The Role and Responsibility of the LEA Representative

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

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 27 years he has had extensive experience representing school districts in special education matters at the administrative and appellate levels. He has spoken and lectured extensively on a wide range of legal issues in the field of education law.

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

A Word of Caution

No two cases are exactly alike. This material is designed to provide administrators with a broad understanding of their role as the local educational agency representative on the IEP Team. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

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I. Overview

The purpose of this material is to provide administrators with an overview of their role and responsibility as the local educational agency representative on an IEP Team. This material is not intended to substitute for legal counsel nor is it intended to provide the breadth of information that one needs as a special educator.

II. The Philosophy Behind the IDEA

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

A. A "Free Appropriate Education at Public Expense"

The fundamental concept behind the IDEA is that every student is entitled to a **free appropriate education at public expense ("FAPE").** The Act does not require a school to maximize the potential of each disabled child commensurate with the opportunity provided non-disabled children. Rather, Congress sought primarily to identify and evaluate disabled children, and to provide them with access to a free public education. A School District satisfies the requirement to provide a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The "appropriateness" standard is a floor rather than a ceiling.

1. What is a "FAPE?"

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

2. What are "Related Services?"

The term "Related Services" means transportation and such developmental, corrective and other supportive services required to assist a child with a disability to benefit from special education. 20 U.S.C.A. §1401(26); Ed 11002.04(q). Related

services include the early identification and assessment of disabling conditions in children, but do not include medical devices that are surgically implanted, or the replacement of such devices. Id. The Act sets forth numerous examples of related services, including, but not limited to, the following: interpreting services, psychological services, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a FAPE as described in the child's IEP, and medical services that are for diagnostic and evaluation purposes only. Id.

3. The "FAPE" Test

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

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

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

B. Reauthorization of the IDEA

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

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

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

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

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

C. The State Educational Agency and the Local Educational Agency

1. The State Educational Agency (SEA)

As a condition of receiving federal IDEA funds, the State is responsible for ensuring that all children with disabilities between the ages of 3 and 21, inclusive, residing in the State receive a free, appropriate public education. 20 USC 1412(a). This responsibility is placed on the State Educational Agency, which is the "State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools . . ." 20 USC 1401(32). The Department of Education serves as the SEA in New Hampshire. The Department of Education is responsible for ensuring IDEA compliance on a State-wide level.

2. The Local Educational Agency (LEA)

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The term "Local Educational Agency" is defined as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools." Ed 1102.03(o); 34 CFR 300.28.

The LEA is responsible for complying with the IDEA on a local level. In New Hampshire, the local school districts serve as the LEA. Thus, each school district is responsible for locating, evaluating, and identifying all eligible children with disabilities in their district. See Ed 1105.01. Once a student is identified as eligible for services under the IDEA, the local school district is responsible for ensuring that the student receives a free, appropriate public education. This is done through ensuring that the IEP team complies with the procedural components of the IDEA, as well as ensuring that the student substantively receives a free, appropriate public education.

The Local Educational Agency Representative is an integral member of the IEP Team. The LEA Representative is responsible for ensuring – at a local level – that the District is complying with the procedural and substantive requirements of the IDEA, and that students are receiving a FAPE.

III. The Local Educational Agency Representative's Role on the Multi-Disciplinary Team

The IDEA requires that the IEP Team for each child with a disability include, among other individuals,

> a representative of the public agency who:
>
> - Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
>
> - Is knowledgeable about the general education curriculum; and,
>
> - Is knowledgeable about the availability of resources of the public agency.

34 C.F.R. 300.321. This individual is commonly referred to as the "Local Educational Agency Representative". The LEA Representative is a required member of the IEP Team, and therefore, must attend each IEP Team meeting.

The LEA Representative must also have the authority to commit District resources and must be able to ensure that all of the services that are described in a child's IEP will be provided by the District. See Fed. Reg. Vol. 71, No. 156 at 46670 (Aug. 14, 2006).

As the following case illustrates, the failure to have a LEA Representative at a meeting can be costly for the District.

Blount County Board of Education, 111 LRP 73137 (Ala. SEA Aug. 4, 2011).

Facts: Student was eligible for services under the IDEA. He attended and received Part C services from a private pre-school program. His teacher was certified by the State Department of Education and was supervised by a Board Certified Behavior Analyst (BCBA).

Shortly before his third birthday, a special education and referral meeting was held. A speech-pathologist, a representative from the private school, and the parent attended the meeting. They reviewed the Student's evaluations and the speech-pathologist relayed that the District's preschool could only accommodate the student for 2 days per week, due to over-crowding. The private school provider and the parent indicated that they did not think that the District's proposal was appropriate, and

suggested that the student continue in the private program. The SLP did not make a placement proposal.

Subsequently, parents informed the District that the Student would be attending the private program. Student attended that program for the next school year. The District convened a Team meeting to propose an IEP for the Student. At the parents' request, the IEP was written to provide consultative and related services for the student. The SLP agreed that the District would provide the Student with certain of those services at the private school, and with the remainder of the services to be provided in the student's home or after school hours.

At that meeting, the parent inquired about why a LEA Representative was not at the meeting; she was told that he was "cutting grass." However, that individual subsequently signed the IEP, indicating that he had participated in the meeting as the LEA Representative, despite the fact that he had not attended the meeting.

Subsequently, parents filed a request for due process, seeking reimbursement for the costs associated with their private placement, and alleging, among other things that the District committed a procedural violation of the IDEA because a LEA representative did not attend Student's Team meetings.

Held: For the parent. The Speech-Pathologist (SLP) signed into the referral meeting as the LEA and served as the LEA Representative. It was clear from the meeting minutes that the SLP did not meet the criteria to serve as a LEA Representative because she was not knowledgeable about all of the resources available in the District, however, at the subsequent IEP meeting, the lack of knowledge benefitted the parents because the SLP committed to provide the student with services at the private school.

Because the SLP had agreed – through the IEP Team process - to provide the services at the private school, the Hearing Officer found that the District was acquiescing and approving of the parental placement. Since a LEA Representative did not attend the Team meetings, the SLP was deemed to be serving as the LEA Representative and therefore, was viewed as authorized to commit the District's resources to fund the private placement.

IV. The LEA's Duties

A. IEP Implementation

As mentioned in the Overview, the IDEA requires that each District provide a free appropriate public education to all children with disabilities residing in the District. This duty includes developing and **implementing** an individualized education program for each such child, as well as participating in the review and revision of the individualized education programs. The LEA Representative is responsible for ensuring that the IEPs

can be implemented. As the following case illustrates, it is the failure on the part of a District to implement its own plan that frequently causes the most problems.

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

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

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

Key Concepts:

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

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

B. The Duty to Convene a Team Meeting

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

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

Facts: An eight-year-old student with mental retardation and speech and language impairment had attended District's alternative school since kindergarten. The state Special Education Bureau found that the school was not age appropriate. The

District then prepared a new IEP, without convening the team and without parental participation, which transferred student to another alternate regular school. District claimed it did not include parents because it knew they opposed transfer and that "no meaningful benefit" would be obtained from holding an IEP team meeting.

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

District of Columbia Public Schools, 8 ECLPR 85 (D.C. SEA Jan. 2, 2011).

Facts: Student was eligible for services under the IDEA due to autism. Beginning with the 2009-2010 school year, he began attending his local neighborhood public school, in the autism program. He began the school year with a dedicated aide, who was assigned to him by the "Office of the State Superintendent of Education's Autism Division" ("OSS"); however, the student's IEPs were not amended to reflect the addition of the 1:1 aide. In February 2010, OSS stopped providing the student with a 1:1 aide. The District did not convene a meeting, did not provide the parent with prior written notice, and did not discuss the removal of the aide with the parent.

Prior to and during the 2009-2010 school year, the parent obtained several independent evaluations; all of the evaluators opined that the student required a dedicated 1:1 aide to participate in all activities.

In March 2010, the District convened an IEP meeting to develop the Student's annual IEP. The District's IEP did not include a provision for a dedicated 1:1 aide. Parent disagreed with the IEP and requested due process.

Held: For the parent. The District committed several procedural errors, and also substantively denied the Student a FAPE. First, the LEA should have ensured that the Student's IEP accurately reflected that the student received the support services of a dedicated aide. The Hearing Officer found that it did not matter that the 1:1 aide was provided by OSS, and not by the District. The Student was receiving the 1:1 assistance in school, and his IEP should have been amended to reflect the 1:1 aide.

Second, the LEA failed to ensure that the parent received prior written notice of the proposal to remove the dedicated aide from the student's educational program. Districts cannot change a student's educational program without first providing the parents with prior written notice.

Third, the Hearing Officer found that the evidence demonstrated that the student required a 1:1 aide to receive a FAPE, and therefore, the procedural violations resulted in a denial of FAPE to the student. As a result, the Student was denied a FAPE and was entitled to compensatory educational services (10 months of a dedicated aide).

Hunter College (NY) Campus Schools, 49 IDELR 18 (OCR Jan. 31, 2007).

Facts: Student was accepted to the Hunter College School, a school for academically gifted students, for the 2002-03 school year (kindergarten). At the end of the 2003-04 school year, student was referred for an evaluation and was ultimately found to have a learning disability. The Hunter School did not participate in the evaluation or eligibility process.

During the 2004-05 school year, student continued to have academic difficulty. In December 2005, the school Principal met with the parent and informed her that because of the Student's academic difficulties, Student would not be allowed to return for the 2006-07 school year (she was permitted to remain for the remainder of the 2005-06 school year).

In February 2006, parents wrote to the School principal and requested a Team meeting to discuss and implement appropriate accommodations for the Student. In March, the Principal responded to the parent, reiterating that the Student would not be permitted to return to the school in the fall. She did not respond to the request for a meeting.

The parent wrote a second letter, requesting that the School provide accommodations and allow the Student to remain at the School with those accommodations in place. The principal responded by confirming that the Student would not be allowed to enroll in the fall.

Parent filed a complaint with OCR, alleging that the District discriminated against the student on the basis of disability by denying the student re-enrollment for the 2006-07 school year.

Held: For the parent. The School was aware that the parent had requested accommodations, and had notice that the Student might be in need of special education or related services under Section 504. Instead of convening a meeting, the Principal unilaterally decided to terminate the Student. The decision to terminate the Student also constituted a unilateral placement decision, since the Student would be required to attend a different program on a different school. Thus, prior to changing the placement, the Principal should have convened a meeting to determine whether the Student could be educated at the School with accommodations.

The School agreed to a resolution agreement, pursuant to which it was required to develop and amend its procedures for Section 504. The School was also required to convene a meeting to determine whether the Student could attend the School with accommodations, and if so, then the School was ordered to reenroll the Student.

Key Concept:

- Never permit unilateral deviation from an IEP. IEPs may only be modified by the Team at a meeting or, if the parents and the district have agreed in writing, the Team may, in lieu of convening a meeting, develop a written document to amend or modify a child's current IEP. 20 U.S.C. § 1414(d).

C. The Duty to Continue with the IDEA Process During Certain Disputes

Letter to Watson, 48 IDELR 284 (OSEP April 12, 2007).

Facts: A parent filed a request for due process, alleging that the District violated the IDEA by refusing to convene a meeting for the annual review of a student's IEP. The District refused to convene a meeting because the parties were involved in administrative and judicial proceedings about the prior IEP.

The District wrote to the Office of Special Education Programs ("OSEP") and inquired whether the IDEA required the IEP team to review and revise a student's present levels of performance and to develop new goals during the pendency of a judicial proceeding.

Opinion: The IDEA provides that during the pendency of any administrative or judicial proceeding regarding a due process complaint, unless the LEA and the parents agree otherwise, the child must remain in his or her current educational placement. The State and its public agencies must ensure that a free appropriate public education is made available to a child while the proceedings are pending. The IDEA does not relieve the LEA of its responsibility to convene Team meetings to review and revise the student's IEP, even if the District is required to maintain the child's current educational placement while the proceedings are pending.

The District also has a duty to maintain a student's "stay put" placement during the pendency of a dispute. When the placement is in a private facility, or for home bound services, the District must continue to fund those placements. T.H. v. Board of Education of Palatine Community Consolidated School District 15, 1998 U.S. Dist. LEXIS 19110, 29 IDELR 471 (N.D. Ill. Dec. 3, 1998).

D. The Duty to Document IEP Implementation

Districts have an absolute duty to maintain contemporaneous written documentation that the services, accommodations, and modifications contained in a child's IEP are delivered to the Student. Letter to Brousaides, 56 IDELR 108 (OSEP

June 9, 2010); see also Ed 1109.06(a) (The LEA is responsible for developing and implementing procedures designed to monitor that all IEPS are implemented).

E. The Duty to Evaluate

Lincoln County Sch. Dist. v. A.A., 39 IDELR 185 (D. Ore. May 14, 2003).

Facts: Student, a 16 year old who was diagnosed with anorexia nervosa, was hospitalized for a total of 31 days during his freshman year, due to emaciation that compromised his cardiovascular system. Despite high academic assessment scores, his grades gradually declined from a GPA of 3.40 from the fall semester of his seventh grade year to a GPA of 1.43 for the fall semester of his tenth grade year.

With increasing frequency during his ninth and tenth grade years, Student expressed the view that classes were irrelevant and school was a waste of time. He also began drafting "dark" writings. His teachers observed that he was withdrawn, and he had conflict with his parents, including physical altercations.

In December 2000 (his freshman year), Student's parents contacted the student's counselor to inquire about a Section 504 plan, and whether the district would provide Student with assistance. A Team met and developed a 504 Action plan that contained several accommodations.

By the middle of his sophomore year, Student was using marijuana, and by March of that same year, he had failed 2 classes, and received a D in another class. Parents requested that he be placed in the District's alternative high school, but were told that space would not be available until the start of his junior year.

In May 2001, his counselor reported to his parents that Student was overheard telling other students that it would be more humane to kill his parents with a gun, rather than with a machete.

Shortly thereafter, Student's parents withdrew him from school and enrolled him in a wilderness program. One day later, the parents informed the District that Student would probably be going to a private residential facility after he completed the wilderness program.

In November 2001, parents filed a request for due process. Parents alleged that the District failed to advise them of their rights under the IDEA. The Hearing Officer found in favor of the parents, and held that the District had denied the Student a FAPE. As a result, the District was ordered to reimburse the parents for the costs associated with their unilateral placements. The District appealed this decision.

Held: For the parent. The Court found that the District had reason to suspect, and reasonably should have suspected, that the student had a disability, because the

student was in recovery from anorexia, which had historically impacted his educational success. In addition, the District should have suspected that the Student required services under the IDEA because it was already providing services to the Student under Section 504. Moreover, the Court faulted the District for failing to provide the parent with notice of the Student's IDEA rights. The Court affirmed the Hearing Officer's decision that the parents were entitled to reimbursement due to the District's denial of a FAPE.

V. The LEA's Role in the Disciplinary Process

A. Understanding the Key Rules

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

1. The "Ten School Day" rule

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

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

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

to the extent such alternatives are applied to children without disabilities. 20 U.S.C. § 1415(k)(1)(B). In addition, school personnel may make additional removals of not more than 10 consecutive school days in the same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement). 34 C.F.R. § 300.530(b)(1).

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

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

2. The "Cumulative Suspension" rule

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

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

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

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

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

OSERS has opined that this provision provides "public agencies the flexibility to implement discipline policies as they deem necessary to create safe classrooms and

schools for teachers and children as long as those policies are fair and equitable for all children and protect the rights of children with disabilities." 71 Federal Register, No. 156, 46728 (Aug. 14, 2006).

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

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

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

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

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

34 C.F.R. § 300.530(e), (h).

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

However, if the LEA believes that maintaining the current placement of a child with a disability is substantially likely to result in injury to the child or others, then the LEA may request an expedited due process hearing. 34 C.F.R. 300.532(a).

Several recent decisions have discussed the manifestation standard. In MAST Community Charter School, the Pennsylvania State Education Agency rejected the parents challenge to the manifestation determination. 47 IDELR 23 (Pa. SEA 2006). The student had been identified as eligible for special education and related services while he was in fourth grade and had made significant academic and behavioral

progress during the period of fourth through ninth grade. During that time, the student had been taking medication to assist in controlling his impulsive behavior. At the end of his ninth grade year, the student's parents took him off of the medication.

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

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

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

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

The District convened a manifestation meeting and determined that the student's behavior was not a manifestation of his disability. His parents appealed that decision, arguing that the student's therapist had opined that his conduct was substantially related to, or caused by, his disability. The SEA rejected that argument, noting that the

opinion that the "student has a major psychiatric disability which has had a significant impact on his psychological, social and academic development" was not the equivalent of an opinion that the student's "specific behavior was caused by, or had a direct and substantial relationship to student's disability."

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

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

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

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

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

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

[1] Weapon is defined as "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 inches in length." 20 U.S.C. § 1415(k)(7)(A).

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

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

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

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

1. Conduct Codes

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

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

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

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

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

20 U.S.C. § 1415(k)(7)(D).

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

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

The LEA will be deemed to have knowledge when:

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

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

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

20 U.S.C. § 1415(k)(5)(B)(i)-(iii).

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

The case of Corpus Christi Indep. School District, 31 IDELR 41 (Tx. SEA 1999) illustrates these protections. In that case, the parents alleged that the District denied a FAPE to their 5-year old kindergarten student because the District failed to recognize and evaluate suspected disability condition and need for special services. The student had a history of behavioral difficulties, including hitting other children. Student's counselor had suggested referral for speech and language testing but parent disagreed.

Counselor and principal then both agreed that student did not require services under the IDEA and did not need referral for IDEA special education eligibility

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

Key Concepts:

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

D. Liability for Disciplinary Techniques

The manner in which an educator disciplines a student may give rise to a challenge that it violates a student's rights. For example, in Watson Chapel Sch. Dist., 35 IDELR 288 (Ark. SEA Dec. 5, 2001), the District was faulted for failing to comply with a behavioral intervention plan.

Facts: Student was a 16 year old, junior in high school. He was identified as having an intellectual disability and specific learning disabilities in math, reading, and writing. He was placed in a self-contained classroom in his public school.

In April 2001, his IEP Team developed a behavior intervention plan that included "a list of progressive punishment options for the child for the principal and assistant principals to access in the event of misbehaviors that result in an office consultation." The plan did not list any specific behaviors, but it listed ten procedures and interventions, beginning with counseling with the student and ending with expulsion.

At the meeting, the Team discussed targeted behaviors and included them in the plan. They included obeying the school dress code, getting to class on time, and obeying classroom and school rules. The Team determined that these behaviors were all manifestations of the child's disabilities. The Team also amended the draft plan to remove the four interventions that would require that the student be removed from his classroom (alternate classroom placement, suspension, consultation with juvenile court/police, and expulsion).

The parent agreed that the child should not be removed from class, but did not agree with the remainder of the plan, and requested due process, alleging that the Student's IEP and behavioral plan were inappropriate. The Parties had a hearing, and the Hearing Officer ordered that the District conduct an updated evaluation.

On October 8, 2001, the child's IEP Team met again. The purpose of the meeting was to review the child's current IEP, functional assessment and behavior intervention plan.

On the day of the meeting, the mother saw the principal, who was not invited to the meeting; she informed him that she was at the school to attend a meeting, and he followed her into the meeting room. During the meeting, the principal drafted a handwritten behavior plan, which he gave to the Team to sign, indicating that the document would be the student's behavior plan. The plan listed a series of punishments, including suspension. In response to the discussion of a rewards system, the principal wrote "Reward - - Each BIP addressed shall be rewarded by his accomplishments earned in classroom and personal satisfaction from adhering to school regulations."

The mother objected to the behavior plan and requested due process.

At the hearing, the mother testified that the principal had been violating the "stay put" behavior plan by calling the student to the office and keeping him there for the majority of the day, and by sending the student home for extended periods (up to five days at a time) as a "time out" (instead of a suspension). The assistant principal testified that the principal informed him that these exclusions did not count as a suspension because the student would be given the opportunity to make up the missed work. However, during the exclusions, the student was not receiving any instruction. Work assignments and the child's books were "at times" sent home, however, "the oral communication book is a regular high school text and the special education texts are on the fourth grade level, but the child cannot read for himself above a first grade level."

By October 8, 2001, the teacher's records indicated that the student was kept out of class for as many as 15 days, although the principal's office indicated that the student had only been out for 8 days (3 for refusing to get in line to wait for the school bus and for talking back to the teacher; and 5 for "refusing to dress out in physical education class because he had been told by his special education teacher that she was coming to get him out of gym to take a make-up test, and for then getting upset because a school janitor called him 'reta**ed' as he was walking down the hall when he was sent to the principal's office by the coach").

After October 8, the student was sent home for at least 8 more days (3 days for disrupting a science class by constantly turning around and talking to another student and then slapping that other student for something the student said about his mother; 5 days for fighting with another student). After the slapping incident, the principal ordered the assistant principal to file charges against the child, despite the fact that the student's IEP specifically excluded "consultation with the juvenile court and police."

Due to the high number of absences, student received incompletes in all of his classes.

Parents filed a request for due process, alleging that the District denied the Student a FAPE by changing the child's educational placement through the use of disciplinary measures, without convening a manifestation meeting.

Held: For the parent. The District violated the stay-put IEP and behavior plan by removing the student from the classroom, and it also violated the IDEA by removing the student from school for more than 10 days without having a manifestation meeting.

Moreover, both behavioral intervention plans were substantively inappropriate. They did not include any aids or services to teach the student how to deal with teasing by other students, or how to get other students' attention in acceptable ways (other than hitting or slapping). The District was ordered to provide compensatory education and to develop and implement an appropriate behavioral intervention plan for the student.

Finally, the hearing officer granted the parents' request for an injunction, prohibiting the principal from having any physical or verbal contact with the student, and enjoining the district from administering punishment inconsistent with the student's IEP and behavior plan. The school was specifically prohibited from excluding the student from class with an in-school or out-of-school suspension, without first seeking hearing officer approval or obtaining a court order.

Key Concepts:

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

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

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