

The Role of Paraeducators In Special Education

November 6, 2012



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

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

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the 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., Franklin Pierce Law Center; 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.

A Word of Caution

No two cases are exactly alike. This material is designed to provide paraeducators with a broad understanding of their role in relation to special education. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this material is to equip the paraeducator with a working knowledge of his or her obligations under the Individuals with Disabilities Education Improvement Act (IDEA). This material is not intended to substitute for legal counsel nor is it intended to cover the detailed procedural requirements of the IDEA or 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 Test for Determining Whether You Are Providing a “FAPE”

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

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

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

Key Concepts:

- Know the content of the student’s IEP and the IEP goals and objectives that you will be responsible for implementing;
- Know the accommodations that are required by the IEP and determine how they will be implemented;

- Know the modifications that are required by the IEP and determine how they will be achieved;
- Know how the IEP measures progress and what aspects of the IEP you will be responsible for measuring progress;
- Watch for, and know how to implement, a behavioral intervention plan.

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. Paraeducators assist in 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. Reporting Obligations

The Act requires that IEPs include a description of how the child’s progress toward meeting his or her annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed 1109.01(8), (9). The IEP must also contain a statement indicating whether progress is sufficient to achieve the annual goals by the end of the school year. Ed 1109.01(9).

A district can only document educational progress through the reports of its educators and the evaluative process. Educators need to be careful in

selecting descriptors that accurately report a student's progress, or lack thereof. Progress reports should be grounded in fact. Educators should refrain from issuing opinions in areas that are outside of their areas of expertise, such as rendering ad hoc psychiatric or medical diagnoses.

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

III. The Paraeducator's Duties

Paraeducators:

- Work under the supervision of a certified special education teacher;
- Are supervised and observed by a certified special education teacher under whom they work as often as deemed necessary by the local education agency (LEA) but no less than once each week;
- Implement a plan designed by the certified educator; and,
- Monitor the behavior of children with whom they are working.

Ed 1113.12(b). Paraeducators are not responsible for designing programs, evaluating the effectiveness of a program, or assuming the responsibilities of a teacher or substitute teacher. Ed 1113.12(c).

IV. Understanding the Paraeducator's Responsibility for IEP Implementation

The duty to provide a FAPE to all children with disabilities residing in the district includes developing and implementing an individualized education program for each such child. 20 U.S.C. §1412(a)(1)(A); 20 U.S.C. §1412(4).

A. Failure to Fully Implement

It is the failure on the part of a District to implement its own plan that frequently causes the most problems. Several case studies in point:

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

Facts: The parents of an autistic first-grader agreed to an IEP that provided that the student be placed in a separate small class (6-8 students) for first grade, with inclusive settings for lunch, recess and specials. The District could only place three children in the class, including the student. The parents

and the District agreed to a new IEP, which opened the small class to second graders. However, the parents and district did not agree whether the classroom would be comprised of the same group of students. Parents believed that the class would be comprised of a consistent group of children, while the District believed that the group did not need to be comprised of the same students each day. Parents requested due process, alleging denial of FAPE.

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

Key Concepts:

- The District must implement the special education program and related services required each IEP.
- This case also illustrates the importance of communication with parents during the creation and modification of IEPs.

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

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

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

Note: Hearing Officer stressed that it was clearly unrealistic to set same exact goals for 9th grade IEP which were never met in 7th and 8th grade IEPs.

Officer discredited testimony of student's classroom teachers that they believed the student was learning, given her poor grades and test scores.

Key Concepts:

- Repetitive IEP goals are a “red flag” in many cases.
- Progress is still measured the “old fashioned way,” by whether the student makes the grades and test scores, and not simply by the perception of a teacher that a student has progressed.

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

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

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

Key Concept:

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

4. **Manalansan v. Bd. of Educ. of Baltimore, 35 IDELR 122 (D. Md. 2001).**

Facts: A seven year-old student had cerebral palsy, hydrocephalus, and a seizure disorder, leading to mobility, motor, and attention impairments. His disabilities affected balance, mobility, and motor skills as well as cognitive and attention abilities. From 1997-98 and 1998-99, student attended a school located near his home, and received special education services. The IEP was modified in the 1998-99 school year to provide for the assistance of an aide.

In June 1999, the District transferred the student to another school. Parent objected, but she was not able to change the transfer. No aide was present to assist student at the new school until his fifth day of school. After that

time, the aides attended inconsistently and often did not stay for the duration of the school day. They arrived after school started and frequently left before school ended, which was particularly problematic because student's balance problems made entering and exiting school difficult for student. The aides were listed among the service providers in students' IEP.

In September 1999, an IEP meeting was convened specifically to address the aides' poor attendance and inconsistent service provision. At that meeting, the discussion centered on an updated physical therapy evaluation indicating that student needed constant supervision. The services provided by aide included "meeting the student at the front door in the morning and escorting him out at the end of the day, helping him to ambulate throughout the school, assisting him at lunch time, and assisting him with fastening his clothes after going to the bathroom." However, the aides assigned to student continued to have poor attendance. There was usually only one regular education teacher present in student's classroom, and "the teacher often had other students rather than an adult take Brandon from class to class and up the stairs." By February 2000, the aides had been late 35 times and frequently departed at 2:25 p.m. rather than at 3:00 p.m. when students were dismissed.

On February 17, 2000, while student was being escorted by a fellow first grader, a group of boys bumped student, causing him to fall backwards and hit his head on the floor. Student awoke in a seizure the following morning and required extensive surgery to remove and replace a broken shunt. Student missed three weeks of school as a result of surgery and recuperation.

Upon review, the Maryland State Department of Education found that student's IEP was not fully implemented, and it ordered an IEP meeting. An IEP review was held on April 11, 2000, and the Team found that student was being appropriately supervised. Plaintiffs then filed a Due Process hearing request. The administrative law judge found in favor of BCPS, and parent appealed to the District court.

Issue: Whether the District failed to adequately provide an aide, as required by student's IEP, where the aides were regularly late or absent?

Held: For Parents. The District did not adequately implement student's IEP, which required an aide during all classroom activities, when the aides were regularly late or absent and did not assist student at times when his disability presented particular difficulties, such as entering and leaving the school.

The IEP clearly required an aide to be present during all classroom activities, and required some supervision during those times where the student's disabilities were "particularly prominent," such as ascending and descending stairs. The Court further found that any contention of "good faith effort" on the

part of BCPS was unavailing. Although the language of the IDEA does make some reference to making a “good faith effort to assist the child to achieve the goals of objective or benchmarks listed in the IEP,” 34 C.F.R. § 300.350, the Court emphasized that the IDEA contains two separate standards for assisting students with objectives/goals and provision of services to students. While districts may make a “good faith effort” to assist students’ progress towards goals listed in the IEP, districts are required to provide services listed in the IEP. Accordingly, the Court found that the provision of an aide to the student for assistance in all classroom activities was a “substantial and material” element of the IEP that the school had no discretion in implementing. The regular tardiness and absence of student’s aides meant that the school did not satisfactorily provide an aide to student as required by the IEP and denied student a FAPE.

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

The IEP is a document that may only be modified in a Team setting. Educators do not have the latitude to unilaterally alter an IEP.

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

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

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

Key Concept:

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

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

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

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

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

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

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

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

Facts: Unhappy with the services offered by their district, parents requested due process, alleging that their child had not received FAPE. The parents, who were new to the district, wanted the district to implement the same program and methodologies that the previous district had implemented.

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

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

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

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

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

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

Ruling: For the school district, because:

- (1) IEP was crafted with parental involvement, provided goals, and objectives, and used proper assessment methods;
- (2) District's academic assessments met Rowley standard and yielded reliable information;

- (3) Officer rejected parents' contentions that the IEP's goals and objectives were required to contain all or most of the grade-level objectives for every essential element, the IDEA does not require the IEP to be a detailed instructional plan, but rather must provide only general direction;
- (4) District not required to adopt parent's preferred methodology for teaching;
- (5) Evidence established student had some benefit from District placement; and
- (6) In addition to using adequate assessment instruments, the District considered input from student's mother and teachers concerning her academic progress and therefore did not use any sole criterion to measure student's program.

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

Key Concept:

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

V. Disciplinary Options Under the IDEA

A. Understanding the Key Rules

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

1. The "Ten School Day" rule

A student with a disability may be suspended or moved to an alternative setting for up to 10 school days, (as with a nondisabled student), without convening an IEP team to determine whether the misconduct was related to the student's disabilities. This is based on the concept that a suspension, or series

of suspensions totaling less than 10 school days, does not constitute a change in placement. The school need not provide services during such a “short-term” suspension or removal, unless services would be provided to a non-disabled student during such suspension or removal. 34 C.F.R. § 300.530(d)(3).

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

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

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

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

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

2. The “Cumulative Suspension” rule

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

1. They amount to more than 10 days in a school year;
2. The student’s behavior is substantially similar to the student’s behavior in previous incidents that resulted in the series of removals; and,
3. Of other additional factors such as the length of the removal, the total amount of time the child has been removed, and the proximity of the removals to one another

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

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

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

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

- a. whether the conduct was caused by, or had a direct and substantial relationship to the child's disability or
- b. whether the conduct was the direct result of the LEA's failure to implement the IEP.

34 C.F.R. § 300.530(e), (h).

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

Several recent decisions have discussed the manifestation standard. In MAST Community Charter School, the Pennsylvania State Education Agency rejected the parents challenge to the manifestation determination. 47 IDELR 23 (Pa. SEA 2006). The student had been identified as eligible for special education and related services while 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 a not manifestation of his disability. 47 IDELR 56 (Pa SEA 2007). During the 2005-06 school year, the student, who had been identified as eligible for services since 1998, engaged in serious threatening behavior. This behavior resulted in the student's placement being changed to a private school for students with emotional disabilities. During the first part of the 2006-07 school year, the student broke into the private school on several occasions, to use the school computers to download pornography. Eventually, the student stole the school's computer server and related equipment. He was caught after he offered to sell the stolen items to other students. He was suspended for three days, and the

school officials recommended transferring the student to a remedial disciplinary setting.

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

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

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

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

1. possession of a weapon¹ at school, on school premises, or at a school function;
2. knowingly possessing or using illegal drugs at school or selling or soliciting the sale of a controlled substance² at school, on school property, or at a school function; or,
3. inflicting serious bodily injury³ upon another person while 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 2 inches in length. 20 U.S.C. § 1415(k)(7)(A).

² Controlled substances that are a 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 a 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;

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

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

1. Conduct Codes

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

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

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

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

The LEA will be deemed to have knowledge when:

1. the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate

§ 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).

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. Short Periods of Discipline

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

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

E. Liability for Disciplinary Techniques

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

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

Key Concepts:

- An IEP written for a student with behavioral issues should contain interventions in the form of a Behavioral Intervention Plan. When the intervention is part of the IEP, it protects the student and the District from disagreement over whether or not the intervention results in a change in placement. A failure to set forth interventions leaves the educator with limited disciplinary options.
- Educators should generally avoid creating new interventions for a student without first convening a team meeting.

VI. Maintaining Professionalism and Reducing Risks under the IDEA

A. Claims of Retaliation

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

The five questions you should consider are:

- (1) Has the parent/student engaged in a protected activity?
(initiated due process proceedings, filed suit in court, filed a complaint with OCR)
- (2) Is the district or its agents aware of the protected activity?
(how and when did district receive notice, is there a rumor or verified action)
- (3) Will the adverse action against the student occur at the same time as, or after, the parent/student engaged in the protected activity?

- (4) Will a neutral third-party decide there is a causal relationship or connection between the protected activity and the adverse action?
- (5) Can the district offer legitimate, nondiscriminatory reasons for the adverse action, which a neutral third-party will not consider to be pretextual?

B. Avoiding Allegations of Retaliation: Six Examples

1. Barring Parent Participation

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

2. Using Confidential Information

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

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

In Barker (New York) Central School District, April 24, 2001, 35 IDELR 253 the parent alleged that the student's discipline and her subsequent arrest were related to the parent's protected activity of filing a complaint with OCR. Additionally, the parent alleged that the district's determination that the student was not qualified for honor roll status was in retaliation to her complaint. OCR considered both of the allegations and rejected both allegations as unsubstantiated. First, OCR reviewed the District's policies and procedures and criteria for participation in its honor roll program. OCR found that while the student's academic record was good her failure to receive passing grades in physical education class disqualified her from the district's honor roll criteria. Based on that evidence OCR found that the district's determination that the student was not qualified for honor roll status was consistent with the district's stated policies and procedures. On that basis OCR concluded that the evidence was insufficient to support a finding of retaliation.

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

4. Towing Student Vehicles

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

5. Engaging in Bus Suspensions

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

6. Reporting Abuse and Neglect

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

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

C. The Duty to Prevent Disability-Based Harassment

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

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

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

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

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

- Sufficiently severe;
- Persistent; or
- Pervasive; as to
- Limit a student to participate in or benefit from educational programs or services.

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

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

- Review of their policies to ensure that they explicitly prohibit disability harassment and affirm the district's commitment to provide an educational environment free from disability discrimination including harassment;
- Training to administrators, teachers and staff on how to recognize, respond to and prevent disability harassment;
- Age appropriate training to students concerning disability harassment.

TABLE OF CONTENTS

I. Overview	3
II. The Philosophy Behind the IDEA	3
A. A “Free Appropriate Education at Public Expense”	3
1. What is a “FAPE?”	3
2. What are “Related Services?”	4
3. The Test for Determining Whether You Are Providing a “FAPE”	4
B. Reauthorization of the IDEA	5
C. Reporting Obligations	5
III. The Paraeducator’s Duties.....	6
IV. Understanding the Paraeducator’s Responsibility for IEP Implementation .	6
A. Failure to Fully Implement.....	6
1. Berkshire Hills Regional Sch. Dist., 38 IDELR 282 (SEA Mass. 2003)	6
2. Maryland-Montgomery County Public School, 31 IDELR 70 (Aug. 12, 1999)	7
3. Arlington (TX) Indep. School District, 31 IDELR 87 (February 9, 1999) ...	8
4. Manalansan v. Bd. of Educ. of Baltimore, 35 IDELR 122 (D. Md. 2001)..	8
B. The Dangers of Unilateral Changes to an IEP: A Case in Point	10
1. Penn-Tyrone Area School District, 31 IDELR 20 (March 22, 1999)	10
C. Flexibility in Methodology: A Case Study of a “Right Way”	11
1. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 2008 WL 3843913 (D.N.H. Aug. 14, 2008), aff’d by 592 F.3d 267 (1st Cir. 2010)	11
2. Elkhorn Public Schools, 45 IDELR 145 (Neb. SEA 2005).....	12
3. CJN by SKN v. Minneapolis Pub. Schs., 323 F.3d 630, 38 IDELR 298 (8th Cir. 2003).....	12

4.	Tex. El Paso Indep. School District, 31 IDELR 25 (Tx. SEA 1998).....	12
V.	Disciplinary Options Under the IDEA.....	13
A.	Understanding the Key Rules	13
1.	The “Ten School Day” rule.....	13
2.	The “Cumulative Suspension” rule.....	15
B.	“Special Circumstances” Allowing for Removal to an Interim Alternative Educational Setting	18
1.	Conduct Codes	19
C.	Protection for Children Not Yet Eligible for Special Education Services	19
D.	Short Periods of Discipline.....	21
E.	Liability for Disciplinary Techniques.....	21
VI.	Maintaining Professionalism and Reducing Risks under the IDEA	22
A.	Claims of Retaliation.....	22
B.	Avoiding Allegations of Retaliation: Six Examples	23
1.	Barring Parent Participation	23
2.	Using Confidential Information.....	23
3.	Engaging in Student Discipline; Failing to Qualify the Student for Honor Roll.....	24
4.	Towing Student Vehicles	24
5.	Engaging in Bus Suspensions	25
C.	The Duty to Prevent Disability-Based Harassment	25
1.	Reducing Risk Through Application of the Two-Part Test	26