An Educator's Toolbox: Equipment for Complying with State and Federal Education-Related Laws

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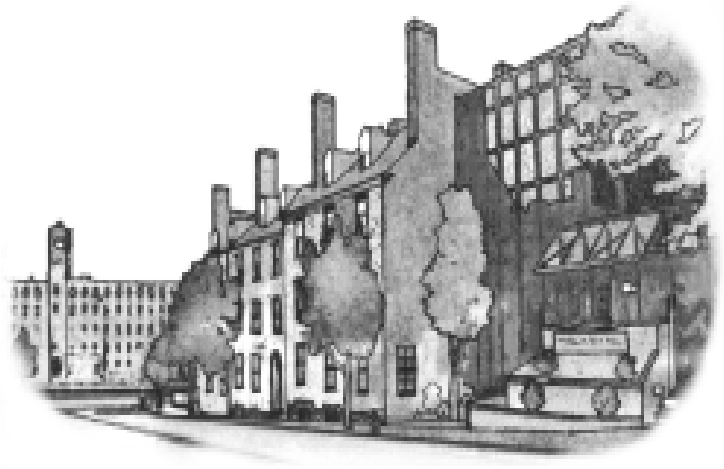

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By: Dean B. Eggert, Esquire
Alison M. Minutelli, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
aminutelli@wadleighlaw.com
Website: www.wadleighlaw.com

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 26 years he has had extensive experience representing school districts in special education matters at the administrative and appellate levels. He has spoken and lectured extensively on a wide range of legal issues in the field of education law.

Alison M. Minutelli, Esquire (JD., Franklin Pierce Law Center; B.A. Brandeis University) is an associate in the firm of Wadleigh, Starr & Peters, P.L.L.C. For the past 6 years, Ms. Minutelli has practiced in the field of school law, and has experience representing school districts in special education matters at the administrative and appellate levels. She has also written numerous articles on a wide range of legal issues in the field of education law.

A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to certain aspects of New Hampshire law and the I.D.E.A. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

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Part I: Risk Management for Educators

I. Overview

The purpose of this material is to provide the educator with a general understanding of the areas in which teachers and school districts encounter work-related risks. The goal of this material is to enable educators to readily identify risks and to equip them to respond appropriately. This material is not intended to substitute for legal counsel, nor is it intended to provide an exhaustive statement of the law.

II. Reporting Requirements Imposed on Educators

This section provides a general overview of the areas in which educators are subject to a statutory reporting obligation. By diligently adhering to these requirements, the educator can reduce District liability and fulfill his or her statutory obligations to protect students.

A. Reporting under the Safe Schools Act, RSA 193-D

This Act prohibits any "act of theft, destruction, or violence" within a "school zone" and subjects any student committing such an act to the provisions of NH RSA 193:13, *"Suspension and Expulsion of Pupils."* See 193:13. In addition to providing for the punishment of perpetrators, the Act contains certain public employee reporting requirements.

1. What is my Obligation?

School employees who witness, or who have information from the victim of, "an act of theft, destruction, or violence" in a "safe school zone" are required to file a **written report** with their supervisor detailing any such acts they witness. The supervisor shall forward any report to the principal, who must make an immediate report to the police department, by telephone or otherwise. Within 48 hours of filing this initial report, the principal must follow up with a written report to the police department. See NH RSA 193-D:4. If the alleged victim is a student, the principal must "immediately" notify the parent/guardian of the alleged victim that a report has been made to the police. The obligation to report a simple assault is deemed to be waived provided the District has a discipline policy requiring parental notification for simple assaults.

2. Where is the "Safe School Zone?"

The "safe school zone" is an area inclusive of "any school property or school buses." See RSA 193-D:1, II.

3. What is an "act of theft, destruction, or violence?"

An "act of theft, destruction, or violence" includes the following criminal acts:

- Homicide;
- First or second degree assault;
- Simple assault;
- Felonious or aggravated felonious sexual assault;
- Criminal mischief;
- Unlawful possession or sale of a firearm or other dangerous weapon;
- Arson;
- Burglary;
- Robbery;
- Theft;
- Illegal sale or possession of a controlled drug; and,
- Criminal threatening.

See RSA 193-D:1, I.

4. What goes in my report?

The report must include the following minimum items:

- ❒ Name and home address, if known, of the person suspected of committing an "act of theft, destruction or violence" in a Safe School Zone;
- ❒ The name and home address of any witness to the act;
- ❒ Identification of the act that was allegedly committed.

RSA 193-D:4, II.

The Department of Education has created a standard form, ED #317 that may be used for reporting under the Safe School Zones Act.

5. Any exceptions?

Yes, a written report need not be made when law enforcement responds at the time of the incident and generates a written report. See RSA 193-D:5.

6. Penalties for Failure to Report

Any person who knowingly fails to comply with the reporting requirements under this statute (unless the report has been waived) is guilty of a **violation.** See RSA 193-D:6.

B. Reporting Suspected Abuse and Neglect

Educators are under a statutory obligation to report suspected abuse and neglect. The primary body to whom this reporting obligation runs is the New Hampshire Department of Health and Human Services, Division for Children, Youth and Families.

1. What is my Obligation?

The Child Protection Act (NH RSA 169-C:1 et seq.) provides, in NH RSA 169-C:29, that, "[a]ny . . . **teacher**, school official, school counselor . . . or any other person having reason to suspect that a child has been abused or neglected shall report the same. . . " to the New Hampshire Department of Health and Human Services.

2. What is "abuse or neglect?"

The terms **"abuse or neglect"** are defined in the context of an "abused child," or a "neglected child." An "abused child" means any child who has been:

- ❒ sexually abused;
- ❒ intentionally physically injured;
- ❒ psychologically injured so that the child exhibits symptoms of emotional problems generally recognized to result from consistent mistreatment or neglect; or
- ❒ physically injured by other than accidental means.

RSA 193-C:3, II.

A "neglected child" means any child who has been:

- ❒ abandoned by her parents, guardian or custodian; or
- ❒ who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for her physical, mental or emotional health, when it is established that her health has suffered or is very likely to suffer serious impairment, and the deprivation is not due primarily to the lack of financial means of the parent, guardian or custodian; or
- ❒ whose parents, guardians or custodian are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization or other physical or mental incapacity.

Note: Certain forms of religiously based treatment may not constitute "neglect."

RSA 169-C:3, XIX.

3. How and what do I report?

An initial immediate report must be made orally by " telephone or otherwise" and followed by a written report within 48 hours if requested by the Department. RSA 169-C:30. A report should contain the following:

- ❒ name and address of the child suspected of being neglected or abused;
- ❒ the name and address of the person responsible for the child's welfare;
- ❒ the specific information regarding the suspected neglect or the nature and extent of the child's injuries and any evidence of previous injuries;
- ❒ the identity of the person or persons suspected of being responsible for the abuse or neglect; and
- ❒ any other information that might be helpful in establishing abuse or neglect or that may be required by the Department.

RSA 169-C:30.

In addition, it is a good practice to alert the school principal of your need to file a report. In those circumstances where you have a question regarding your duty to report, you should consult your supervisor/principal with regard to whether or not you may have a duty to make a report.

4. Am I legally liable for making a report that turns out to be unfounded?

NH RSA 169-C:31 provides that a "good faith" reporter is immune from civil and criminal liability. This liability does not extend to protect a reporter that has actually engaged in abuse and neglect from the consequences of his or her actions.

C. Pupil Safety and Violence Prevention Act

In 2000 the state legislature adopted the "Pupil Safety and Violence Prevention Act of 2000." RSA 193-F:1, et seq. The Pupil Safety and Violence Prevention Act was a direct response to incidents of school violence that had occurred throughout our nation. Educators and lawmakers alike observed a persistent theme where the perpetrator of violence had been the victim of bullying in the school setting.

The law was amended in 2004 to mandate that schools provide a tangible remedy to the problem of bullying.

In 2010, the Legislature repealed and reenacted the majority of RSA 193-F, expanding the scope of the bill to include cyberbullying. See N.H. Laws of 2010, Chapter 155 (enacting HB 1523).

1. Definitions

The Pupil Safety and Violence Prevention Act includes several definitions. They are as follows:

- Bullying: a single incident or pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:
    - Physically harms a pupil or damage the pupil's property; or
    - Causes emotional distress to a pupil; or
    - Interferes with a pupil's educational opportunities; or
    - Creates a hostile educational environment; or
    - Substantially disrupts the orderly operation of the school.
- Bullying also includes "actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs." See RSA 193-F:3, I(a)-(b).

Note: When bullying constitutes a "pattern of incidents" it may give rise to a duty to refer that student for special education and related services. See e.g. N.H. Ed. 1105.02 (discussing child find).

- Cyberbullying: conduct defined in paragraph I of this section [the definition of bullying] undertaken through the use of electronic devices. RSA 193-F:3, II.
- Electronic devices: include but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites. RSA 193-F:3, III.
- Perpetrator: a pupil who engages in bullying or cyberbullying. RSA 193-F:3, IV.
- School property: all real property and all physical plant and equipment used for school purposes, including public or private school buses or vans. RSA 193-F:3, V.

- Victim: a pupil against whom bullying or cyberbullying has been perpetrated. RSA 193-F:3, VI.

Bullying or cyberbullying occurs when "an action or communication as defined in RSA 193-F:3:

a. Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or

b. Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event."

RSA 193-F:4, I.

2. Policy Requirements

a. Substantive Requirements

By January 1, 2011, the school board of each school district (and the board of trustees of chartered public schools) must adopt a written policy prohibiting bullying and cyberbullying. The law contains numerous requirements pertaining to the development of the policy and the contents of the policy. RSA 193-F:4, II, IV.

At a minimum, the policy must include the following substantive elements:

- The definitions contained in RSA 193-F:3 (these definitions are set forth in Section C, above);
- A statement prohibiting bullying or cyberbullying of a pupil;
- A statement prohibiting retaliation or false accusations against a victim, witness, or anyone else who in good faith provides information about an act of bullying or cyberbullying and, at the time a report is made, a process for developing, as needed, a plan to protect pupils from retaliation;
- A requirement that all pupils are protected regardless of their status under the law;
- A statement that there shall be disciplinary consequences or interventions, or both, for a pupil who commits an act of bullying or cyberbullying, or falsely accuses another of the same as a means of retaliation or reprisal; and,

- A statement indicating how the policy shall be made known to school employees, regular school volunteers, pupils, parents, legal guardians, or employees of a company under contract to a school, school district, or chartered public school. Recommended methods of communication include, but are not limited to, handbooks, websites, newsletters, and workshops.

See RSA 194-F:4, II(a)-(e), (n).

b. Procedural Requirements

In addition to the above, the law requires that each policy contain the following procedures:

- A procedure for reporting incidents of bullying or cyberbullying;

- A procedure outlining the internal reporting requirements within the school or school district or chartered public school;

RSA 193-F:4, II(f)-(g).

Each school district is responsible for developing its own set of procedures.

c. Reporting Requirements: To whom and when am I required to report?

The policy also contains several reporting requirements:

- A procedure for notification, within 48 hours of the incident report, to the parents or guardians of a victim of bullying or cyberbullying and the parent or parents or guardian of the perpetrator of the bullying or cyberbullying. The content of the notification shall comply with the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g;

    - This notice should be in writing, and may contain the name of the alleged victim and perpetrator, a description of the reported event and the circumstances in which the event occurred.

- A provision that the superintendent or designee may, within the 48-hour period, grant the school principal or designee a waiver from the notification requirement if the superintendent or designee deems such waiver to be in the best interest of the victim or perpetrator. Any such waiver granted shall be in writing. Granting of a waiver shall not negate the school's responsibility to adhere to the remainder of its approved written policy;

- Note: if a waiver is going to be granted, it should be granted for both students.

- A requirement that the principal or designee report all substantiated incidents of bullying or cyberbullying to the superintendent or designee; and,

- A written procedure for communication with the parent or parents or guardian of victims and perpetrators regarding the remedies and assistance, within the boundaries of applicable state and federal law. This communication shall occur within 10 school days of completion of the investigation.

    - This communication cannot contain information about any consequences that were given to the other student. It can only contain information pertaining to the student that is the subject of the letter (i.e., information about the victim can be communicated to the victim's parents, but they cannot be told about any disciplinary consequences or non-disciplinary interventions taken against the perpetrator).

RSA 193-F:4, II(h)-(i), (l)-(m).

d. Investigation Requirements: What is the scope of the duty to investigate?

The policy must contain a written investigation procedure, such as:

- The investigation must be initiated by the building principal or his/her designee within 5 school days of the reported incident. If the principal/designee are "directly and personally involved with a complaint or" are "closely related to a party to the complaint, then the Superintendent shall direct another district employee to conduct the investigation";

- The investigation may include documented interviews with the alleged victim, alleged perpetrator, and any witnesses. All interviews shall be conducted privately, separately, and shall be confidential. At no time will the alleged victim and perpetrator be interviewed together during the investigation;

- If the allegations involve cyberbullying, the investigator may ask for printed copies of e-mails, text messages, website pages, or other similar electronic communications;

- Privacy rights of all parties shall be maintained in accord with applicable laws.

- The investigator may consider the following factors as part of the investigation:

    - Description of the incident, including the nature of the behavior;
    - How often the conduct occurred;
    - Whether there were past incidents or past continuing patterns or behavior;
    - The characteristics of parties involved (name, grade, age, etc);
    - The identity and number of individuals who participated in bullying behavior;
    - Where the alleged incident(s) occurred;
    - Whether the conduct adversely affected the student's education or educational environment;
    - Whether the alleged victim felt or perceived an imbalance of power as a result of the reported incident; and
    - The date, time and method in which parents or legal guardians of all parties involved were contacted.

- The investigation must be completed within 10 days of receipt of the report, however, the Superintendent may grant a written extension of up to 7 school days, if necessary. The Superintendent shall notify all parties involved of the extension.

- Whether a particular action or incident constitutes a violation of this policy shall require a determination based on all facts and surrounding circumstances and shall include recommended remedial steps necessary to stop the bullying and a written final report to the Principal.

See RSA 193-F:4, II(j).

The intent of the investigation is to identify whether the alleged bullying / cyberbullying is substantiated or unsubstantiated.

e. Remediation Requirements: What happens when the investigation is complete?

Policies must also contain:

A requirement that the principal or designee develop a response to remediate any substantiated incident of bullying or cyberbullying,

including imposing discipline if appropriate, to reduce the risk of future incidents and, where deemed appropriate, to offer assistance to the victim or perpetrator. When indicated, the principal or designee shall recommend a strategy for protecting all pupils from retaliation of any kind.

See RSA 193-F:4, II(k).

When a perpetrator or victim is identified as a student with an educational disability, the Principal's response to remediate any substantiated incident of bullying or cyberbullying should be presented to the IEP Team. The IEP Team is permitted to amend or augment the response in a manner necessary to ensure that the perpetrator and/or victim receives a free, appropriate public education, while still taking appropriate measures to remediate bullying.

Please Note: The amendments to the Pupil Safety and Violence Prevention Act do not impact the district's duties under RSA 193-D; thus, if the underlying act involves an act of theft, destruction, or violence in a safe school zone, then the public school employee may also have a duty to make a report in accord with RSA 193-D.

3. Immunity

SAU employees, school employees, chartered public school employees, regular school volunteers, pupils, parents, legal guardians, or employees of a company under contract to a school, school district, SAU, or chartered public school, shall be immune from civil liability for good faith conduct arising from or pertaining to the reporting, investigation, findings, recommended response, or implementation of a recommended response under RSA 193-F. RSA 193-F:7.

D. Policy Based Reporting Requirements

Most local school districts have policies which contain local reporting requirements. Even when the local policies do not require such, educators should, as a matter of best practice, report the following:

- ❒ sexual harassment;
- ❒ all forms of discrimination;
- ❒ inappropriate educator conduct;
- ❒ violations of the Code of Conduct;
- ❒ all student threats to self and others;
- ❒ site safety issues/concerns; and

- ❒ all criminal acts relating to the school district.

E. The Duty to Report to the State Department of Education

Educators having reason to suspect that another educator has abused or neglected a student have a duty under NH Regulation ED 510.01 to report that suspected educator to the:

- ❒ Division for Child, Youth and Families; and
- ❒ The Bureau of Credentialing, Department of Education.

ED 510.01 goes on to state, in subpart c., that a failure to report any charges of misconduct or incidence of suspected misconduct shall result in disciplinary action being taken against the non-reporting educator by the State Board of Education.

III. The Duty to Refer

State and federal law also impose upon educators a duty to refer students with particular needs. The three primary areas in which an educator may have a duty to refer a student for evaluation or accommodation arise in the following circumstances:

A. Duty to Refer under the Individuals with Disabilities Education Act (the "IDEA")

The IDEA imposes upon all districts the obligation to promptly find children who may have educational disabilities, and to promptly determine whether or not they have an educational disability through the multi-disciplinary team process. This obligation includes a duty on the part of educators to refer students for evaluation by a multi-disciplinary team. A failure to timely refer and identify a student can translate into a far more difficult task to ensure that the student receives a FAPE.

B. Duty to Refer under Section 504

Section 504 provides that "[n]o otherwise qualified person with a disability shall, solely by reason of the disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance." 29 U.S.C. § 794. The protections of Section 504 apply to both students and teachers. In order to provide equality of opportunity to disabled students, the District is frequently called upon to provide affirmative aids, services, or benefits known as "accommodations."

Section 504 is broader in scope than the IDEA. While the IDEA focuses on an educational disability, Section 504 deals with a more inclusive definition of disability.

Simply put, a disability under Section 504 usually consists of a physical or mental impairment which substantially limits one or more of that person's major life activities.

As an educator, you have a duty to refer a student who appears to require consider under Section 504 to your building level 504 coordinator.

C. Duty Under the Americans with Disabilities Act (the "ADA")

Districts are required to provide access to students with disabilities. The ADA may require modifications in order to afford a student equal access or opportunity to the District's programs and activities. Educators should promptly report any observed access difficulties to the District's ADA Coordinator.

IV. An Educator's General Liability

An educator is not automatically protected from civil liability for his or her actions. There are two key statutes that define when a school district will step forward and indemnify an educator from liability.

A. Indemnification for Damages: NH RSA 31:105

A school district may by a vote of the governing body indemnify, and save harmless for loss or damage occurring after said vote, any person employed by it from personal financial loss and expense, including reasonable legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of **negligence** or **other act resulting in accidental injury** to a person, or accidental damage to or destruction of property, if the indemnified person, at the time of the accident resulting in the injury, damage, or destruction, was **acting in the scope of employment**.

This statute is permissive in nature. It means that a school district does not have to indemnify an employee. Most importantly, this statute does not extend to the following:

- Intentional or malicious acts;
- Reckless or wanton acts.

B. Indemnification for Civil Rights Suits: NH RSA 31:106

All school districts shall indemnify and save harmless any person employed by it from personal financial loss and expense, including reasonable legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of any act or omission constituting a violation of the civil rights of an employee, teacher or student or any other person under federal law, if such act or omission was **not committed with malice**, and

if the indemnified person at the time of such act or omission was **acting within the scope of employment**.

In contrast to the general indemnification statute, this obligation is mandatory. However, it too is limited in scope. An educator will not be indemnified for an intentional malicious act, or an act that is outside the scope of the educator's employment.

C. Frivolous Actions Against Teachers and Other Education Employees

In 2002, the Legislature passed the "Penalties for Frivolous Actions Against Teachers and Other Education Employees" Act. RSA 507-G:1. The Legislature believed that "good order and discipline are necessary to provide New Hampshire students with a proper learning environment," and that consequently, "employees . . . should not be inhibited in their attempts to enforce good order and discipline by the threat of civil actions against them." RSA 507-G:2.

The statute defines an employee as "any individual elected or appointed to an educational entity, any individual who is an employee of such entity, and any employee of a company under contract to a school or school district who is directly engaged in student-related services." RSA 507-G:3.

This statute provides for the following penalties for frivolous actions against employees:

- If, during any phase of a tort action brought against an employee which results from an action taken while the employee is directly engaged in student-related services, it appears to the court by a preponderance of evidence that the action is frivolous, or intended to harass or intimidate the named employee or any other employee involved in the student-related services at issue, or both; then the court, upon motion of a party or upon its own motion, may order summary judgment or other relief against the party who brought such action, and it shall award costs and reasonable attorney's fees to the prevailing party or parties. Costs shall include, but not be limited to, all reasonable pre-trial investigation and tribunal time and expenses. The court shall report such conduct to the professional conduct committee.
- In addition, the court shall order the party bringing the action against an employee to pay the sum of $1,000.00 to each of the prevailing parties.

RSA 507-G:4. This statute is clearly intended to protect employees, including teachers, from frivolous lawsuits.

D. The Duty of Educators to Provide Adequate Protection or Supervision to Students

Marquay v. Eno, 139 N.H. 708 (1995), is a landmark case in this state with respect to the liability of teachers for failing to provide adequate protection or supervision to students. Marquay involved a lawsuit brought by three women who were formerly students in the Mascoma Valley Regional School District. Each woman alleged that she was exploited, harassed, assaulted and sexually abused by one or more employees of the school district. The alleged perpetrators were teachers and coaches of the students at various times over the course of their junior high and high school years. Each woman alleged that a host of school employees, including other teachers, coaches, superintendents, principals and secretaries, were either aware, or should have been aware, of the abuse. The women alleged that these other employees were aware of the abuse because the employees had either witnessed inappropriate conduct by the abusing employees or were told about the inappropriate conduct by these three women and other students. The women sought damages against the school district, the abusing employees, and the non-abusing employees whom they contended were aware, or should have been aware, of the abuse. Among the non-abusing employees named as defendants were several of the women's classroom teachers.

The school district and several of the non-abusing employees moved to dismiss the claims against them, contending that they did not owe the students any duty to protect them from harm by the abusing employees. The Court disagreed, ruling that schools share a special relationship with students entrusted to their care, which imposes upon them certain reasonable duties of supervision. The Court instructed that the scope of the duty owed is limited by what risks are reasonably foreseeable to the actor. That is, a party will be held liable for negligence if he or she could reasonably have foreseen that his or her conduct would result in an injury, or if his or her conduct was not reasonable in light of what he or she could anticipate.

The Court declined to hold that every school district employee has a personal duty to all students simply by virtue of receiving a paycheck from the district. Rather, the Court held that the duty falls upon those employees who have supervisory responsibility over students and who thus have stepped into the role of parental proxy. The Court instructed:

> [t]hose employees who share such a relationship with a student, and who acquire actual knowledge of abuse, or who learn of facts which would lead a reasonable person to conclude that a student is being abused are subject to liability if their level of supervision is unreasonable and is a proximate cause of a student's injury.

The Court thus refused to dismiss the claims against the women's classroom teachers who contended that they were unaware of the abuse.

Under this holding, the Court also stated that a school employee may be subject to liability for injuries that occurred off school premises, if the student can show that the employee's negligent acts or omissions proximately caused the injury to the student.

E. Examples of Recent Liability Theories

There is value in considering some of the recent liability theories that have been advanced by parents and students.

1. The Duty to Protect Students from Other Students

There have been a number of cases alleging that educators had a duty to protect a student from injury by other students. The theory alleged by the parents is that the educators assumed a duty to protect the student from injury by another student and that the educator knew or should have known that the offending student had a propensity for violent behavior, and that knowing such, the educators should have taken steps to protect the victim.

While Courts have been reluctant to impose such a duty, educators should take threats of student-on-student violence seriously, and should react in a manner that defuses the risk.

2. The Duty in Administering Medications

Teachers and aides are sometimes placed in the position of administering a medical procedure to a student. No teacher or aide should do such without:

- ❒ permission from the School Nurse;
- ❒ adequate training;
- ❒ documented instructions; and
- ❒ parental permission.

We know from the case of Cedar Rapids Community School v. Garret F., 526 U.S. 66 (1999) that a school district is required to provide those non-physician medical services that may be required to assist a child with a disability to benefit from special education. Districts also have a duty under the IDEA to hire specially trained personnel to meet disabled student needs. Educators and classroom aides are sometimes placed in the position of administering a medical procedure to a student. Both the improper administration and the failure to administer medication have resulted in claims of liability.

A school is required to act as a reasonable school would in responding to the medical needs of the student. This duty of care does not make the school responsible

for guaranteeing the health of its students or for assuming the role of a physician and diagnosing and treating its students. Individual educators may perhaps be held liable for knowingly disregarding their duty to administer a medical procedure. Schools may be held liable for failing to hire trained staff or failing to properly train staff.

The following cases are instructive on the scope of this duty and illustrate that liability theories can arise from both administering and failing to administer medical treatment:

a. *Nance v. Matthews*, 20 IDELR 3, 622 So. 2d 297 (Ala. 1993)

A student with spina bifida allegedly sustained physical injuries and mental trauma when an aide failed to catheterize her -- a procedure which was necessary due to the student's recent bladder surgery. The aide had been hired by the school system to care for the student, and she allegedly failed to perform that duty after she was advised of the need to do so. The student's parents brought suit against the school principal, school nurse, special education director, and special education aide. The Court allowed the claim against the aide to proceed, but dismissed claims against the other employees alleging that they negligently or wantonly failed to supervise and train the aide. The Court ruled that those individuals were protected by discretionary function immunity from liability for negligent supervision and training of the aide, due to the fact that their supervisory and training responsibilities required constant decision-making. Moreover, they were protected by qualified immunity from liability for wanton misconduct, absent a showing of bad faith.

b. *Frederico v. Order of Saint Benedict in Rhode Island*, 64 F. 3d 1, 23 IDELR 215 (1st Cir. 1995)

Medical attention required by a student with asthma, after he had an attack onset by a food allergy, was not as discernible as that required by the student in *Nance* – making the determination of liability an even more complicated one. The student died as a result of the attack. At trial, the experts disagreed over whether administration of an epinephrine injection, which the school did not apply, would have saved the student's life. A jury returned a verdict in favor of the school. On appeal, the Court of Appeals for the First Circuit held that the jury had properly been instructed that the school was required to act as a reasonable school would in responding to the medical needs of students, but that the standard did not make the school responsible for guaranteeing the health of its students or for assuming the role of a physician in diagnosing and treating its students.

IMPACT: These cases indicate that the risk of liability is greater in cases where the student's disabilities require the administration of medical procedures by school personnel, on a routine basis, as a condition of the student's ability to function in the school setting, i.e. (the types of medical procedures which are contemplated under the "school health services" category of related services). The liability risk is lower in a situation where emergency medical measures are indicated and there are no set procedures in place which have been disregarded, i.e., the types of medical procedures performed by a physician which are deemed to be medical services exempt from coverage under the IDEA.

It also seems clear that an individual, such as an aide, who is charged with administering a medical procedure in the course of normal work duties, can be held liable for knowingly disregarding those duties. However, as demonstrated in *Nance v. Matthews*, other school personnel who are not involved in the direct administration of those procedures, and act more in terms of a supervisory capacity, such as an administrator, are less likely to be held liable unless the actor's negligence can be clearly attributed to the administrator.

c. Emergencies and the "Good Samaritan" Doctrine

The general procedures for administering medication should not be confused with the provision of emergency medical assistance. As a general rule, a district's liability risk is substantially lower in a situation where emergency medical procedures are indicated and there are no set procedures in place which may have been disregarded. For example, the provision of the types of medical procedures usually performed by a physician in an emergency context are less likely to give rise to liability. In fact, the failure to act in the emergency context is much more likely to give rise to liability than action, even if the action is not the perfect medical response.

NH RSA 508:12 provides that if any person in good faith renders emergency care at the place of the happening of an emergency or to a victim of a crime or delinquent act or while in an ambulance or rescue vehicle, to a person is in urgent need of care as a result of the emergency or crime or delinquent act, and if the acts of care are made in good faith and without willful or wanton negligence, the person who renders the care is not liable in civil damages for his acts or omissions in rendering the care, as long as he receives no direct compensation for the care from or on behalf of the person cared for.

Any person rendering emergency care shall have the duty to place the injured person under the care of a physician, nurse or other person qualified to care for such a person as soon as possible and to obey the instructions of such qualified person. See NH RSA 508:12.

3. The Duty to Discipline with Care

Suffice it to say, corporal punishment has been explicitly proscribed by the State Department of Education. However, the abolition of corporal punishment did not eliminate all potential liability for educators with regard to student discipline. While a teacher is "justified" under the criminal code in using "necessary force," the improper use of restraint, and the use of inappropriate disciplinary techniques may also result in claims of liability on the part of the educator.

The District has a duty to discipline with care and to ensure that the restraint practices used with a student are not disputed or controversial practices but rather generally accepted practices.

For example, in Ronnie Lee S. v. Mingo County Board of Education, 500 S.E.2d 292, 27 IDELR 202 (W.VA. 1997) a West Virginia Appeals Court ruled that a state law claim for damages arising from the alleged improper use of a restraining device on an autistic student could proceed forward despite the fact that the parties had entered into a written settlement agreement as to their administrative IDEA claims.

a. Steps Toward Reducing Risk with Restraint and Discipline

There are four fundamental steps to be taken by any district to reduce its risks in the area of passive restraint. They are as follows:

- ☐ Any restraint technique should be written into the IEP;
- ☐ The nature of the restraint techniques should be reviewed with the parent to ensure that the parents have given informed consent when they sign the IEP;
- ☐ The techniques should be generally accepted in the education community;
- ☐ The district should provide certificated training in the area of passive restraint and should have individuals designated to provide the necessary restraint.

Similar steps should be taken with regard to disciplinary techniques. They are as follows:

- ☐ The IEP should explicitly indicate whether or not the student is subject to the District's standard disciplinary procedures;
- ☐ The district should not deviate from the disciplinary procedures used by the district unless deviation is permitted in the IEP;
- ☐ The disciplinary measures must be a generally accepted practice.

Note: RSA 126-U imposes additional requirements and limits the use of restraint in the school setting to the use of "physical restraint." RSA 126-U:6. The New Hampshire Special Education Regulations also contain additional requirements pertaining to the use of restraints on children with disabilities. See Ed 1113.05-1113.08.

4. The Duty to Protect Students from Sexual Harassment

Title IX protects students from teacher-on-student sexual harassment. The United States Supreme Court has recently ruled that districts are not liable under Title IX for teacher-on-student sexual harassment, unless an employee with supervisory power over the offender actually knew of the abuse, had the power to end it, and failed to act. However, this decision in no way relieves an educator from liability for sexual harassment. Instead, it simply means that the educator will be the primary target in any subsequent litigation. Educators should exercise extreme care to ensure that they do not engage in any conduct that could be construed or misconstrued as sexual harassment.

F. Teachers as Witnesses

With increasing frequency, teachers are being subpoenaed to testify in domestic litigation. A teacher who receives a subpoena or is asked to testify in a domestic matter is placed in a "no-win" situation. Particularly in custodial matters, the teacher runs the risk of alienating one or both parents.

When approached by a lawyer who represents a parent, the teacher should promptly notify his or her principal of the contact. This will provide the District with an opportunity to determine whether:

- ❍ any other parties should participate in contact with the lawyer;
- ❍ the student's privacy interests are at risk;
- ❍ the district and teacher's interests are adequately protected;
- ❍ the district's legal counsel should participate in the process;
- ❍ a substitute teacher will be required.

As a general rule, educators should remember that they are tasked with educating students. They are not tasked with making judgments with regard to child custody matters. Having said that, every educator should be prepared to testify truthfully and accurately as to what they have observed in the classroom regarding the student.

G. Threatened Litigation

At some point in your career you may encounter a parent, a student, or a third party who threatens litigation against you, the District, or both. The key to managing that threat is prompt reporting. Any threat of litigation should be immediately reported to your principal. A failure to promptly report such a threat can compromise the ability of the District and the District's self-insurance program to fairly and accurate assess the risk posed by the litigation threat.

V. Protecting your Teaching Credential

A teacher's certification is his or her "meal ticket" in New Hampshire. Therefore an educator should exercise great care to maintain the level of professionalism that does not jeopardize certification. The State Department of Education, Bureau of Credentialing, has recently hired a full-time investigator who is tasked with enforcing the state teaching standards. There is every indication that the State Department of Education is seriously upgrading the quality of its enforcement measures.

NH RSA 189:14-c provides that any teacher certified in New Hampshire who has been convicted of any felony involving child pornography or of a felonious sexual assault on a minor, or of any sexual assault, shall have their teacher certification revoked. A district is required by law to immediately terminate a teacher with such a conviction.

Incidentally, teachers are prohibited by state law from:

-advocating communism as a political doctrine; or
-advocating any other doctrine which includes the overthrow by force of the government of the United States or of the State of New Hampshire in any public school.

See NH RSA 191:1.

A. Reasons for Termination during your Contract

In addition to the reasons set forth above, a teacher may be terminated for the following reasons:

- Immorality;
- Failure to meet competency standards; and
- Failure to conform to prescribed regulations.

However, **NO** teacher shall be dismissed before the expiration of the period for which they were engaged to teach without having been previously:

- Notified of the cause of their dismissal; and

- Granted a full and fair hearing.

RSA 189:13.

Any teacher facing the specter of termination should be in consultation with his or her union representative.

B. Nonrenewal and Tenure (The Holy Grail)

As a general rule, a teacher may be nonrenewed provided he or she receives notice in writing of the District's decision to nonrenew by April 15, or within 15 days of the adoption of the district budget by the legislative body, whichever is later, provided that no notification shall occur later than the Friday following the second Tuesday in May. The term "teacher" includes any professional employee of a district whose position requires certification as a professional engaged in teaching, such as principals, assistant principals, librarians, and guidance counselors. See N.H. Ch. Law 267 (2011).

A teacher who has taught for five consecutive years or more in their current school district, or who taught for three consecutive years in the District before July 1, 2011, may request in writing within ten (10) days of receipt of a notice of nonrenewal: 1) a written statement of the reasons for nonrenewal; and, 2) a hearing before the school board.

A teacher who has a professional standards certificate from the State Board of Education shall be entitled to all of the rights for notification and hearing if: 1) the teacher has taught for 5 consecutive years or more in any school district in the state and has taught for 3 consecutive years or more in the current school district; or 2) before July 1, 2011, the teacher taught for 3 consecutive years or more in any school district in the state and taught for 2 consecutive years or more in the current school district. Teachers should be familiar with their rights under NH RSA 189:14-a.

Part II: The Legal Responsibilities of Educators Under the IDEA

I. Overview

The purpose of this material is to provide the regular educator with a working knowledge of his or her obligations under the Individuals with Disabilities Education Improvement Act [IDEA]. This material is not intended to cover the detailed procedural requirements of the IDEA, nor is it intended to provide the breadth of information that one needs as a special educator.

A. The Philosophy Behind the IDEA

The key to understanding the IDEA lies in understanding the philosophy behind the IDEA. When Congress adopted the IDEA, it did such with the intent of ameliorating the systemic inequities that existed with regard to the education of individuals with disabilities. With the 1997 and 2004 reauthorizations of the IDEA, Congress set in law the educational concept of inclusion, by requiring that students with educational disabilities be included, to the extent possible, in the regular education classroom.

1. A "Free Appropriate Education at Public Expense"

The fundamental concept behind the IDEA is that every student is entitled to a **free appropriate education at public expense ("FAPE").** The Act does not require a school to maximize the potential of each disabled child commensurate with the opportunity provided non-disabled children. Rather, Congress sought primarily to identify and evaluate disabled children, and to provide them with access to a free public education. A School District satisfies the requirement to provide a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Teachers are a key component to ensuring that the instruction is truly personalized. Without teachers actually implementing the student's individualized education program [IEP], there is a greatly reduced likelihood of truly affording a FAPE. The "appropriateness" standard is a floor rather than a ceiling.

a. What is a "FAPE?"

According to the definitions contained in the Act, a "free appropriate public education" consists of special education and related services that are provided at public expense, under public supervision and direction, without charge, and which meet the standard of the State Educational Agency, include an appropriate preschool, elementary school, or secondary school education, and are provided in conformity with the individualized educational program required under the Act. 20 U.S.C.A. §1401(9); Ed 1102.01(s). School districts must provide a free, appropriate public education to children with disabilities who are between the ages of 3 and 21, and who have not yet received a regular high school diploma. See e.g. Ed 1102.01(r).

b. What are "Related Services?"

The term Related Services means transportation and such developmental, corrective and other supportive services required to assist a child with a disability to benefit from special education. 20 U.S.C.A. §1401(26); Ed 11002.04(q). Related services include the early identification and assessment of disabling conditions in children, but do not include medical devices that are surgically implanted, or the replacement of such devices. Id. The Act sets forth numerous examples of related services, including, but not limited to, the following: interpreting services, psychological services, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a FAPE as described in the child's IEP, and medical services that are for diagnostic and evaluation purposes only. Id.

c. The Test for Determining Whether You Are Providing a "FAPE"

As a checklist for adequacy under the Act, school districts must ensure that instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's Individualized Educational Program ("IEP").

Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

A court's inquiry in suits brought under the IDEA is twofold. First, has the School District complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? The Court's inquiry is really no different than the inquiry that every teacher should make when providing instruction to a student who has been identified as having an educational disability: **Is what I'm doing reasonably calculated to enable this student to make educational progress?**

Key Concepts:

- ❍ Know those students in your class that have been identified as educationally disabled;

- ❍ Know the content of the student's IEP and how the IEP goals and objectives will be integrated into the structure of your classroom and your lesson plan;

- ❍ Know the modifications that are required by the IEP and determine how they will be achieved;

- ❍ Know how the IEP measures progress and gear your progress reports to touch on those areas which are being measured.

- ❍ Watch for, and know how to integrate, a behavioral intervention plan in the context of your classroom.

- ❍ Understand how a particular methodology, such as a reading instruction methodology, can be integrated into your classroom curriculum.

B. Reauthorization of the IDEA

The 2004 reauthorization amended most sections of the IDEA. However, the Congressional findings indicate that the concept of inclusion remains paramount. The regular education teacher is vital to ensuring that this inclusion requirement is met.

Congress found ". . . that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to –

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

(ii) to be prepared to lead productive and independent adult lives, to the maximum extent possible."

20 U.S.C. 1400(c)(5)(A)(i)-(ii) (emphasis added).

C. The Educator's Referral Obligations

The IDEA imposes upon all districts the obligation to promptly find children who may have educational disabilities, and to promptly determine whether or not they have an educational disability through the multi-disciplinary team process. This obligation includes a duty on the part of educators to refer students for evaluation by a multi-disciplinary team. The duty to refer extends to children who are suspected of being a child with a disability and in need of special education, even though the child is advancing from grade to grade. 34 C.F.R. § 300.111(c)(1).

The 2004 Reauthorization of the IDEA extends this Child Find duty to two unique classes of students: students placed in private schools located within the district; and homeless or migratory students. Under the newest version of the IDEA, the public school district has a duty to identify those students with disabilities within these particular protected classes, as well as the general population of public school students. See also Ed 1105.

D. Specific Learning Disabilities

When determining whether a child has a specific learning disability, the LEA must use one or more of the following criteria:

- A discrepancy model between intellectual skills and achievements;
- A process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures; and/or
- Other alternative research-based procedures.

Ed 1107.02(a). The regular education teacher will play an important role in the response to intervention process.

E. Reporting Obligations

The Act requires that IEPs include a description of how the child's progress toward meeting his or her annual goals 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. 20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed 1109.01(8), (9). The IEP must also contain a statement indicating whether progress is sufficient to achieve the annual goals by the end of the school year. Ed 1109.01(9).

A district can only document educational progress through the reports of its teachers and the evaluative process. Educators need to be careful in selecting descriptors that accurately report a student's progress, or lack thereof. Progress reports should be grounded in fact. Teachers should refrain from issuing opinions in areas that are outside of their areas of expertise, such as rendering ad hoc psychiatric or medical diagnoses.

Often an IEP will call for a particular method of progress reporting. This can range in frequency from daily to quarterly. It is critical to the success of the IEP that educators carefully adhere to the reporting regimen called for in the IEP.

II. The Educator's Role on the Multi-Disciplinary Team

A. "Joining the Team"

The IDEA requires that the IEP Team for each child with a disability include, among others, not less than one regular education teacher of the child. Ed 1103.01. Regular education teachers participate in the development of the IEP, determine appropriate positive behavioral interventions and supports and other strategies, and determine appropriate supplementary aids and services, program modifications and support for school personnel.

(Authority: 20 U.S.C. § 1414(d)(1)(B); 20 U.S.C. § 1414(d)(3)(c)).

B. The New Law on Team Participation

An exception process now qualifies the general Team attendance requirement, as set forth above. A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if that member, the parent of a child with a disability, and the local educational agency agree that the attendance of such member is not necessary because no modification to the member's area of the curriculum or related services is being modified or discussed in the meeting. 34 C.F.R. § 300.321(e)(a)(1).

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) that member, 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.

WRITTEN AGREEMENT AND CONSENT REQUIRED- A parent's agreement to waive attendance or to excuse attendance shall be in writing.

20 U.S.C. § 1414(d)(1)(C)(i)-(iii); 34 C.F.R. § 300.321(e)(2).

The LEA or parent shall notify the party 72 hours before a scheduled meeting, or upon learning of the expected absence of a team member, whichever is earlier. Ed 1103.01(d).

The IDEA also permits the team to agree to conduct IEP and placement meetings via alternative means of meeting participation, such as video conferences and conference calls. In addition, meetings do not include informal or unscheduled conversations among public agency personnel, and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposed response to a parent proposal that will be discussed at a later meeting.

C. Case Studies

The case of Baltimore County Public Schools, 47 IDELR 234 (Md. State Educational Agency ("SEA") 2006) illustrates the written agreement requirement.

Facts: On January 23, 2006, the District scheduled a Team meeting for February 6, 2006; prior to the meeting, the district and the parents provided each other with proposed goals and objectives, and suggested revisions to the same. At the meeting, the team agreed

to amend the IEP to incorporate the draft goals and objectives, with the parent's revisions; the team also discussed ESY and determined that the student was not eligible for services. The student's speech-language pathologist ("SLP") was on medical leave from January 31, 2006 through April 18, 2006; prior to her leave, she prepared a progress report and proposed goals and objectives, which she provided to the special education coordinator. The January 23, 2006 meeting notice listed all invitees; the SLP was not on the notice. The parent filed a complaint with the Maryland DOE, alleging, in part, that the district violated the IDEA by conducting a meeting without all of the legally required Team members.

Result: Despite the fact that the SLP was not listed on the meeting notice, the DOE found that the District did not properly convene the IEP Team. The DOE stated that "since the area of speech-language services was to be discussed at the meeting, the law requires that a formal excusal was required." Although the SLP had submitted written input, the District failed to obtain written agreement from the parent, excusing the SLP from the meeting. The DOE ordered that the District convene a meeting within 30 days to determine whether the procedural violation had an educational impact on the child, and if so, what compensatory services or other remedy is necessary to redress the violation.

Similarly, in Bacon v. City of Richmond, the Arkansas SEA held that a decision to proceed with a team meeting despite the parents' objection to proceeding without several team members violated the IDEA. 47 IDELR 119 (Ark. SEA 2006). The district had convened a meeting to review the results of the student's three-year reevaluation. Parents requested that the student's AT teacher and speech-language therapist attend the meeting; despite this request, the district conducted the meeting, and proposed an IEP, without those individuals. The hearing officer found that the district violated its own policies, which required it to obtain consent from the parents in writing if an IEP Team member was unable to attend a meeting. If the parent did not consent, then the district was required to reschedule the meeting to a later date. In this case, the parent objected at the meeting, and after the meeting sent a written objection to the superintendent. The hearing officer held that the district's failure to reschedule the meeting prohibited the parents from participating in the team process and denied the child a FAPE.

In the case of Board of Ed. of the City School District of NY, 24 IDELR 199 (NY SEA 1996) an IEP team for a student with a cognitive impairment recommended, after an evaluation, that the student's classification be changed to autistic and that he be placed in a special education classroom with speech and language therapy, occupational therapy, and an aide. The student's teacher was delayed in attending the IEP team meeting where this decision was reached, and the parent left the meeting before the teacher arrived. The parent later enrolled the student in a private school and sought an order that the district's recommended placement was inappropriate. The hearing officer declared the district's placement recommendation a nullity, because the IEP team was not validly composed due to the teacher's absence from the meeting. See also Board of Education of Valley Stream 13 Union Free School District, 25 IDELR 1027 (N.Y. SEA 1997) (school's failure to include student's teacher in IEP team meeting was a fatal flaw to IEP development, regardless of whether or not team's recommended placement may have been otherwise appropriate).

Key Concepts:

- ❍ Your attendance at a meeting is vital. Without your presence the legal structure of the team has been compromised.

- ❍ You have the right and obligation to understand how an IEP impacts your teachers and your classrooms.

- ❍ Frequently the regular educator has the most practical suggestions for how to modify the curriculum or the classroom setting. You should be aware of the fact that your input is considered as significant as the input from any other team member.

III. The Educator's Responsibility for IEP Implementation

As mentioned in the Overview, the IDEA requires that each District provide a free appropriate public education to all children with disabilities residing in the District. This duty includes developing and **implementing** an individualized education program for each such child, as well as participating in the review and revision of the individualized education programs. You will be informed of your specific responsibilities related to implementing IEPs as well as the specific accommodations, modifications, and supports that must be provided for the child in accordance with his or her IEP.

20 U.S.C. §1412(a)(1)(A); 20 U.S.C. §1412(a)(4); 34 C.F.R. § 300.323(d)(2).

A. Failure to Fully Implement

The duty to provide a FAPE to all children with disabilities residing in the district includes developing and implementing an individualized education program for each such child. 20 U.S.C. §1412(a)(1)(A); 20 U.S.C. §1412(1)(4). It is the failure on the part of a District to implement its own plan that frequently causes the most problems. Several case studies in point:

1. Berkshire Hills Regional Sch. Dist., 38 IDELR 282 (SEA Mass. 2003)

Facts: The parents of an autistic first-grader agreed to an IEP that provided that the student be placed in a separate small class (6-8 students) for first grade, with inclusive settings for lunch, recess and specials. The District could only place three children in the class, including the student. The parents and the District agreed to a new IEP, which opened the small class to second graders. However, the parents and district did not agree whether the classroom would be comprised of the same group of students. Parents believed that the class would be comprised of a consistent group of children, while the District believed that the group did not need to be comprised of the same students each day. Parents requested due process, alleging denial of FAPE.

Ruling: The hearing officer found that by only having 3 students in the classroom, the District failed to fully implement the first IEP. However, the hearing officer was not able to determine the educational implications, if any, of the district's failure to provide the student with a classroom without the number of students required by the IEP. The hearing officer found that the second IEP was ambiguous and therefore could not make a finding as to whether the district complied with that IEP.

Key Concepts:

- The District must implement the special education program and related services required each IEP.

- This case also illustrates the importance of communication with parents during the creation and modification of IEPs.

2. Maryland-Montgomery County Public School, 31 IDELR 70 (Aug. 12, 1999)

Facts: A student with a mild learning disability had attended district schools for 7th, 8th and part of 9th grade year. When the student was in 9th grade, parents removed student to an 8th grade curriculum at a private school, claiming that school failed to implement IEP and failed to provide an adequate IEP. School had used methods such as counselor involvement, parent conferences, consultations with specialists and colleagues, adjusted workload, preferential seating, student conference, modifying methods and materials.

Ruling: School failed to meet goals of student's 7th and 8th grade IEPs, which called for specified hours of weekly SPED services and thereby deprived student of appropriate education for two years. School's 7th, 8th, and 9th grade IEP's were inadequate, because they were based on student's emotional problems, and not on consideration of how she learned. Parents entitled to private school tuition reimbursement, plus transportation and related costs, and two academic years of compensatory education.

Note: Hearing Officer stressed that it was clearly unrealistic to set same exact goals for 9th grade IEP which were never met in 7th and 8th grade IEPs. Officer discredited testimony of student's classroom teachers that they believed the student was learning, given her poor grades and test scores.

Key Concepts:

- Repetitive IEP goals are a "red flag" in many cases.

- Progress is still measured the "old fashioned way," by whether the

student makes the grades and test scores, and not simply by the perception of a teacher that a student has progressed.

3. Arlington (TX) Indep. School District, 31 IDELR 87 (February 9, 1999)

Facts: A student with ADD was the subject of a Section 504 Plan. Parents complained that classroom teacher failed to implement the student's 504 Plan because teacher did not provide all of the modifications described in the Plan.

Ruling: Computer course teacher failed to comply with requirements of Section 504 because she did not provide all of the modifications in the 504 accommodation plan, despite her testimony that she "accepted late assignments, gave student special instructions, and extended deadlines beyond what was allowed for other modified students."

Key Concept:

- ❍ Educators cannot selectively implement an IEP or Section 504 Plan.

B. The Dangers of Unilateral Changes to an IEP: A Case in Point

The IEP is a document that may only be modified in a Team setting. However, when making changes to an IEP after the annual IEP Team meeting, the parent and the LEA may agree not to convene a Team meeting for purposes of making the changes, and instead may develop a written document to amend or modify the current IEP. 34 C.F.R. § 300.324(a)(4)(i). However, educators do not have the latitude to unilaterally alter an IEP.

1. Penn-Tyrone Area School District, 31 IDELR 20 (March 22, 1999)

Facts: An eight-year-old student with mental retardation and speech and language impairment had attended District's alternative school since kindergarten. The state Special Education Bureau found that the school was not age appropriate. The District then prepared a new IEP, without convening the team and without parental participation, which transferred student to another alternate regular school. District claimed it did not include parents because it knew they opposed transfer and that "no meaningful benefit" would be obtained from holding an IEP team meeting.

Ruling: Court declared the IEP a "nullity." District had to convene IEP team and start anew.

Key Concept:

- ❍ Never permit unilateral deviation from an IEP. IEPs may only be modified by the Team at a meeting or, if the parents and the district have agreed in writing, the

Team may, in lieu of convening a meeting, develop a written document to amend or modify a child's current IEP. 20 U.S.C. § 1414(d).

C. Flexibility in Methodology

District does have flexibility in the methodology it uses to reach an IEP's goals and objectives. However, it is important that the methodology be consistent throughout the educational program.

1. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 2008 WL 3843913 (D.N.H. Aug. 14, 2008), aff'd by 592 F.3d 267 (1st Cir. 2010)

Facts: Parents argued in part, that the IEP proposed by the district for the 2005-06 school year was deficient because it "lack[ed] a viable literacy program." Parents alleged that the student "was nineteen at the start of the 2005-2006 school year," and that "she could not read." The district asserted that the student "was progressing at a level commensurate with her abilities and disabilities." While the IEP was being developed, parents provided the district with an evaluation from Dr. Kemper, who recommended that the district provide a multi-sensory reading program, specifically, the Lindamood Phonemic Sequencing ("LiPS") program, to the student.

The district had been providing the student with a multi-sensory reading program, which it had initially planned to continue, but during IEP development, the district had the student's speech pathologist trained in the LiPS program, and revised the IEP to include the LiPS program. The parent believed that the speech pathologist was not sufficiently trained in LiPS because "she lacked hands-on experience in administering the program and refused to allow the speech pathologist to work with" the student. Parent also suggested that a different reading program, the Davis Reading Program, would be better for the student. The Hearing Officer found in favor of the district, and the court affirmed, rejecting the parent's argument that "the LiPS program has to be administered by a provider who at a minimum was trained and had at least one year of experience in working with the LiPS program."

Ruling: For the District. "School districts are authorized to select among competing programs or methodologies that are most suitable for a child's needs. It is difficult, therefore, for parents to succeed on a claim, under the IDEA, that their recommended program would be a better choice. 'Where, as here, a school system develops an IEP component in reliance upon a widely-accepted methodology, an inquiring court ought not to condemn that methodology ex post merely because the disabled child's progress does not meet the parents' or the educators' expectations." Id. at *6 (citations omitted).

2. Elkhorn Public Schools, 45 IDELR 145 (Neb. SEA 2005)

Facts: Unhappy with the services offered by their district, parents requested due process, alleging that their child had not received FAPE. The parents, who were new to the

district, wanted the district to implement the same program and methodologies that the previous district had implemented.

Ruling: The hearing officer found that the district had considered all of the available information and that it offered placement in the least restrictive environment. The hearing officer held that as long as the methods offered by the district were appropriate, the district was not required to utilize the methodologies requested by the parents.

3. CJN by SKN v. Minneapolis Pub. Schs., 323 F.3d 630, 38 IDELR 298 (8th Cir. 2003)

Facts: A student with lesions on his brain and a history of psychiatric illness had behavioral difficulties, but continued to make appropriate academic progress with the District's program. The parents requested that the District implement a specific behavioral program; thereafter, his parents decided to unilaterally place the student in a private school, and requested reimbursement for the placement.

Ruling: The hearing officer found that despite his behavior problems, the student made academic progress. Therefore, the student's IEP appropriately managed his behavioral issues and it was not necessary for his educators to implement the methodology preferred by the parents. Parents request for reimbursement was denied.

4. Tex. El Paso Indep. School District, 31 IDELR 25 (Tx. SEA 1998)

Facts: Eighteen-year-old student had ADD, learning disability and speech impairment. Parents made unilateral private school placement because of dissatisfaction with student's IEP.

Ruling: For the school district, because:

(1) IEP was crafted with parental involvement, provided goals, and objectives, and used proper assessment methods;

(2) District's academic assessments met Rowley standard and yielded reliable information;

(3) Officer rejected parents' contentions that the IEP's goals and objectives were required to contain all or most of the grade-level objectives for every essential element, the IDEA does not require the IEP to be a detailed instructional plan, but rather must provide only general direction;

(4) District not required to adopt parent's preferred methodology for teaching;

(5) Evidence established student had some benefit from District placement; and

(6) In addition to using adequate assessment instruments, the District considered input from student's mother and teachers concerning her academic progress and therefore did not use any sole criterion to measure student's program.

Note: This decision is consistent with a long line of cases giving district's discretion to use particular methodologies or personnel, as long as choices are "reasonably calculated to provide educational benefit."

Key Concept:

❍ As long as they are implementing the services required by the IEP, educators are not required to implement methodologies that are not required by the IEP.

IV. Disciplinary Options Under the IDEA

A. Understanding the Key Rules

The disciplinary options available to educators are curtailed to some extent by the IDEA. The philosophy behind this curtailment is that educationally disabled students should not be disciplined for wrongful acts that are a manifestation of their educational disability, and that they should receive a FAPE even if subject to long-term suspension or expulsion. You should be aware of the following rules:

1. The "Ten School Day" rule

A student with a disability may be suspended or moved to an alternative setting for up to 10 school days, (as with a nondisabled student), without convening an IEP team to determine whether the misconduct was related to the student's disabilities. This is based on the concept that a suspension, or series of suspensions totaling less than 10 school days, does not constitute a change in placement. The school need not provide services during such a "short-term" suspension or removal, unless services would be provided to a non-disabled student during such suspension or removal. 34 C.F.R. § 300.530(d)(3).

School personnel may consider "any unique circumstances" on a "case-by-case basis " when determining whether to order a change in placement for a child with a disability "who violates a code of student conduct." 20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 300.530(a). School personnel may now remove a child with a disability who violates a code of conduct from their current placement to:

- an appropriate interim alternative educational setting;
- another setting; or
- suspension for not more than ten (10) days

to the extent such alternatives are applied to children without disabilities. 20 U.S.C. § 1415(k)(1)(B). In addition, school personnel may make additional removals of not more than

10 consecutive school days in the same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement). 34 C.F.R. § 300.530(b)(1).

"Unique circumstances" were not defined in the regulations, but the Office of Special Education and Rehabilitative Services ("OSERS") has opined that they include the child's disciplinary history, the child's ability to understand consequences, whether the child has expressed remorse, and the supports that were provided to the child prior to the violation. 71 Federal Register, No. 156, 46714 (Aug. 14, 2006).

Once a child has been removed from the current educational setting for 10 school days in the same school year, the district must provide the child with educational services that enable him or her to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 C.F.R. §§ 300.530(b)(2); 300.530(d)(1)(i). The district must also provide, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. Id. at § 300.530(d)(1)(ii). School personnel, in consultation with at least one of the child's teachers, are responsible for determining the extent to which services are needed so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. Id. at § 300.530(d)(4).

2. The "Cumulative Suspension" rule

If a student has been removed for more than 10 consecutive school days or is subjected to a series of removals that constitutes a pattern because:

1. They amount to more than 10 days in a school year;

2. The student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and,

3. Of other additional factors such as the length of the removal, the total amount of time the child has been removed, and the proximity of the removals to one another

then the student will be considered to have been subjected to a change in placement. 34 C.F.R. § 300.536(a). The LEA is responsible for determining, on a case-by-case basis, whether a pattern of removals constitutes a change in placement. Id. at § 300.536(b)(1). A change in placement requires the school to continue to provide services necessary for the student to progress in the curriculum and to advance toward achieving the goals of the student's IEP, and to provide, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. 20 U.S.C. § 1415(k)(1).

OSERS has opined that this provision provides "public agencies the flexibility to implement discipline policies as they deem necessary to create safe classrooms and schools for teachers and children as long as those policies are fair and equitable for all children and protect the rights of children with disabilities." 71 Federal Register, No. 156, 46728 (Aug. 14, 2006).

In any suspension of more than ten school days, or removal that constitutes a change in placement, the school must:

1. No later than the date on which the decision to take the suspension or removal action is made, notify the parents of the decision and provide a procedural safeguards notice;

2. Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take the suspension or removal action is made, convene a meeting with the parents and the relevant members of the IEP Team (as determined by the parent and the LEA) to review all relevant information in the student's file, including the IEP, teacher observations, and relevant information provided by the parents to determine:

    a. whether the conduct was caused by, or had a direct and substantial relationship to the child's disability or

    b. whether the conduct was the direct result of the LEA's failure to implement the IEP.

34 C.F.R. § 300.530(e), (h).

If the LEA, parent and relevant members of the IEP Team determine that paragraphs (2)(a) or (2)(b), above, are applicable to the child, then the conduct shall be determined to be a manifestation of the child's disability, and the team must conduct a functional behavioral assessment, and implement a behavioral intervention plan ("BIP"), if it has not already done so. If a BIP has already been developed, the team must review the BIP plan and modify it, as necessary, to address the behavior and, unless special circumstances exist, must return the child to the placement from which he or she was removed, unless the parent and LEA agree to a change in placement as part of the modifications to the BIP. 20 U.S.C. § 1415(k)(1); 34 C.F.R. § 300.530(f).

Several recent decisions have discussed the manifestation standard. In MAST Community Charter School, the Pennsylvania State Education Agency rejected the parents challenge to the manifestation determination. 47 IDELR 23 (Pa. SEA 2006). The student had been identified as eligible for special education and related services while in was in fourth grade and had made significant academic and behavioral progress during the period of fourth through ninth grade. During that time, the student had been taking medication to assist in controlling his

impulsive behavior. At the end of his ninth grade year, the student's parents took him off of the medication.

In October 2006 (tenth grade), the student was suspended for ten days after he took a three-inch folded hunting knife to school. The student informed school officials that he carried the knife to protect himself when he walked in his neighborhood. The district convened a manifestation meeting, which was initially postponed at the request of his parents, who had obtained an emergency evaluation. At the student's manifestation meeting, the team reviewed his records, IEP, and the evaluation, and determined that the weapons violation was not a manifestation of the student's disability. Therefore, the team recommended placement in a 45-day interim alternative setting.

The parents disagreed with this decision and requested a due process hearing. The SEA agreed with the team, noting that since there was no dispute that the district had been implementing the IEP, the behavior would be a manifestation only if the disability caused, or had a substantial relationship to, the conduct in question. The SEA held that the student's deliberate decision to bring the knife to school on a regular basis, was not caused by, or substantially related to, his disability which was largely due to impulsive behaviors. Accordingly, the student could be disciplined in the same manner as children without disabilities.

Similarly, in Baltimore County Public Schools, the student, a sixteen year old with psychiatric and behavioral disorders, was suspended for using illegal drugs prior to going to school. 46 IDELR 179 (Md. SEA 2006). On the day he was suspended, the student had taken psychiatric medication, which he had not taken for three-weeks. After taking the medication, the student became drowsy and lethargic. The student's instructional assistant noticed that the student had his head on his desk, and after asking the student to come to his desk, told him "You are high as a kite." The student replied "No s**t, you're just noticing?"

The instructional assistant brought the student to the nurse, who believed that the student's drowsiness and slower reactions were caused by his psychiatric medication. The student was sent back to class; when the behavior continued, his teacher sent him back to the nurse's office and the assistant principal ordered the nurse to conduct an impairment assessment. Following the assessment, the nurse determined that he was impaired; the student subsequently told the nurse that he had smoked a joint before school. He was suspended and sent home; the district later recommended that he be expelled because of his use of illegal drugs.

The District convened a manifestation meeting and determined that the student's behavior was not a manifestation of his disability. His parents appealed that decision, arguing that the student's therapist had opined that his conduct was substantially related to, or caused by, his disability. The SEA rejected that argument, noting that the opinion that the "student has a major psychiatric disability which has had a significant impact on his psychological, social and academic development" was not the equivalent of an opinion that the student's "specific behavior was caused by, or had a direct and substantial relationship to student's disability."

In contrast, in Philadelphia City School District, the SEA held that the district erred when it determined that the student's behavior was a not manifestation of his disability. 47 IDELR 56 (Pa SEA 2007). During the 2005-06 school year, the student, who had been identified as eligible for services since 1998, engaged in serious threatening behavior. This behavior resulted in the student's placement being changed to a private school for students with emotional disabilities. During the first part of the 2006-07 school year, the student broke into the private school on several occasions, to use the school computers to download pornography. Eventually, the student stole the school's computer server and related equipment. He was caught after he offered to sell the stolen items to other students. He was suspended for three days, and the school officials recommended transferring the student to a remedial disciplinary setting.

A manifestation meeting was convened, it was determined that the student's behavior was not a manifestation of his disability, and the parents were given notice that the district was recommending placement in a remedial disciplinary setting. The parents disagreed with this decision and requested due process.

The SEA reversed the hearing officer's decision, holding that the student's conduct had a direct and substantial relationship to his disability. The SEA believed that it was "more likely than not" that the student's ED, which was marked by inappropriate behaviors, attention-seeking and ODD, caused or was substantially related to his repeated break-ins, which culminated in theft of items. Because the behavior was a manifestation of the student's disability, the district could not change his placement without parental consent.

B. "Special Circumstances" Allowing for Removal to an Interim Alternative Educational Setting

A student with a disability may be removed to an appropriate interim alternative educational setting for the same amount of time that a non-disabled child would be removed, but for not more than 45 days, without regard to whether the behavior was a manifestation of the child's disability, if the removal is for:

1. possession of a weapon[1] at school, on school premises, or at a school function;

2. knowingly possessing or using illegal drugs at school or selling or soliciting the sale of a controlled substance[2] at school, on school property, or at a school function; or,

[1] 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 of less than 2 ½ inches in length." 20 U.S.C. § 1415(k)(7)(A).

[2] Controlled substances that are "legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used" are expressly excluded from the definition of "illegal drug." 20 U.S.C. § 1415(k)(7)(B).

3. inflicting serious bodily injury[3] upon another person while at school on school premises, or at a school function.

20 U.S.C. § 1415(k)(1)(G). That student must still receive a FAPE and the interim educational setting shall be determined by the IEP team. Id. at § 1415(k)(1), (2).

It is important to note that nothing in the IDEA "shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. § 1415(k)(6)(A).

1. Conduct Codes

To the extent that alternate placements are applied to children without disabilities, school personnel may remove a child with a disability who violates a code of conduct from their current placement to: an appropriate interim alternative educational setting; another setting; or suspension for not more than ten (10) days. 34 C.F.R. § 300.530(b)(1).

School personnel may consider "any unique circumstances" on a "case-by-case basis" when determining whether to order a change in placement for a child with a disability "who violates a code of student conduct." 34 C.F.R. § 300.530(a).

C. Protection for Children Not Yet Eligible for Special Education Services

A child who has violated the code of student conduct and who has not yet been determined to be eligible for special education and related services may assert the protections provided by the IDEA if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 20 U.S.C. § 1415(k)(5)(A).

The LEA will be deemed to have knowledge when:

1. the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

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[3] Serious bodily injury means bodily injury which involves:

- A substantial risk of death;
- extreme physical pain;
- protracted and obvious disfigurement; or
- protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

20 U.S.C. § 1415(k)(7)(D).

2. the parent of the child has requested an evaluation of the child; or

3. the teacher of the child, or other personnel of the LEA, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of the agency or to other supervisory personnel of the agency.

20 U.S.C. § 1415(k)(5)(B)(i)-(iii).

The LEA will not be deemed to have knowledge that the child is a child with a disability if the parent has not allowed the child to be evaluated or has refused services, or if the child was evaluated and it was determined that the child was not a child with a disability. 20 U.S.C. § 1415(k)(5)(C). If the LEA does not have knowledge then the child may be disciplined in the same manner as all other children without disabilities who engage in comparable behavior. Id. at § 1415(k)(5)(D)(i). However, if the parent requests an evaluation during the period in which the child is subject to disciplinary measures, the district must conduct an expedited evaluation. If the child is determined to be a child with a disability, then the district must provide special education and related services. Id. at § 1415(k)(5)(D)(ii). Pending the evaluation results, the child shall remain in the educational placement determined by the school authorities. Id.

The case of Corpus Christi Indep. School District, 31 IDELR 41 (Tx. SEA 1999) illustrates these protections. In that case, the parents alleged that the District denied a FAPE to their 5-year old kindergarten student because the District failed to recognize and evaluate suspected disability condition and need for special services. The student had a history of behavioral difficulties, including hitting other children. Student's counselor had suggested referral for speech and language testing but parent disagreed. Counselor and principal then both agreed that student did not require services under the IDEA and did not need referral for IDEA special education eligibility

Ruling: Based upon at least 31 recorded disciplinary referrals and a threatened suspension, the district should have been suspicious that student may have had a qualifying disability under IDEA. District was ordered to assess student for all suspected areas of disability and educational needs.

Key Concepts:

- A district's child-find duty is not dependent on any request for special education testing, referral, or services. Duty arises with district's knowledge of facts, such as disciplinary history, tending to establish a "suspected" disability and need for IDEA special education services.

D. Short Periods of Discipline

In the case of Coventry (R.I.) Public School, 31 IDELR 60 (OCR 1999) the parent alleged that the district discriminated against a student based on his disability, ADHD/OCD, by giving him detention for behavior related to his disability. The student received a one-time, half-hour detention for a "bag-popping" incident.

The Court reasoned that Section 504 requires a district to evaluate a student with a disability prior to making a "significant change" in his or her placement. A change in placement is considered "significant" when actual or proposed disciplining of a student excludes the student from the educational program for more than ten consecutive school days. This detention was not a significant change in placement sufficient to trigger protection under Section 504. The Court's reasoning in this case applies with equal force to circumstances involving the short-term discipline of a student protected by the IDEA.

E. Liability for Disciplinary Techniques

The manner in which an educator disciplines a student may give rise to a challenge that it violates a student's due process rights. For example, in the case of Rasmus v. State of Arizona, 24 IDELR 824, 939 F.Supp. 709 (D. Ariz. 1996), a student with ADD and an emotional disability was locked in a small, lighted, unfurnished room, (the "time-out" room), where the student could hear and speak with the teacher, and could be observed by the teacher, as discipline for violent behavior. The Court found that the School's conduct did not violate the student's due process rights since the interference with his liberty interests was de minimis. The employees were also granted immunity by the court.

The decision by the Court in these circumstances was within the exercise of its discretion. There is no guarantee that another court would rule in accord with this decision.

Key Concepts:

- An IEP written for a student with behavioral issues should contain interventions in the form of a Behavioral Intervention Plan. When the intervention is part of the IEP, it protects the student and the District from disagreement over whether or not the intervention results in a change in placement. A failure to set forth interventions leaves the educator with limited disciplinary options.

- Educators should generally avoid creating new interventions for a student without first convening a team meeting.

V. The Educator's Responsibility with Regard to Placement

After a child has been referred, identified and received an Individualized Education Plan, it is the role of the IEP Team to make a decision as to where that child will be placed, i.e., where the child will receive their Free Appropriate Education at Public Expense. This FAPE requirement imposes on local school districts an obligation to provide a program that is

"sufficient to confer some educational benefit upon a [disabled] child." See Board of Education v. Rowley, 458 US 176, 200 (1982). The IDEA also requires that districts, to the maximum extent appropriate, educate their students with disabilities with their non-disabled students and that they only remove disabled students from the regular educational environment when the student cannot make adequate educational progress in that environment. See e.g. 34 C.F.R. § 300.114. Neither the IDEA nor New Hampshire Law require that the IEP and placement decisions be made to "maximize," a child's educational benefit.

A school district faces a tremendous financial challenge when an IEP Team, Hearing Officer or court concludes that the district lacks the resources to educate a child within the district. Thus, RSA 186-C:18, X provides that "unexpected special education costs incurred by a school district which are eligible for reimbursement from the state pursuant to RSA 186-C:18, III and which could not be identified prior to the adoption of the local school district budget shall be exempt from the provisions of RSA 32:8, RSA 32:9, and RSA 32:10." Districts must include, in their annual report, an accounting of actual expenditures for special education programs and services for the previous two fiscal years. RSA 32:11-a.

On some occasions, parents will unilaterally place their children in private school without the prior consent of a school district and then seek reimbursement from the district. A school district is not required to pay for a unilateral private placement if the school district has made an offer of a Free Appropriate Education at Public Expense to the child. For example, if a child will make adequate educational progress in a day program, the district is not responsible to reimburse the parent for the residential program even if the residential program would better enable the child to reach their full educational potential. However, if a student's social and emotional problems adversely impact on their education in the local school to the point where they are not making adequate educational progress, the district is at risk for a determination by a Hearing Officer or court that the only opportunity to adequately educate the child is in the more restrictive setting of a residential educational placement.

VI. Grading Special Education Students

There are some basic rules that the educator should apply to the grading of a special education student. These rules are as follows:

A. All students are entitled to a grade.

If a student is to receive truly an equal opportunity, he or she should be given the opportunity to receive a grade. If the IEP does not reference any grade modifications, the assumption by the Office for Civil Rights is that the student will be graded in accord with the school's general grading standards. Thus, there should be no informal grade modifications outside of those established through the IEP team process. Simply put, students with disabilities should receive grades and credit in the same manner as other students when they complete the same courses as other students.

B. All students with disabilities are entitled to grades that reflect the level of work they are capable of completing, consistent with the IEP authorized accommodations and modifications to the core curriculum.

This rule is true regardless of whether or not the student is receiving services in a regular or special class. This basic rule only works effectively if the IEP Team sets academic standards that will balance the student's exceptional needs with challenging academic levels.

C. High, low or modified grades may be given to students with disabilities as long as those grades are available to ALL students.

A student's grade may not be modified solely on the basis of his or her special education status. To do such is to create a discriminatory classification. It is permissible to give modified grades, so long as the modified grades are available to all students, not just students in special education.

Any modification should be reflected in the IEP and should be directly related to the student's disability. If the modification is so extreme that it significantly alters the assignment or assessment, then it should be identified as an alternative assignment or assessment. Any such alternative assignments or assessments should be stated in the IEP and should relate directly to the student's disability.

When an IEP Team determines that a student with a more severe disability can not attain the school's content standards for a given course despite accommodations and modifications, then it is proper for progress toward IEP goals to be considered an appropriate measurement for grading.

D. Modified Grades may be identified as such on report card or transcript as long as the student's special education status remains confidential.

As a general rule, modified grades may be reflected as such on the report card or transcript provided:

- ❒ The decision to provide the modified grade is made on an individual basis;
- ❒ The decision provide the modified grade is reflected in the IEP;
- ❒ The modified grade is available to all students (special education, general and gifted); and
- ❒ The decision to allow the modified grade is not made on the basis of the student's status as a special education student.

E. Classes should not be identified as special education classes on a report card or transcript.

The Office for Civil Rights (OCR) strongly discourages the use of transcript labels that identify a course as a special education course. See e.g. California (CA) Department of Education, 47 IDELR 45 (OCR 2006) (Section 504 and the ADA prohibit districts from stating, on a transcript, that a student received special education or related services - "[i]nformation that a student has received special education or related services or has a disability does not constitute information about the student's academic achievements"). OCR encourages the use of more generic descriptors, such as "Basic," "Level One," or "Practical," in describing courses that are targeted to special education students.

In contrast, Section 504 and the ADA do not prohibit districts from indicating, on report cards, that a student is receiving special education or related services, as long as the information is presented in a manner that provides parents with information about the students' progress or level of achievement in specific classes, course content, or curriculum. Id.

F. General education teachers should collaborate with special education teachers.

When both the general educator and the special educator are providing instruction to a student with disabilities, it is advisable that the teachers collaboratively reach an appropriate grade. This requires that the general educator and special educator develop a mutual grading arrangement in the context of an IEP meeting and that the arrangement is indicated in the IEP.

G. Students with disabilities may not be excluded from recognition on the Honor Roll or other such academic honors on the basis of their status.

Students must be given an equal opportunity to participate in courses at all levels for which they are qualified or meet course requirements. A District may establish a neutral system of weighted grades, or "core course" criteria for honor roll, as long as the standards are founded on legitimate educational standards. The practical result may be that certain students with disabilities will be unable to perform at the levels required for these honors.

H. Pass/Fail grades should only be awarded if they are allowed as a legitimate modified grade in the IEP or are available to all students in the course.

The grading matrix for a special education student should not differ from other students unless the difference is the result of a legitimate modification in the IEP. An example of an inappropriate grading practice would be for all special education children to receive a pass/fail grade in a course when the non-identified students receive a letter grade.

I. An appropriate grading policy must be simple to understand, provide adequate notice to parents and students, and provide informed choice as to whether to accept accommodations which affect grading.

Communication with parents regarding grades is vital. The time to do such is during the IEP Team meeting. Parents are entitled to notice of the District's grading policy and an explanation of the grading policy. Parents of special education students should be offered an informed choice as to whether or not to accept accommodations and/or modifications that will affect grading. They should also be made aware of the adverse impact that a lack of accommodation or modification may have on promotion.

VII. Teacher Comments

Beyond simply providing a letter grade, teacher comments on progress reports or report cards can be the impetus for complaints by parents and students. Comments are often necessary to convey specific information regarding a student's progress, or lack of progress, as well as to document a student's classroom behavior. However, teachers should use caution to assure that all comments are made timely and accurately, and should maintain records throughout the marking period. This will go far toward refuting any contention that a student is being discriminated against because of behavior related to his or her disability.

In the case of Coventry (R.I.) Public School, 31 IDELR 60 (OCR Feb. 1999), an English teacher wrote the following comment on a student's report card: "behavior needs improvement." The parent complained that the comment was made solely because of parent filing a complaint, because all of the student's previous comment reports had been good. The OCR found that the teacher's comments were not made in retaliation for the parent's action in filing a complaint. The hearing officer relied upon the teacher's testimony that the comment was warranted based on student's misbehavior on several prior occasions. In particular, the officer noted that there were at least two indications of some misconduct contained in the teacher's prior reports.

VIII. Promotion

In the special education context, disputes have often arisen over the subject of promotion, in particular, over the practice known as "social promotion." Parents and students have frequently argued on both sides of the equation; that is, they may argue for promotion when the district does not believe that the student has earned it, and they may argue against promotion when the district believes that promotion is in the student's best interest, whether because of academic or social factors, or a combination thereof. The key here is for the district, via the classroom teachers, to provide the student with the opportunity to earn promotion, and to carefully consider and document the reasons behind the district's decision to recommend for or against promotion. Even if the district gives in to pressure from a parent in determining whether or not to promote, the basis for the district's recommendation should be carefully documented.

Hernando (FL) County School, 31 IDELR 89 (OCR Feb. 12, 1999), is a case demonstrating this debate and a district that acted properly under the circumstances. This case involved a student with diabetes and asthma. After an evaluation, the district determined that he did not have a specific learning disability. In his fourth grade year, student had a Section 504 plan, which focused on the effects the student's disabilities had on his academic performance. The district recommended against promotion to 5th grade because of academic deficiencies, but relented upon parent's insistence. In the 6th grade, student had 36 unexcused absences and failed five classes. The school refused to promote the student to 7th grade. His parent contended that the absences were due to the student's diabetes, and that failure to promote was therefore discriminatory. The hearing officer ruled that the district did not discriminate based on disability when it failed to promote. The officer determined, based upon the student's record and teacher testimony, that the decision was based on the student's failure to master the subject matter. Given the accommodations that the district had provided, including a liberal policy for allowing the student to make-up missed work, the student's performance not hampered by any failure of the district to accommodate his needs.

IX. Maintaining Professionalism and Reducing Risks under the IDEA

A. Claims of Retaliation

Parents have frequently complained that school personnel have taken adverse action against a student in response to a parent's decision to assert his or her rights under the IDEA or other legislation affording rights to parents of disabled students. This concept has become known as "retaliation" in the case law. While it would be a rare case for an educator to intentionally take adverse action against a student in retaliation for assertion of his or her legal rights, the focus is not simply the educator's intent, but rather, how the educator's action is perceived in hindsight. OCR has developed a five-part test to determine whether a district has engaged in prohibited retaliation. It may be useful for you to consider the steps of this test before taking action with respect to a student who is involved in due process proceedings or whose parents have filed a complaint with OCR.

The five questions you should consider are:

(1) Has the parent/student engaged in a protected activity?

(initiated due process proceedings, filed suit in court, filed a complaint with OCR)

(2) Is the district or its agents aware of the protected activity?

(how and when did district receive notice, is there a rumor or verified action)

(3) Will the adverse action against the student occur at the same time as, or after, the parent/student engaged in the protected activity?

(4) Will a neutral third-party decide there is a causal relationship or connection between the protected activity and the adverse action?

(5) Can the district offer legitimate, nondiscriminatory reasons for the adverse action, which a neutral third-party will not consider to be pretextual?

B. Avoiding Allegations of Retaliation: Six Examples

1. Barring Parent Participation

In the case of Spencer County (KY) School District, December 31, 1998, 31 IDELR 38, the parent of home-schooled child, who was receiving some special reading and writing instruction at a district school, alleged that district retaliated against her for filing a complaint, by banning her from the school and refusing to let her volunteer in her son's class. The school principal had denied the parent's request to volunteer in her son's classroom, because he had received complaints from school staff regarding the parent's failure to adhere to student confidentiality rules. Under the five part test for retaliation, the hearing officer found no causal relationship existed between the principal's action and the filing of the complaint. The school had documented the complaints regarding the parent's conduct, so there was sufficient evidence to establish that the school's action was consistent with school's rules, and that the school acted for legitimate, non-discriminatory, non-pretextual reasons.

2. Using Confidential Information

In another recent case, Forest Grove (OR) School District 15, October 9, 1998, 31 IDELR 15, the parent of a child suffering from post-traumatic stress disorder claimed a district retaliated against her for insisting that teachers follow her daughter's Section 504 Plan. The parent claimed that a principal canceled a parent-requested meeting with teachers and that the superintendent used sensitive information about the student's hospitalization and emotional condition to intimidate the parent. The hearing officer determined that the district did not retaliate against the parent, because the principal had provided an acceptable reason for canceling the meeting, relating to the inability of all necessary parties to attend. Also, the superintendent testified that his reasons for questioning the parent about the student's hospitalization and recovery were not for the purpose of discouraging parent from pursuing the student's rights, or in retaliation against the parent. His actions were justified by his desire to see that school staff was informed sufficiently to provide the student the services she would need upon return to school.

3. Engaging in Student Discipline; Failing to Qualify the Student for Honor Roll

In Barker (New York) Central School District, April 24, 2001, 35 IDELR 253, the parent alleged that the student's discipline and her subsequent arrest were related to the parent's protected activity of filing a complaint with OCR. Additionally, the parent alleged that the

district's determination that the student was not qualified for honor roll status was in retaliation to her complaint. OCR considered both of the allegations and rejected both allegations as unsubstantiated. First, OCR reviewed the District's policies and procedures and criteria for participation in its honor roll program. OCR found that while the student's academic record was good her failure to receive passing grades in physical education class disqualified her from the district's honor roll criteria. Based on that evidence OCR found that the district's determination that the student was not qualified for honor roll status was consistent with the district's stated policies and procedures. On that basis OCR concluded that the evidence was insufficient to support a finding of retaliation.

The student had also made complaints that she wanted three district personnel dead and warned that when she was gone the place was going to be "blown up." As a result, the student was arrested. The student also received an out-of-school suspension for five (5) days. OCR concluded that there was insufficient evidence to support the allegation that the student's discipline and her arrest were related to the complainant's engaging in the protected activity of filing a complaint with OCR. Instead, the district found the disciplinary episode to have been credibly accounted by the district and OCR concluded that the district's reason for disciplining the student was not a pre-text for discrimination.

4. Towing Student Vehicles

In a local case, Salem (NH) School District, April 16, 2001, 35 IDELR 260, a parent alleged that the District failed to properly prepare and implement her son's IEP resulting in his failing grades and ultimate loss of the opportunity to play hockey. OCR rejected this allegation finding that the district followed its policies and procedures for evaluating the student and providing him with FAPE and further finding that the student did meet the age and attendance requirements for athletic eligibility. The parent also alleged that the student was harassed because his car was towed while illegally parked without a permit. The Office for Civil Rights found no evidence that the student's car was towed as a way to harass him based on his disability. The parent also alleged that the presence of a school resource officer at team meetings was intended to intimidate the student. OCR found that the school resource officer's occasional participation did not create a hostile environment based on the student's disability.

5. Engaging in Bus Suspensions

In Conecuh County (Al) School District, 35 IDELR 193 (OCR 2001) the parent alleged that the district discriminated against a student by suspending that student from the school bus for the first semester. OCR found that the student violated school bus rules by standing up, yelling out the bus window and using profanity toward the bus driver. OCR found that while the student had a learning disability in reading the IEP did not list bus transportation as a service to be provided in accord with the student's IEP. The conduct of the student was perceived by OCR to have been warranting punishment and that since riding the bus was considered a privilege by the district, OCR found there was insufficient evidence to support a finding that the district failed to adhere to the provisions of Section 504.

6. Reporting Abuse and Neglect

In Citrus County (Fl.) School District, 35 IDELR 192 (OCR 2001) a parent met with the superintendent of schools and requested an investigation as to why her child's IEP was not being followed. The district looked into the matter and assured the parent that her child's IEP was indeed being followed. Shortly thereafter certain personnel of the district became aware of facts which they considered to constitute abuse and neglect. On that basis, the personnel called a child services hotline and reported the conditions in the parent's home. The parent filed a complaint with OCR alleging that the abuse and neglect report was retaliatory in nature.

While OCR noted the close proximity between the parental complaint and the reporting of the abuse and neglect, OCR then concluded that the evidence was insufficient to show that the complainant was treated any differently after she engaged in the protected activity. OCR considered the reason why the parent was reported to the Division of Children Services and found that the teachers made their reports on the basis of what they observed in the parents' home. Of particular note was that none of the teachers were directed by district administrators to make their report. On that basis OCR determined the district provided legitimate non-discriminatory reasons for its actions and rejected the parents' complaint.

C. The Duty to Prevent Disability-Based Harassment

Section 504 prohibits discrimination against individuals on the basis of disability. Federal Regulations, provide that “no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from federal financial assistance.” See 34 CFR Section 104.4.

1. Reducing Risk Through Application of the Two-Part Test

In determining whether a school district has subjected a student to discrimination-based harassment resulting in a hostile environment, the Office for Civil Rights determines the following:

- □ Whether there was conduct by the district based on disability that was hostile, intimidating, abusive, degrading or threatening;
- □ Whether a hostile environment was created.

According to the Office for Civil Rights a hostile environment exists when there is a disability based harassing conduct that:

- □ Sufficiently severe;
- □ Persistent; or
- □ Pervasive; as to

□ Limit a student to participate in or benefit from educational programs or services.

The case of San Juan (Ca.) Unified School District, 36 IDELR 135 (OCR 2001) provides some guidance as to measures a district can take to avoid claims to reduce its risk of disability-based harassment. In this particular case, the parent alleged that a teacher allowed other children in her son's special education classroom to ridicule and humiliate him. The district entered into a voluntary resolution agreement where it agreed to develop and distribute a policy prohibiting disability harassment and affirming the district's commitment to providing an educational environment free from disability discrimination including harassment. The district also agreed to provide training to administrators, teachers and staff which was designed to instruct employees to recognize, respond to and prevent disability harassment in the educational environment. The district further agreed to provide the Office for Civil Rights a plan to furnish age appropriate training to students in the school system concerning disability harassment as well as specific training for administrators, teachers and staff who are involved in the provision of services to students with disabilities which would include information to increase awareness of social and behavioral issues associated with specific disabilities.

This voluntary consent agreement in the San Juan case provides guidance as to how a district can reduce the risk of disability-based harassment. Educators and districts should consider the following:

□ Review of their policies to ensure that they explicitly prohibit disability harassment and affirm the district's commitment to provide an educational environment free from disability discrimination including harassment;

□ Training to administrators, teachers and staff on how to recognize, respond to and prevent disability harassment;

□ Age appropriate training to students concerning disability harassment.

D. Duty to Communicate with Parent/Guardian

Often problems arise with special education students because parents or guardians were not fully informed by school personnel, or did not receive timely notice of an event or issue related to the student's academic progress or behavior. Open lines of communication on a regular basis are the best strategy for avoiding complaints or litigation.

An example of how one school district erred is demonstrated by the case of North East Indep. School District (TX), September 25, 1998, 31 IDELR 101. A student with autism and speech impairment had been in the district's preschool program for children with learning disabilities. His parents unilaterally withdrew him from the district before his first grade year and placed him in private school, because of their complaints about the district program's class size and lack of teacher training. In his kindergarten year, the student had been placed in a general classroom with therapy, a personal assistant, and an at-home trainer, but his behavior deteriorated and punitive measures were used. Based on student's behavior and the

conclusions of a private psychologist, the school proposed placing the student in a resource room. Parents objected to the proposed placement and the district's proposed first grade IEP. Parents further claimed that the district withheld important information regarding behavioral interventions, thereby denying them effective participation in the IEP process.

The hearing officer ruled that the parents were denied meaningful input into the IEP process, because the district failed to provide the parents with information about the punitive behavior management strategies used during the kindergarten year, which violated the parent's procedural rights. The parents were awarded compensatory education and partial reimbursement of private school tuition. The hearing officer also stressed that parent participation involves the opportunity to have meaningful input into the IEP process.

The case of City of E. Chicago School (Ind.), November 6, 1998, 31 IDELR 45, is another illustration of the consequences for failing to keep a parent/guardian informed. The guardian of a mentally handicapped student complained that the school had not provided the guardian with progress reports on a regular basis. The student's IEP specifically required progress reports at certain intervals. The hearing officer ruled that the school's failure to provide the reports violated the requirements of the IDEA. As an additional precaution, the district was also ordered to meet with the guardian at the conclusion of each grading period to report on student's progress and goal attainment.

Key Concepts:

- The regular education teacher should carefully adhere to any notice or communication requirements provided for in a student's IEP.
- School personnel should be vigilant about providing notice for both procedural, (e.g., notice of a meeting), and substantive, (e.g., notice of a child's pattern of misbehavior) matters.
- In hindsight, more information will always be seen as better than less information, so err on the side of inclusion when determining how much information to communicate to a parent.
- Timeliness is key to adequate communication: meet all procedural deadlines for notice and promptly communicate any issues that arise.

X. Conclusion

The statutory requirement of inclusion dictates that each and every educator become an integral part of the special education process. When all is said and done, the measure of the educator will be taken not by their ability to comply with the letter of the law, but instead will be taken by the answers to the following questions:

-Have you **communicated** well with the parents/guardian and student?

-Have you shown **consideration** for the student's special needs and abilities?

-Have you demonstrated that you **care**?