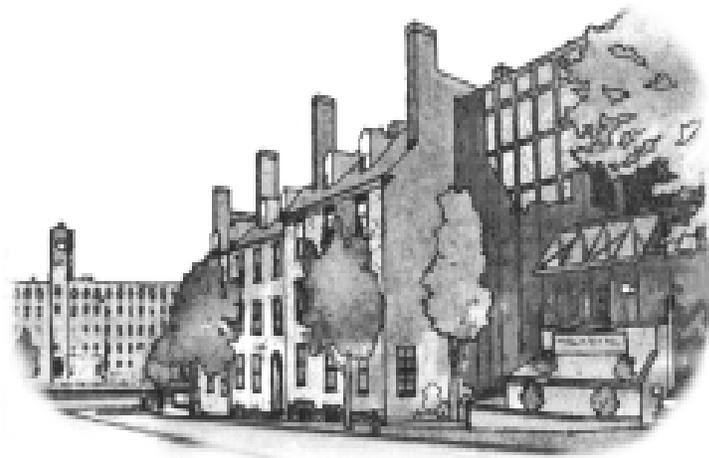


“That’s All Folks”: A Closer Look at Transition Services and Graduation Under the Individuals with Disabilities Education Act

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to certain aspects of New Hampshire law and the 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 educators with a better understanding of certain aspects of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1401 et. seq. The focus of this material is on the requirements of the IDEA that pertain to transition planning and graduation of students with disabilities. This material is not intended to substitute for legal counsel, nor is it intended to provide an exhaustive statement of the law.

II. Provision of Transition Services¹

A. Defining Transition Service

The term “transition services” is defined as “a coordinated set of activities for a child with a disability that -

- A. Is designed to be within a results oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing in adult education, adult services, independent living, or community participation;
- B. Is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and
- C. Includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and when appropriate, acquisition of daily living skills and functional vocational evaluation.”

20 U.S.C. § 1401(34); 34 C.F.R. § 300.43; Ed 1102.05(m) (adopting the definition set forth in 34 C.F.R. § 300.43).

Transition services for students with disabilities may be considered special education if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.43(b).

¹ The transition services discussed in this material should not be confused with the transition services generally provided as a matter of practice when students move from placement to placement.

B. The Scope of the Entitlement to Transition Services

Transition services are considered part of the IEP development process. Beginning at age 14 (or younger if determined appropriate by the IEP team) IEPs must include a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education). Ed 1109.01(a)(10).

Beginning with the first IEP to be in effect when the child turns 16 (or younger if determined appropriate by the IEP team) and updated annually thereafter, IEP's must contain the following additional items:

- Appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;
- The transition services (including courses of study) needed to assist the child in reaching those goals; and
- Beginning not later than one year before the child reaches the age of majority under state law, a statement the child has been informed of the child's rights under [the IDEA], if any, that will transfer to the child on reaching the age of majority.²

20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(cc); 34 C.F.R. § 300.320(b). Thus, the IEP for each child with a disability must include measurable post-secondary goals, regardless of the student's skill levels relating to education, employment and training. See Questions and Answers on [IEPs], Evaluations, and Reevaluations, 47 IDELR 166 (OSEP 2007).

The student's IEP team is responsible for determining the transition services that are needed to provide the student with a FAPE. The team's decision must be based on the child's individual needs, and must take into account the child's strengths, preferences, and interests.

² All rights accorded to parents under the IDEA transfer to the student once the student has reached eighteen years of age. 20 U.S.C. § 1415(m)(1); see also 34 C.F.R. § 300.520; N.H. Ed. R. 1120.01(a)-(b). Districts must notify the parents and the student of the transfer of rights. 34 C.F.R. § 300.520(a)(3).

Once rights transfer to a student, any notice required by section 615 of the IDEA must be provided to parents and students. 20 U.S.C. § 1415(m)(1)(A); 34 C.F.R. § 300.520(a)(1)(i). The notice requirements set forth in section 615 include: written prior notice; notice of procedural safeguards, and notice of a due process complaint.

According to the Federal Register, “the only area in which post-secondary goals are not required in the IEP is in the area of independent living skills. Goals in the area of independent living are required only if appropriate. It is up to the child’s IEP team to determine whether IEP goals related to the development of independent living skills are appropriate and necessary for the child to receive FAPE. Fed. Reg. Vol. 71, No. 156, 46668 (Aug. 14, 2006) (emphasis added).

Practice Pointer: Transition goals should be as specific as possible and should take into account a student’s needs and/or interests. However, districts are not required to ensure that students are successful in achieving all of their transition goals. See e.g. High v. Exeter Township Sch. Dist., 54 IDELR 17, 2010 U.S. Dist. LEXIS 7965 (E.D. Pa. Feb. 1, 2010) (“while the District helped [student] realize she wanted to attend college, the District was not required to ensure she was successful in fulfilling that desire. The IDEA is meant to create opportunities for disabled children, not to guarantee a specific result”).

In Letter to Moore, 39 IDELR 189 (OSEP 2002), the Office of Special Education Programs (“OSEP”) responded to specific questions regarding transition planning under IDEA 1997 (the relevant provisions are similar to the 2005 revisions to the IDEA). OSEP indicated that the IEP team must “determine what instruction and educational experiences will assist the student to prepare for transition from secondary education to post-secondary life,” and that the IEP must include “related services, community experiences, employment experiences, other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocational evaluations.” Id. OSEP also noted that there is “no specific requirement under the IDEA that high schools must arrange for all students with disabilities to be tested to determine their eligibility to be considered students with disabilities in college.” Id.

C. What Notice is Required with Regard to Transition Planning?

There are specific notice requirements pertaining to scheduling meetings involving transition planning. For a student with a disability beginning at age 14 (or younger if determined appropriate by the IEP team, when transition services are going to be discussed at a team meeting, the meeting notice should indicate that the purpose of the meeting will be the development of the statement of transition service needs of the child. The notice should also indicate that the student will be invited to the meeting.

Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP team, when transition services are going to be discussed at a team meeting, the meeting notice must indicate:

- That a purpose of the meeting will be the consideration of postsecondary goals and transition services for the child;

- That the agency will invite the student; and
- It must identify any other agency that will be invited to send a representative.³

34 C.F.R. § 300.322(a)(2).

D. Who Participates in an IEP Meeting Involving Transition Service Planning?

Decisions pertaining to transition services are made by the IEP Team. However, when the purpose of the meeting is to consider postsecondary goals for the child and the transition services needed to assist the child to achieve those goals, then the child must be invited to the meeting. 34 C.F.R. § 300.321(b)(1); see also Ed 1103.01(a) (requiring compliance with 34 C.F.R. § 300.321). If the child is under 18 years of age, the parents may decide whether the child will attend the meeting. Fed. Reg. Vol. 71, No. 156 at 46671 (Aug. 14, 2006). If the student does not attend the meeting, the district must take other steps to ensure that the child's preferences and interests are considered. 34 C.F.R. § 300.321(b)(2).

In addition, if the parents (or adult student) consent, the district must invite a representative from any participating agency that is likely to be responsible for providing or paying for the transition services. 34 C.F.R. § 300.321(b)(3). Districts must obtain informed, written consent before releasing personally identifiable information to officials of participating agencies providing or paying for transition services. 34 C.F.R. § 300.622(b)(2).

OSEP has opined that districts must obtain informed, written consent from parents each time that they wish to invite participating agencies to Team meetings, and that such consent must be obtained before the meeting occurs. Letter to Gray, 50 IDELR 198 (OSEP 2008). “[O]ne annual consent would not be sufficient if there is more than one IEP Team meeting conducted during a 12-month period where a purpose of the meeting will be the consideration of the child’s postsecondary goals and the transition services needed to assist the child in reaching those goals.” Id. The request for consent must meet the requirements of 34 C.F.R. § 300.9; that is, the:

- parent must have been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- parent must understand and agree in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes the activity and lists the records (if any) that will be released and to whom; and,

³ See the discussion in section D, below, pertaining to inviting outside agencies to IEP Team meetings.

- parent must understand that the granting of the consent is voluntary on the part of the parent and may be revoked at any time.
- Parents should also be informed that the District cannot guarantee that the other agency representative will attend the meeting.

OSEP has suggested that District's consider the following factors when deciding whether to invite participating agencies to a Team Meeting:

- Whether the purpose of the meeting will be consideration of post-secondary goals for the child and the transition services needed to reach those goals;
- Whether a participating agency, other than the district, is likely going to be responsible for providing or paying for the child's transition services;
- Whether the parent (or a child who has reached the age of majority) has consented to the participating agency's participation at the team meeting.

Letter to Caplan, 50 IDELR 168 (OSEP 2008).

E. Who is Responsible for Providing Transition Services?

Transition services may be provided by an agency other than the LEA, to ensure that there is no interruption in the services detailed in the child's IEP. Ed 1109.03(i). However, if the agency fails to provide the service, the LEA would need to reconvene the IEP team "to identify alternative strategies to meet the transition objectives for the child set out in the IEP." 34 C.F.R. § 300.324(c)(1); Ed 1109.03(h) (requiring compliance with 34 C.F.R. § 300.324).

Transition services must be monitored by LEA personnel, on no less than a weekly basis. Ed 1109.03(j).

F. What if the District, Parents and Student are Unable to Agree on the Statement of Transition Services?

The first step in any case of disagreement is to attempt to resolve the disagreement through the team process. If, however, the team process breaks down, either the parent or the district may request mediation or a due process hearing. In addition, a parent may file a complaint.

G. What are the Consequences of a District's Failure to Provide Transition Services?

A district's failure to provide transition services can result in either a complaint or a request for an impartial due process hearing. In the event a district fails to provide the transition services, the district may be liable for compensatory education. Hearing Officers in at least two states have ordered that districts rescind a regular high school diploma when they failed to provide students with appropriate transition services. See In re Carver Pub. Schs., 103 LRP 13523 (MA SEA 2001) ("A Hearing Officer may declare a regular diploma invalid where the district failed to provide advance notice [of the intent to graduate] or a transition plan"); Livermore Valley Joint Unified Sch. Dist., 33 IDELR 288 (CA SEA 2000) (ordering that the student's regular high school diploma be rescinded because the student had not completed transition planning and services, which were required prior to graduation); Student v. Novato Unified Sch. Dist., 22 IDELR 1056 (CA SEA 1995).

In the case of San Diego Unified School District, 36 IDELR 172 (SEA CA 2002), the district was ordered to provide the student with a comprehensive phonics based program for one year. The student was an 18 year old student with Downs Syndrome who was eligible for special education under the category of mental retardation. He was scheduled to graduate in June 2002; following graduation, the student intended to pursue supported employment. Testing completed in December 2000 revealed that the student was reading at a first grade level, and that he had been reading at that level since June 1992 (second grade). In November 2001, student's parent filed a request for due process, asserting that the student should have been receiving a phonics-based reading program for the 1999-2000, 2000-2001, and 2001-2002 school years.

The Hearing Officer found that the student "had unique reading needs . . . in the area of transition services, particularly in the area of preparation for supported employment and independent living after graduation," and that the student's IEP lacked reading goals and objectives designed to help him procure employment or live independently. In particular, the IEP did not instruct the student on how to read job applications or safety warnings, skills that the district's inclusion specialist believed that the student needed to know prior to graduation. Thus, the transition plan goal of pursuing employment following graduation was not supported by sufficient reading goals and objectives to help the student secure employment. As a result, the district was responsible for providing the student with one year of a comprehensive phonics program, designed to assist the student in meeting the transition goal.

In Caribou School Department, 35 IDELR 118 (SEA ME 2001), the Hearing Officer went even further, awarding compensatory education in the form of a college tuition award, English tutorial services and the incidental costs of college attendance. In that case, the student requested due process, alleging that the district "failed to develop and deliver an appropriate set of transition services to student, resulting in student's lack of preparation for his post secondary educational career, and a denial of a free appropriate public education."

The issues presented for the hearing officer were as follows:

- Did the district commit procedural violations as part of its transition planning, beginning in the 1997-98 school year and ending with the 2000-2001 school year?
- Did the district fail to provide the student with a FAPE during the 1997-98, 1998-98, 1999-2000, and 2000-01 school years by providing the student with IEPs that failed to meet the IDEAs transition planning requirements?

The Hearing Officer found that the district:

- Failed to inform parents about the role of transition planning, and about the requirement that transition planning be an outcome oriented process requiring a coordinated set of activities designed to assist student in reaching his post secondary goals;
- Failed to inform the parents about their ultimate authority over selection of student's classes;
- Failed to discuss transition planning at IEP team meetings; and,
- Developed transition plans outside of the IEP team process.

The Hearing Officer noted that "transition planning, particularly for a student who intends to go on to college, must be much more than graduation," and found that the student's IEP over his four high school years failed to include appropriate transition plans and that there was an inadequate delivery of transition services. As a result, the district was ordered to provide the student with compensatory education.

H. Recent Decisions

The following cases illustrate the IDEA's transition requirements:

The first case, Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18 (1st Cir. 2008). involved a dispute, in part, over transition services and a transition plan. The student was diagnosed with moderate mental retardation (she has an IQ of 42), speech impairments, cognitive delays, a seizure disorder, scoliosis, a leg-length discrepancy, and partial-paralysis of her left side. In 2001 she was placed at Crotched Mountain Rehabilitation Center.

The student's IEP team met in April 2004 to discuss her IEP for the 2004-05 school year. From April through December 2004, the team met at least 4 times to

discuss the IEP; in the interim, the district implemented the 2003-04 IEP. During a Team meeting on August 16, 2004, the district provided the parent with a proposed IEP and requested that she sign it. The draft given to the parents contained a one-page “transition plan,” which ended in mid-sentence.

The parent refused to sign the proposed IEP. Thereafter, the district requested, in writing, that she specify which areas of the IEP that she disagreed with, and offered to schedule additional meetings to discuss the IEP; the parent did not communicate any objections to the IEP to the district.

The Team met again in October and December; at both meetings, the parent refused to provide the district with her objections to the proposed IEP. The IEP proposed in December contained a “full-blown transition plan (that is, a plan designed to transition the disabled child into independent, adult life).” Parent refused to sign the IEP and the district requested due process. The Hearing Officer found for the district and the parent appealed to the United States District Court for the District of New Hampshire, and then to the First Circuit Court of Appeals.

The parent argued that the August 2004 IEP proposal was incomplete, in part, because it did not contain a complete transition plan. The First Circuit rejected this argument, stating

[t]his contention substantially misconceives what the IDEA requires. The transition plan contained in the August IEP consists solely of background information and performance goals, and suddenly ends mid-sentence. That is hardly a full-fledged transition plan. The rub, however, is that the IDEA does not require a stand-alone transition plan as part of an IEP.

Id. at 25 (emphasis added). The court went on to state,

Sections 1414(d)(1)(A)(vii)(I) and (II)⁴ . . . require that IEPs contain statements of transition services. But neither section requires that those statements be articulated in a separate component of the IEP. . . . Thus, merely pointing to the absence of a stand-alone transition plan cannot form the basis for a founded claim of procedural error. . . . To be sure, the statutory provisions . . . implicitly acknowledge the transition services must be provided to disabled children who need them, in accordance with the Rowley standard. Here, however, the appellants have made no claim that the August IEP lacks sufficient transition services (which, in fact, are integrated throughout the IEP’s various components). We thus reject the ‘transition plan’ claim of error.

⁴ The court cites to the IDEA as it existed prior to 2005; however, as discussed above, the IDEA does not contain a “transition plan” requirement. Instead, the IDEA focuses on the provision of transition services, which it also did prior to 2005. Similarly, neither RSA 186-C nor the New Hampshire regulations contain a requirement for a “transition plan.”

Id. (emphasis added).

The parent also argued that the December IEP was substantively inappropriate, asserting, in part, that the Rowley standard had “been supplanted by the 1997 amendments to the IDEA.” Id. at 27. The court began “with the Rowley Court’s mandate that IEP components must be reasonably calculated to enable the child to receive educational benefits,” and rejected the parent’s argument that the 1997 amendments to the IDEA “raised the bar for IEP transition services, directing that those services must result in actual and substantial progress toward integrating disabled children into society.” Id. at 27-28.

The court noted that the term “process” in the definition of transition services,⁵ “denotes a praxis or procedure; it does not imply a substantive standard or a particular measure of progress.” Id. at 28. Similarly, the “phrase ‘outcome-oriented’ is similarly agnostic with respect to ultimate results; it specifies the perspective that participants in the process should strive to attain but does not establish a standard for evaluating the fruits of that process.” Id. Thus, the court declined to depart from the Rowley standard with respect to transition services.

Finally, the parent complained that the transition services offered in the December IEP were “too generic and that a personalized IEP tailored to [student’s] needs would necessarily have contained ‘relatively intense services in community-based settings to prepare her to be a contributing member of society.’” Id. at 29. Parent “acknowledge[d] that the IEP provided for monthly field trips into the community, but aver[ed] that those trips were inadequate because behavior problems often prevented [student] from participating in them.” Id. at 29-30.

The court rejected this argument, noting that:

In addition to the scheduled field trips, the December IEP incorporated a wide array of other transition services. These included six hours of pre-vocational training each week and regular instruction in specific transition-related skills (such as using a telephone, identifying workers in community settings, maintaining proper self-hygiene, and preparing food). This regimen apparently

⁵ The 1997 amendments defined “transition services” as “a coordinated set of activities for a child with a disability that is designed within an outcome-oriented process, which promotes movement from school to post-school activities.” Lessard, 518 F.3d at 28 (quoting 20 U.S.C. § 1401(30)(A)) (emphasis added). In 2005 this definition was amended to reference a “results oriented process that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities . . .” 20 U.S.C. §1401(34)(A)-(C). Although these definitions differ, the court’s discussion, above, was applied to the current definition in a later case. See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 2008 WL 3843913 (D.N.H. Aug. 14, 2008).

had some efficacy; the district court found that [student's] transition skills were improving.

Id. at 30. The parent argued that “a specific service - activities conducted in community settings - failed adequately to provide educational benefits in an important area of need.” Id. The court rejected this argument for two reasons:

First, in considering the adequacy of a myriad of transition services, an inquiring court must view those services in the aggregate and in light of the child's overall needs. The test is whether the IEP, taken in its entirety, is reasonably calculated to enable the particular child to garner educational benefits. Were the law otherwise, parents could endlessly parse IEPs into highly particularized components and circumvent the general rule that parents cannot unilaterally dictate the content of their child's IEP.

The second reason . . . is that the district court concluded that the extant community-oriented services, when evaluated in conjunction with the IEP's other transition services, furnished [student] with the requisite educational benefit. This finding is not clearly erroneous. While we can accept the possibility that monthly field trips might not be an ideal service component given [student's] needs, the IDEA does not require an ideal or optimal IEP, simply an adequate one.

Id.

In August 2008, the United States District Court decided another case involving the same parties. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 2008 DNH 154 (D.N.H. Aug. 14, 2008), *aff'd* 592 F.3d 267 (1st Cir. 2010). In that case, the parent argued, in part, that the transition services offered by the district for the 2005-06 school year were inappropriate.

The Hearing Officer found for the district, and the court affirmed. In doing so, the court found that the IEP “included ‘a significant increase in services in the area of pre-vocational skills’ and that the Lessards did ‘not seriously object to the amount of time devoted to pre-vocational services, or to the prevocational [sic] goals and objectives in the draft IEP.’” Id. The court also found that the parties “agree that the transition plan proposed in the 2005-2006 IEP is the same as the plan in the 2004-2005 IEP,” and that the parents challenged the 2005-06 transition plan on the same grounds that they challenged the 2004-05 plan. Id. The court affirmed the hearing officer's decision, noting that the issues raised by the parents had been resolved in favor of the district in the context of the 2004-05 IEP.⁶

⁶ The parents attempted to argue on appeal that district was required to articulate a new transition plan for the 2005-06 IEP rather than rely on the same plan that was used for the 2004-05 IEP. The court rejected this argument because it was not raised during the due process hearing, but also

Similarly, in In re: Student with a Disability, 51 IDELR 89 (N.Y. SEA 2008), the parents filed due process, alleging that the district failed to provide an appropriate transition plan. The parents sought reimbursement for a unilateral private placement. The Hearing Officer found that the IEP was “reasonably calculated to enable the student to receive educational benefits [sic],” but also found that the “district failed to offer the student a FAPE due to the ‘absence of an individualized transition plan.’” The Hearing Officer ordered the district to reimburse the parents for their son’s tuition costs at the Bay Ridge Preparatory School (“Bay Ridge”), and the district appealed to the state educational agency. On appeal, the district argued that the student’s IEP was appropriate, and even if the transition plan was deficient, it was a minor error that did not amount to a denial of FAPE.

The relevant facts were as follows: the student was identified as eligible for services due to a learning disability; he had dyslexia and dysgraphia, and was disorganized. His transition plan contained long-term adult outcomes for the student to “integrate into the community independently,” “attend a post secondary institution for a Master of Science degree,” “live independently,” and “be competitively employed.” The transition services included “that the student ‘will relate school subjects to potential careers,’ that the student ‘will explore career opportunities by networking with community resources,’ that the student ‘will schedule and arrange college tours,’ and that the student ‘will assess his personal strengths and weaknesses.’”

The SEA noted that the district must provide an IEP that is likely to produce progress, not regression, and that affords the student with an opportunity “greater than mere trivial” advancement. The SEA found that the record did not support the Hearing Officer’s finding that the district denied FAPE because of the absence of a transition plan. Instead, the SEA found that the district had offered a transition plan, so the relevant inquiry was whether the transition plan offered by the district was appropriate, and, if not, whether the plan denied the student a FAPE. The SEA concluded that the plan included measurable long-term adult goals, including integrating into the community, attending a post-secondary institution for a Master of Science degree, living independently, and being competitively employed. The plan also delineated who was responsible for the transition activities. The SEA found that the activities were sufficiently linked to his long-term adult goals, and that he was pursuing a diploma to achieve his goals.

The SEA also noted that the IEP academic goals and objectives, which included a silent reading goal, a comprehension goal, a writing goal and a math goal, were linked to his post-secondary goals, and that his IEP also “included a counseling goal relating to his long-term adult outcomes in addressing the development of skills needed to deal effectively with challenging situations in school.” The SEA also found that the

noted that “because transition services are assessed in the context of the IEP as a whole, and the hearing officer found that the IEP included more pre-vocational services, their new argument would not succeed.”

placement offered by the district included programs and services related to post-secondary options, including a career awareness program, a college advisor, clubs and activities, and a tutoring program. The SEA concluded that the district's transition plan was appropriate and reversed the decision of the Hearing Officer.

Key Point: Transition services should relate to the student's post-secondary goals. If the student wishes to attend college, then services and goals should be linked to that goal.

Similarly, in Simi Valley Unified School District, 50 IDELR 267 (Ca. SEA 2008), the parents requested due process, alleging in part that the district had denied FAPE by failing to "offer an appropriate transition plan including appropriate levels of services and appropriate goals."

The student was eligible for services under the IDEA as a result of a visual impairment. She was "totally blind and had a significant cognitive delay." The student's transition plan stated that the parents would "begin working with [Tri Counties Regional Center] TCRC to investigate post-high school options for [Student] to help direct instruction in her last years of school toward her strongest areas of need in the areas of semi-independent living, community access, and work." The transition plan indicated that the student would continue with developing independent living skills through a functional skills curriculum, would participate in learning to use public transportation, and would have exposure to employment through two on-campus and one off-campus jobs. The district agreed to reconvene the team to develop functional goals that aligned with the post-secondary program chosen by the parents.

The parents argued that the district denied the student a FAPE because (among other things) the transition plans in her IEPs were deficient. The student argued that the plans should have identified specific outcomes in the area of independent living and should have indicated that the Student intended to pursue training and education after exiting high school.

The SEA noted that the failure to properly formulate a transition plan may be a procedural violation of the IDEA, but that in this case, the student's parents, who had full guardianship over the student, participated in the development of all of the Student's IEPs, and that the parents were on notice that they were required to express a preference for post-secondary goals for the Student. The SEA rejected the argument that districts are obligated to "independently select the most appropriate post-secondary outcome for a particular student or provide a transition plan that takes into account all possible post-secondary outcomes." The SEA also noted that "the information known to the IEP teams at the time was that neither job training, nor post-secondary education were realistic or even preferred post-secondary outcomes and that Student's functional skills program, which included skill-building at job sites and a functional skills curriculum, was appropriate." Thus, in light of what was known to the IEP team, the transition plans were appropriate.

Key Point: The determination of whether a transition plan is appropriate will be based on the specific student's needs and abilities.

In contrast, in East Hartford Board of Education, 50 IDELR 240 (Ct. SEA 2008), the parents requested due process, alleging in part that the student's transition plans for the 2005-06, 2006-07, and 2007-08 school years were inappropriate. The SEA found that the transition planning process is "supposed to involve a continuous process of updating the dreams, visions and outcomes for the student and developing goals and objectives that reflect what skills the student will need to achieve their goals, [however] the Student's [transition plan] was never revised or updated after June 2004." The SEA held that the student's IEP was inappropriate because "it provides for too much teaching of functional skills in the Board high school, rather than in the community. The goals and objectives are very general, not measurable or individualized and are focused almost entirely on vocational skills, with little to no emphasis placed on instruction in the areas of independent living and community participation."

It is worth noting that in this case, the SEA also found that the student's placement was inappropriate, and that the district had failed to provide the student with essential services, including assistive technology, and audiologist and speech/language support. The SEA also noted that the placement, which was in a self-contained program, while inappropriate for substantive reasons, was also inappropriate for transition planning in that it was not "relevant to community integration," and there "was nothing in the program that addressed the Student's transition needs in the areas of independent living or community participation."

The SEA found that the student's IEP was inappropriate because it did not place the student with non-disabled students to the maximum extent appropriate, it was not based on an updated transition plan that reflected the student's post-secondary goals, it lacked emphasis on community participation and independent living skills based on the Student's targeted post-school outcomes, and it did not contain any goals objectives pertaining to the Student's high level of distractibility, which would be an issue in an employment situation. As a result, the district was required to provide the student with compensatory education, in the form of (among other things) transition services.

Key Point: A student's post-secondary goals and transition services must be updated annually. Transition services will be judged based on whether they are appropriate for a student with a disability.

III. Graduation

A. Graduation Requirements

All New Hampshire School Board's have a duty "to provide, at district expense, elementary and secondary education to all pupils who reside in the district until such

time as the pupil has acquired a high school diploma or has reached age 21, whichever occurs first. . . .” RSA 189:1-a.

To that end, each school board is required to award a regular high school diploma to those students who earn at least 20 credits⁷ for courses selected from the school’s program of students, provided that the student meets the requirements for high school graduation. Ed 306.27(h). The local school board is required to “award a regular high school diploma to all students, with and without disabilities, who have earned at least their local high school’s required units of credit for graduation” Ed 306.27(j).

A child with a disability who requires special education and related services is “entitled to continue in an approved program until such time as the child has acquired a regular high school diploma or has attained the age of 21, whichever occurs first” RSA 186-C:9. By definition, a child with a disability under the IDEA is a child who “has not yet received a regular high school diploma,” and who is between the ages of 3 and 21 years of age. Ed 1102.01(t).

“[S]tudents with disabilities shall be entitled to continue with their high school educational program until such time as each student has earned a regular high school diploma or has attained the age of 21, whichever comes first, or until the IEP or Section 504 team, through a formal evaluation process, determines that such student is no longer in need of, and thereby not eligible for, special education and related services or accommodations and auxiliary supports.” Ed 306.27(l); see also Ed 1113.13(b).

B. The Obligation to Offer a FAPE

Districts are required to offer a free, appropriate public education (“FAPE”) to all children with disabilities. 34 C.F.R. § 300.101(a). However, the obligation to make FAPE available to all children with disabilities does not apply to children who have graduated from high school with a regular high school diploma. 34 C.F.R. § 300.102(a)(3)(i). The term “regular high school diploma” does not include alternative degrees that are not fully aligned with the State’s academic standards, such as a certificate or general educational developmental credential (GED). 34 C.F.R. § 300.102(a)(3)(iv). A district may not graduate a student who has been denied a FAPE under the IDEA. See Doe v. Marlborough Public Schs., 54 IDELR 283 (D. Mass. June 30, 2010) (collecting cases).

C. Procedural Requirements for Graduation

Graduation from high school with a regular high school diploma constitutes a change in placement. 34 C.F.R. § 300.102(a)(3)(iii). As such, districts must provide parents and adult students with written prior notice that the student will graduate. Id. A

⁷ 20 credits is the minimum number of credits. School boards may set a requirement of more than 20 credits for a regular high school diploma; if that occurs, the local credit number applies. Ed 306.27(f).

parent or adult student who disagrees with the proposal to graduate may request due process.

While it is not required, including the anticipated or expected date of graduation on a student's IEP may reduce the risk that a parent or adult student would assert that they did not have notice of the team's intent to propose graduation.

The decision to graduate a student should be discussed by the student's IEP team at a Team meeting. The Team should determine whether the student meets graduation requirements and if so, submit a written prior notice indicating that it is proposing to graduate the child. Letter to Anonymous, 22 IDELR 456 (OSEP 1994).

D. The Summary of Performance

When a child graduates from high school with a regular education diploma, or turns 21, the district must provide the child with a summary of the child's academic achievement and functional performance. 34 C.F.R. § 300.305(e)(3). This shall include recommendations on how to assist the child in meeting his/her post-secondary goals. Id.; see also Ed 1109.04(c). However, LEAs are not required to provide services to students to meet these goals. See Questions and Answers on [IEPs], Evaluations, and Reevaluations, 47 IDELR 166 (OSEP 2007).

The purpose of this document is to assist the child in transitioning beyond high school. While it is not necessary to do so, the summary of performance may include documentation necessary to determine a child's eligibility for another program of service, such as vocational rehabilitation, or the child's need for accommodations in the post-secondary setting. See Questions and Answers on Secondary Transition, 52 IDELR 230 (OSEP 2009).

E. Awarding a Regular Education Diploma

Students with disabilities must be afforded "an equal opportunity" to complete a course of studies leading to a regular high school diploma. Ed 1113.13(a). However, the IDEA does not guarantee that every student with a disability will receive a diploma when he/she graduates from high school. Letter to Anonymous, 22 IDELR 456 (OSEP 1994); see also Florida Dep't of Educ., 102 LRP 37673 (OCR 2001) (Section 504 does not require that a district award a regular high school diploma to a student with disabilities who is unable to satisfy the requirements for the awarding of the diploma; however, students with disabilities may not be "categorically foreclosed" from the opportunity to receive a regular high school diploma).

This "equal opportunity" standard is consistent with Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability. See 34 C.F.R. § 104.33(a) (under Section 504, public schools are required to provide students with disabilities with a FAPE); 34 C.F.R. § 104.37(a) (schools are also required to

provide students with disabilities with an “equal opportunity for participation” in “non-academic and extracurricular services and activities”).

The “equal opportunity” standard means that students with disabilities should be given the same opportunity as their non-disabled peers to enroll in courses necessary to obtain a regular high school diploma. See e.g. Letter to Runkel, 25 IDELR 387 (OSEP 1997) (under Section 504, a student who has met graduation requirements, regardless of age, cannot be treated differently on the basis of disability). However, districts are not required to award diplomas to students who do not meet the requirements for a regular high school diploma. Special Sch. Dist. of St. Louis County, 16 IDELR 3078 (OCR 1989). A student’s IEP team may agree to modify graduation requirements for a student, provided that the modification is included on the student’s IEP. See e.g. Letter to Runkel, 25 IDELR 387 (OSEP 1997).

F. Application of “Stay Put” to Students who have Graduated with a Regular High School Diploma

When a parent or district requests due process, unless the parents and district agree otherwise, the child involved in the proceeding “shall remain in his or her current educational placement.” Ed 1123.23(a); 34 CFR 300.518(a). Thus, when a parent or adult student requests due process to challenge a decision to graduate a student with a regular education diploma, that student will remain in his/her current placement for the duration of the proceeding. Id.; see also B.A.W. v. East Orange Bd. of Educ., 55 IDELR 76, 2010 U.S. Dist. LEXIS 90544 (D. N.J. Aug. 31, 2010) (stay put applies to a dispute over whether graduation was appropriate); Doe v. Marlborough Pub. Schs., 2010 U.S. Dist. LEXIS 66482 (D. Mass. June 30, 2010) (same); R.Y. v. State of Hawaii, 54 IDELR 4, 2010 U.S. Dist. LEXIS 13424 (D. Haw. Feb. 17, 2010) (same).

G. Recent Decisions

In a case recently decided by a New Hampshire Hearing Officer, a parent was successful in obtaining an order that required the district to allow the student to attend school through June 2010. Student/Oyster River Coop. Sch. Dist., IDPH FY 10-08-007 (Jan. 5, 2010).

In that case, the student, who had been diagnosed with Aspergers Disorder and had significant anxiety issues relating to Aspergers, wanted to attend UNH after graduation. His 2008/2009 IEP contained a transition plan that provided for a year long Spanish class. By the end of the 2008-2009 school year, the student had sufficient credits to graduate with a regular education diploma. However, the District team members agreed to extend student’s education until January 2010. When the Team met to develop an IEP for the 2009/2010 school year, the District proposed to graduate the student in January 2010, as he would have met all of the District’s graduation requirements. Parent objected, on the basis that the transition plan provided for a year long Spanish class, which the student had not participated in, and which was required in

order for him to meet in goal of applying to UNH. Parent sought an order that the District could not graduate the student until June 2010.

After a hearing, the Hearing Officer found in favour of the parent, holding that the student be permitted to remain at the District until June 2010. The Hearing Officer noted that the District made a commitment to provide a full year of Spanish, and graduating the student in January 2010 would not allow that to occur. In addition, the student had not met transition goals and objectives, including independent living goals, community participation goals, prevocational goals, and vocational goals, such as securing employment.

In the case of Cedarburg Sch. Dist., 36 IDELR 220 (Wis. SEA 2002), the Hearing Officer found that the District improperly graduated a student and ordered that the graduation be rescinded. In that case, the student was born with lissencephalopathy, a chronic and degenerative congenital condition that affects normal brain development. As a result, the student had profound developmental delays, poor control of movement, problems with feeding, frequent seizures and repeated episodes of pneumonia. Her adaptive functioning was at approximately a four-month age equivalency, and her cognitive development was between the one and four month level of functioning.

Student enrolled in Cedarburg High School in 1998, as a freshman. By the 2001-2002 school year, she was designated as a "senior." Her IEP goals "reflect[ed] her profound disability and centered on maintenance and improvement of motor skills and upper extremity range of motion. To the extent that the IEP's can be regarded to include any academic component, they would be commensurate with the Student's developmental level. The annual goals in the IEP's during grades nine through twelve were relatively unchanged from year to year."

During a February 2001 IEP Team meeting, the Team began taking steps toward linking with outside agencies with a view to the Student's ultimate post-school transition destination. The Team identified a post-high school day program to be provided by a community-based program for adults with disabilities. The Student's parent considered that program to be the student's post-high school transition goal. The District believed that the transition to that program would be complete by January 2002, and that the student would graduate from the District at that time; however, this was not clearly articulated or communicated to the parent, and the parent was not aware that the District intended to graduate the student (thereby terminating her eligibility for services) in January 2002.

In 2001, the student participated in the community-based program for adults' summer program. Although this was not part of the student's IEP and the IEP did not contain any goals or objectives pertaining to this program, the District awarded the student credit towards graduation based on her participation in the program.

In August 2001, the student's Team met, and agreed that the student would participate in the community-based program for 3 days per week; however, this was not formally incorporated into the student's IEP.

By letter dated September 17, 2001, the District informed the parents that it intended to graduate the student in January 2002, noting that her transition from the high school to the community-based program would be complete. Prior to that date, the District had not told the parents that it intended to graduate the student in January 2002 and none of the student's IEPs had contemplated that the student would graduate before she reached the age of 21.

The District's graduation policy required students to obtain 22 credits, and allowed IEP Teams to make accommodations pertaining to graduation requirements for students with disabilities. The policy also permitted students to graduate early, provided that the student and his/her parent meet with the student's guidance counselor prior to May 1 of the year preceding graduation. The student's parents did not request early graduation, and they did not meet with the guidance counselor.

At the beginning of the student's 12th grade year (2001-2002), she had earned 22.5 credits in the following courses: Beginning Foods, Basic Academics, Life Skills, Leisure Skills, Vocational Education, Speech and Language, Adaptive Physical Education, Art, Choir, and Ceramics. Since the student's credits were not earned in the required core subjects (English, Social Studies, Mathematics, Science, Physical Education, and Health), the District revised its graduation criteria to ensure that student could graduate with a regular diploma. However, this was done outside of the Team process.

During a Team meeting in November, Parent objected to the District's proposal to graduate the student in January. Nevertheless, in January 2002, the District issued a notice of graduation, which indicated that the student's IEP Team determined that she had met the requirements for graduation and successfully transitioned to the community-based program. The District also provided the student with a regular education diploma, which was dated June 9, 2002, the graduation date for the remainder of the class of 2002.

Parents requested due process, and the Hearing Officer found that the District: 1) failed to provide the parents with reasonable notice of the anticipated graduation date; and 2) that the IEP team failed to develop and determine the student's graduation criteria; and 3) as a result, the student was denied a FAPE.

With regard to the first finding, the Hearing Officer concluded that the written notice provided in September 2001 of an anticipated graduation in January 2002 was not a "reasonable time" before the projected graduation.

In addition, the Hearing Officer found that the District failed to follow the Team process when it determined that the student would receive course credit towards a

regular education diploma for her courses, that the student should obtain a regular diploma, and that the student was not required to meet the criteria for an early graduation. As a result, the District denied the student a FAPE. The District was required to rescind the student's regular education diploma and was required to provide the student with compensatory services and develop and implement a new IEP.

In Broward County (FL) Sch. Dist., 34 IDELR 12 (OCR 2000), parents alleged that the district discriminated against their son in violation of Section 504 by failing to properly evaluate and place the student. OCR found that the student was placed in the district's specific learning disabilities program, and that he was initially working towards a "special" diploma. Testing conducted in June 1997 showed that the student was achieving within expectancy in the areas of mathematics, reading, and spelling, and that he showed difficulty with word identification and decoding skills seemed minimal.

In January 1999, student's IEP team developed an IEP and agreed that the student would receive a specialized curriculum for all academic classes. During the meeting, the student indicated that he would like to attend a junior college and earn an Associate's Degree. To meet that goal, the Team determined that the student would need to be proficient in Algebra and be capable of writing a five paragraph essay. The Team determined that, at the time, the student did not possess either of those skills, as they were not required for students who were working toward a regular diploma. The Team believed that "with intensive instruction and extended time, the Student would have the ability and desire to achieve [his] goal." Thus, the Team decided that the Student would remain in school for one more year to meet those goals. The student completed his course requirements and graduated in May 2000. OCR found that the District did not deny the student a FAPE, and that it had not failed to properly evaluate and place the student.

IV. Conclusion

It is important to remember that student's with disabilities must be given an equal opportunity to complete a course of studies leading to a regular high school diploma. Decisions about graduation and transition services should be made by the IEP Team, and IEPs should indicate, at the earliest possible date, the student's anticipated graduation date.