being bullied two to three times a month or more within a school semester.[2] Schools are in a unique position to protect the lives of these young victims. School officials have a "comprehensive authority…, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[3] The Supreme Court has in the past recognized "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[4] Some student misconduct, regarded as bullying, which goes unaddressed may put schools in violation of federal anti-discrimination laws and may lead to school liability.

CASE SUMMARIES

PUBLIC SCHOOL LIABILITY

Gebser v. Lago Vista Independent School District (1998)[5]

The Supreme Court, in 1998, defined the standard of liability for cases involving sexual harassment of students by a school employee. This case involved the alleged sexual harassment of a student by a school teacher off-campus. The student brought suit against the school, and the Supreme Court determined that liability could only be imposed if the school official, someone who has at minimum the authority to address the discrimination, was "deliberately indifferent" to the harassment. While the Supreme Court concluded that a school could be liable for damages to a student due to such harassment by a teacher, in this case it found that the school was not liable.

Davis v. Monroe County Board of Education (1999)[6]

[1] Associated Press (AP). *Education Week*. "New study reports 50% of high school students admit to bullying in the past year." (October 27, 2010).
[2] *Id.*
[3] *Davis v. Monroe County Board of Education*, 526 U.S. 629, 646 (1999) (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969)).
[4] *Veronia School District 47J v. Acton*, 515 U.S. 646, 655 (1995). *See also New Jersey v. T.L.O.*, 469 U.S. 325, 342, n. 9 (1985) ("The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities.").

[5] *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989 (1998).
[6] *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999).

The Supreme Court in *Davis* determined that private damages action could lie against a school board, as a recipient of federal funds, in instances of student-on-student harassment, when it acts with "deliberate indifference" to known acts of harassment in its programs or activities. However, this is only true for harassment that is so "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." The *Davis* case defines standards by which it would be determined whether a school board will be held liable for private damages in instances of student-on-student harassment and not standards by which a school and its administrators should address bullying and harassment.

Based on the *Davis* case, the following five-part harassment test was developed to determine if public school liability may exist, based on Title IX of the Education Amendments of 1972, which prohibits gender discrimination in federally funded educational programs:

(1) The student is a member of statutorily protected class (gender, race, disability)
(2) The peer harassment is based upon the protected class
(3) The harassment is severe, pervasive and objectively offensive
(4) A school official with authority to address the harassment has actual knowledge of it
(5) The school is deliberately indifferent to the harassment

Tinker v. Des Moines Independent School District (1969)[7]

This case involved an action against a school district to obtain an injunction against the enforcement of a school regulation prohibiting students from wearing black armbands while on school facilities to exhibit their disapproval of Vietnam hostilities. The Supreme Court concluded that public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying. However, in this particular case, the Supreme court held that in the absence of demonstration of any facts that might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, or any showing that disturbances or disorders on school premises actually occurred, regulation prohibiting wearing the black armbands and issuing suspensions to those students who refused to remove them was an unconstitutional denial of the students' right of expression and free speech.

T.K. and S.K. v. New York City Department of Education (E.D.N.Y. April 2011)[8]

The federal district court applied a broad standard of liability to the New York public schools in this case, finding that a disabled student had stated a valid claim that she had been denied a free appropriate public education under the federal *Individuals with Disabilities Education Act*, due to school officials' failure to remedy peer-bullying and harassment based on her disability. Note that the court in this case incorporated the standard set out in the Office of Civil Rights "Dear Colleague Letter" from October 2010.[9] Based on the letter, the Court concluded that schools should take prompt and appropriate action when responding to bullying that may interfere with a special education student's ability to obtain an appropriate education.

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[7] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
[8] *T.K. and S.K. v. New York City Department of Education*, 779 F. Supp. 2d 289 (E.D.N.Y. 2011).
[9] *See* Handout, Pgs. __ - __.

DeGooyer v. Harkness (S. Dakota 1944)[10]

This was the very first hazing case in a non-postsecondary setting. In this case the South Dakota Supreme Court affirmed a jury verdict that found the high school athletic coach liable for his active participation in the initiation rights of the school's lettermen club that led to the wrongful death of a student. The particular initiation employed in this case was to administer an electric shock via a device, with the coach present and assisting. The court found that the coach was charged with the "highest degree of care that skill and vigilance could suggest," and that he failed to observe the duty owed to the student being initiated, and thus was liable for the student's wrongful death.

Gendelman, et al. v. Glenbrook North High School, et al. (N.D. Ill. May 2003)[11]

This case was on the international media and involved an annual "powder puff" high school hazing event, where five students ended up being hospitalized. The school district responded by giving 10-day suspensions to 32 students, and all faced potential expulsions. Most students suspended were seniors who were set to graduate in a few weeks. Two such seniors brought an action in the federal court to enjoin the school district from preventing their graduations. The Northern District of Illinois denied their request for the temporary restraining order. Parenthetically, the discipline was based on a little known school district prohibition against "secret societies" even though everyone in the school, for many years, knew of the event.

Golden v. Milford Exempted Village School District (Ohio Ct. App. Oct. 2011)[12]

This case involved an attack on a member of the freshman basketball team by several fellow team members, but particularly one student who had engaged in aggressive sexual behavior toward other team members throughout the season. The student-aggressor targeted the freshman while other members of the team held the student down while waiting to board a bus to travel to basketball practice. No adults were supervising the students as they waited for the bus. When the word of the attack got out, the school district conducted an investigation. The student-victim and his parents filed suit against the student-aggressor and the school district and basketball coach. Claims against the school district and coach included civil hazing and negligent supervision. The court determined that the acts that occurred were not acts of "civil hazing" and could rather be considered "bullying". Accordingly, the school district was not held liable under the civil hazing statutes of the state. With regard to the claim of negligent supervision, the Court found that while it was the basketball coach's duty to supervise the team, there was no evidence that the coach acted in a manner that would be considered reckless, or willful and wanton that would lead to liability and overcome the qualified immunity provided to governmental employees.

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[10] *DeGooyer v. Harkness et al.*, 13 N.W.2d 815 (S. Dakota 1944).
[11] *Gendelman v. Glenbrook North High School*, No. 03 C 3288, 2003 WL 21209880 (N.D. Ill. 2003).
[12] *Golden v. Milford Exempted Village School District Board of Education*, No. CA2010-11-092, 2011 WL 4916588 (Ohio App. 12th Dist. Oct. 17, 2011).

PUBLIC SCHOOLS, THE FIRST AMENDMENT AND BULLYING

Kara Kowalski v. Berkeley County Schools, et al. (4th Cir. July 2011)[13]

In a case involving cyber-bullying, a student sued the school district for limiting her First Amendment free speech rights by suspending her for creating a hate website against another student at school. The Fourth Circuit determined that the speech created actual or reasonably foreseeable "substantial disorder and disruption" at school; therefore, this was not the "speech" a school is required to tolerate and did not merit First Amendment protection.

T.V., M.K. v. Smith-Green Community School Corporation, et al. (N.D. Ind. Aug. 2011)[14]

This was the first case to address in a comprehensive manner whether and to what extent the First Amendment's Free Speech Clause would apply to "sexting". Students brought an action against their school district and principal alleging that their First Amendment rights were violated when the school suspended them from extracurricular activities for posting provocative and suggestive photographs on a social media website. The court held that the students' conduct was speech within the realm of the First Amendment. In addition, the court found the "off campus" conduct to be protected "expressive" conduct that did not *substantially interfere with requirements of appropriate discipline in the operation of the school*. Accordingly, the court found the punishment imposed to be a violation of the First Amendment. Additionally, the portion of the student handbook providing that, "If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year," was found to be impermissibly overbroad and vague under constitutional standards.

J.S. v. Blue Mountain School District & Layshock v. Hermitage School District (3rd Cir. 2011)[15]

Both cases concern students engaging in off-campus behavior involving the posting and creation of fake profiles of each of the students' principals on social networking sites. Parents of both high school students brought actions against the school district alleging that disciplining the students was a violation of their First Amendment rights. The Third Circuit ruled that the school district did not have authority to punish these students for their off-campus expressive conduct. In *Layshock*, the Court stated "the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline."

D.J.M. v. Hannibal Public School District #60 (8th Cir. Aug. 2011)[16]

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[13] *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011).
[14] *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*, No. 1:09-CV-290-PPS, 2011 WL 3501698 (N.D. Ind. Aug. 10, 2011).
[15] *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir. 2011); *Layshock v. Hermitage School District*, 650 F.3d 205 (3rd Cir. 2011).
[16] *D.J.M. v. Hannibal Public School District #60*, 647 F.3d 754 (8th Cir. 2011).

In this case, a high school student brought § 1983 civil rights action against his school district alleging that his suspension, which was based on alleged threats the student made to shoot other students, violated his First Amendment freedom of speech rights. The Eighth Circuit found that the student's statements were not protected speech under either "true threat" or substantial disruption analysis. A "true threat" is a statement that a reasonable recipient would interpret as a serious expression of intent to harm or cause injury to another and is intended to be communicated to another by the speaker. Such a statement is not considered protected speech. The student communicated his statements to a friend via "instant messaging", who then shared "something serious" with an adult, who informed the school principal and superintendent. Furthermore, the student's conduct was that which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, and thus is not protected by the First Amendment.

PRIVATE SCHOOLS AND LIABILITY

Illinois Bullying Prevention Law

Section 27-23.7of the Illinois School Code, which concerns 'Bullying prevention' is applicable to private non-sectarian schools. Specifically, the relevant sections of the statute state as follows:

> *Because of the negative outcomes associated with bullying in schools, the General Assembly finds that school districts and non-public, non-sectarian elementary and secondary schools* ***should educate*** *students, parents, and school district or non-public, non-sectarian elementary or secondary school personnel about what behaviors constitute prohibited bullying.*
>
> *Bullying on the basis of actual or perceived race, color, religion, sex, national origin ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, unfavorable discharge form military service, association with a person or group with one or more of the aforementioned actual or perceived characteristics, or any other distinguishing characteristic is* ***prohibited*** *in all school districts and non-public non-sectarian elementary and secondary schools. . . .*
> * * * *
> *(d) Each school district and non-public, non-sectarian elementary or secondary school* ***shall create and maintain a policy on bullying, which policy must be filed with the State Board of Education****. Each school district and non-public, non-sectarian elementary or secondary school must communicate its policy on bullying to its students and their parent or guardian on an annual basis. The policy must be updated every 2 years and filed with the State Board of Education after being updated. . . .*

* * * *

(e) This Section shall not be interpreted to prevent a victim form seeking redress under any other available civil or criminal law. . . .

105 ILCS 5/27-23.7(a), (d), (e) (Emphasis added.)

***Cotton v. Catholic Bishop of Chicago* (1st Dist. Ill. June 17, 1976)**[17]

A student brought suit to recover for the injuries he sustained when he was assaulted by a fellow student in a gymnasium of his **private school**. The Appellate Court of Illinois held that the Illinois school code provision imposing a "willful and wanton" standard for injuries arising out of the school-pupil relationship applies to private as well as public schools. The complaint alleged a failure to supervise certain gymnasium activities and claimed ordinary negligence against the private school. Similar to lawsuits against public schools for mere negligence in student supervision or maintenance of discipline cases, private schools and their teachers have status of a parent or guardian to all students (*in loco parentis*) and the liability of a parent to a child does not attach absent willful and wanton misconduct. Thus, a private school may only be liable in a negligence suit if it acted willfully and wantonly (definition below).

> *Note:* In *Haymes v. Catholic Bishop of Chicago* (Ill. 1968), the Supreme Court of Illinois held unconstitutional a provision that limited recovery in tort actions against private schools to $10,000.

***Iwenofu v. St. Luke School* (Ct. App. Ohio Feb. 16, 1999)**[18]

This case involves an eighth-grade student at **parochial school** who was disciplined for engaging in behavior involving inappropriate touching of female classmates. The school suspended the student for three days and required him to engage in counseling before he returned. Subsequently, the student and his parents sued the school principal, school, and diocese based on various claims related to the discipline of the student and the juvenile court proceedings brought against the student by the diocese, which was resolved in favor of the student. The parents argued that the school **breached its contract** with them because the school did not follow its handbook in handling the matter, that the students constitutional rights were violated because no due process was afforded in the discipline proceeding, and that the school committed various torts against the student. The Court found that the actions taken by the school were within their discretion. Further, the Court found that private schools are vested with broad discretion in the manner in which they discipline students. "Private schools have broad discretion in making rules and setting up procedures to enforce those rules." Moreover, to uphold a claim that the private school breached its contract, parents would have to prove that the actions of the school violated the school handbook and that the handbook in fact created contractual rights between the parties.

Query: Do you have an incorporation provision in your yearly contracts?

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[17] *Cotton v. Catholic Bishop of Chicago*, 39 Ill. App. 3d 1062, 351 N.E.2d 247 (1st Dist. 1976) .
[18] *Iwenofu v. St. Luke School*, 132 Ohio App. 3d 119, 724 N.E.2d 511 (Ct. App. Ohio 1999).

***Doe v. Williston Northampton School* (D. Mass. Feb. 28, 2011)[19]**

This case involved a student and her parents bringing an action against her **private school** and teacher for sexual harassment and sexual assault. The Court found that the private claim against the private school was actionable under Massachusetts statute making sexual harassment by any educational institution an "unfair educational practice."

***Bloch v. Hillel Torah North Suburban Day School* (1st Dist. Ill. Sept. 9, 1981)[20]**

This older case involves a student and his parents suing a **private school** for the student's wrongful expulsion. The Appellate Court of Illinois found that Illinois law recognizes the availability of a remedy for monetary damages for a private school's wrongful expulsion of a student in violation of its contract. The court reasoned that in the case where a contract is one that establishes a personal relationship, like one between a student and his/her school, and calls for "the rendition of personal services, the proper remedy for a breach is generally no specific performance but rather an action for money damages."

***Merrill v. Catholic Bishop of Chicago* (2nd Dist. Ill. Dec. 11, 1972)[21]**

This case involved an action against a **nonprofit private school** and its staff for injuries sustained by a student who was directed to cut a length of wire from a coil. The Appellate Court of Illinois held that the (public) School Code provision that schools stand, in all matters relating to discipline and conduct, in a relation of parents and guardians as to all activities connected with school programs applies to private schools. Accordingly, the Court relieved the private school of liability for alleged negligence.

Immunity

Private schools are not afforded all of the same immunities as public schools. The Tort Immunity Act, 745 ILCS 10/1-101 *et seq.* provides for the protection of "local public entit[ies]" (which includes public school districts and school boards) from liability arising from such claims. 745 ILCS 10/1-101.1(a), 745 ILCS 10/1-206. However, the Tort Immunity Act does not protect private schools.

Private schools may only enjoy immunity against school liability under Section 24-24 of the School Code. Section 24-24 confers on teachers *in loco parentis* status involving all matters relating to the supervision of students in school activities. 105 ILCS 5/24-24. The statute grants educators the immunity that parents enjoy with respect to suits by their children. *Templar v. Decatur Public Sch. Dist. 61*, 538 N.E.2d 195, 198 (4th Dist. 1989). As such, Section 24-24 immunizes educators and certain other educational employees from acts involving ordinary negligence, but not from acts involving willful and wanton misconduct. *Id.* "Willful and wanton conduct" is that which is either intentional or committed with reckless disregard or indifference

[19] *Doe v. Williston Northampton School*, 766 F. Supp. 2d 310 (D. Mass. 2011).
[20] *Bloch v. Hillel Torah North Suburban Day School*, 100 Ill. App. 3d 204, 426 N.E.2d 976 (1st Dist. 1981).
[21] *Merrill v. Catholic Bishop of Chicago*, 8 Ill. App. 3d 910, 290 N.E.2d 259 (2nd Dist. 1972).

for the consequences when the known safety of other persons is involved. To prove willful and wanton misconduct, one must show that the defendant has actual or constructive knowledge that the conduct posed a high probability of serious harm to others. As long as the actions of private school personnel are not considered willful and wanton misconduct, the immunity will apply and the private school will likely be protected.

Board of Directors of Private Schools

Pursuant to the General Not For Profit Corporation Act of 1986, 805 ILC 105/101.01 *et seq.*, a non-profit board of directors **serving without compensation** shall not be liable and "no cause of action may brought, for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities of such director or officer unless the act or omission involved willful or wanton conduct." 805 ILCS 105/108.70(a). However, nothing in Section 108.70 is intended to bar any cause of action against the non-for-profit corporation arising out of an act or omission of any director exempt from liability for negligence. *See* 805 ILCS 105/108.70(e).

OCR
Complaints

WHITTED + TAKIFF + HANSEN LLC

FILING OCR COMPLAINTS

Attached please find a document revised this month by the Office for Civil Rights. It is a useful summary of the areas over which OCR has jurisdiction.

If you desire to file a discrimination complaint with OCR in the Chicago Region, we suggest a ***certified*** *letter to:*

The United States Department of Education
Office for Civil Rights
Midwestern Division, Chicago Office
Suite 1475
500 West Madison Street
Chicago, IL 60661

Once you send your letter, which should be sufficiently detailed for the OCR team to determine that an investigation would have merit, you will receive a letter so stating, and enclosing the attached memorandum.

The advantages of filing an OCR complaint are:

1. *It does not require an expenditure of money;*
2. *If OCR holds in your favor, they have essentially done your investigation for you, at no cost to you;*
3. *There is always a chance the school district will mediate and the unpleasant experience of going to court will be avoided altogether; and*
4. *If OCR concludes there is no justification for investigating, you may choose to proceed on your own, without prejudice.*

ED.gov

OCR COMPLAINT PROCESSING PROCEDURES

LAWS ENFORCED BY OCR

OCR enforces the following laws:

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin;
- Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex;
- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability;
- Age Discrimination Act of 1975, which prohibits discrimination on the basis of age;
- Title II of the Americans with Disabilities Act of 1990 which prohibits discrimination on the basis of disability;
- Boy Scouts of America Equal Access Act, part of the No Child Left Behind Act of 2001, which prohibits denial of access to or other discrimination against the Boy Scouts or other Title 36 U.S.C. youth groups in public elementary schools, public secondary schools, local education agencies, and state education agencies that have a designated open forum or limited public forum.

EVALUATION OF THE COMPLAINT

OCR evaluates each complaint that it receives in order to determine whether it can investigate the complaint. OCR makes this determination with respect to each allegation in the complaint. For example, OCR must determine whether OCR has legal authority to investigate the complaint; that is, whether the complaint alleges a violation of one or more of the laws OCR enforces. OCR must also determine whether the complaint is filed on time. Generally, a complaint must be filed with OCR within 180 calendar days of the last act that the complainant believes was discriminatory.[1] If the complaint is not filed on time, the complainant should provide the reason for the delay and request a waiver of this filing requirement. OCR will decide whether to grant the waiver. In addition, OCR will determine whether the complaint contains enough information about the alleged discrimination to proceed to investigation. If OCR needs more information in order to clarify the complaint, it will contact the complainant; the complainant has 20 calendar days within which to respond to OCR's request for information.

OCR will dismiss the complaint if OCR determines that:

- OCR does not have legal authority to investigate the complaint;
- The complaint fails to state a violation of one of the laws OCR enforces;
- The complaint was not filed timely and that a waiver will not be granted;
- The complaint is unclear or incomplete and the complainant does not provide the information that OCR requests within 20 calendar days of OCR's request;
- The allegations raised by the complaint have been resolved;
- The complaint has been investigated by another Federal, state, or local civil rights agency or through a recipient's internal grievance procedures, including due process proceedings, and the resolution meets OCR regulatory standards or, if still pending, OCR anticipates that there will be a comparable resolution process under comparable legal standards;
- The same allegations have been filed by the complainant against the same recipient in state or Federal court;
- The allegations are foreclosed by previous decisions of the Federal courts, the U.S. Secretary of Education, the U.S. Department of Education's Civil Rights Reviewing Authority, or OCR policy determinations.

OPENING THE COMPLAINT FOR INVESTIGATION

If OCR determines that it will investigate the complaint, it will issue letters of notification to the complainant and the recipient. Opening a complaint for investigation in no way implies that OCR has made a determination with regard to the merits of the complaint. During the investigation, OCR is a neutral fact-finder. OCR will

collect and analyze relevant evidence from the complainant, the recipient, and other sources as appropriate. OCR will ensure that investigations are legally sufficient and are dispositive of the allegations raised in the complaint.

INVESTIGATION OF THE COMPLAINT

OCR may use a variety of fact-finding techniques in its investigation of a complaint. These techniques may include reviewing documentary evidence submitted by both parties, conducting interviews with the complainant, recipient's personnel, and other witnesses, and/or site visits. At the conclusion of its investigation, OCR will determine with regard to each allegation that:

- there is insufficient evidence to support a conclusion that the recipient failed to comply with the law, or
- a preponderance of the evidence supports a conclusion that the recipient failed to comply with the law

OCR's determination will be explained in a letter of findings sent to the complainant and recipient. Letters of findings issued by OCR address individual OCR cases. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

RESOLUTION OF THE COMPLAINT AFTER A DETERMINATION OF NONCOMPLIANCE

If OCR determines that a recipient failed to comply with one of the civil rights laws that OCR enforces, OCR will contact the recipient and will attempt to secure the recipient's willingness to negotiate a voluntary resolution agreement. If the recipient agrees to resolve the complaint, the recipient will negotiate and sign a written resolution agreement that describes the specific remedial actions that the recipient will undertake to address the area(s) of noncompliance identified by OCR. The terms of the resolution agreement, if fully performed, will remedy the identified violation(s) in compliance with applicable civil rights laws. OCR will monitor the recipient's implementation of the terms of the resolution agreement to verify that the remedial actions agreed to by the recipient have been implemented consistent with the terms of the agreement and that the area(s) of noncompliance identified were resolved consistent with applicable civil rights laws.

If the recipient refuses to negotiate a voluntary resolution agreement or does not immediately indicate its willingness to negotiate, OCR will inform the recipient that it has 30 days to indicate its willingness to engage in negotiations to voluntarily resolve identified areas of noncompliance, or OCR will issue a Letter of Finding to the parties providing a factual and legal basis for a finding non-compliance.

If, after the issuance of the Letter of Finding of non-compliance, the recipient continues to refuse to negotiate a resolution agreement with OCR, OCR will issue a Letter of Impending Enforcement Action and will again attempt to obtain voluntary compliance. If the recipient remains unwilling to negotiate an agreement, OCR will either initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance to the recipient, or will refer the case to the Department of Justice. OCR may also move immediately to defer any new or additional Federal financial assistance to the institution.

RESOLUTION OF THE COMPLAINT PRIOR TO THE CONCLUSION OF THE INVESTIGATION

Early Complaint Resolution (ECR):

Early Complaint Resolution allows the parties (the complainant and the institution which is the subject of the complaint) an opportunity to resolve the complaint allegations quickly; generally, soon after the complaint has been opened for investigation. If both parties are willing to try this approach, and if OCR determines that Early Complaint Resolution is appropriate, OCR will facilitate settlement discussions between the parties and work with the parties to help them understand the legal standards and possible remedies. To the extent possible, staff assigned by OCR to facilitate the Early Complaint Resolution process will not be the staff assigned to the investigation of the complaint. OCR does not approve, sign or endorse any agreement reached between the parties as a result of Early Complaint Resolution, and OCR does not monitor the agreement. However, if the recipient institution does not comply with the terms of the agreement, the complainant may file another complaint with OCR within 180 days of the date of the original discrimination or within 60 days of the date the complainant learns of the failure to comply with the agreement, whichever date is later.

Resolution of the Complaint Prior To the Conclusion of an Investigation

A complaint may also be resolved before the conclusion of an investigation, if the recipient expresses an interest in resolving the complaint. If OCR determines that the resolution of the complaint before the

conclusion of an investigation is appropriate, OCR will attempt to negotiate an agreement with the recipient. OCR will notify the complainant of the recipient's request and will keep the complainant informed throughout all stages of the resolution process. The provisions of the resolution agreement that is reached must be aligned with the complaint allegations and the information obtained during the investigation, and must be consistent with applicable regulations. A resolution agreement reached before the conclusion of an investigation will be monitored by OCR.

APPEAL OF OCR'S DETERMINATIONS

OCR is committed to a high quality resolution of every case. OCR affords an opportunity to the complainant to submit an appeal of OCR's dismissal or administrative closure of a complaint or letter finding insufficient evidence of a violation. The appeal process provides an opportunity for complainants to bring information to OCR's attention that would change OCR's decision. The appeal process will not be a *de novo* review of OCR's decision.

If the complainant disagrees with OCR's decision, he or she may send a written appeal to the Director of the Enforcement Office (Office Director) that issued the determination. If the complainant has documentation to support the appeal, the documentation must be submitted with the complainant's appeal. In an appeal, the complainant must explain why he or she believes the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, *and* how this would change OCR's determination in the case. Failure to do so may result in the denial of the appeal.

In order to be timely, an appeal (including any supporting documentation) must be submitted within 60 days of the date of the determination letter. The Office Director may exercise discretion in granting a waiver of the 60-day timeframe where:

1. the complainant was unable to submit the appeal within the 60-day timeframe because of illness or other incapacitating circumstances and the appeal was filed within 30 days after the period of illness or incapacitation ended; or
2. unique circumstances generated by agency action have adversely affected the complainant.

A written response to an appeal will be issued as promptly as possible. The decision of the Office Director constitutes the agency's final decision. The decision will inform the complainant that he or she "may have the right to file a private suit in federal court whether or not OCR finds a violation."

ADDITIONAL INFORMATION

Right to File a Separate Court Action

The complainant may have the right to file suit in Federal court, regardless of OCR's findings. OCR does not represent the complainant in case processing, so if the complainant wishes to file a court action, he or she must do so through his or her own attorney or on his or her own through the court's pro se clerk's office.

If a complainant alleges discrimination prohibited by the Age Discrimination Act of 1975, a civil action in Federal court can be filed only after the complainant has exhausted administrative remedies. Administrative remedies are exhausted when either of the following has occurred:

1) 180 days have elapsed since the complainant filed the complaint with OCR and OCR has made no finding; or
2) OCR issues a finding in favor of the recipient. If this occurs, OCR will promptly notify the complainant and will provide additional information about the right to file for injunctive relief.

Prohibition against Intimidation or Retaliation

An institution under the jurisdiction of the Department of Education may not intimidate, threaten, coerce, or retaliate against anyone who asserts a right protected by the civil rights laws that OCR enforces, or who cooperates in an investigation. Anyone who believes that he or she has been intimidated or retaliated against should file a complaint with OCR.

Investigatory Use of Personal Information

In order to investigate a complaint, OCR may need to collect and analyze personal information such as student records or employment records. No law requires anyone to give personal information to OCR and no formal sanctions will be imposed on complainants or other persons who do not cooperate in providing information during the complaint investigation and resolution process. However, if OCR is unable to obtain the information

necessary to investigate a complaint, we may have to close the complaint.

The Privacy Act of 1974, 5 U.S.C. § 552a, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, govern the use of personal information that is submitted to all Federal agencies and their individual components, including OCR. The Privacy Act of 1974 protects individuals from the misuse of personal information held by the Federal government. It applies to records that are maintained by the government that are retrieved by the individual's name, social security number, or other personal identifier. It regulates the collection, maintenance, use and dissemination of certain personal information in the files of Federal agencies.

The information that OCR collects is analyzed by authorized personnel within the agency and will be used by the government only for authorized civil rights compliance and enforcement activities. However, in order to investigate or resolve a complaint, OCR may need to reveal certain information to persons outside the agency to verify facts or gather additional information. Such details could include the name, age, or physical condition of the person who is the alleged subject of discrimination. Also, OCR may be required to reveal information requested under FOIA, which gives the public the right of access to records of Federal agencies. OCR will not release any information about a complainant to any other agency or individual except in the one of the 11 instances defined in the Department's regulation at 34 C.F.R. § 5b.9(b).

OCR does not reveal the name or other identifying information about an individual (including individuals who file complaints or speak to OCR) unless (1) it such information would assist in the completion of an investigation or for in enforcement activities against an institution that violates the laws, or; (2) unless such information is required to be disclosed under the FOIA or the Privacy Act. OCR will keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the civil rights laws, or unless disclosure is required under the FOIA, the Privacy Act or otherwise by law; or (3) such information is permitted to be disclosed under both the FOIA and the Privacy Act and OCR determines disclosure would further an interest of the Department and the United States.

However, OCR can release certain information about your complaint to the press or general public, including the name of the school or institution; the date your complaint was filed; the type of discrimination included in your complaint; the date your complaint was resolved, dismissed or closed; the basic reasons for OCR's decision; or other related information. Any information OCR releases to the press or general public will not include your name or the name of the person on whose behalf you filed the complaint except as noted in the paragraph above.

FOIA gives the public the right of access to records and files of Federal agencies. Individuals may obtain items from many categories of records of the Federal government, not just materials that apply to them personally. OCR must honor requests for records under FOIA, with some exceptions. Generally, OCR is not required to release documents during the case evaluation and investigation process or enforcement proceedings, if the release could reasonably be expected to interfere with the affect the ability of OCR to do its job. 5 U.S.C. § 552(b)(7)(A). Also, a Federal agency may refuse a request for records if their release would or could reasonably be expected to result in an unwarranted invasion of privacy of an individual. 5 U.S.C. § 552(b)(6) and (7)(C). Also, a request for other records, such as medical records, may be denied where disclosure would be a clearly unwarranted invasion of privacy.

Updated April 2014

[1]Complaints that allege discrimination based on age are timely if filed with OCR within 180 calendar days of the date the complainant first knew about the alleged discrimination.

Observation of Programs by Parents and Experts

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Enclosed please find excerpts from the above captioned new law, effective August 25, 2009. You probably are already aware that public school districts must allow observation by parents and their retained experts or other qualified professionals. There is an evolving procedure for submitting requests for observation in writing, then agreeing to an appropriate time for the observation. These procedures, as they continue to be adopted by school districts, should not be so rigid or constrained that the observation is rendered meaningless. The school district should be reasonably flexible in allowing observations that, of course, are not disruptive and that do not interfere with the education of other students. This law does not apply to private schools.

PUBLIC ACT 96-0657

(EXCERPT)

REGARDING mandated observation of educational programs by parents & professionals

2004 (Pub ...sibility of the State ...es setting forth the ...he federal Individua... ...nt Act of 2004 (Pub... ...boards. The notice sh... ...bility upon request of a list of free or low-cost legal and other relevant services available locally to assist parents in initiating an impartial due process hearing. Any parent who is deaf, or does not normally communicate using spoken English, who participates in a meeting with a representative of a local educational agency for the purposes of developing an individualized educational program shall be entitled to the services of an interpreter.

(g-5) For purposes of this subsection (g-5), "qualified professional" means an individual who holds credentials to evaluate the child in the domain or domains for which an evaluation is sought or an intern working under the direct supervision of a qualified professional, including a master's or doctoral degree candidate.

To ensure that a parent can participate fully and effectively with school personnel in the development of appropriate educational and related services for his or her child, the parent, an independent educational evaluator, or a qualified professional retained by or on behalf of a parent or child must be afforded reasonable access to educational

facilities, personnel, classrooms, and buildings and to the child as provided in this subsection (q-5). The requirements of this subsection (q-5) apply to any public school facility, building, or program and to any facility, building, or program supported in whole or in part by public funds. Prior to visiting a school, school building, or school facility, the parent, independent educational evaluator, or qualified professional may be required by the school district to inform the building principal or supervisor in writing of the proposed visit, the purpose of the visit, and the approximate duration of the visit. The visitor and the school district shall arrange the visit or visits at times that are mutually agreeable. Visitors shall comply with school safety, security, and visitation policies at all times. School district visitation policies must not conflict with this subsection (q-5). Visitors shall be required to comply with the requirements of applicable privacy laws, including those laws protecting the confidentiality of education records such as the federal Family Educational Rights and Privacy Act and the Illinois School Student Records Act. The visitor shall not disrupt the educational process.

(1) A parent must be afforded reasonable access of sufficient duration and scope for the purpose of observing his or her child in the child's current educational placement, services, or program or for the purpose of visiting an educational placement or program proposed for

the child.

(2) An independent educational evaluator or a qualified professional retained by or on behalf of a parent or child must be afforded reasonable access of sufficient duration and scope for the purpose of conducting an evaluation of the child, the child's performance, the child's current educational program, placement, services, or environment, or any educational program, placement, services, or environment proposed for the child, including interviews of educational personnel, child observations, assessments, tests or assessments of the child's educational program, services, or placement or of any proposed educational program, services, or placement. If one or more interviews of school personnel are part of the evaluation, the interviews must be conducted at a mutually agreed upon time, date, and place that do not interfere with the school employee's school duties. The school district may limit interviews to personnel having information relevant to the child's current educational services, program, or placement or to a proposed educational service, program, or placement.

PUBLIC ACT 96-0657
Citation:105 ILCS 5/14-8.02(g-5)
EFFECTIVE DATE: AUGUST 25, 2009

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SERVICES AT PRIVATE SCHOOLS:
Obligations of School Districts for Voluntarily Enrolled Students and "Unilateral" Parent Placements

WHITTED + TAKIFF + HANSEN LLC

PRIVATE SCHOOLS

Retroactive Reimbursement Under IDEA

I. The Burlington Case

A. Introduction

Prior to the Burlington case,[1] it was very difficult for advocates to argue on behalf of parents that retroactive reimbursement was a remedy which might be available under IDEA. Nevertheless, in 1985, the Burlington case was decided. A few of the very unusual things about the Burlington case were that (1) it was a *unanimous* U.S. Supreme Court decision and (2) it was an opinion delivered by Justice Rehnquist. As some of the readers of this article might be aware, unanimous Supreme Court opinions do not occur all that often, and Mr. Justice Rehnquist was not known for his sympathies toward protected groups. These two factors make the Burlington opinion all that much more powerful.

B. The Opinion

The Burlington opinion involved the parents' unilateral placement in a facility, in part during the pendency of proceedings under the IDEA. At the end of the case, since the district noted that the parent had only prevailed partially, the school district sought to be paid back for that period of time during which it felt it had "won" part of this *six year* case. The U.S. Supreme Court said that the "stay put" or "frozen placement" provision did not work two ways. In other words, the IDEA provision is **parent oriented**. Thus, it applies only where a parent, in an attempt to provide an appropriate educational setting for his or her child, effects a unilateral placement in an appropriate facility.

There was a caveat in the case. Where an appropriate education is shown to have been *made available* by the district at the time the unilateral placement was made by the parent, the parent placement of the child in a non-public location is at parents own expense. This tracks precisely with the provision in the regulations at 34 C.F.R. 300.403(a) which stated at the time the case was decided:

> *If a child with a disability has FAPE[2] available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to*

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1 *Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).*

2 *Free Appropriate Public Education.*

pay for the child's education at the private school or facility.

II. The Carter Case

A. Introduction

Once the Burlington case was decided, legal luminaries in the field of parent advocacy were most pleased to advise their clients that this remedy was available, as long as the facility chosen by the parent "met the standards" of the state in which retroactive reimbursement is sought. In Illinois, for example, the state statute provides for the state board to maintain an "approved" list of placements which have met certain state standards.[3] In Indiana, there is no such list and if the proper approvals are obtained in a particular case, any reasonably appropriate facility may be used. States do vary, but advocates did make attempts to steer their clients to "state approved" facilities.

B. The Case Facts

In 1993, Justice Sandra Day O'Connor delivered the Carter opinion.[4] In this case, the pupil in question, Shannon Carter, was classified as learning disabled in ninth grade in 1985 and the school's recommendation was regular education with three resource periods per week. The goal was to get Shannon to progress *four months* during the *entire school year*. The parents requested a hearing, and on both administrative levels, the independent hearing officers held (against the parents) that the IEP was adequate. Meanwhile, the parents had placed Shannon privately in a school for disabled LD students, but this school was not "approved" by the state and in fact **did not even write Individual Education Plans**. Shannon graduated from the school in 1988.

In 1986, two years before Shannon's graduation, the parents filed suit to challenge the adverse administrative decisions. After a bench trial, the parents won. The court, in the process, appointed an independent expert to evaluate Shannon's progress and gave great weight to the findings. It was found that she had made "substantial progress" even though the school did not follow all of the state standards. For example, her reading levels rose *three grades* per year as opposed to the goals designated in the IEP.

The appellate court affirmed that the private school was "appropriate," and that the parents were entitled to retroactive reimbursement. It should be noted in this case that the violations generally were not procedural but substantive in nature. A challenge to the substantive basis for the IEP becomes a

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3 *Cite 105 I.L.C.S. 5/14-7.02 (1994).*

4 *Florence County School District Four v. Carter, ___ U.S. ___, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).*

battle of experts and it is best to use the most highly qualified and reputable experts that a parent can afford. An affiliation with a major center of learning also helps.

C. Court's Holdings

The Supreme Court, after reviewing the appellate court and trial records, delivered the following holdings: (1) that the IEP was inappropriate; (2) that the private school's program was reasonably calculated to enable the child to receive educational benefits under the Rowley[5] test; and (3) that retroactive reimbursement to parents when an IEP is found to be inappropriate ***does not require placement in a state approved program***.

In somewhat acid tone, Justice Sandra Day O'Connor asked why courts should leave the job of "approval" in the hands of the very agency that violated the plaintiff's rights in the first place.

This decision was unanimous, as was Burlington, which was heavily quoted in the Carter decision. The case further held that Burlington grants parents a right of "unilateral withdrawal" and placement of their child in a non-approved private facility when a district's IEP is inappropriate. The Court explained that "approval" requirements *do not make sense in the context of a parental placement*. Note also here that the private school was in fairly severe non-compliance with any state standards. Two faculty members were not state certified, they didn't write IEPs, and the State of South Carolina kept no list of approved private schools but "approved" them on a case by case basis. However, it was pointed out by Justice O'Connor that public school officials had previously placed three children at the school.

The final holding of the Court is instructive. As support for the proposition that parents need not seek state cooperation in the form of state approval of the parents' placement, she noted that "such cooperation is unlikely in cases where the school officials disagree with the need for private placement." Id., 114 S.Ct. at 366.

III. Public Law 105-17: The 1997 Revisions to IDEA Limit *Carter/Burlington* Recovery to Some Degree

A. New IDEA Section

The new Section 1412(a)(10(C)(iii) mandates that to preserve the parental right to seek retroactive reimbursement under the *Burlington* and *Carter*

[5] *Board of Education v. Rowley, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982).*

cases, it is necessary that the district be notified at the "most recent IEP meeting" or letter must be submitted to the district, at least ten business days in advance of actually placing the child, of parental intent to place. This means there must be some evidence that the district has actually received the correspondence, and further, the parent theoretically cannot place prior to ten business days having elapsed from date of receipt. The term "business day" includes any regular business day even though that might fall on a school holiday.

B. Effects of Amendment

The Burlington and Carter cases have thus been limited by IDEA reauthorization. There are certain specific limitations to retroactive reimbursement if parents do not properly comply with their notification duties. For convenience, a sample notification form is attached, "Appendix I."

IV. Preauthorization - "Proportionate Share"

A. Decisional Precursor to Reauthorization

Fowler v. Unified School District 259, 107 F.3rd 797 (10th Cir. 1997)

B. Facts and Holdings of the Courts

Parents withdrew their hearing impaired son from a district school and enrolled him in a private school, requesting an ASL interpreter onsite full time for purposes of "increased academic challenge." The school district declined and the parents requested a hearing. The hearing officer held for the parents, with the state level hearing officer reversing against them. The parents then appealed to the federal district court which held for the parents and this case involved the district's federal appeal of that adverse trial court ruling.

The court held there was an obligation for "equitable" participation in FAPE for "voluntarily enrolled" pupils, as there is a difference between children placed in private schools through an IEP and those placed "unilaterally" at parental discretion (as in this case).

The court examined K.R. v. Anderson Community School Corp., 81 F.3d 673 (7th Cir. 1996) and Goodall v. Stafford County School Board, 930 F.2d 363 (4th Cir. 1991). Both of these cases held that if FAPE is made available by the district and the parents choose, at their discretion, to enroll the child at a private facility, there is no obligation on the part of the district to give services onsite. The court also looked at Cefalu (103 F.3d 393, 5th Cir. 1997) and Russman (85 F.3d 1050, 2nd Cir. 1996) and Cefalu's test as follows: "Is onsite provision of services necessary in order for them to be meaningful?" If the answer is yes, according to Cefalu, the student is entitled to some, but not more, benefit than he or she would receive if attendance was at the public school.

C. Discussion

Most significant about this case is the pre-IDEA reauthorization "proportionate share" language. Here, the court stated that district must calculate the average amount spent per pupil (it is unknown whether this is per handicapped pupil or all pupils) in the public school for the service in question, and make an "equivalent" amount of funding available for any student enrolled in a private school. Later, of course, the U.S. Supreme Court vacated the rulings in Anderson, Russman, and Fowler and ordered the appellate courts to reexamine their holdings in light of the reauthorization of IDEA.

V. IDEA Reauthorization - Private Schools (20 U.S.C. §1412(a)(10) et. seq.)

A. Enrollment by Parents - §1412(a)(10)(A)(i) ("voluntarily" enrolled children)

Districts must provide a "proportionate share" of services, in accord with the following:

1. Amounts expended for provision of services by a local education agency shall be equal to a "proportionate amount of federal funds made available under this part."

2. Such services may be provided to children with disabilities on the premises of private, *including parochial*, schools to the extent "consistent with law."

B. Children Placed in, or Referred to, Private Schools by Public Agencies -- §1412(a)(10)(B)(i)

(i) In general - schools must provide FAPE in private facilities if that was the purpose of making the referral in the first place.

(ii) Standards:

- ► facility and services must meet the LEA standards
- ► children have the *same rights as if directly served by the local education agency*.

C. Payment for Education of Children Enrolled in Private Schools Without Consent of or Referral by the Public Agency -- §1412(a)(10)(C)

1. (i) In general - there is no requirement for the LEA to pay if it was making FAPE available and the parents elect to enroll the child in a private facility anyway. This is no change from Rowley, Burlington, and Carter.

2. (ii) A district may be liable for retroactive reimbursement if it is found by a court or hearing officer not to have offered FAPE *in a timely manner* prior to parental enrollment in a private facility.

   - ► This section seems to be limited to children who have previously received special education and related services through a public agency.

3. (iii) Limitation on reimbursement - reimbursement may be reduced or denied (i) if

   - ► (aa) at the most recent IEP meeting the parents did not inform the LEA that they were rejecting its placement, and *including a statement of their concerns, as well as their intent to enroll their child in a private school at public expense*; or

   - ► (bb) parents fail to notify the LEA in writing ten business days in advance of placement of their concerns, prior to their child's removal from the public schools. (It should be noted here that "business day" includes any school holidays falling on a business day.) See "Appendix I."

D. Exceptions to **Limitations** - §1412(a)(10)(C)(iv)

The above section, imposing certain duties on parents, does <u>not</u> apply if:

- ► Parent is **illiterate** and cannot write in English;
- ► Compliance with the clause would likely result in physical or serious emotional **harm** to the child;
- ► The school ***prevented*** the parent from providing the required notice;
- ► The parents have not received a ***written notice*** of their own obligation to provide notice under this section.

Further limitations or denials pursuant to §1412(a)(10)(C)(iii)(II) can occur,

- ► If, prior to parent removal from the public school, the LEA informs the parents of its intent to evaluate the child and the parents **refuse** to make the child available for such evaluation, or
- ► (iii) upon a *judicial finding* of **"unreasonableness"** with respect to the parents.

APPENDIX I

UNILATERAL PLACEMENT FORM LETTER

(To be Sent to School Superintendent at Least 10 Business Days in Advance of Placement)

Date: _____

Re: ***(Name and Age of Student):***
Written Notice of Intent to Place Disabled Child in Nonpublic Facility and Seek Reimbursement from School District Pursuant to Public Law 105-17 at 20 U.S.C. 1412(a)(10)(C)(iii)(I)(bb)

Dear Superintendent:

Please treat this correspondence as your formal written notification pursuant to the above captioned section of Public Law 105-17. We intend to place our above named child at the _____ School [address, phone] on _____, 19____. We will seek reimbursement of costs for that nonpublic facility from your district.

As you are aware, Section 1412(a)(10)(C) states as follows:

(C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOL WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY. (...)

> *(iii) LIMITATION ON REIMBURSEMENT. The cost of reimbursement described in clause (ii) may be reduced or denied -- (I) if --*
>
> > *(aa) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or*
> >
> > *(bb) Ten business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa); ...*

Please treat this correspondence as your formal 1412(a)(10) notice as required by that section.

Sincerely,

____

Parent(s)

The Final Word on School Health Services:

The U.S. Supreme Court Decision in

Cedar Rapids CSD v. Garret F.

WHITTED + TAKIFF + HANSEN LLC

I. Facts and Case History

When he was four years old, Garret's spinal column was severed in a motorcycle accident. There was no adverse effect on his mental capacities. He is ventilator dependent and needs someone nearby at all times. In 1993, mother requested the school district to be financially liable for one-to-one school nursing services while Garret was at school. The school district denied this and thought at that time they were not responsible for services they felt were "medical." Garret was the only ventilator dependent pupil in this district of 17,500 students. Mother requested a hearing and during the proceedings, the school district admitted the services were *capable of being provided by a non-physician*. The administrative hearing officer held that the school district had to provide the services, for this reason, according to the Tatro case. The school district then appealed the hearing officer's administrative decision in federal court, and the court upheld the hearing officer's ruling, granting the parent's motion for summary judgment. The Court of Appeals affirmed, using the Tatro "bright line" test, since it was undisputed that Garret could not attend school if the services were not provided.

II. The Supreme Court Opinion

A. District's Position

In its petition, the school district asked the Supreme Court to overrule the appellate court in favor of a "multi factored" test, not a "bright line" test. The Supreme Court held in favor of the Appellate Court because, they said, the text of the related services definition is very clear, and here, the district did not challenge the idea that Garret needed the services requested. The court further commented in a footnote that they see no reason to either revise Tatro or rewrite the U.S. Department of Education's regulations, which favor the test used by the Appellate Court. The court therefore held that the in school services, while more extensive and expensive, must be provided, and further that Garret's needs were no more "medical" then those needed by Amber Tatro in her case. [1999 WL 104410*4.]

1. *"Continuous" and "Complex" (Translation: Expensive)*

The school district used an argument that the services were required in a complex form and they were necessarily "continuous." Yet the court said unequivocally that "the district's multi factor test is not supported by any recognized source of legal authority." Just because "continuous" services may be more costly and require more personnel does not make them any more "medical" under Tatro. [Footnote 8 at 1999 WL104410*5.]

2. *Limitations of "Existing" Staff*

The court further stated that the "district cannot limit educational access simply by pointing to the limitations of existing staff. The district must hire specially trained personnel as required by law." As to this problem of existing school staff being unable to meet all of their responsibilities and provide for Garret too, the concept was dismissed out of hand. As in

Honig, the U.S. Supreme Court declined to read into the law a definition that was not present. The court was remarkably consistent here. Note also footnote 9 (at 1999 WL104410*5) which mentions that Garret had a teaching assistant who also was a qualified LPN. In Iowa, the State Board of Nursing has held that RN's can delegate responsibilities to LPNs.

The court further held that school districts cannot use cost itself in the definition of related of related services. This would be "judicial law making without any guidance from Congress." Citing Rowley, as courts always do, the court further required that districts must "open the door" of opportunity to all qualified children. There is no "onerousness" exception.

III. Summary

The analysis in this case is just as simple as that found in the Tatro case: is *meaningful access* to the public schools assured? This is not about the "level of education that a school must finance once access is attained." To be specific, the services at issue were as follows:

1. Ventilator checks;

2. Ambubag (manual breathing assistance) when ventilator is being maintained and as needed;

3. Urinary bladder catheterization;

4. Suctioning of tracheotomy tube as needed;

5. Getting Garret into a reclining position five minutes during every hour; and

6. Assistance from someone who is familiar with emergency procedures, in other words, at least an LPN.

The court held that regardless of how expensive or complex (the dissent points out that the services will cost the school district $18,000 per year), the services must be provided if Garret is to remain in school. It was held that the district is required to provide these services and further, that the Neely and Detsel cases (appellate cases favoring the approach of the district) have now been abrogated.

IV. Conclusion

The U.S. Supreme Court has now adopted the Tatro "bright line" test: if a related service is required to enable a qualified disabled pupil to remain in school, it must be provided as long as it is not a purely "medical" service. And "medical" is provider controlled, that is, if the service can only be provided by a licensed physician, it is an exempt "medical" service unless it is needed for diagnostic or evaluative purposes. If, however, the service is capable of being delivered by a non-physician, it must be provided by school districts regardless of any financial or staffing burdens the act of providing the services might impose. The Supreme

Court has again - and quite predictably in light of the Honig case on expulsion - read the Act for its plain, simple meaning and has again declined to "read in" exceptions that are not present.

Suspension, Expulsion and Discipline Under the IDEA

WHITTED + TAKIFF + HANSEN LLC

INTRODUCTION

A New York City study found that while disabled children constitute thirteen percent of the student body, this minority percentage is responsible for 50.3 *percent* of violent incidents directed against staff. Almost all of these attacks emanate from the categories of autism and seriously emotionally disturbed children. Apparently with considerations such as these in mind, Congress in 1997 amended the Individuals with Disabilities Education Act ("IDEA") so as to encourage state boards of education to set aside dollars for the purpose of providing direct services to children, *including* alternative programming for children who have been expelled from school.[1] It is ironic to observe that state education agencies now have, under §1411(f)(3) of the amendments, the authority to *take money away* from school districts that are currently doing a good job of providing a free appropriate public education ("FAPE") to students and to reallocate it to those districts who are *not*. In the 2004 reauthorization of the IDEA, Congress once again amended significant portions of the statute as it relates to disciplining students with disabilities. The recent amendments provided districts more flexibility to discipline students with disabilities. What follows is an attempt to make sense of a number of quite complicated provisions, some of which have been added for the first time to IDEA. A serious attempt has been made to write clearly and simply and to reduce the need for the repeated cross-referencing that is endemic to the amendments. It is hoped that parents and educators alike will find this initial review helpful.

I. Suspensions

In Illinois, suspensions are defined as "a period not to exceed 10 school days."[2] The IDEA protects students with disabilities from excessive suspensions by defining the removal from the students "then-current educational placement" for more than 10 school days as a "change of placement".[3] In general, districts cannot unilaterally change a student's placement without consent from the parents. Therefore, suspensions 10 school days or less are not considered a "change of placement" and do not require the parents' consent. During the 10-days of suspension, the federal implementing regulations suggest that IEP services do not need to be provided, although the statute itself does not provide for any interruption of educational services.[4]

It is clear that districts cannot suspend students with disabilities for longer than 10 days in a row without resorting to the additional procedures required when districts seek an expulsion or change of placement (which will be discussed in more detail below in Section II). However, there is currently great debate as to what extent a district can suspend a student with disabilities more than 10 *non-consecutive* days within a school year before the suspensions constitute a change of placement, and therefore, subject to these additional procedures.

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1 *20 U.S.C. §1411(e)(2)(c)(ix).*
2 *105 ILCS 5/10-22.6(b).*
3 *20 U.S.C §1415(j) and (k)(1)(B).*
4 Compare, 34 CFR 300.530 with 20 USC §1415(k).

When looking at more than 10 non-consecutive days of suspensions, the general rule is that a change of placement occurs when "the child has been subjected to a series of removals that constitute a [pattern of removals]." [5] To determine whether a "pattern" exists, the school district will on a case-by-case basis look to factors such as (1) whether the child's behavior is substantially similar to previous incidents, (2) the total amount of time the child has been removed, (3) the length of each removal, and (4) the proximity of the removals to one another.[6] The district's decision is subject to review through due process and judicial proceedings. If the parent files for due process, there is a statutory injunction, referred to as the "stay put provision" enjoining the school district from changing the "current" educational placement during the pendency of all proceedings under the IDEA.[7]

> *PRACTICAL APPLICATION OF THE LAW: Districts should take a conservative approach toward suspending students for more than 10 school days in any given school year. Parents and districts should carefully monitor students who are repeatedly suspended and proactively request a meeting to discuss the student's current educational program. Alternative behavioral intervention plans and/or more supportive placements should be considered in lieu of multiple suspensions from school. Only in situations where the student has engaged in dangerous behaviors harmful to the child or educational environment should a district go beyond 10 suspension days in a school year.*

Finally, in addressing cases of suspensions for less than 10 days, it should be noted that students with disabilities retain the same procedural rights as their non-disabled peers to contest a school suspension using the regular education procedures. While a suspension may not be considered a change in placement, school district still must report the suspension immediately to the parents of guardian of the student along with a full statement of the reasons for the suspension and notice of the right to review that decision.[8] If the parents or guardian request a review, either the school board or hearing officer would review the actions of the school administrators. The student would have the ability to be heard and present evidence contesting the allegations. The board would then take action "as it finds appropriate." While decisions regarding suspensions may be reviewed judicially, Courts are reluctant to overturn a district's discretion in disciplinary matters where the deprivation of schooling is 10 days or less.

II. Expulsions

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5 *34 C.F.R. §300.536.*
6 *Id.*
7 20 U.S.C §1415(j).
8 *105 ILCS 5/10-22.6.*

The general rule as set forth by the United States Supreme Court and the IDEA, is that no disabled student may be expelled for behavior that is a manifestation of his or her disability.[9] There are significant changes in the 2004 amendments to the IDEA concerning the standards for determining when behavior is a manifestation of a student's disability. In order for a school district to expel a student with disabilities, the relevant members of the student's IEP must meet in what is typically called a manifestation determination review ("MDR") meeting. An MDR meeting must be convened within 10 school days of any decision to expel or change the placement of the student.

> *PRACTICAL APPLICATION OF THE LAW: Since there are strict 10 day timeframes to implement the manifestation review meeting, district typically suspend students with disabilities for 10 days in order to have time to assemble to relevant staff and review the student's situation. Parents, on the other hand, often use this time to contact legal counsel as well as the student's private clinical providers so that the student's entire clinical "picture" will be provided at the meeting as well as other mitigating or relevant information.*

At the MDR meeting all relevant information[10] shall be considered in order to address two questions: (1) Is the conduct in question caused by, or had a substantial relationship to, the student's disability; and (2) Is the conduct in question the result of the school district's failure to implement the IEP. If either answer is "yes" then the behavior is a manifestation and the school may not expel the student or change his or her educational placement. In addition, a "yes" to either question creates in the school district an additional responsibility of conducting a functional behavioral assessment and implementing a behavioral intervention plan based on that assessment, or if a behavioral plan already exists, the affirmative duty to review and modify the plan as necessary. Finally, unless the behavior falls into one of the special circumstances described below in Section III, the student must be returned back to the educational placement from where he or she was removed unless the district and parents agree to a change in placement as part of the behavioral plan.

If the district at the MDR determines that the behavior was unrelated to the student's disability and the IEP was properly implemented then the student is subject to a change of placement and any other disciplinary measures that could be imposed on a non-disabled student, including expulsion through the regular education expulsion process. Under the IDEA, the school district must still provide special education services to an expelled student with disabilities, so as to enable the child to continue to progress in the general education curriculum and progress towards meeting his or her IEP goals. These services would be provided to the expelled student in an alternative educational setting.

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[9] 20 U.S.C §1415(k)(3) and Honig v. Doe, 108 S.Ct. 592 (1988).

[10] Relevant information can include, among other items, any evaluative and diagnostic results (including all information supplied by the parents), an observation of the child, and a review of the child's IEP and current placement.

The decision of the MDR team with respect to placement or the manifestation determination is subject to appeal through a due process hearing. As previously indicated, the filing of the due process request triggers the "stay put provision" of the IDEA, which enjoins the district from removing the student from his or her then-current educational placement during the pendency of any all proceedings under the IDEA. The U.S. Supreme Court stated unequivocally in *Honig v. Doe* that unless the parents and school district agree, the student remains in the then-current educational placement. Referring to the intent of Congress the Court stated,

> *We think it clear, ... that* ***Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.*** *In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.*[11] (Emphasis Added)

The Court also remarked that the absence of an "emergency" exception to the stay-put provision for "dangerous" students was "conspicuous."

Therefore, the filing of a due process request enjoins the district from removing (i.e. expelling) the student until the issues are resolved through the administrative hearing. The Court's interpretation is consistent with the reasons for initial passage of the EHA, which included the fact that school systems across the country had excluded one out of every eight disabled children from classes. The Supreme Court stated that participating states must educate all disabled children, regardless of the severity of their disabilities.

III. Special Circumstances

Prior to the 1997 and 2004 amendments, school districts seeking to override the "stay put" provision had to affirmatively go into Court and seek a restraining order or injunction based on the severity or dangerousness of the student's misconduct. The legislature finally added an "emergency" exception (previously noted by the *Honig* Court to be absent) to stay-put in the 1997 and 2004 amendments. There now exist several circumstances where upon the commission of certain offenses, the school district can unilaterally place a student with disabilities in an interim alternative educational setting regardless of whether the behavior was a manifestation of the student's disability. If a student with disabilities while at school, on school premises, or at a school function (1) carries or possesses a weapon, (2) knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance, or (3) inflicts "serious bodily injury" upon another person, that student can be removed to an alternative educational setting for up to 45 school days without regards to whether the behavior is determined to be a manifestation of the student's disability.

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[11] Honig at 604.

PRACTICAL APPLICATION OF THE LAW: A "weapon" is defined as, "A weapon, device, instrument material, or substance, animate or inanimate, that is used for or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade less than 2 ½ inches in length." 20 U.S.C. §812(c)

It is important to note that districts can place students who have committed any of the three acts unilaterally. However, the interim alternative placement must be determined by the IEP Team, not an individual school administrator. The placement must be selected so as to enable the child to *continue to progress in the general curriculum*, although in another setting, to *continue to receive all IEP services* that will enable the child to meet his IEP goals, and finally shall include *services and modifications* designed to address the behavior so it will not reoccur.[12] Even if the district elects to place a student in a 45-day placement, they are still obligated to follow the procedural timeframes regarding holding a MDR meeting.

The decision to place a child in an interim alternative placement may be appealed through a due process request. Furthermore, under the new amendments, school districts can file their own due process to request an order from a hearing officer ordering an alternative placement for 45 school days if the student does not fit into one of the three special circumstances, but the district believes that maintaining the current placement is substantially likely to result in injury to the child or to others.

IV. Due Process for Disciplinary Decisions

A special education due process hearing may be requested by the parent of a child with a disability who disagrees with any decision regarding the manifestation determination or placement resulting from an MDR or unilateral alternative 45-day placement. As noted above, the district can also request a hearing to place a student in an alternative 45-day placement if the district believes that maintaining the current placement is substantially likely to result in injury to the child or others.

If the school district has placed the student in a 45-day interim alternative setting, then the student will remain in that placement pending the decision of the hearing officer or the expiration of the time period, whichever occurs first. Therefore, all challenges to 45-day placements are expedited, meaning that they must occur within 20 school days of being requested with a decision issued within 10 school days. At expedited hearing, the hearing officer will determine one of the following questions: (1) whether the child shall be placed in the proposed alternative educational setting; or (2) whether the district has demonstrated that the child's behavior was not a manifestation of the child's disability.[13]

[12] *20 U.S.C. §1415(k)(1) and (2).*
[13] 23 Ill Admin. Code 226.655

PRACTICAL APPLICATION OF THE LAW:

Events	Appeal By	Status of Hearing
MDR (Not related)	Parents	Expedited
Unilateral 45-Day Placement (Special Circumstance)	Parents	Expedited
Unilateral 45-Day Placement (No Special Circumstance)	District	Expedited
MDR (Related, Change of Placement other than 45-day)	Parents	Non-expedited
MDR (Related, No Change of Placement, Change of Services)	Parents	Non-expedited

Consequently, there can be circumstances where two separate due process hearings are required to resolve all issues. Take for example the situation where a student brings drugs to his traditional high school where he attends. The District convenes an MDR and finds that the behavior is related, but determines that after looking at other disciplinary incidents over the course of the year, that the current placement is not meeting the student's needs and therefore also recommends a therapeutic day placement. In addition, the district exercises its right to unilaterally place the student at a 45-day placement pending his more permanent placement.

In the above case, the parent has the right to challenge the 45-day placement through an expedited hearing. In addition, the parent can bring a non-expedited hearing to challenge the change in placement. So where is the stay-put placement during these appeals? For 45-school days the student would remain at the 45-day placement until the expedited hearing is resolved in the student's favor or the 45-school days expire. At the conclusion of the 45-day placement the stay-put would convert back to the traditional high school until the completion of the non-expedited hearing. Of course, if the facts warrant, the district could bring an additional expedited due process hearing alleging that the current placement is dangerous to the student or others. If the hearing officer agrees that the student was a danger to themselves or others, the district could place the student in subsequent additional 45-day alternative placements while the non-expedited hearing was pending.

If the nature of the student's behavior does not fall under one of the special circumstances, then the filing of a due process triggers the stay-put provision and the student may not be removed from the last agreed upon IEP placement. While a great deal of detail has been provided regarding the amendment's complex special circumstances, the IDEA remains essentially intact in that there is still a presumptive injunction enjoining school districts from changing the "current" educational placement during the pendency of all proceedings under the Act that do not fall under the narrow special circumstances exceptions.

This is underscored by a recent Massachusetts administrative due process hearing overturning the district's decision to place a student with Asperger syndrome, ADHD and multiple LDs in a 45-day interim alternative setting for pulling the principal's tie when he learned he would not be permitted to leave school early. The hearing officer in that case noted that the student did not cause serious bodily injury and refused to find that the tie was a "weapon," as it was not capable of causing death or serious injury. Furthermore, the hearing officer noted that the student did not "possess" or "carry" the necktie. Since there were no special circumstances present, the district was not permitted to change the student's placement

unilaterally. *Scituate Public Schools*, 47 IDELR 113 (Massachusetts State Educational Agency, January 29, 2007)

V. What is the Current Placement During Appeals?

In summary, when a *parent* requests a hearing to challenge a disciplinary action taken by a school district for weapons/drugs/risk of injury behavior, and this challenge involves a dispute as to the alternative educational setting chosen or the manifestation determination decision made, the child must remain in the alternative education setting until the expiration of the time period in the applicable paragraph, i.e., not more than 45 days.[14]

If a child is placed in an interim 45-day alternative placement for weapons/drugs/risk of injury behavior and school personnel propose to change the placement *after the expiration* of the 45 day time period, during the pendency of any challenge to the proposed change, the child must remain in the location he was in *prior to being moved* to the alternative educational setting, except that the local education agency may request an "expedited hearing" if they think it is dangerous for the child to go to the pre-AES placement.[15] In this instance, to order a change in placement, the officer must find that:

- ✓ the school district has shown that maintenance of the current placement is substantially likely to result in **injury to the child or others**;
- ✓ the current alternative educational **setting is appropriate**;
- ✓ the school district has made **reasonable efforts** to minimize the risk;
- ✓ the alternative educational setting meets the "additional requirements" to enable the child to **continue to participate in the general curriculum** even though he is placed in another setting and to **continue to receive all IEP services** enabling the child to meet his IEP goals, including modifications designed to address the behavior in question.

VI. Protections for Children Not Yet Eligible for Special Education - 20 U.S.C. §1415(k)(5)

A child can invoke special education procedures, even if he or she is not yet eligible for special education, if the school district had knowledge that the child had a disability *before* the behavior in question occurred. The basis of such "knowledge" is as follows:

1. The parent (if not illiterate) has expressed a concern in writing that the child is in need of special education services to either supervisory or administrative personnel of the district or to a teacher of the child.

-- OR --

2. The parent has requested a Case Study Evaluation;

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[14] *20 U.S.C. §1415(k)(4).*
[15] *20 U.S.C. §1415(k)(7)(B) & (C).*

-- OR -

3. A teacher or "other [school district] personnel" have expressed concern about the child's behavior or performance to the Special Education Director or to "other supervisory personnel" of the local education agency.[16]

If there is no "knowledge" found to be present, the child may be subject to the same discipline rules as others.[17] However, if a request for an evaluation is made during the time the child is subjected to disciplinary procedures, the evaluation must be "expedited."[18] No time period is specified, however.

If the child is determined to be a child with a disability, the district must provide special education services and extend all of the disciplinary procedural protections of the Act, including holding an MDR meeting.

VII. Other Considerations: Records Confidentiality Issues

A provision requires that any school district reporting a crime must ensure that copies of the special education and disciplinary records are transmitted for consideration by the appropriate authorities to whom it reports the crime.[19] Although this provision is explicitly intended to reverse some of the case law which held that a report to juvenile authorities is an arguable change of placement, the amendment goes too far and in fact would be a direct violation of the mental health confidentiality acts of many states. Certainly, any conveyance of "special education and disciplinary records" without proper consent of the parents and any minor age 12 to 18 would be a clear violation of the Illinois Department of Mental Health and Developmental Disabilities Confidentiality Act, thereby raising the possibility of an award of attorney fees and damages to the parents from the violating district.

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16 *20 U.S.C. §1415(k)(5)(B).*
17 *20 U.S.C. §1415(k)(5)(D)(i).*
18 *20 U.S.C. §1415(k)(5)(D)(ii).*
19 *20 U.S.C. §1415(k)(6)(B).*

APPENDIX A

NOTE: An expedited due process request should be used when contesting the manifestation determination or placement in an alternative educational setting resulting from disciplinary action.

EXPEDITED DUE PROCESS REQUEST FORM

(to be hand delivered or sent by certified mail)

Date: _____

_____, Superintendent
_____
_____

Re: **(Name of Student, Age, Date of Birth)**

Dear Superintendent _____:

Please treat this correspondence as a formal request for a due process hearing pursuant to 105 ILCS 5/14-8.02b, 23 Illinois Administrative Code §226.655, 20 U.S.C. 1415(k)(3) and 34 CFR 300.532, 300.533, 300.507 and 300.508.

I. Name of Child:

The name, age, and date of birth of the child are stated above.

II. Address of Child's Residence:

Address:
_____
City/State/Zip:
_____
Phones:
_____

III. Name of School the Child is Attending:
_____
_____

IV. Description of the Nature of the Problem, Including Facts Relating to the Problem:
_____
_____

V. Proposed Resolution of the Problem to the Extent Known and Available at the Present Time:
_____
_____

For the above listed reasons, it is our position that the district has failed to provide our child with a free appropriate public education as required by state and federal law. We will participate in state sponsored mediation efforts.

Sincerely,

_____

Parent(s)

School Discipline: Board has Obligations, Discretion in Discipline

WHITTED + TAKIFF + HANSEN LLC

School discipline: Board has obligations, discretion in discipline

by Brooke R. Whitted, Neal E. Takiff and Shermin S. Ali

Brooke R. Whitted, Neal E. Takiff and Shermin S. Ali are attorneys with Whitted, Cleary and Takiff LLC in Northbrook, Illinois.

A study by the Illinois Criminal Justice Information Authority regarding balanced and restorative justice revealed that between 1991 and 2007, according to Illinois State Board of Education statistics, public school suspension rates increased 56 percent and expulsion rates more than doubled in Illinois.

Part of this increase may be attributable to the Gun-Free Schools Act of 1994, which led to a national zero tolerance policy authorizing expulsion for *no less* than one academic year for bringing a weapon to school. Since then, however, school districts have expanded zero tolerance to include nonviolent student behavior.

Additional ISBE statistics point to zero tolerance policies that possibly are not being applied consistently to all students. While 77 percent of school arrests in Chicago Public Schools were of black students, they constitute just 50 percent of the district's student population. For the state overall, African American students represented 44 percent of the 2009 expulsions and 45 percent of one-time 2009 suspensions, while making up just 19 percent of the entire state school population.

But school discipline is an area in which school officials have broad discretion. And in Illinois, courts have been reluctant to overturn decisions to suspend or expel students made by school boards.

Just how informed are school board members about their obligations and discretion in terms of suspensions and expulsions?

The information that follows reviews laws and case law related to the suspension and expulsion of non-disabled students, as well as "zero tolerance" and alternative attendance policies. The rules for disabled and special education students are different and are referenced at the end of the article.

Suspensions

In Illinois, a suspension is defined as the removal of a student from school for a period of 10 consecutive days or less for a serious act of misconduct. However, where a student is suspended due to gross disobedience or misconduct on a school bus, the suspension may be more than 10 days in length for safety reasons.

In Illinois, a total of 79,292 students were suspended once during the year; 57,165 were suspended more than once.

State law does not put an upward limit on the cumulative number of days that a non-disabled student may be suspended during the school year; the only limitation is the maximum of 10 days *per* suspension.

According to the *Illinois School Code*, "Gross disobedience or misconduct that may lead to suspension or expulsion of a student shall include any activity or behavior which might reasonably lead school authorities to forecast substantial disruption or material interference with school activities or which in fact is substantial disruption or material interference with school activities." (*105 ILCS 5/10-22.6*)

It is important to note that the section quoted above was not intended to be a self-executing regulation of student conduct; rather it is a "grant of power" to local school boards. It does not prohibit specific acts or omis-

sions which may be penalized by suspension, but serves as a guide to school boards, suggesting that to be grounds for suspension or expulsion, the student's disobedience or misconduct must be "gross."

In *Goss v. Lopez* (1975), the U.S. Supreme Court recognized that "[s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have, and an opportunity to present his side of the story."

In *Goss*, the Supreme Court set out the minimum due process required for the suspension of students from school for 10 days or less, which was subsequently incorporated into the *Illinois School Code* by the legislature.

According to Section 10-22.6(b), when a child is suspended from school, the school must immediately provide the parent or guardian with oral or written notice of the suspension, which includes:

- the reason for the suspension;
- the length of the suspension; and
- notice of the parent or guardian's right to review the school's decision to suspend their child.

If a child is suspended, a parent or guardian may appeal the suspension by requesting a meeting (or "review") with school officials. At this review, the parent and child may talk with school officials about the suspension and reasons that the student should not be suspended.

A school board official, or hearing officer appointed by the school board, must review the action of the suspending school official. A hearing officer is someone qualified by the Illinois State Board of Education and chosen from a list of five potential names provided by ISBE. The hearing officer submits a written summary of the evidence heard at the review to the school board. Subsequently, the school board may take action as it finds appropriate.

While the reality may be that by the time a review of the suspension is scheduled, the period of the suspension will already have been served by the child, it may nevertheless be important to appeal a child's suspension. Parents who successfully appeal a suspension can effectively remove that suspension from their child's school record, ultimately reducing the likelihood that the child will be expelled for subsequent misconduct, and eliminating the stain on the student record that colleges may consider.

Once the school board decides a student will be suspended, a parent/guardian may request schoolwork for their child during that suspension. The Student Code of Conduct for Chicago Public Schools states that school principals shall make sure that suspended students receive homework assignments during their suspension and that those students' grades will not be lowered if the work is completed satisfactorily.

However, not all districts allow make-up work that can count toward a student's grade. Local board policies should provide guidance in this area.

Expulsions

An expulsion is defined by the *Illinois School Code* as a removal of a student from school for gross disobedience or misconduct for a period of time ranging from in excess of 10 days to a definite period of time *not to exceed two school years*.

In 2009, 967 students were expelled from school districts in Illinois.

The Supreme Court in *Goss*, as previously cited, noted that in the instance of expulsion, more formal due process procedures are required since an expulsion involves more serious consequences than a suspension.

The Illinois legislature provides for this increase in the due process required in 105 ILCS 5/10-22.6(a). As a result, in Illinois, a student may be expelled *only after* his/her parent has been requested to appear at a meeting with the school board, or with a hearing officer appointed by the school board, to discuss their child's behavior. Again, a hearing officer is appointed from a list of qualified candidates certified by ISBE. The request to appear shall be made by registered or certified mail and state the time, place and purpose of the meeting.

State statute requires the hearing officer to send a written summary of the evidence heard to the board, from which the board may take action as it sees fit. It is the non-delegable authority of the school board to make the final decision regarding the expulsion of a student. The school board, however, may consider recommendations from administrators.

If the student or parent chooses, they may have an attorney represent the student at the expulsion hearing at their own expense. This may help to safeguard the student's due process rights and guarantee that proper procedures are being effectuated at the hearing.

Due process afforded students

facing expulsion does not require the presence of a stenographer at the hearing to provide a transcript, so long as there is some other means to allow for adequate review. Parents/guardians attending the hearing may bring their own tape recorder or retain a court reporter, if they choose to do so. It should also be noted, that while a school board is considered a public body, student disciplinary hearings are typically closed to the public as one of the allowable exceptions to an open meeting under the *Open Meetings Act*.

If, after the hearing, the school board decides to expel the child, that decision may be appealed by filing in state court.

Generally, school districts are given broad deference in making decisions regarding disciplinary actions. Illinois courts will rarely overturn a school board's decision to suspend or expel a student. Where no deprivation of a constitutional right was alleged, a school board's decision to expel or suspend a student will be overturned *only if* it is "arbitrary, unreasonable, capricious or oppressive."

In making this determination, Illinois courts consider the following factors before overturning a school board's decision:

1) the egregiousness of the student's conduct,
2) the history or record of the student's past conduct,
3) the likelihood that such conduct will affect the delivery of educational services to other students,
4) the severity of the punishment, and
5) the interest of the child.

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Zero tolerance misconduct

Certain misconduct will not only lead to automatic expulsion of a student, but may also result in criminal penalties. The following is a review of zero tolerance policies for two prohibited behaviors — weapons and drugs — on school grounds:

Weapons: Under the Gun-Free Schools Act, a student who brings a weapon to school, any school-sponsored activity or an event that bears a reasonable relationship to school shall be expelled for a period of *not less than one year*, unless the expulsion period is modified by the superintendent, whose decision may be modified by the school board on a case-by-case basis.

It is important to note that even under the Gun-Free School Act, there are no requirements for "zero tolerance." Under the *Illinois School Code*, the board may expel a student for a definite period of time not to exceed two calendar years, as determined on a case-by-case basis. This type of behavior may also be punished criminally, where charges can range from a Class A misdemeanor to a Class X felony for unlawful use of weapons on school grounds.

Drugs: While a federal statute does not exist for the automatic expulsion of a student who possesses, transfers or uses drugs on school grounds, such behavior will lead to some form of disciplinary action by the school board and shall be reported to enforcement authorities.

As with the possession, use or transfer of a firearm, under Illinois law, the school principal or his/her designee shall immediately notify the local law enforcement agency upon receipt of verbal, written or electronic notification from any school official, including a teacher, guidance counselor or support staff, that they observed a person in possession of a firearm or verified an incident involving drugs on school grounds. If the individual possessing the firearm is a student, the principal or his/her designee must also immediately notify that student's parent or guardian.

Attending school elsewhere

It is apparent that when a school board expels or suspends a student, that student's education will be disrupted. However, once a student has been suspended or expelled from school, he or she may have the right to attend another school.

Some school districts have adopt-

ed policies providing that if a student is suspended or expelled for any reason from any public or private school in Illinois or elsewhere, the student must complete the entire term of that suspension or expulsion before he/she may be admitted into an Illinois public school district.

Where a student has been suspended or expelled for possessing a "weapon" or for possessing, selling or delivering a controlled substance or cannabis on school grounds, or for battering a staff member of the school, and attempts to transfer into another public school in the same or different district, the student records required to be transferred must include the date and duration of the period of suspension and/or expulsion.

Where the suspension or expulsion is by reason of the above misconduct, the student must not be permitted to attend class in the public school into which he/she is transferring until the expiration of the disciplinary period. However, that school district may approve placement of the student in an alternative school.

A policy such as the one described above may still allow for the placement of an expelled or suspended student in an alternative school program for the remainder of the suspension or expulsion. An alternative school is intended to educate "disruptive students" in grades 6 through 12, who would otherwise be subject to expulsion or suspension by the school district.

Where a school district has an alternative school program, a student may be administratively transferred into the alternative school. However, this administrative transfer may not occur without first providing the student with the requisite due process, as discussed earlier.

It should be noted that not every school district has an alternative school program. Where a student is administratively transferred into an alternative school, appropriate personnel from both the sending school and the alternative school must meet to develop an alternative education plan, and shall invite the parent/guardian of that student to participate in the meeting. The student may also be invited to the meeting. An alternative education plan must include the date when the student may return to his/her regular school, specific academic and behavior plans, and a method for reviewing the student's progress at the alternative school.

Middle ground

The question that remains unanswered is whether there is another option besides expulsion that is less exclusionary and punitive. The following outlines some disciplinary methods that may serve as a middle ground:

Balanced and restorative justice (BARJ): The Illinois Criminal Justice Information Authority has long supported the use of BARJ philosophies in the Illinois juvenile justice system. Recently, the Authority published

a guide, *Implementing restorative justice: A guide for schools*, to assist in the application of restorative justice policies in schools.

The three main goals of restorative justice are: accountability, community safety and competency development. In addition, restorative justice aims to depart from traditional punitive and exclusionary methods of discipline and those that criminalize school misconduct, leading to the "school-to-prison pipeline."

Restorative discipline combines strict control and strong support of youth, and approaches wrongdoing in a way that is not punitive, neglectful or permissive. Restorative justice policies have already been successfully implemented in schools around the world, including Canada, the United Kingdom and Japan.

Restorative discipline policies in schools require the involvement of the victim, which may be a teacher, school staff or bystander, as well as other students and the school community. Approaches that support restorative justice philosophies and may be implemented in schools include: mentoring, "peacemaking circles," mediation with a trained mediator and peer juries. "Peacemaking circles" bring willing participants together to talk freely about issues and to resolve conflict with the presence of a trained facilitator.

SMART programs: Public schools in Chicago have implemented the SMART program in place of expulsion on a case-by-case basis. SMART stands for "Saturday Morning Alternative Reach-Out and Teach." If a child attends a Chicago Public School and is at risk of expulsion, at the hearing a parent may ask that his/her child attend the SMART program instead.

Students in this program receive guidance for certain social behaviors, such as drug and alcohol abuse. Additionally, students are committed to completing 20 hours of community service for a non-profit organization. Students enrolled in SMART must attend every class; otherwise, they may be expelled from school.

This program has not been made available in incidents involving the possession of firearms, sale of drugs or acts of violence, including threats.

Discipline of disabled students

According to a report published by the Civil Rights Project at Harvard University, African-American, Latino and disabled children "bear the brunt of the consequences" of zero tolerance policies. In Texas, special education students represent 10 percent of the school population, yet they account for 20 percent of those expelled from school.

In Florida, the implementation of one such zero tolerance policy led to a disabled 14-year-old student being reported to the police by the principal for allegedly stealing $2 from another student; subsequently, that disabled student was held in an adult jail for an unusually long period of time before charges were finally dropped.

Under the Individuals with Disabilities Education Act (IDEA), Congress set out specific provisions to guide schools in disciplining students with disabilities, affording these students certain due process rights.

If there is a possibility that a student's misconduct was the result of his/her disability, and that student is not currently in special education,

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School discipline *continued from page 25*

that child may still have the same rights as a child with a disability if the school knew or should have known that the child had a disability before his/her misconduct.

Please refer to the Whitted, Cleary & Takiff LLC memorandum, "Suspension, Expulsion and Discipline under the IDEA" for further information about school discipline with regard to children with disabilities, available online at *http://www.wct-law.com/CM/Publications/Publications101.asp*.

References

Jessica Ashley and Kimberly Burke, *Implementing restorative justice: A guide for schools*, Illinois Criminal Justice Information Authority, 2009

Jane Cutter, "Students with disabilities more often expelled," *PSLweb.org*, April 30, 2010

Illinois School Code, 105 ILCS 5/10-22, 5/13A, 5/10-24, 5/10-27, 105 ILCS 120/2

Illinois State Board of Education, End-of-Year Reports: *http://www.isbe.state.il.us/research/htmls/eoy_report.htm*

Ralph C. Martin, "Zero Tolerance Policy," ABA Juvenile Justice Committee, February 2010

Bruce Morris and Donna Wells, "School Safety Issues: Zero Tolerance," Commonwealth Educational Policy Institute, 2000

Student Code of Conduct for Chicago Public Schools for the 2009-10 School Year, Section 705.5, July 22, 2009

Court cases

Robinson v. Oak Park and River Forest High School, 571 N.E.2d 931, 933 and 934-35, (First District, 1991)

Linwood v. Board of Education of City of Peoria, School District No. 150, Peoria County, Illinois, 463 F.2d. 763, 768, (Seventh Circuit, 1972)

Goss v. Lopez, 419 U.S. 565, 581 and 584 (1975)

Colquitt v. Rich Township High School District, 699 N.E.2d 1109 (First District, 1998)

Wilson ex rel. Geiger v. Hinsdale Elementary School District 181, 810 N.E. 2d 637, 642-43 (Second District, 2004)

Common Mistakes That Can Lead to Court

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Common mistakes that can lead to court

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School districts as well as parents often make common mistakes that result in formal hearings or court cases that could be avoided. These repetitive issues that arise when disputes between parents and school districts reach official levels could be avoided by following some practical advice.

Common mistake #1:

Failure to make sufficient use of interpersonal skills

In about half of the cases, disputes are really personality conflicts, resulting when interaction between school staff and a parent becomes so strained that there is no room for compromise. School staff in the field are the best equipped to identify "high maintenance/high risk" families: those whose sufficient anguish may lead to anger and frustration directed squarely at school district personnel. Just as with disabled children, disabled families need a special approach. Listening goes a long way. Not listening and power struggles cause disputes.

This is the easiest category of mistakes to avoid. When listening to parents, give them the opportunity to vent and to conclude that you are sympathetic and able to lend a supportive ear.

Common mistake #2:

Not following through

The most frequent complaint to parent legal representatives is that the school district has not been communicating and/or has not done what it said what it was going to do. Nine times out of 10, when a school district has failed to follow through, the parents also voice frustration with an almost immediate defensive denial on the part of the administrator involved: "That's not what I meant to say" or " I never said that!"

These parents are often met with an unequivocal denial that the commitment was ever made or that a service was ever promised, rather than an apology and a quick, direct correction of the mistake. This infuriates already frustrated parents, who admittedly are under pressure (and often angry) by the time they get to the office of an attorney. Better to face up to an error (if there was one) and move on than to deny the error ever occurred, incurring the hostility and wrath of the parents.

Common mistake #3:

Categorical treatment manifested as "zero tolerance"

Often, parents appear in the lawyer's office and say they approached an educator for a service and were told, "We don't do that." Or, "Children with your child's disability all go to the XYZ Program." Or, "It's my way or the highway."

Categorical treatment, within which zero tolerance falls as a subset, is a sure-fire way to drive parents insane. A better idea is what federal and state laws say a school district must do: treat each situation on a case-by-case, *individualized* basis. This way, parental confidence in the ability of the school district to meet the individual and unique needs of their children will be raised, and a greater rapport will be established between district and parents.

Moreover, any educator should recognize that, with young children at the early elementary level, they are likely to be compelled to work with these families for at least another six or seven years. To start off the relationship in a hostile fashion only allows it to fester through the years, building hostility rather than happiness.

With good interpersonal skills, however, staff can turn potential parental enemies into some of the district's top supporters.

Common mistake #4:

Refusal to provide a mandated service

The courts become quite upset with school districts that blatantly refuse to provide a service the law clearly mandates. Not only does this cause disputes, but it risks incurring personal liability against school board members and administrators for not providing the clearly mandated service. Many examples in decisional case law exist in which personal liability has been imposed for this reason.

Common mistake #5:

Graphic procedural violations

Often, parents will appear in the attorney's office and say, "The school district completed their case study in 61 school days. Can I sue them?" The answer is usually no, because a procedural violation, to be actionable, must be serious.

A delay of a few days is human, not serious. A delay of a year or two is serious and actionable. A delay of months - or years - without explanation or even a simple phone call to the parents is likely to be serious.

If a school district knows it has incurred such a procedural violation, the best policy is to communicate with the parents immediately and offer a truthful explanation as to why there has been a delay. This way, school districts can be as transparent as possible and the parents can continue to have confidence that communications are open and honest. To say nothing fosters suspicion. Suspicion fosters lawsuits.

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Common mistake #6:

Secretive behavior

Secretive behavior includes refusals to be open with parents about what is going on in their child's program. Restrictive visitation/observation rules, resisting discussions of methodology and/or doctrinaire adherence to a particular methodology are all good examples.

In a classic example, the parent of a cochlear implant child might think oral education is better. The district restricts visitation of the proposed program by the parent so she won't see the extent to which ASL is really being used. This is deceptive and fosters suspicion. And, as mentioned, suspicion fosters disputes.

Likewise, use of fuzzy bureaucratic terms or acronyms that parents can't understand falls within the "secretiveness" category. If parents don't understand what is going on, they will become suspicious. Rule of thumb: communicate in simple, understandable terms and avoid $10 words or vague acronyms. Offer further explanation when parents seem confused. Avoid officious behavior.

Sometimes parents can make mistakes as well.

Common parental mistake #1:

Desire to fight for the sake of fighting

Often, parents are so angry and frustrated over a child's difficulties that they want to displace their anger squarely on the district, sometimes for no apparent reason. Often, even after an attorney obtains everything the parents are seeking without a hearing (and this is the attorney's duty if at all possible), parents then become angry that they have not had their "day in court," or that they have to pay attorney fees.

These families will want to fight regardless of what you do. Nothing will please them. At some point, it is necessary to draw the line, grit your teeth and conclude that the family will never be happy, even when the educators' efforts to satisfy the needs of the child

can be described as Herculean, as was done by a judge in one case.

Common parental mistake #2: *Greed*

Sometimes, school districts enter into an amicable settlement, either orally or in writing, for a reasonable retroactive reimbursement. However, on the day the agreement is supposed to be finalized, the parents ask for more! From a school district perspective, this should not be tolerated in very many cases.

If everyone has bargained in good faith, there is no reason to reverse positions just because of greed. Without some very compelling reasons, or a significant miscalculation, hold to the deal you've made.

Common parental mistake #3: *Not listening, or taking everything as a promise*

Sometimes events are visualized by members of a family under severe stress - or with a multitude of borderline personality disorders - which never occurred. These families also tend to thrive on conflict, so it is of no use to engage in confrontations.

The best approach is to pin down every communication with written correspondence (return receipt) to clarify the communication and ensure that all communication is accurate and, of course, truthful. A firmer approach with families that manifest this kind of dysfunction will usually engender respect, although there can be times when such a plan might backfire. Use your judgment! ■

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