THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) -- THE BASICS

Lyn Beekman
Special Education Solutions
Williamston, MI 48895
ses@spedsolutions.com

I. INTRODUCTION.

A. This presentation will not be a slow "walk through the rules." Rather, its purpose will be to provide an overview of the IDEA scheme, a "feel" for how it works (and doesn't work), and insight regarding particular areas where significant substantive issues may arise for HOs.

B. The first basic—the supremacy clause: federal law (IDEA and its regulations) prevails whenever state law/district policy conflicts with IDEA and its regulations or where the state law/district policy (including collective bargaining agreements) is an obstacle to the accomplishment/execution of the purposes/objectives of IDEA. Pacific Gas & Electric v State Energy Resource Conservation & Dev Comm, 461 US 190, 203-04 (US Sup Ct 1983). See for example Vogel v School Board of Montrose R-14, 552 IDELR 202 (USDC MO 1980), and Parks v Illinois DMH, 554 IDELR 197 (App Ct IL 1982).

II. CHILD FIND.

A. Each state education agency (SEA) and its local districts must have in effect policies and procedures to insure that all children with disabilities residing in the state/district, including those in private schools or who are homeless, who are in need of special education and related services are identified, located, and evaluated. How this is to be accomplished is not specified. Typically it is through public service announcements, brochures, school newsletters, etc., as well as district staff having reasonable cause to suspect that a student has an eligible "disability," even if they are advancing from grade to grade (since, for example, an academically successful student might still have emotional impairments adversely affecting the student's education). 34 CFR § 300.111.

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III. ELIGIBILITY.

A. Age range: Under IDEA (Part B), typically referred to as "special education," it is basically 3 to 21. But, DC law extends the age to 22. 34 CFR § 300.101.

B. "Child with a disability" means a child: (1) evaluated in accordance with IDEA regulations (34 CFR §§ 300.304-311); (2) having characteristics of one of the categorical impairments; and (3) because of the impairment(s) needs special education or related services. See 34 CFR § 300.8.

Note: Lots of children have special needs. Which of those children are included as being "disabled" per IDEA's categorical definitions can vary, dependent on if, and how, the definitions are changed or expanded when IDEA is reauthorized every few years. About 10-12% of the student population qualifies under the current definitions.

Under IDEA there are 13 categories: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectually disabled (formerly referred to as mental retardation), multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment. 34 CFR § 300.7(c). States can opt to allow districts to use another category called "developmental delay" for certain students between the ages of 3 through 9. 34 CFR § 300.7(b).

C. Limits—In Timothy W v Rochester Sch Dist, 441 IDELR 393 (1st Cir 1989), a student had such severe disabilities that the only services which could be provided to him consisted of stimulation and physical therapy. The First Circuit Court of Appeals found him eligible for services under IDEA, basically adopting the "zero reject" theory as being what Congress intended.

D. Students with disabilities are not excluded merely because they happen to be in hospitals, institutions, jails, or prisons. Moreover, the student's condition, such as carrying the HIV virus, does not cause them to be ineligible for services, typically in school. See District 27 Comm Sch Bd v Bd of Ed, 557 IDELR 241 (Sup Ct NY 1986). A district cannot exclude a student from school for health reasons unless it can show unusual risk that cannot be reasonably controlled by sanitation or other procedures. Also, misconduct, whether related to the disability or not, cannot serve as a basis to deny the student services (albeit maybe at home).

E. Possible events terminating eligibility—Graduation (inasmuch as post-secondary education is not required per 34 CFR § 300.17(c)), i.e., completion of regular education requirements and special education requirements, including adequate progress on IEP goals (as well as transition goals). 34 CFR § 300.102(a)(3). Some students "age out" at 21. Many drop out. Few are "cured" (or no longer found eligible).

Note: Compensatory education may be a remedy granted by a HO/court that would have the effect of extending eligibility beyond the age limitation.

IV. APPROPRIATE EDUCATION.

A. "Free appropriate public education" is defined as special education or related services that: (1) are provided at public expense; (2) meet the standards of the state; (3) include preschool, elementary school, or secondary school (i.e., not post-secondary) and (4) are provided in conformity with an Individualized Education Program (hereinafter, "IEP"), meeting the requirements of 34 CFR §§ 300.320-324. See 34 CFR 300.17.

B. An attempt was made to define "appropriate" by the United States Supreme Court in Bd of Ed v Rowley, 553 IDELR 656 (US Sup Ct 1982). Finding that Congress intended IDEA to provide "equal educational opportunity," the Court rejected arguments that appropriate meant some maximization of potential or commensurate opportunity. Noting it was not attempting to establish any one test for determining the adequacy of educational benefits IDEA required, it stated that an IEP: 1) had to be formulated in accordance with the procedural requirements of the Act; and 2) must be "reasonably calculated" to enable the child to obtain educational benefit. For some, it said yearly advancement from grade to grade would be an important factor. It called the IEP the "keystone" of the child's program and IDEA.

The Court emphasized the primary responsibility for formulating the educational methodologies under IDEA was left to state and local officials in cooperation with the parents. Accordingly, lower courts should not impose their views of preferable educational methods upon states.

Note: Courts have since treated HOs as state officials even though they typically are not educators!

C. With regard to "state standards" under FAPE, numerous cases in a variety of states hold that a state may establish a higher programming standard. David D v Dartmouth Sch Committee, 557 IDELR 141 (5th Cir 1985). Michigan, for example, has the standard: "develop the maximum potential." Only a couple states continue to do so. One court has stated these words may be more of an earnest request than a mandate. Soraruf v Pinckney Comm Sch, 32 IDELR 4 (6th Cir 2000).

Certain standards of what may constitute an appropriate education (e.g., personnel, class age-range, class size, etc.) were clearly left under IDEA to the individual states. See for example, with regard to "qualified," it means a person who has met state certification or other requirements. 34 CFR § 300.156. These standards would be a part of the "state standards" which must be met under the definition of FAPE.

V. REFERRAL/EVALUATION.

A. IDEA regulations require that before being provided special education programs and related services, a student must be given a comprehensive assessment meeting a variety of specific requirements, e.g., tests/measures administered in child's native language, valid for the specific purpose used, administered by trained personnel, tailored to assess specific areas of educational need, selected/administered to ensure it measures what it purports to measure, not used as a single procedure/sole criterion, and assess in all areas of suspected disability. The process must include functional/developmental information regarding the student's involvement progress in the general curriculum. 34 CFR §§ 300.304-305 and 307-310.

An "evaluation" means procedures to determine: 1) eligibility; and 2) nature/extent of all special education and related service needs (and not just those linked to the student's disability category). 34 CFR § 300.15.

IDEA also requires that an assessment plan for an initial and reevaluation be developed for each student by reviewing existing evaluation data and then determining what additional data is needed to determine: 1) eligibility; 2) present level of performance and educational needs; 3) special education and related service needs; and 4) additions/modifications to enable the child to meet IEP goals and participate in general curriculum. 34 CFR § 300.305.

B. If the assessment planning team decides a reevaluation, in total or in part, is not necessary, the district must notify the parents, note the reasons, and advise the parents of their right to request a reevaluation in total if they choose. 34 CFR § 300.305(d).

A reevaluation of a child must be conducted every three years or more frequently if the district determines the child's educational/related service needs warrant such or the parent or teacher requests such. A reevaluation shall not occur more frequently than once a year (unless the parent and district agree otherwise) and the parent and district can also agree to change the once every three years requirement. 34 CFR § 300.303.

C. Prior notice and parent consent is necessary regarding an initial evaluation (and initial placement for that matter). 34 CFR § 300.300(a). IDEA requires consent for reevaluation as well unless the district can show it has taken "reasonable measures" to obtain consent and the parents failed to respond. 34 CFR § 300.300(c)(1). If a parent attempts to "revoke" consent, the district still has all of its obligations under IDEA and the revocation is not retroactive. 34 CFR 300.9(c)(2).

If a parent refuses or fails to respond to a request to provide consent for an initial evaluation, a district may not go to hearing to try and override it. If the parent refuses to consent to the initiation of services, the district is also prohibited from

going to an override hearing (and such will not be considered a denial of FAPE). 34 CFR § 300.300(b)(3) and (4).

D. An evaluation must be completed within 60 calendar days of when the district received parental consent, unless an SEA has a different timeline. DC has done so setting the timeline at 120 days from referral. The timeline does not apply if a district did not receive the referred student until after the period started to run if: 1) the district is making "sufficient progress to ensure prompt completion of the evaluation"; and 2) the parent and district agree to a specific completion date or the parent repeatedly fails/refuses to produce the child. 34 CFR § 300.301(c).

E. Under IDEA eligibility must be determined by a team of qualified professional including the parent. Usually this is the IEP Team ("IEPT"). Further, a copy of the evaluation report and eligibility determination must be given to the parent upon completion of administration of tests and other evaluation materials. 34 CFR § 300.306.

F. If a parent disagrees with an evaluation by a district, the parent has a right to an independent educational evaluation (IEE). The parents need not provide prior notification of their disagreement or even the areas of their disagreement although the district can ask. 34 CFR § 300.502(b)(4).

An IEE paid for by the parents must be "considered" by the district. If a parent contends a district's evaluation was not "appropriate" (i.e., in accordance with IDEA requirements), the parent can request an IEE at public expense. The district, upon receipt of such a request, must either: 1) grant it; or 2) go to hearing. 34 CFR § 300.502. As a practical matter, districts usually pay for the IEE given the cost is less than going to a hearing.

VI. INDIVIDUALIZED EDUCATION PROGRAMS (IEP).

A. An IEP must be in place before special education or related services are provided. 34 CFR § 300.323. The requirements regarding its development and content are many (34 CFR §§ 300.320-328) and are important since the IEP, as noted in Rowley, is the keystone of the child's program and IDEA itself. One of the best documents on the interpretation of IDEA requirements concerning IEPs is an OSEP "Notice of Interpretation" at Federal Register, Vol. 64, No. 48 (March 12, 1999), at pp. 12469-12480, referred to as "Appendix A" to the regs, which sets forth 40 questions and answers.

B. The IEP team must have a district representative qualified to supervise/provide special education, knowledgeable about the general education curriculum, and knowledgeable about the district's available resources. The child's special education teacher/provider must attend. If transition services are to be considered, a representative of any other agency providing/paying for such service must be present. Every effort must be made to obtain the parent's participation. The child may attend

if appropriate, as well as others, at the discretion of the parent/district. At least one regular education teacher must attend if the child is/may be participating in general education and a person who can interpret the "instructional implications" of evaluation results. 34 CFR § 300.321.

An IEPT member is now not required to attend a meeting if the parent and district agree such is not necessary because the member's area of curriculum/related services is not being modified/discussed at the meeting. Plus, a member may be excused from attending a meeting when the meeting involves a modification to/discussion of the member's area of curriculum/related services if the parent and district agree that the member may submit written input prior to the meeting. These agreements need to be in writing. 34 CFR § 300.321(e). Members can participate in meetings by telephone. 34 CFR § 300.328.

C. The IEP must contain a statement regarding present level of academic achievement and functional performance, including involvement/progress in the general curriculum (or for preschoolers, participation in appropriate activities), measurable annual goals, special education/related services to be provided (including extent of participation in general education and explanation why not greater), needed transition goals and services, if the student is age 16 or older, projected dates for initiation of services/duration, and objective criteria/evaluation procedures for determining whether goals are being achieved. Remember–the general education curriculum is a "thing"–not a "place" (i.e., a general education classroom).

There must be a statement as to special education/related services/supplementary aides and services/program modification/personnel support necessary for the child to advance on goals, be involved in/progress in the general curriculum, participate in extra curricular/non-academic activities, and be educated/participate in general education curriculum/extra-curricular/non-academic activities. The IEP must note whether the child will participate in state/district-wide student achievement tests, if not, why not, and if not an alternative assessment. It must be stated how parents will be kept informed of the student's progress toward annual goals on a regular basis (at least as often as parents of non-disabled children). Finally, the IEP team must also give special consideration to positive behavioral interventions, limited English proficiency, Braille instruction, the communication needs of the deaf/hard of hearing, and assistive technology. 34 CFR §§ 300.320 and 324.

The regular education teacher, to the extent appropriate, must participate in decisions regarding positive behavioral intervention strategies, supplementary aides and services, program modifications and personnel support. 34 CFR § 300.324(a)(3).

Finally, remember an IEP must address all of a child's special education and related service needs–not just those related to their eligibility category. 34 CFR § 300.304(c)(6). And, special education/related services/supplementary aids must be "based on peer reviewed research to the extent practicable." 34 CFR § 300.320(a)(4).

D. After an annual IEP is developed, a district and parent may agree to change the IEP and not convene an IEPT meeting by agreeing to amend/modify the current IEP in writing. 34 CFR § 300.324(a)(4).

E. Not less than annually, a child's IEP is to be reviewed and revised as appropriate to address any lack of expected progress toward annual goals, the results of any reevaluation, information about the child provided by the parent, the child's anticipated needs, or other matters. 34 CFR § 300.324(6).

F. If a methodology is an "integral part" of what is individualized about a child's education, it must be in the IEP. See Federal Register, Vol. 64, No. 48 (March 12, 1999), at pp. 12552 and 12595. But, the components of the method–not the method's label/name, should be noted in the IEP.

G. If one IEP has been appealed and remains pending, either at the hearing officer or court level for a year, another IEP should be held and, if necessary, eventually consolidated with the original appeal. Town of Burlington v Dept of Ed, 555 IDELR 526 at 537 (1st Cir 1984), and Anderson v District of Columbia, 441 IDELR 508 at 511 (DC Cir 1989).

H. Where a student with disabilities moves to a new district within the same state during the school year and the parties are unable to agree on an interim placement, the new district must implement services comparable to those in the old IEP until it adopts the old IEP or a new IEP is developed. Where a student transfers from one state to another during the school year, the situation is basically the same. 34 CFR § 300.323(e) and (f).

I. A district must give the parent a copy of the IEP. 34 CFR § 300.322(f). Plus, the district must inform each person responsible for implementation their specific responsibilities and any "specific accommodations/modifications/supports" the IEP requires. 34 CFR § 300.323(d).

VII. PLACEMENTS.

A. Just as with the initial evaluation of a student, prior notice and parent consent is necessary regarding an initial placement. 34 CFR § 300.300(b)(2). A district may not go to hearing in an attempt to override the refusal. 34 CFR § 300.300(b)(2). However, thereafter, unless the parent requests a due process hearing after an IEPT, the district should proceed to implement it. J. J. Garcia v Bd of Ed, 558 IDELR 152 at 155 (USDC DC 1986).

B. The placement decision must be made by a group of persons knowledgeable about the child, the evaluation data and placement option (typically the IEPT participants) and such must be done in conformity with LRE rules, documented information, etc.

34 CFR § 300.327. Under IDEA, the parents must participate in the group. 34 CFR § 300.501(c).

C. Clearly, residential placement was contemplated when necessary to provide special education/related services, including non-medical care and room and board. 34 CFR § 300.104. The "test" regarding whether a residential program is "necessary" is not set forth in any law or rule, but rather determined on a case-by-case basis.

The courts across the country have basically taken one of two approaches in attempting to determine--what makes residential placement "necessary"? Some look at the student and consider such factors as: what precipitated the residential placement (a history of tried but failed less restrictive environments or a medical/psychiatric crises)?; the linkage educationally between what is being done with a student during typical school hours and whether that must be continued (or tied into) after school hours activities/plans?; why was a day treatment program with the student residing at home, a foster home or some other setting rejected?; is the student medically stable, psychologically or otherwise? The language in Kruelle v New Castle County Sch Dist, 552 IDELR 554 (3rd Cir 1981), is often quoted:

> Analysis must focus, then, on whether full time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social, or emotional problems that are segregable from the learning process.

Some courts have thrown up their hands finding the student's needs are so "inextricably intertwined that realistically it is not possible for the court to perform the Solomon-like task of separating them." North v D.C. Board, 551 IDELR 157 (USDC DC 1979). In such cases, the court in North and others have said the district is responsible for all costs. But another court, also often quoted, has stated that IDEA does not require placement in a residential program merely to enhance an otherwise sufficient day program or simply to remedy a poor home setting. Abrahamson v Hershman, 554 IDELR 403 (1st Cir 1983).

The other line of cases is where courts go off and not look at the students' needs but rather the accreditation/approval of the facility where the student is housed, i.e., is it really a hospital or is it a school? In doing so, courts also look at who basically is supervising the child's program (i.e., a physician or an educator), is it an educational IEP that drives the student's program or a treatment plan, does the institution have a full time school or merely a school operated by local district on premises to meet the educational needs of the children who happen to be hospitalized there. *See* with differing results Taylor v Honig, 16 IDELR 138 (9th Cir 1990), and Clovis Unified Sch Dist v California, 16 IDELR 944 (9th Cir 1990).

D. Where a parent had an extremely hostile attitude toward the district, it was held proper to consider it a factor in judging whether an IEP was "reasonably calculated" to provide educational benefit to a student. Bd of Ed of Community Consolidated

Sch Dist No. 21 v Illinois State Board, et al, 18 IDELR 43 (7th Cir 1991), commonly referred to as the "Brozier" case. A vigorous dissent declared that parents had succeeded in dictating the educational result by their continued and extremely hostile attitude, noting additional concern about the precedent. The majority stated that it was up to a hearing officer to assess whether a family's hostility was "manufactured" or posed a real threat to the success of the proposed IEP. Often this situation is referred to as a "poisoned environment" so as to allegedly deny the child a FAPE.

E. If something changes in a child's educational situation (e.g., the teacher, the building, the bus pick up/drop off location/time, suspension from an athletic team, etc.), a question arises as to whether a "change in placement" has occurred in violation of IDEA, most notably the child's IEP. The generally accepted view is that for a change in educational placement to occur, a student's program must be "materially altered, not just for example by a change in location, but rather a fundamental change in or elimination of a basic element of the educational program, affecting a child's learning experience in a significant way." Letter to Fisher, 21 IDELR 992 (OSEP 1994).

VIII. AT NO COST.

A. IDEA requires that a FAPE be "without charge" and that special education be "at no cost." 34 CFR § 300.17. "At no cost" is defined to mean without charge, but not precluding incidental fees that are normally charged to non-disabled students or their parents as part of the regular education program. 34 CFR § 300.39(b)(1). Accordingly, parents may volunteer or acquiesce to provide transportation, serve as an aide, etc., but such cannot be made a condition by a district for a child to receive a program or service. Further, the parent has the right to be paid reimbursement for mileage, their time, etc.

Accordingly, cost is legally not to be a factor in discussions except: (1) if there are two or more appropriate options, the cheaper one can be utilized; (2) "center" programs can be used for low-incidence populations; and (3) as part of most LRE approaches (although it is usually not determinative).

B. In funding programs, IDEA specifically allows interagency agreements. Further, it is expressly provided that an insurer or similar third party is not relieved from an otherwise valid obligation to provide or pay for services provided to a student under IDEA. 34 CFR § 300.103. Potential insurers or other third parties might include a student's health insurance, no-fault/automobile insurance, Medicaid reimbursement, adoption subsidies, etc.

C. If insurers or other third parties are to be utilized, the "without cost" to the parent requirement means, for example, the filing of a health insurance claim cannot pose a realistic threat of the student suffering a financial loss (e.g., decrease in available lifetime coverage, increase in premiums, discontinuation of policy, or payment of deductible). Policy Interpretation, 103 IDELR 24 (1980). Before a parent gives

consent to utilize health insurance, an extensive notice must be provided regarding potential financial losses.

IX. RELATED SERVICES.

A. "Related services" means supportive services "required to assist a child … to benefit from special education." The list in the rule is not exhaustive. 34 CFR § 300.34. Some states, to avoid being unable to use IDEA funds for related services not required to assist a student to benefit from "special education", define special education as including related services.

B. Noteworthy are the number of related services which specifically address providing services to parents, e.g., "parent counseling and training," "psychological services" (including psychological counseling), and "social work services in schools," including group and individual counseling with the child and family, helping parents acquire skills to support implementing IEP and to work in partnership with schools. 34 CFR § 300.34(c)(1), (8), and (14).

C. Related services might also be utilized in conjunction with meeting LRE requirements, i.e., "the use of supplementary aids and services" must be offered in the regular education environment in an attempt to satisfactorily achieve integration before segregating the student. 34 CFR § 300.114(a)(2).

D. In the medical area there are various terms. "Medical services" means services provided by a physician and they are allowed only with regard to evaluation and not the provision of other services. “School nurse services" and “school health services” are those provided by a nurse or other qualified person. In Irving Indept Sch Dist v Tatro, 555 IDELR 511 (US Sup Ct 1984), the court held the district was obligated to provide these services only if necessary to aid the student to benefit from special education (i.e., had to be done during the school day rather than before or after, and could be provided by a school nurse/qualified person and not a physician). 34 CFR § 300.34(c)(5).

E. It is important to distinguish the difference between medically necessary OT and PT (to address personal needs) and that therapy which is necessary under IDEA to allow the student to participate/benefit/function educationally. Moreover, there are varying approaches to delivering such services, i.e., "monitoring" or “consultive” as opposed to "hands-on” or “direct." The appropriate method will vary depending upon the particular needs of the student and his or her goals, the monitoring/consultive approach often being utilized in more integrated/functional settings with the "direct" approach being utilized in pull-out situations.

X. ASSISTIVE TECHNOLOGY DEVICES (ATD).

A. ATD means basically any item/equipment/product system used to increase/maintain/ improve the functional capabilities of children with disabilities. 34 CFR § 300.5.

Assistive technology service means any services that directly assist a child with a disability and the selection/acquisition/use of an ATD. 34 CFR § 300.6. An IEP team determines what ATDs and services are necessary to provide the student with a FAPE. 34 CFR § 300.24(a)(2)(v).

B. As a practical matter, districts have typically not been asked to provide and bear the expense of eye glasses, hearing aides, or medical equipment, such as respirators or even wheelchairs (although the latter has been ruled required). See Stohrer, 213 IDELR 209 (OSEP 1989). More recently, in response to court decisions which held that the mapping cochlear implants was a related service, IDEA was amended to except from the definition of ATDs a "medical device that is surgically implanted or the replacement of such device." 34 CFR § 300.34(b) and 113(b).

XI. LEAST RESTRICTIVE ENVIRONMENT (LRE).

A. Generally, LRE means that children with disabilities must be educated with children without disabilities to the maximum extent appropriate considering various factors. In years past, the term "mainstreaming" was used, albeit not a legal term. More recently, the term "inclusion" has been used, but it also is not a legal term.

IDEA requires that "to the maximum extent appropriate" children with disabilities be educated with children without disabilities and that segregation occur only when the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR § 300.114. Among the factors to be considered in determining the LRE for a child: is it the school closest to the child's home?; is it the school the child would have attended if not disabled?; are there any potential harmful effects on the child or on the quality of services the child needs?; and is there disruption in the regular education setting which significantly impairs the education of other students? 34 CFR § 300.116.

B. LRE is not an option. It is a mandate. But, the student does not have an absolute right to be in a general education classroom or in their "home" school, only the right to have such considered first and rejected for good reason. The LRE for each student must be determined based upon an analysis of the above factors and that child's individualized situation. Bottom line, the LRE mandate creates tension between two IDEA requirements: 1) educating the student to the maximum extent appropriate in general education settings with supports; while 2) meeting all of the student's unique needs, academically, socially, behaviorally, etc.

C. IDEA and its regulations do not set down a "test" to determine LRE. But, OSEP in Memorandum 95-9, 21 IDELR 1152 (OSEP 1994), and most federal circuits across the country have created their own tests. They vary in significant ways so check the test of the federal circuit in which you are located. The DC Circuit has not as yet established a test. Many of the tests ask a series of questions, such as: 1) has the district taken steps to accommodate the student in the general education setting?; 2)

would the district need to provide too much support to the general education teacher and modify the general education curriculum too much?; 3) would the child receive any educational benefit from the general education setting academically, socially, or otherwise?; 4) how do the benefits of general education versus special education balance out for the child?; and 5) what is the effect of the student's presence in the general education environment on other students (e.g., disruptive, etc.)?

Importantly, it must be remembered that participation in the general education curriculum does not mean having to be in a general education classroom. The general education curriculum can be taught in a special education classroom. Moreover, participation in general education settings is not an all or nothing matter. Some of the student's needs might be met in a general education setting (with supports), while other needs might be met in special education settings. LRE principles also apply to the transportation of a student to and from school. Finally, inasmuch as communication is an essential fundamental in the provision of education, what constitutes the LRE for deaf students, particularly for those who strongly support the "deaf culture," has been the subject of much debate and controversy over the years.

XII. EXTENDED SCHOOL YEAR (ESY).

A. If a child's IEPT determines on an individual basis that services beyond a normal school year are necessary for the child to receive a FAPE, then an ESY must be provided. 34 CFR § 300.106.

B. IDEA does not provide a test to determine when such is "necessary." Various federal circuit courts have established tests. The DC Circuit Court has not as yet adopted a test. The majority utilize what is commonly referred to as the "regression without reasonable recoupment" standard (i.e., does the child with regard to one or more goals regress over any break in school (usually the summer) regarding that skill to the point where they cannot recoup the skill within a reasonable period of time upon return, typically approximately seven weeks). Other circuits have stated ESY should be provided when the child's situation requires a "continuous" educational experience to be appropriate or that the student's skills need to be "maintained" or "enhanced" during the summer period to be appropriate.

C. ESY services should focus only upon those goals which meet the test, and may require further traditional school days, particular related services, summer camps, etc., depending upon how that child's needs can be appropriately met.

XIII. TRANSITION.

A. When the student is no older than 16, the IEP team must conduct appropriate transition assessments relating to training, education, employment, and where appropriate independent living skills. Then, based on the results of these assessments, transition goals must be established for the student and transition

services, including courses of study, provided as needed to assist the child in reaching the goals. 34 CFR § 300.320(b). This is a recent change in that previously transition services were a coordinated set of activities designed with an outcome oriented process to promote movement from school to post-school activities. Now, transition is a result oriented process to facilitate movement from school to post-school activities.

Also newly required is that the district must provide the child with a summary "of the child's academic achievement and functional performance, which will include recommendations on how to assist a child in meeting the child's post-secondary goals." 34 CFR § 300.305(e)(3). It is believed the intent here was to give the child greater leverage to be able to advocate for supportive assistance from other agencies/ post-secondary institutions after graduation.

B. While other community agencies are to be invited to participate in an IEPT meeting and provide services in cooperation with the district, if those agencies fail to provide such services, IDEA requires that the district do so. 34 CFR § 300.324(c). Historically, this has been problematic, particularly as funding for those agencies' services has been curtailed.

XIV. PRIVATE SCHOOLS—SERVICES TO STUDENTS VOLUNTARY, PARENTALLY PLACED.

A. For years litigation raged with regard to the extent, if any, of a district's obligation under IDEA to provide services to such students. IDEA now provides an elaborate set of procedures requiring districts to consult with private schools (and parents) with regard to the child find process, the design/development of special education/related services, the proportionate amount to be spent on such services (based on the number of students attending private schools relative to the total number of students receiving special education services in the district), the consultation process itself, and how/where/and by whom special education and related services will be provided. The pro rata amount is relatively small. A FAPE is not required to be provided.

B. Private schools may submit a complaint to an SEA that its consultation with the district was not meaningful/timely or that the district did not give due considerations to its views, and that complaint may be appealed to the Office of Special Education Programs (OSEP). 34 CFR § 300.136.

Parents who believe these provisions have been violated with regard to their child may only file a complaint and not a request for a due process hearing, except regarding allegations of child find or evaluation provisions. 34 CFR § 300.140.

XV. DISCIPLINE.

A. As a fundamental principle under IDEA, there are different rules for disciplining students with disabilities because it requires the teaching of appropriate behavioral/

social skills if a student needs such as a result of his or her disability. But, no matter what offense the student commits, or the discipline imposed (even expulsion), the district must continue to provide interim alternative educational services (IAES). These services must enable the student to participate in the general education curriculum (in another setting) and progress toward meeting the student's IEP goals. Plus, the student must, if appropriate, receive a functional behavioral assessment (FBA) and behavioral intervention services designed to address the behavior violation so that it does not recur. 34 CFR § 300.530(d). Depending upon the situation, developing the IAES can be very challenging for the student's IEPT.

If an incident with potential disciplinary consequences occurs, and the district wants to change the student's placement (such as suspending more than 10 days or expelling), it needs to conduct a "manifestation determination" (i.e., whether the behavior/conduct subject to discipline is related to the student's disability. Two questions must be addressed: 1) was the conduct in question caused by, or had a direct and substantial relationship to, the child's disability; or 2) if the conduct in question was the direct result of the district's failure to implement the IEP. 34 CFR § 300.530(e).

If the conduct/behavior is <u>not</u> related to the child's disability, then the district may discipline the child as it would children without disabilities. On the other hand, if the conduct/behavior is found to be related to the disability, a functional behavioral assessment (FBA) must be conducted and a behavior intervention plan (BIP) developed, if not previously done, or if so, the FBA and BIP reviewed, with the child returning to the prior placement unless the parent and district agree otherwise. 34 CFR § 300.530(f).

B. The procedures regarding the discipline of student's with disabilities in various situations, including those involving weapons, drugs, controlled substances, and where a substantial likelihood of injury will occur to the child or others, are very complicated.

C. The procedures for expedited hearings vary from traditional hearings. The hearing is to occur within 20 school days of the date the hearing is requested and a determination is to be made within 10 school days after the hearing. 34 CFR 300.532(c)(2). The proposed regulations provide that a resolution meeting must be scheduled in 7 days and completed within 15 days or the above hearing timelines will start running. 34 CFR 300.532(c)(3). Basically, only three issues can be the subject of an expedited hearing. A parent can appeal a manifestation determination, the IEPT's IAES, or both. A district can seek to change a student's placement alleging maintaining the current placement "is substantially likely to result in injury to the student or others" 34 CFR 300.532(a).

D. With regard to a child who has not yet been determined eligible under IDEA who is engaged in behavior that violates the code of student conduct, the district will be deemed to have had knowledge that the child was a child with a disability if, prior to

the behavior that precipitated the disciplinary action: 1) the parent expressed written concern to supervisory/administrative personnel of the district or a teacher that the child needed special education; 2) the parent requested an evaluation; or 3) the teacher or other district staff express specific concerns about a pattern of behavior directly to the director of special education or the supervisory staff. A district is not deemed to have had knowledge the child was a child with a disability if the parent did not allow the child to be evaluated, the child was evaluated and found not eligible or the parent refused special education services. 34 CFR § 300.534(b).

If a request for evaluation is made after the child is subjected to disciplinary measures, the evaluation is to be expedited. But, pending results of the evaluations, the child remains in the placement determined by the district. 34 CFR § 300.534(d)(2).

XVI. PARENTAL STATUS.

A. "Parent" is defined to mean not only a natural or adoptive parent but a guardian or a person acting as a parent (e.g., relative with whom child lives or one legally responsible for child's welfare), as well as a surrogate parent. 34 CFR § 300.30. If no parent can be identified, after reasonable efforts by the district, or the child is a ward of the state, the district must assign an individual to act as a surrogate for the parent and there are procedures relating to the training and selection of such persons. 34 CFR § 300.519.

B. If a foster parent meets certain requirements, the person can be a parent within the meaning of IDEA. 34 CFR § 300.30(a)(2).

C. In divorce situations, care should be taken to examine the order regarding custody in terms of whether it is with one parent or joint and whether it includes educational matters. Where custody is joint, both parents have the right to participate in the IEP and appeal it. Moreover, non-custodial parents have been held to have rights (albeit not contesting an IEP) (e.g., access to records, participating in an IEPT, observing the child, etc.).

XVII. PROCEDURAL SAFEGUARDS.

A. Each district is required to establish and maintain procedures to assure parents get IDEA's procedural safeguards. 34 CFR § 300.500. Included among said safeguards are the right to examine records, the appointment of a surrogate parent if the parent is unknown/unavailable/a ward of the court, independent educational evaluations, the right to file complaints for alleged violations of law, the right to request a due process hearing, prior notice and consent, a procedural safeguards notice, the right to have the child "stay put" pending appeals, and attorneys' fees if a prevailing party. 34 CFR 300.503.

The safeguards notice must be given to the parent only once a year, except a copy must also be given when a parent makes an initial referral or request for evaluation, first requests a due process hearing or files a state complaint, not later than the date of a decision to take disciplinary action and when a parent requests one.

B. When a district proposes/refuses to initiate/change the identification, evaluation, placement or FAPE of a child, prior written notice must be provided to the parent which includes: a description of the action proposed/refused; an explanation of why; a description of other options considered and why rejected; a description of each evaluation procedure/test/report used by the district as a basis for the proposed/refused action; and a description of other relevant factors to the district's proposal/refusal. The parent must be advised where to get a copy of procedural safeguards if not enclosed and sources to contact to obtain assistance in understanding their rights. 34 CFR § 300.503.

C. Each state has a mediation system in which parents/schools may voluntarily participate at no cost. It cannot deny or delay a parent's right to a hearing. Districts and parents choosing not to utilize the mediation process can be required by a state or district policy to meet with a disinterested third party who would encourage and explain the benefits of mediation. Mediators are required to be trained and be knowledgeable in the laws regarding special education. Mediation is available to parties even before they might file a request for a due process hearing. 34 CFR § 300.506.

A mediation agreement must be written, confirm that the discussions were “confidential” (i.e., cannot be used later as evidence in any subsequent IDEA proceeding), and be signed by the parent and a district representative with the authority to bind it. The agreement is enforceable in any court of competent jurisdiction. 34 CFR § 300.506(b)(7).

D. If the parent is a "prevailing party," he/she may be awarded reasonable attorneys' fees by a court. Factors considered include the reasonableness of the rate, whether either party unreasonably protracted the resolution, the time spent, and whether the parent was justified in refusing a settlement offer made 10 days or more prior to the hearing which was "more favorable" than the eventual decision. If at the time the hearing is requested the parent refuses to provide notice to the district of the problems causing the hearing request and proposed solutions "to the extent known and available to the parents at the time," any potential request for attorneys' fees by the parents could be reduced or denied. 34 CFR § 300.517.

An SEA or district can recover attorneys’ fees from a parent’s attorney who requests a hearing or starts a court action that is “frivolous, unreasonable, or without foundation” or continues to litigate after the litigation has become such. Attorneys’ fees can also be recovered from either the parent’s attorney or the parent if the parent’s request for hearing in subsequent court action “was presented for any

improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 34 CFR § 300.517(a)(1)(iii).

XVIII. COMPLAINTS.

A. IDEA regulations require that a state establish a procedure for the filing of complaints (i.e., alleged violations of IDEA). 34 CFR §§ 300.551-553.

A complaint must be filed within one year of the alleged event. 34 CFR § 300.153(c). Money reimbursement, compensatory services and other corrective action can be provided if a FAPE was found to be denied. 34 CFR § 300.151(b).

B. A parent may utilize either or both of the complaint or hearing processes. Letter to Chief State School Officers, 34 IDELR 264 (OSEP 2000).

C. If an issue has already been decided in a due process hearing, then that decision should prevail over a complaint investigation of the same issue. Alternatively, the results of a complaint investigation may be presented as evidence in a hearing. If the parents have commenced both processes, the complaint may be held in abeyance pending conclusion of the hearing. If no hearing has also been requested, the complaint must be pursued and resolved within 60 days.

D. An SEA in its procedures regarding complaints must provide that a district have the opportunity to respond to a complaint, including a proposal to resolve it, and if the parent consents, the opportunity to resolve the complaint through mediation or some other means, with the 60 day time limitation being automatically extended upon agreement of the parties. 34 CFR § 300.152(a)(3).

XIX. DUE PROCESS HEARING.

A. Under IDEA a parent has the right to a hearing on any matter for which notice must be given (i.e., relating to identification, evaluation, placement and FAPE). 34 CFR § 300.507(a). They must be given information on available free/low cost legal and other relevant services and attorneys' fees by the district. A list of organizations which provide free legal services is also available from the SHO.

The hearing officer must be impartial (i.e., not involved in the education of the child or have a personal/professional interest conflicting with objectivity). In addition, hearing officers must possess knowledge of/ability to understand IDEA and legal interpretations of courts, possess the knowledge/ability to conduct appropriate legal hearings, and possess the knowledge/ability to render and write appropriate legal decisions.

At the hearing, parties have a right to be accompanied by counsel (or individuals with special knowledge or training with respect to children with disabilities), present evidence, confront/cross examine/compel witnesses, prohibit evidence not disclosed

5 days before the hearing, and obtain either a written or electronic record and decision. The parent can opt for the hearing to be open or closed.

A decision is to be rendered within 45 days of the date of the hearing after the resolution period, unless waived or the parties have agreed otherwise. Hearings sometimes may take longer due to the parties finding mutually convenient hearing dates, wanting to pursue settlement via mediation or otherwise or desiring additional evaluations. 34 CFR § 300.515(a).

The decision must be made on substantive grounds based upon a determination of whether a child received a FAPE. Where a parent alleges a procedural violation, the HO may find the child did not receive a FAPE only if procedural inadequacies: 1) impeded the child's right to a FAPE; 2) significantly impeded the parent's opportunity to participate in the IEPT meeting; or 3) caused a deprivation of educational benefits. The HO can order a district to comply with IDEA's procedural requirements in any event.

Under IDEA, a state may at its option allow for a second tier of administrative hearing. If so, generally the same rights are present and the decision must be rendered within 30 days of the appeal. 34 CFR § 300.515(b). Thereafter, either party may appeal to a state or federal court. 34 CFR § 300.516.

B. A due process complaint notice must allege a violation "that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint" (unless the state has another time frame), with the following exception-if the parent was prevented from requesting the hearing due to: (1) specific misrepresentations by the district that it had resolved the problem forming the basis of the complaint; or (2) the district withheld information from the parent that was required to be provided the parent. 34 CFR §§ 300.507(a)(2) and 511(e).

C. SEAs must develop a model form for such notice (as well as a complaint). 34 CFR § 300.509.

The due process notice is required to be provided to the other party and the SEA before that party can have a due process hearing. If a district upon receipt of the notice has not sent a prior written notice to the parent regarding the matter raised in the notice, the district has within 10 days of receipt of the notice to send the parent prior written notice, usually referred to as the response.

The party receiving the notice (including a district that has to give the parent a prior written notice on the matters in the notice) can assert the notice is insufficient within 15 days of receipt of the notice by bringing it before a hearing officer, with a copy to the other party (otherwise, the notice will be deemed sufficient). Within 5 days after receipt of the claim of insufficiency of notice, the hearing officer must determine on the face of the notice whether it meets the requirements and so notify the parties in

writing. Within 10 days after receipt of a notice, that party must provide a written response that specifically addresses the issues raised in the notice.

A party may amend its notice only if: 1) the other party consents in writing and is given an opportunity to resolve it through a resolution meeting; or 2) the hearing officer grants permission not later than 5 days before the hearing. If a notice is amended, the timeline for a resolution meeting and the hearing recommences at that point.

A party giving the notice (requesting the hearing) is not allowed to raise issues at the hearing that are not raised in the notice unless the other party agrees. But, it is expressly provided a parent can file a separate due process complaint on an issue "separate" from a due process hearing complaint already filed. 34 CFR § 300.508.

D. A "resolution meeting" is required within 15 days of receiving the parent's notice requesting a hearing. It must be attended by the parent and "the relevant member or members of the IEP team who have specific knowledge of the facts identified in the" notice. A representative of the district who has decision-making authority must also attend. The district's attorney cannot attend unless the parent has an attorney. If attorneys do participate, there is no right to recover attorney fees. If the parent and district agree, they may in writing waive the meeting or agree to use mediation as an alternative. 34 CFR § 300.510.

If the district and parent have not resolved the issues in the notice to the parent's satisfaction within 30 days of receipt of the notice, the parties waive the resolution meeting or mediation/resolution meeting starts but the parties agree no agreement is possible, the due process hearing may proceed (with the timelines for the hearing commencing). 34 CFR § 300.510(c). On the other hand, if a resolution is reached, the parties shall have a written agreement that is legally binding, signed by the parent and a district representative with authority to bind it, which is enforceable in a court of competent jurisdiction. Either party may void any such agreement within 3 business days after it is signed. 34 CFR § 300.510(d) and (e).

E. In determining what placement constitutes the "stay put" for the purposes of 34 CFR § 300.518, usually it is obvious. But, when a part of the program isn't in an IEP or the appeal is after the disputed IEP has been implemented, the question is tougher. The Sixth Circuit Court of Appeals has held that it is the "operative" or "then current" placement at the time the dispute arises. Thomas v Cincinnati Bd of Ed, 17 IDELR 113 (6th Cir 1990). Also, if a parent prevails in the last state administrative decision, it constitutes the "stay put" if the litigation continues. 34 CFR § 300.518(d).

F. A hearing officer (or a court) has the equitable authority under IDEA to order a district to reimburse parents for their expenditures in unilaterally placing their child in a private school pending a due process hearing and appeals if it is ultimately determined the district's placement was inappropriate and the parent's placement was

"proper" under IDEA. Burlington Sch Committee v Dept of Ed, 556 IDELR 389(US Sup Ct 1985). The U. S. Supreme Court clarified its ruling in Burlington, holding that the private school chosen by the parent does not need to meet all IDEA requirements in order for them to obtain reimbursement. Further, the parent's chosen placement need not meet FAPE requirements. To be "proper under the act" the parents need only show that the private school education chosen is "reasonably calculated to enable the child to receive educational benefits." Florence County Sch Dist 4 v Carter, 20 IDELR 532 (US Sup Ct 1993). Some, but not all, of the principles from the Burlington and Carter decisions re now set forth in 34 CFR 300.148.

Under IDEA, parents must provide the district with notice at the IEP meeting last attended or 10 business days before the child is transferred to a private school, noting they object that the district's IEP is not providing FAPE, the nature of their concerns, and their intent to make the transfer to the private school and seek payment for said unilateral placement. Failure to provide such notice can be considered by a hearing officer or a court to reduce or deny any reimbursement (unless compliance will likely result in physical harm to the child, or the parent was not notified such notice was required). 34 CFR § 300.148(d). OSEP has opined that the notice is only required when the child is first removed from the public schools and that no such notice is required in any subsequent year in which the student remains in the unilateral placement.