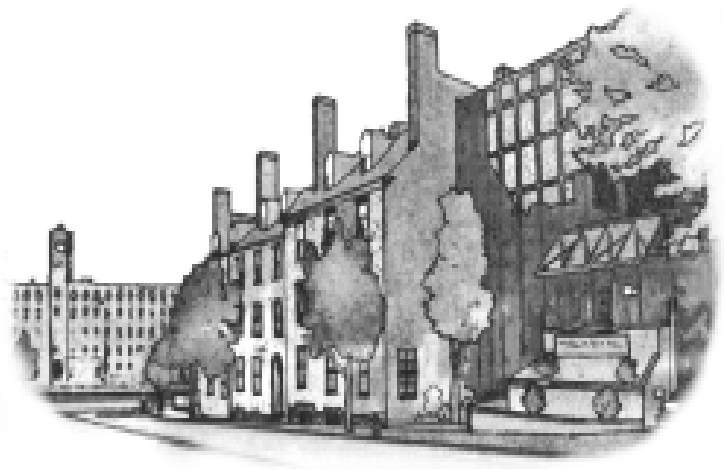
ME TOO!
INCLUSION, ASSISTIVE TECHNOLOGY, AND MEDICALLY FRAGILE STUDENTS

A Seminar Presented to the New Hampshire Association of Special Education Administrators

March 20, 2008



Wadleigh, Starr & Peters, P.L.L.C.
Serving New Hampshire since 1899

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 last 20 years he has had extensive experience representing school districts in its special education matters at the administrative and appellate levels. He has also provided in-service seminars to school districts on issues of risk management in the field of special 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. Ms. Minutelli practices in the areas of school law and civil litigation.

A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an understanding of certain aspects of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq*., as amended by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA). 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.

I. Overview

The purpose of this material is to provide school officials with a deeper understanding of the laws, regulations, and cases pertaining to inclusion, with a focus on the role of assistive technology and inclusion of medically fragile children with educational disabilities. Part II of this material provides an overview of the statutes, regulations, and case law pertaining to inclusion. Including students through the use of assistive technology devices and services, is the subject of Part III, and the material concludes in Part IV, with a discussion of the inclusion of medically fragile students with disabilities.

II. The Legal Framework

A. Relevant Statutes and Regulations

The IDEA contains a presumption that children with disabilities will be educated, to the maximum extent appropriate, with children who are not disabled. 20 USC 1412(5)(A); see also 34 CFR 300.114(a) (public agencies must ensure that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled"); see also Proposed Ed. 1111.01 (LEAs "shall ensure that, to the maximum extent appropriate, children with disabilities, including children in public or private providers of special education, are educated with children who do not have disabilities and that, consistent with 34 CFR 300.114, special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily");[1] Proposed Ed. 1113.08(a)-(c) (to the maximum extent appropriate, children with disabilities must have access to the general curriculum, and the curriculum must be accommodated and/or modified to meet the unique needs of the child. Preschool children must also have full access to the preschool curriculum and appropriate preschool activities).

"[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment" is to "occu[r] only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 USC 1412(5)(A); see also 34 CFR 300.114(b). The Office of Special Education and Rehabilitation Services ("OSERP") has opined that these provisions set forth a "strong preference," for inclusion, rather than a mandate. Vol. 71, No. 156, Fed. Reg. at 46585 (Aug. 14, 2006).

[1] The citation "Proposed Ed. ____" refers to the NH Board of Education, Draft Final Proposal of the New Hampshire Rules for the Education of Children with Disabilities. These rules are in draft form and have not been adopted by the Board and they do not have the weight and authority of a State Regulation.

The Congressional findings provide further support for the "inclusion preference." Congress found that the education of children with disabilities can be made more effective by:

- Ensuring "access to the general education curriculum in the regular classroom, to the maximum extent possible in order to meet developmental goals, and to the maximum extent possible, the challenging expectations that have been established for all children"

- "[P]roviding appropriate special education and related services, and aids and supports in the regular classroom . . . whenever appropriate"

- "[S]upporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities."

20 USC §§ 1400(c)(5)(A)(i), 1400(c)(5)(D), 1400(c)(5)(H).

To effectuate these goals, local educational agencies are required to:

- Provide supplementary aids and services, which are "aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate. . ." 34 CFR § 300.42; see also Proposed Ed. 1102.98 (adopting the definition of "supplementary aids and services" set forth in § 300.42).

- "[T]ake steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic[2] and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities." 34 CFR § 300.107(a); see also Proposed Ed. 1102.40 (defining "extracurricular and nonacademic activities" as the "activities and services set forth in 34 CFR 300.107").

[2] "Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available." 34 CFR § 300.107(b).

- Children with disabilities "must be afforded the opportunity to participate in the regular physical education program available to nondisabled children." 34 CFR § 300.108(b). This requirement does not apply to children who are "enrolled full time in a separate facility" or to children who require "specially designed physical education," as set forth in their IEPs. Id.

- In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, supplementary aids and services, public agencies must ensure that children with disabilities participate with nondisabled children to the maximum extent appropriate to the needs of each child. 34 CFR § 300.117.

- Ensure that "a continuum of alternative placements is available to meet the needs of children with disabilities." 34 CFR § 300.115(a). This continuum must "[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." Id.

In addition, placement decisions must be "made in conformity with the [least restrictive environment] LRE provisions . . ." The placement must be "as close as possible to the child's home," and, "[u]nless the IEP of a child with a disability requires some other arrangement, the child [must be] educated in the school that he or she would attend if nondisabled." 34 CFR § 300.116(b)(3), (c). Public agencies must also ensure that children with disabilities are "not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 CFR § 300.116(e).

The State Board of Education has proposed the following continuum of learning environments for students ages 6-21:

- Regular classroom
- Regular classroom with consultative assistance
- Regular classroom with assistance by specialists
- Regular classroom plus resource room help
- Regular classroom plus part-time special class
- Full-time special class
- Full-time or part-time special day school
- Full-time residential placement
- Home instruction

Proposed Table 1100.4. In contrast, the Proposed Continuum for Preschool children is as follows:

- Community Early Childhood Setting
- Home setting
- Early childhood special education – partially integrated setting
- Early childhood special education – specialized/therapeutic setting
- Early childhood special education –general self-contained setting
- Early childhood special education – specialized self-contained setting
- Separate school setting
- Residential setting

Proposed Table 1100.02.

OSERP has opined that "[t]he overriding rule in § 300.116 is that placement decisions for all children with disabilities must be made on an individual basis and ensure that each child with a disability is educated in the school the child would attend if not disabled unless the child's IEP requires some other arrangement." Vol 71, No. 156, Fed. Reg. at 46587 (Aug. 16, 2006). Moreover, "section 612(a)(5)(A) of the [IDEA] presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement." Id. at 46588 (emphasis added). OSERP went on to state that, "before a child with a disability can be placed outside of the regular educational environment, the full range of supplementary aids and services that could be provided to facilitate the child's placement in the regular classroom setting must be considered." Id. It is only when the Team determines that the child "cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that the child could be placed in a setting other than the regular classroom." Id.

B. Case Law

1. N.H. Cases

There are several recent New Hampshire decisions involving placement in the least restrictive environment.

a. Unilateral Placement: District's Public School Placement is Appropriate

In the first, Student v. . . . Regional School District, IDPH-FY-08-11-035 (Feb. 11, 2008), the district filed for due process, seeking an order that the placement it offered (in the public middle school) was appropriate. The parents had rejected the district's proposal, and placed the student in a private school.

The student, an 11 year old with a significant language impairment, had attended public school where she received special education and related services, including

speech/language and a modified curriculum. Parents placed the student in a private school, where she and three other (special education) students worked on a self-paced computer curriculum. Student did not receive speech/language services from the private school, and in the opinion of the private school teacher, she did not require speech services.

The Hearing Officer pointed out that the "District has a legal obligation to place the Student in the least restrictive environment among [sic] this continuum [of services in NH ED 1115.04]," and that the "Team must consider the least restrictive environments in tandem with the requirements that the student be placed in an appropriate program that can implement the student's IEP and meet the student's unique needs." Id. (citations omitted). The Hearing Officer found that the District's offer of placement at the middle school was reasonably calculated to meet the student's needs and would provide an appropriate education in the least restrictive environment. The Hearing Officer noted that the student would be educated with non-disabled peers, and would be provided with social opportunities where she could work on successful social interactions. The Hearing Officer also noted that the private placement was "considered the most restrictive environment for the student as there are only three students in the program and there are no regular education students," and stated that the private placement was "not an appropriate placement . . . because Student's current IEP does not indicate student requires placement in the most restrictive environment and because Student is not receiving speech and language services at . . . Academy, as required by her current IEP [sic]." Id.

i. Safety Concerns

The next case, Student/Middleton School District, IDPH-FY-08-08-013 (Dec. 17, 2007), involved the following issues: whether the student should have been identified as having a learning disability; whether the safety issues rendered placement at the public school inappropriate; and, if placement at the public school was inappropriate, whether parents were entitled to reimbursement for their unilateral placement.

The student, a ten-year old fifth grader, was identified as eligible for special education and related services because of an other health impairment and speech/language impairment. The student also has a latex allergy, and the district maintains a latex-safe environment. The student's team agreed to an IEP for the 2007-08 school year; according to the IEP, the student would receive resource room assistance for reading and language, as well as speech, OT, and PT. In addition, the student would share a paraprofessional.

Parent alleged that during the 2006-07 school year, there were a number of incidents that jeopardized the student's safety and/or violated FAPE. These incidents included the following:

- Poinsettia plants displayed in the hall near the main office; student did not have any contact with the plants, and the school contacted an expert to confirm that the substance in poinsettias would not cause an allergic reaction to individuals with latex injuries;

- While on a trip, a therapist purchased souvenir pencils for all of the students; before she handed out the pencils, she realized that the erasers might contain latex and gave the student another gift;

- On one occasion, latex balloons were brought into another wing in the building; they were immediately confiscated and student did not have any contact with them;

- A guidance counselor, who did not work with student, used crutches that did not contain latex [sic];

- On one occasion, the adult who was supposed to meet student at his bus did not do so because she was not available; instead, the bus driver watched the student leave the bus, and student was not injured;

- On one occasion, the student's bus broke down on the way to school. The wait was so short that the students were not late for school, and student was fine at school;

- Student's IEP called for student to wear a seat belt on the bus, but on a field trip, the bus did not have seat belts. Student sat in the back with his classmates and an aide did not make him move his seat. Student was not injured.

Parents believed that the district was not providing a safe environment for the student, and enrolled him in a private school for the 2007-08 school year. The placement chosen by the parents does not provide special education and related services, and parents did not believe that it was the best placement for student; instead, parents characterized it as an "interim placement."

The Hearing Officer found that the district had adequately and appropriately addressed parents' safety concerns, and that the district had offered student a FAPE. The Hearing Officer went on to note that, even if the District was unable to provide the student with a FAPE in its placement, that the parent's placement was not appropriate because it did not provide special education and was not the least restrictive placement for the student.

b. Unilateral Placement: District's Public School Placement is Inappropriate

Finally, in the case of Student/Cooperative School District A, IDPH-FY-08-08-012 (Oct. 19, 2007), parent filed for due process, arguing that the student should be retained in third grade, and if not retained, then placed in School B (another school district within the SAU). The District offered placement at School A, in the regular education classroom with resource room assistance, and time in the district's functional skills program. The student would also have a 1:1 aide.

In December 2003, the student was identified as having an educational disability due to a developmental delay and speech language impairment. Student's 2004-2005 IEP included 2.0 hours per week of special education and 1.5 hours per week of related services (speech and OT). In February 2004, parent requested a classroom aide for the 2004-05 school year; the District denied that request, stating that it was too early to decide whether student needed an aid for the upcoming year. Student's 2005-06 IEP included 2 hours of resource room time per week, one hour of speech/language per week, and 30 minutes of OT per week. Because the student had mastered very few of her IEP goals, many of the 2005-06 goals were carried over onto the 2006-07 IEP. This was also noted with respect to the 2006-07 IEP; thus, many of those goals were carried over into the 2007-08 IEP. The parent accepted the IEP, but rejected the placement proposed by the District.

The Hearing Officer held that retaining the student would not be in her best interests, as "retention is not supported by current educational authority." The Hearing Officer also held that the district "failed to provide the student with adequate progress, or FAPE, in the last three years." Id. The Hearing Officer acknowledged that the District met to review progress and evaluations, but that when the student failed to make progress the District did not revise the goals to ensure that the student was making adequate progress. The Hearing Officer also found that the IEP's have consistently failed to address the student's social and emotional issues, and that the parent had consistently raised concerns regarding the student's emotional health. The Hearing Officer held that the "evidence . . . supports the view that the student has been denied FAPE and this determination has bearing on the hearing officer's substantive evaluation of the appropriateness of the district's proposed placement."

With respect to the district's placement proposal, the Hearing Officer held that the placement offered by the District was not appropriate because the student would be the most cognitively advanced student in the functional skills program, and she would be a "model" for other students. In addition, the student had not made appropriate progress with a similar placement (regular classroom with resource room help) in prior years. Therefore, the District's placement proposal was not reasonably calculated to meet the student's needs.

The Hearing Officer ordered that the student "be placed in a small (low student-teacher ratio) special class where she will receive individualized and small group modified instruction to ensure student has retained concepts taught and met her IEP goals." The Hearing Officer held that the student "would not be appropriately placed in the functional skills classroom, as witness testimony indicates she would be a role model in that placement. Nor would student be appropriately placed in a mainstream classroom with an instructional aide, where she has shown regression and where, as the evidence indicates, she will not function to her potential in a classroom setting with 17-20 students. . . . The student requires instruction in a small separate classroom that is currently not available at the middle school."

2. Cases from Other Jurisdictions

a. Public School Placement Not Appropriate

Inclusion in the public school setting is not always appropriate, as evidenced by the case of Shrewsbury Public Schools, 49 IDELR 27 (Mass. State Educational Agency Sept. 11, 2007). In that case, the parents of a student with autism rejected the district's placement proposal in favor of placement in a public school, special education setting. The student had been educated in a substantially separate special education classroom; due to the severity of her behaviors, however, the student could only tolerate inclusion in the regular education classroom and in her special education classroom for short periods of time. As a result, she spent the majority of her day in a small room with her 1:1 ABA technician. Because she was not making appropriate social, educational, or behavioral progress in this intensive public school setting, the district proposed a placement in a private day school. The hearing officer held that, based on the severity of the student's behaviors, the district's placement offer was appropriate.

Similarly, in the case of Montgomery County Public Schools, 49 IDELR 174 (Maryland State Educational Agency 2007), the parent requested due process, seeking a placement in a full-time inclusion program. The district recommended that the student, a cognitively impaired ninth grader, be placed outside of the general education classroom for 60% of the school day. The hearing officer held in favor of the district, finding that the student was struggling in her mainstream science and algebra classes, and that full-time placement in the general education classroom would likely overwhelm the student, which would trigger problem behaviors.

b. Despite Safety Concerns, District's Restrictive Placement Not Appropriate

In the recent case of Twin Falls School District No. 411, 49 IDELR 175 (Idaho State Educational Agency 2007), the hearing officer held that the District's placement proposal (self-contained special education classroom) violated the least restrictive environment requirement of the IDEA. The Hearing Officer rejected the District's argument that the second-grader's behavior would be too disruptive for the general

education setting. The Hearing Officer also noted that the District's decision to place the student in the self-contained program was based largely on "anecdotal" behavior reports by teachers. The Hearing Officer stated "[b]y inference, the district seems to be arguing that such behavior disruptions are undesirable in a general education classroom but are more acceptable in a special education classroom."

In contrast, in Slippery Rock School District, 49 IDELR 116 (Pa. State Educational Agency Sept. 28, 2007), the District denied FAPE to a student who made threatening remarks when it placed him in a restrictive program designed to be a temporary placement for students with behavior problems. In this case, a sixth-grade student with ADHD and Asperger's Syndrome, made statements at a community dance (not a school function) that he intended to bring a gun to school and kill another student. As a result, the student received a notice of in school suspension for the period of February 12-26, 2007, and was placed at the District's Alternative Learning Center, a program designed as a temporary placement for students with behavior, learning or truancy issues. During the period that the student was suspended, he said that he "was going to 'get' a teacher and pounded his fists into his palm." The District suspended the student for another 10-days. Rather than hold a manifestation meeting, the District reduced the 10-day suspension to 4 days. In March 2007, the District proposed a new IEP, with full-time placement in the Alternative Education Program. Parents filed for due process; the student remained in the Alternative Education Program for the remainder of the year.

The Hearing Officer held that the Alternative Education Program was not the least restrictive environment for the student to be educated. The Hearing Officer found that the student had been educated in the regular education environment for specials, science, social studies and lunch from second through sixth grade, and that attempts to fully mainstream the student during his sixth-grade year were unsuccessful. Rather than reduce the time spent in the regular education environment, or add additional supports, the District placed the student in the Alternative Education Program. This program was inappropriate as it was too restrictive for the student's needs. The Hearing Officer rejected the District's argument that the Alternative program was necessary because the student was dangerous, instead finding that the District attempted to change the student's placement to a more restrictive environment without following proper procedures. The Hearing Officer awarded "compensatory education five days a week for the period of the 2006-07 school year."

c. After-School and Extracurricular Programs

Finally, the case of Morris Board of Education, 48 IDELR 295 (NJ State Educational Agency Aug. 10, 2007) illustrates the application of principles of inclusion to after-school and extracurricular programs. In that case, a 9-year old autistic student, was enrolled in the Sunset Program, a three-hour after-school program. The Sunset

Program was not part of the student's IEP, nor was it tailored to students with disabilities; thus, students with disabilities were required to have an aide. At the parents' request, the District provided the student with an aide, but only for one hour. Parents funded the remaining two hours, and requested due process, arguing that the District denied FAPE and violated Section 504 by failing to provide the aide for the full three hour period; parents requested reimbursement for the monies spent on the aide for two hours per day.

The Hearing Officer found that the student's IEP provided her with appropriate inclusionary programs that allowed the student to interact with her non-disabled peers. Thus, the District was not required to provide the student with opportunities for inclusion in after-school hours, and there was no denial of FAPE. However, the District did violate Section 504 because it failed to provide "meaningful and equal access" to the after-school program. Thus, the District should have provided the student with a full-time aide, which she required in order to access the after-school program. The District was ordered to reimburse the parents for the costs associated with providing the aide during the after-school program.

III. Assistive Technology and Inclusion

A. Overview of Assistive Technology

Each public agency is required to ensure that assistive technology devices and/or services are made available to children with disabilities, if required as part of their special education, related services, or supplementary aids and services. 34 CFR § 300.105(a). New Hampshire's Proposed Regulations state that LEAs are required to provide appropriate instructional equipment and materials adequate to implement the IEP for each child with a disability, including assistive technology devices and/or services that are required as part of the child's special education, related services or supplementary aids and services. Proposed Ed. 1113.09(a), (c). LEAs are also required to "monitor the proper functioning of hearing aids . . . low visions aids, and other orthotic and prosthetic devices and assistive technology services and devices . . . used by children with disabilities in school," and to "provide for the necessary repairs for hearing aids, low vision aids, and other orthotic and prosthetic devices and adaptive equipment." Proposed Ed. 1113.09(b).

The fact that assistive technology can be deemed special education, a related service or a supplementary aid and service simply illustrates the breadth of a district's potential responsibility to provide assistive technology. The broad definition of supplementary aids and services means that assistive technology may be afforded not only in the classroom, but also certain non-classroom environments that are deemed to be other educationally-related settings.

In addition, 34 CFR § 300.105(b) provides that on a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings

is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE.

All children with disabilities are potentially eligible for assistive technology and assistive technology services. In developing each child's IEP, the IEP Team shall consider whether the child requires assistive technology devices and services. 20 USC § 1414(d)(3)(B)(v). Children who receive Part C Early Intervention Services are also potentially eligible for assistive technology devices and assistive technology services as a part of early intervention. See 20 USC § 1432(4)(E)(xiii).

Simply put, assistive technology devices and services can be deemed a part of the specially designed instruction provided at no cost to the parents to meet the unique needs of a child with a disability. Similarly, assistive technology (devices or services) can be deemed a related service, i.e., "such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education." 34 CFR 300.34(a). Finally, assistive technology can be deemed part of a child's supplementary aids and services, i.e., a type of aide service and other support that is provided in either the regular education class or other education related setting to enable a child with a disability to be educated with non-disabled children to the maximum extent appropriate. See 34 CFR 300.42.

B. Defining "Assistive Technology"

An "Assistive technology device" is "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability." 20 USC § 1401(1)(A). "[M]edical device[s] that [are] surgically implanted" and the replacement of those devices are excluded from the definition of the term "Assistive technology device." 20 USC § 1401(1)(B); see also 34 CFR § 300.5; Proposed Ed. 1102.11.

The term "Assistive technology service" is defined as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." 20 USC § 1401(2). Assistive technology services include:

- The evaluation of the assistive technology needs of a child, including a functional evaluation of the child in the child's customary environment;
- Purchasing, leasing or otherwise providing for the acquisition of assistive technology devices by a child with a disability;
- Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

- □ Coordinating and using other therapies, interventions, or services with assistive technology devices such as those associated with existing education and rehabilitation plans and programs;

- □ Training or technical assistance for a child with a disability or, where appropriate, that child's family; and

- □ Training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of a child with a disability.

20 USC § 1401(2)(A)-(F); see also 34 CFR § 300.6; Proposed Ed. 1102.12.

C. Recent Cases Involving Assistive Technology

1. Training

In the case of Ada-Borup Indep. School District #2854, 49 IDELR 55 (Minn. State Educational Agency July 24, 2007), illustrates the need to provide appropriate training in assistive technology devices. The parents alleged that the District failed to provide the student with a free, appropriate public education because it failed to provide the student with the assistive technology communication device that his IEP team believed he needed, and by failing to convene the IEP team to revise the student's IEP. The Student, a first grader, was identified as having a developmental cognitive delay and speech/language impairment. The student was only able to verbally express himself with one-word utterances, and used approximately 70 words in the school setting. n December 2006, the District conducted an assistive technology/augumentive communication evaluation. Prior to the evaluation, the student had a six-week trial use of an augumentive communication device, the CHAT-PC, in the school setting. The device used a computer software program with vocabulary and phrases for the Student to choose on a display screen. Using this program, the program assisted the student in increasing his vocabulary and providing him with more chances to imitate expressive language. In October 2006, the District proposed an IEP; the proposal did not include the use of the CHAT-PC. Parents objected, and in December, the District agreed to include the communication device. The District also indicated that it would have staff to train the student on the use of the device. The parents requested medical reimbursement for the purchase of a CHAT-PC for their home. The District did not agree with that request; however, the Team reached agreement on a temporary IEP. The student had the CHAT-PC available for use at school for the remainder of the 2006-07 school year, but did not receive complete training on the device.

The Hearing Officer found that the District did not deny FAPE by failing to provide the student with the CHAT-PC communication device for his home because the

student's IEP Team did not determine that the Student needed the device at home to receive a FAPE. However, the Hearing Officer also found that the District violated 34 CFR 300.105 when it failed to train the student and his parents on the use of the CHAT-PC. The District was ordered to provide training within ten days of the date of the order.

Similarly, Student v. Manchester School District, IDPH-FY-04-08-19 (N.H. State Educational Agency Dec. 4, 2003), further illustrates the need to provide students with appropriate training on assistive technology devices and services that the Team determines are necessary for the provision of FAPE. In this case, the student's team agreed that he required assistive technology devices and services to facilitate progress towards his IEP goals. The team also agreed that the student would receive two hours of training on the software; parents agreed to the IEP, with the exception that if two hours was not sufficient, additional training should be provided. Parents testified that they requested additional training, but that it was not provided.

The Hearing Officer found that the student required additional instruction to allow him to meaningfully access the benefits of the assistive technology devices/services that the Team agreed were necessary. The District should have provided, and was ordered to provide, training on the assistive technology devices, and its failure to do so constituted a denial of FAPE.

Finally, in Susavage v. Bucks County Schools Intermediate Unit, 2002 US Dist. Lexis 1274, 2002 WL 109615 (E.D. Pa. Jan. 22, 2002), the court upheld a personal injury action against the school district for failure to adequately train in the use of a seat restraint system. The seat restraint system was improperly installed such that the child strangled on the school bus. The court noted that the IDEA defines "assistive technology services," as including selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing or replacing assistive technology devices. The court noted that the services include training or technical assistance for professionals or other individuals who provide services to children with disabilities. On that basis, the court found that the school district had either actual or constructive notice of the need for training based on this federal requirement. The court reasoned that if deliberate indifference by the school district caused it to utilize a restraint that was unsafe for use on the child, a causal nexus would be established with regard to liability.

2. Evaluations

School Board of Independent School District No. 11 v. Pachl, 2002 US Dist. Lexis 23205, 2002 WL 32653752 (D. Minn. May 10, 2002) illustrates the necessity of a school district to timely follow through with an assistive technology evaluation. In Pachl, the hearing officer found that the defendant was denied FAPE due to the district's tardiness in conducting an assistive technology evaluation coupled with its failure to implement a subsequent independent assistive technology assessment. The court specifically noted that it is not a parent's obligation to determine what assistive

technology devices or resources are necessary to provide FAPE. Instead, it is the school district's obligation to recommend the appropriate level of assistive technology.

3. Did the District Offer an Appropriate Assistive Technology Device?

Sherman v. Mamaroneck Union Free School District, 340 F.3d 87 (2nd Cir. 2003) is illustrative of the proper standard to be used in reviewing issues pertaining to assistive technology. In Sherman, the child successfully completed his freshman and sophomore mathematics courses using several assistive technology devices, including a Texas Instruments Model 82 calculator. The parent advocated that her son be allowed to use a more advanced calculator during his junior year and that he needed the advanced calculator in order to do factoring in his math class. The Team concluded that the student could learn to factor and that the use of the advanced calculator would circumvent that part of the learning process. The Team was opposed to the more advanced assistive technology because it would allow the student to answer questions without demonstrating any understanding of the underlying mathematical concepts. As the court noted, "There was almost universal agreement among the school district teachers and administrators that the TI-82 struck the right balance between educational assistance and the need for Grant [the student] to show mastery of the underlying mathematical concepts." Sherman, 340 F.3d at 90.

The parent alleged that the more advanced calculator was necessary to ensure that her son received FAPE and that without the more advanced calculator he would not be able to pass his math course. True to the parent's allegation, her son ultimately failed his math course. On appeal, the Second Circuit observed that, "The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aids requested, to succeed, but nonetheless fails. If a school district simply provided the assistive devices requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires." Sherman, 340 F.3d at 93, 94.

The Sherman decision stands for the premise when a child is able to make educational progress and either fails to make such progress for another reason or indeed makes progress, the assistive technology offered by the district will be deemed to be appropriate.

Richardson (TX) Indep. School District, 40 IDELR 244 (OCR, Sept. 18, 2003) involved a complaint by parents who alleged that the district denied their daughter a FAPE when it failed to provide her with a hearing aid monitor for six months.

OCR found that the most recent audiological evaluation recommended that the team "consider a FM system for classroom setting," and that the Team considered the FM system, but did not believe that it was necessary to meet the student's individual educational needs. The team also did not agree that a hearing aid monitor was

necessary to meet the student's individual needs. Thus, the district's failure to provide a hearing aid monitor or the FM system did not deny the student a FAPE.

In Collier County School Board, 44 IDELR 80 (Fla. State Educational Agency, May 10, 2005), parents filed a request for due process, alleging that the district failed to provide a FAPE because it did not provide the student, a 16-year old student with ADHD, with an appropriate assistive technology device and because the student failed to make appropriate progress on his IEP goals. The parents had requested that the district provide the student with a "Tablet P.C." for use as an assistive device. The Tablet PC is a type of computer in which the user can make handwritten notes on the screen, and the device will convert the handwriting to text. Instead of the Tablet PC, the District provided the student with a "Dana" device. The Dana device contains a full-size keyboard, and a small screen, and operates in a manner similar to a personal organizer. Data can be input into the Dana by typing on the keyboard or writing on the screen, and data can be transferred to/from a personal computer. The student used the Dana device for 5 school days, but stopped using it because, for social reasons, he was uncomfortable with the device. After the District rejected the parents request for a Tablet PC, the parents filed due process.

The Hearing Officer found that the reason that the student rejected the Dana device was because of the social stigma attached to other students who used them, and not because it was inappropriate for the student's needs. The Tablet PC was not required, and the refusal to provide that specific device did not constitute a denial of FAPE. The District offered appropriate assistive technology that would permit the student to meet his IEP goals.

The Hearing Officer also found that the student was making appropriate progress on his goals, and to the extent that he was not, his lack of progress was the result of the student's refusal to utilize the appropriate assistive technology devices.

IV. Medically Fragile Students

A. Overview

We know from the case of Cedar Rapids Community School v. Garret F., 526 US 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.

B. Related Services

Districts may be able to include medically fragile students through the use of appropriate related services. Related services include "such developmental, corrective, and other supporting services (including . . . school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child . . . and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education . . . 20 USC § 1401(26)(A); see also 34 CFR § 300.34(a); RSA 186-C(V) (defining educationally related services as ". . . such developmental, corrective, and other supportive services as are specifically required by an individualized education plan to assist an educationally disabled child to benefit from special education").

School health services and school nurse service are defined as "health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person." 34 CFR § 300.34(c)(13).

Medical services are defined as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 CFR § 300.34(c)(5). As a general rule, Districts are not required to provide medical services as a related service, "unless such services are necessary for purposes of diagnosis and evaluation." RSA 186-C(V).

In the case of Los Angeles Unified School District, 48 IDELR 118 (Ca. State Educational Agency, March 26, 2007), the parents alleged that the District failed to provide a free, appropriate public education when it:

1) refused to administer gastrostomy tube feedings at school using the "plunge method," which was used at home; and

2) refused to fund an out-of-district placement that utilized the "plunge method" or to fund a home school program

The student, a nine-year old, suffered from multiple disabilities and required tube feedings four times per day, one of which occurred during school hours. Parents fed the student using the "plunge method," whereby a syringe containing a pureed food mixture is inserted into the student's tube, and intermittent pressure is applied to a plunger until the syringe is empty.

The mother asserted that the student's doctor had prescribed the use of the "plunge method," but failed to provide the District with a prescription. Thus, the District argued that the "plunge method" was not required, and that it could feed the student using the "gravity method," the use of which was supported by the State guidelines. The gravity method is similar to the plunge method, but instead of applying pressure to the syringe, the food is allowed to flow slowly through from the syringe through the tube. No plunger is used in that method and the flow of the food is regulated by gravity.

The District offered placement in its day program for students with multiple disabilities, with the student being fed by the gravity method. Parents rejected this placement because the District refused to use the plunge method to feed the student.

The hearing officer held that the District was not required to use the plunge method to feed the student. The hearing officer specifically noted that the parents had not provided a prescription that required the use of the plunge method, and that the evidence established that the "gravity method" was appropriate. The hearing officer also found that the student could attend school if the gravity method was utilized. Because the District could accommodate the student's needs at its placement, the District was not required to place the student in a private school.

C. Medical Procedures

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.

Two 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:

1. Nance v. Matthews, 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.

2. Federico v. Order of Saint Benedict in Rhode Island, 64 F.3d 1 (1st Cir. 1995).

In this case, the 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.

Federico and Nance 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.

New Hampshire R.S.A. 508:12 provides that persons who “in good faith [and without willful or wanton negligence] renders emergency care at the place of the happening of an emergency or to a victim of a crime . . . to a person who is in urgent need of care as a result of an emergency or crime or delinquent act . . . [are] not liable in civil damages for [their] acts or omissions in rendering the care, as long as [they] receive no direct compensation for the care from or on behalf of the person cared for.” Thus, in accord with this statute, educators, in good faith, who administer emergency care to students in urgent need of care as a result of an emergency would likely be immune from any resulting civil damages.