Demythologizing the IDEA

April 2012

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A Word of Caution

No two cases are exactly alike. This material is designed to provide school board members with a broad understanding of the law pertaining to certain aspects of New Hampshire law and the Individuals with Disabilities Education Improvement Act (IDEA). This material does not include every aspect of the law, and you are advised to consult with your District's attorney regarding specific cases.

I. Overview

The purpose of this material is to provide school board members with a working knowledge of their District's obligations under the Individuals with Disabilities Education Improvement Act ("IDEA" or the "Act"), 20 U.S.C. 1400 *et seq*. 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 to be 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 "FAPE" Test

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?**

What to expect from your educators

The educator should:

- Know those students in their 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 their 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 their 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 their classroom.

- ❍ Understand how a particular methodology, such as a reading instruction methodology, can be integrated into their 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. Understanding 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. Your 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.

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.

What to expect from your educators:

- In the absence of written agreement from the parents, their attendance at a meeting is vital. Without their presence the legal structure of the team has been compromised.
- They have the right and obligation to understand how an IEP impacts their teaching.
- 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 their input is as significant as the input from any other team member.

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).

III. The Educator's Responsibility for IEP Implementation

As previously mentioned, 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. 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 (Md. SEA 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:

- 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 (Office for Civil Rights ("OCR") 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). Educators do not have the latitude to unilaterally alter an IEP.

1. Penn-Tyrone Area School District, 31 IDELR 20 (Pa. SEA 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. 34 C.F.R. § 300.324(a)(4)(i).

C. Flexibility in Methodology: A Case Study of a "Right Way"

A 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).

3. Changes in placement never occur without "Manifestation Determinations," "FBAs" and "BIPs"

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,

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

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[1] Weapon is defined as Aa 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 2 inches in length.@ 20 U.S.C. § 1415(k)(7)(A).

[2] Controlled substances that are Alegally 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 Aillegal drug.@ 20 U.S.C. § 1415(k)(7)(B).

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;

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

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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).

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:

- 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.

While the Board has no seat at the IEP Team meeting, it should expect from its administrators that it will receive timely reports from its administration as to any anticipated changes in the district's financial exposure for out-of-district placement.

VI. Student Privacy

Under the Family Educational Rights and Privacy Act ("FERPA"), a school district is prohibited from disclosing student educational records to third parties without prior parental consent. 20 U.S.C. § 1232g. Educational records are generally defined as records: (1) directly related to a student; and (2) maintained by an education agency or party acting on the agency's behalf.

The import of this law is that Board Members should exercise vigilance to ensure that the identity of a student with a disability is not revealed in any way, shape or form to the public. As a matter of best practice, administrators will generally not discuss specific disabled students with Board Members in a manner which reveals their identity. This privacy right, coupled with the fact that placement decisions are delegated by law to the IEP Team, leaves the Board in the position of a bystander on these matters.

VII. Administrative Due Process

Federal law requires that all states offer an opportunity for parents and school districts to resolve disagreements through resolution sessions, mediation and, if necessary, impartial due process hearings.

Within fifteen days of receiving notice of a parent's complaint, the district is required to convene a meeting with the parents to discuss the complaint and the specific issues that form the basis of the complaint. The meeting, or "resolution session," must include a representative of the district who has decision-making authority for the district; this affords the district with the opportunity to resolve the complaint during the resolution session. The district's attorney cannot attend the session unless the parents are accompanied by an attorney. 34 C.F.R. § 300.510.

The parents and the district may agree in writing to waive the resolution session, or they may agree to mediate. If the district has not resolved the matter to the parent's satisfaction within thirty days, the due process hearing and hearing time lines will commence. If the meeting results in the resolution of the complaint, the parties shall execute a legally binding settlement agreement. Each party has a "review period" of three business days from the date the agreement was executed, during which time either party may void the agreement. Id.

Due process hearings are conducted through the State Department of Education and the decisions are rendered by contract Hearing Officers. The task of the Hearing Officer is to apply the procedural and substantive requirements of the IDEA to the facts of a given case and render a decision. These decisions often can have far reaching consequences for a school district. For example, if a child has a profound disability which requires a 24/7 residential placement, the cost of that placement can exceed $175,000.

The Hearing Officer's decision must be based on a determination of whether or not the child received a FAPE. When a parent raises procedural issues, the hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies

(i) impeded the child's right to a FAPE
(ii) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child; or
(iii) caused a deprivation of educational benefits

34 C.F.R. § 300.513(a)(2).

In the event a school district or parent is aggrieved by the Hearing Officer's decision, they may appeal the decision by way of a complaint filed in the United States District Court. 34 C.F.R. § 300.516. The consequences of a district losing a due process hearing are not limited to the costs of an educational program. If a district does not prevail, the parents are entitled to recover their attorney's fees. 34 C.F.R. § 300.517. However, if the district does prevail, the IDEA now permits the district to recover attorney's fees against the attorney of a parent who

files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of the parent if the attorney continues to litigate after the litigation clearly becomes frivolous, unreasonable, or without foundation. The district may also recover attorney's fees against the attorney of a parent if the complaint or subsequent cause of action was presented for any improper purpose, such as to harass, cause unnecessary delay, or to needlessly increase the cost of litigation. 34 C.F.R. § 300.517(a)(1)(ii)-(iii).

VIII. Teacher Comments about Students with Disabilities

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 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.

IX. 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 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.

X. 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. 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 § 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.

C. The Duty to Communicate with Parents/Guardians

Often problems arise with special education students because parents or guardians had 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), 31 IDELR 101 (Tx SEA1998). 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.), 31 IDELR 45 (Ind. SEA1998), 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.

XI. 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 district 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:

-Has the district **communicated** well with the parents/guardian and student?

-Has it shown **consideration** for the student's special needs and abilities?

-Has it demonstrated that its educators **care**?

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