

Special Education and the Law

A Legal Guide for Families and Educators

**What Parents and Educators Should
Know About the Laws and Court
Decisions That Affect the Education of
Students with Disabilities in Washington
State**

February 1998

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All laws are subject to change by legislation and by court decisions. Some details of the reauthorization of IDEA on June 4, 1997, are not reflected in this document. We intend the information in this guide to be understandable to both parents and educators alike. It is not our intent that the material will be used as legal advice relating to any specific child’s circumstances. It is a public education resource. Parents and educators will be better prepared to work cooperatively with an understanding of the statutes and regulations pertaining to students’ disabilities. With such knowledge, we hope that the escalation of conflict that often leads to expensive and time-consuming due process hearings and litigation will be avoided in many cases.

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What Parents and Educators Should Know About the Laws and Court Decisions That Affect the Education of Students With Disabilities in Washington State

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Introduction

Washington was one of the first states to establish laws mandating at public expense the education in the public schools of all children who experience disabilities.

Washington State's "Education for All" law represented a revolutionary new concept in education. Programs for children with disabilities were to become individualized and meet the unique needs of each disabled child. For the first time, parents were incorporated in the education planning process as *equal partners*.

At the same time that Washington State's law was being enacted, two federal court cases *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*,¹ and *Mills v. Board of Education*² brought national attention to the education of children with disabilities. The results in these cases led to the congressional enactment of **Section 504 of the Rehabilitation Act of 1973** and **Public Law 94-142**.

Public Law 94-142 was originally called the "Education For All Handicapped Children Act" and is now known as the **Individuals with Disabilities Education Act (IDEA)**.

These laws were established within the context of a larger civil rights movement to end discrimination against children and adults with disabilities. Many parents became actively involved in enforcing the new "right to education" that Congress, state legislatures, and the courts had granted to their children. The laws created a new set of expectations for educating children with disabilities which many school districts were initially unable to meet. School personnel lacked experience and training while school districts as a whole were challenged by inadequate funding and a shortage of qualified related service staff. This caused an occasionally uneasy relationship between parents and educators.

School districts struggled to meet all of the new requirements imposed upon them, such as identifying and evaluating every child with a disability in their local area; writing an individualized education program for each eligible child; and creating programs that would meet their needs. Today, school districts continue to seek new and innovative ways to meet the challenges presented by each student with a disability. With better evaluation tools, a growing field of professional expertise, and a greater understanding of the causes and nature of many disabilities, most schools face these challenges

Washington State law preceded federal law in mandating educational services for children with disabilities.

supported by well-trained staff and effective programs.

At times, however, conflicts between parents and educators do occur. The state of Washington has a historical commitment to working out problems cooperatively, rather than through lawsuits. This is demonstrated by the ground-breaking passage of “Education for All” prior to any federal requirements. Similarly, most school districts in Washington State attempt to resolve conflicts through communication and mediation, rather than formal “due process.” While the legal process allows courts to apply the law to individual children in specific situations, it rarely produces a “winner.” Financial costs are high for both parents and school districts. The emotional strain on the relationship between the educators and the families they serve often remains—even after the “problem is solved” by legal intervention.

The intent of this legal guide is to prevent as much future litigation as possible by (1) presenting information about the requirements of the laws, (2) explaining the ways courts have interpreted the laws, and (3) offering suggestions to parents and educators for addressing the most challenging and recurring issues affecting the education of children with disabilities.

We will highlight in each chapter the federal and state statutes and regulations that apply to each topic. We will also summarize court cases that demonstrate how judges have applied the statutes and regulations to specific individual situations. We will try to provide some *general guidelines* that parents and educators can use to make educational decisions. It is important to remember that how the law is applied varies with each individual child and situation. The outcome of a court decision is influenced by several factors, including (1) the “facts” of a particular student’s “case”; (2) the information provided by the parents, student, educators, and experts who know the student best; and even (3) the attitude and approach of the lawyers and judges involved when the case is presented.

Although the laws governing the education of students with disabilities have been in place since the early 1970s, conflicts still arise about their meaning and requirements.

There are few absolute rules that fit in every case. A high degree of variability often exists in court decisions, even between two cases with remarkably similar facts. In the same way, the solutions for individual children with disabilities must be made based on each child's unique needs, along with the requirements of the law. When school districts and parents—acting together—make individualized decisions with both the specific child and the law in mind, formal conflict can be avoided in most cases.

The solutions to the problems facing a child in obtaining an appropriate education will differ based upon several factors, including the child's age; areas of strength and weakness; behavior; and the family's support system, values, and priorities. Equally important is the school district's philosophy, attitude, training, availability of special services, and commitment to quality education for each and every child. *Both* the parents and the district must understand that their objectivity is affected by their emotional and financial stake in the outcome, as well as the extent of their desire to maintain control—either over the child's program or the district's operations. Open communication, collaborative problem solving, and positive outcomes for a child with a disability depend on educators and parents working together willingly and honestly. It also depends on everyone having a shared set of expectations and a good understanding of what the law requires.

Court decisions and this guide may help parents and educators better understand the laws related to educating children with disabilities.

The Foundation of Special Education Law

The Constitutional Foundations of Special Education

In the early 1970s, a series of decisions in federal courts confirmed that many schools were unlawfully discriminating against students with disabilities. Public schools excluded students with disabilities by a number of means, including: placing them on waiting lists, using disciplinary procedures to remove them from classrooms due to behavior problems, failing to properly identify students as disabled, not serving those determined to be not “educable,” and failing to provide a meaningful education to those actually in school. The courts found that these students’ rights were being violated under the Equal Protection and Due Process clauses of the Fourteenth Amendment of the Constitution of the United States. Lawyers for children with disabilities emphasized to the courts the legal principle established in *Brown v. the Board of Education of Topeka* (May 17, 1954):³

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.* (emphasis added)

One of the major federal court decisions that launched the special education revolution was *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (PARC).⁴ Pennsylvania had a series of statutes that allowed school districts to exclude any child that the public school psychologist deemed “uneducable” and “untrainable.”

Prior to 1970 students with disabilities were not provided equal access to education.

Students who were labeled severely or profoundly retarded were routinely denied any access to the public school system. The court found that such exclusion was not allowed under the U.S. Constitution.

In *Mills v. Board of Education*,⁵ using very similar arguments, attorneys acting on behalf of 12-year-old Peter Mills and six other children filed a lawsuit against the Board of Education in the District of Columbia. Judge Waddy characterized the problem as having two aspects:

...[T]he failure of the District of Columbia to provide publicly supported education and training to plaintiffs and other 'exceptional children' ... *and* the excluding, suspending, expelling, reassigning, and transferring of 'exceptional children' from regular public school classes without affording them due process of law. (emphasis added)

In *Mills*, "exceptional" children included the "mentally retarded, emotionally disturbed, physically handicapped, hyperactive, and other children with behavioral problems," which broadened the class of children represented in the *PARC* case. *Mills* also brought to light the large numbers of children with disabilities who at that time were not being provided an education that met their needs.

The *Mills* court gave the parties numerous opportunities to come to an agreement and establish a "comprehensive plan" for the education, treatment, and care of physically and mentally impaired children aged 3 to 21 years. The school district, however, repeatedly failed to meet the timelines established by the court. Finally the court entered an order obligating the school district to "provide each child of school age a free and suitable publicly supported education regardless of the degree of the child's physical, mental, or emotional disability or impairment. Furthermore, defendants shall not exclude any child ... from such publicly supported education on the basis of a claim of insufficient resources."

In the fall of 1970, while the parents and attorneys in Pennsylvania and Washington, D.C., were participating in the *PARC* and *Mills* cases, a group of parents in Washington State came together independently to voice similar concerns. They decided to approach the problem of obtaining services for their disabled children through the legislative process rather than the courts. These parents formed a small committee

PARC and *Mills* were the legal cases which brought national attention to the issue of educating students with disabilities.

adopting the name “Education for All.” The name was taken from the portion of the Washington State Constitution which reads as follows:

It is the paramount duty of the state to make ample provision for the *education of all* children residing within its borders, without distinction or preference on account of race, color, caste, or sex. (emphasis added)

Article IX, Section 1 of the Washington State Constitution

Washington’s special education law was considered a “permissive” statute prior to 1970. School districts were *encouraged* but not *obligated* to provide programs to children with disabilities. The “Education for All” committee successfully drafted House Bill 90, a bill changing the special education statutes which are now found and codified in chapter 28A.155 RCW. The law changed the permissive nature of the statute to a mandatory law requiring that all children with disabilities receive an appropriate educational program, at public expense, directed to each individual child’s unique needs and abilities. The new law provided parents with the right to challenge the program offered by the school district if the parents did not feel that the program was appropriate to meet their child’s needs.

The Washington State law was the legislative equivalent to the *PARC* and *Mills* decisions. An interesting footnote is that the same concepts, and even the same key words, were developed through both approaches without any contact between the attorneys or parents working on this issue.

As a result of the Washington State legislation and the *PARC* and *Mills* decisions. Congress took action in 1974 to establish Public Law 94-142, the Education For All Handicapped Children Act. Consistent with the concepts established in Washington’s “Education for All” law, much of the language of P.L. 94-142 can be traced directly to the *PARC* consent order and the *Mills* judgment. One of the sponsoring congressmen working on the development of the statutory language asked the members of the “Education for All” committee if he could borrow the name of the Washington State law for his new federal bill.

Washington State’s Constitution requires the education of ALL children in the state.

Washington’s “Education for All” law played a part in shaping the federal law.

Over the years, concern has often been expressed that the right of children with disabilities to a free and appropriate public education may be limited or even eliminated by Congress. We must all remember that the congressional action was a *response* to federal court decisions granting this right on the basis of the Fifth and Fourteenth Amendments to the U.S. Constitution. Congress did not *create* the right to education for children with disabilities. In addition, in Washington State, the right to education for all children, including all children with disabilities, is based upon our state constitution and not just upon a federal legislative enactment. The constitutional basis for the right to education—and the establishment of a “full and ample” funding system for the statute—at least in the state of Washington, has been confirmed by both the Legislature and the courts.⁶ While the fight for the educational rights of children with disabilities would become much more difficult if the state and federal statutes were limited or repealed, the constitutional basis for these laws would remain.

The right to education for all children, including those with disabilities, is in the U.S. Constitution and cannot be taken away.

An Overview: What is “Special Education?”

“It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in Section 1412 (2) B of this title, a free appropriate public education (FAPE) which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist states and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.” **Individuals with Disabilities Education Act 20 USC s.1400 (c)**

“A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.” **Section 504 of the Rehabilitation Act of 1973 34 CFR 104.33(a)**

The first quoted section is from the *Individuals with Disabilities Education Act* or **IDEA**. The second quote is from the regulations supporting *Section 504 of the Rehabilitation Act of 1973*, often referred to as **Section 504**. School districts must comply with both laws; Washington State law requires the implementation of these federal requirements in **WAC 392-172-020 and 392-172-030**.

The IDEA requires that children aged 3 through 21 be determined eligible for special education and related services if they meet the requirements of any one of the disability categories found in (1) Part B of the IDEA or (2) the categories described in Washington State law found at **WAC 392-172-114 through WAC 392-172-148**.

The two laws which provide the requirements and protections for educating students with disabilities are the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973.

Who is eligible for special education and related services?

Children with disabilities are “identified” by category of disability through an evaluation. In Washington, the categories of disability are:

- Developmentally delayed.
- Seriously behaviorally disabled.
- Communication disorder.
- Orthopedically impaired.
- Health impaired.
- Specific learning disability.
- Mental retardation.
- Multiple disabilities.
- Deafness.
- Hearing impairment.
- Visually impaired/blindness.
- Deaf/blindness.
- Autism.
- Traumatic brain injury.

Students who demonstrate the characteristics of any one of these disabilities can be provided special education and related services *if* their disability **adversely affects educational performance** and requires specially designed instruction.

For those students who may experience disabilities but do not qualify under IDEA, Section 504 and its regulations will determine what is required by school districts. Section 504 uses the language “handicapped person” to define those who are protected by this law. It covers many more individuals than the IDEA. Individuals covered by Section 504 must meet the following requirements:

Section 504 Definition of “Handicapped”

‘Any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

To be protected under the IDEA, children aged 3 through 21 must meet the eligibility criteria **and** be in need of special education and related services.

Some students not covered by the IDEA may be protected by Section 504.

(i) ...'Physical or mental impairment' means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs: respiratory, including speech and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) 'Major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁷

Such students may include those with asthma, diabetes, allergies, some children with attention deficit disorder, some students with drug and alcohol problems, and others. Students who are IDEA-eligible, but have issues and concerns not addressed by the IDEA or Washington regulations implementing the IDEA, are also covered by Section 504. Since the IDEA addresses the education of students with disabilities in a much broader fashion, we will focus our attention on that law in most instances. However, we will mention Section 504 and its regulations when it is different than IDEA.

Both laws require school districts to provide students with disabilities a **free appropriate public education** that includes **special education and related services**. For purposes of Section 504, a "free appropriate public education" may consist of either "special education" or "regular education" and includes "related aids and services." The IDEA requires an individualized education program (IEP) to be developed that outlines what the "special education" and "related services" are that will be provided to a child with a disability. Section 504 does not require a written "plan," but school districts must be able to demonstrate what "special education" or "regular education" and "related aids and services" are being provided to a child with a disability. School districts may use an IEP or other written plan to show how a free appropriate public education is being provided under Section 504.

In the first special education case to reach the U.S. Supreme Court, the standards for determining if a child is receiving a free appropriate public education were defined. In *Hendrick Hudson Central School District Board of Education v. Rowley*,⁸ the court said that the instruction and services provided to the child must:

- Be provided at public expense and under public supervision.
- Meet the state educational standards.
- Comply with the child's IEP.
- Confer educational benefit upon the child.

For students enrolled in the regular education program for whom grades are an appropriate measure of "benefit," a student who is receiving passing grades and moving from grade to grade is deemed to be receiving educational benefit. The Supreme Court did not interpret the IDEA as requiring school districts to "maximize" a student's potential. The court asked two questions in this case which are applied in every case since *Rowley*. They are:

1. Did the school district follow all of the **procedures** required in the IDEA (i.e., identification, evaluation, development of an IEP, parental participation, annual review, notice, due process rights, etc.).
2. Is the IEP **reasonably calculated** to enable the child to receive educational benefit?

These questions and the standards set out in the *Rowley* decision will be referred to several times in the Sections that follow.

What is a free appropriate public education?

Washington State regulations define a *free appropriate public education* by simply describing its components:

- Special education and related services.
- Provided at public expense, without charge to parents.
- Under local educational school district or other public agency supervision that meets the requirements of the state educational agency and State Board of Education.
- In conformity with the child's IEP. **WAC 392-172-035**

School districts must follow all of the requirements of IDEA and provide an appropriate educational program to each student with a disability.

Another way to examine the meaning of a *free appropriate public education* is to look at each term separately.

Free

“Free” is defined as provided at “public expense” and “at no cost” to children with disabilities, their parents or guardians.⁹ School districts are allowed to charge parents only for those expenses they would charge to children without disabilities, such as lab fees, student association dues, etc.

Congress knew that educating children with disabilities may sometimes cost more than educating students without disabilities. Those extra costs are why Congress made grants available to states through the IDEA. The IDEA has never been fully funded to its recommended levels. States have absorbed a large portion of the excess expenses. School districts are not permitted to restrict services that should be provided to students with disabilities because federal funding assistance is not available at the anticipated for amounts. Section 504 specifically makes education a basic right for *all* students with disabilities. The overall costs of education must be taken into consideration by state legislatures and local school boards when they design their budgets. School boards are not permitted to place any unequal burden for the ever-increasing costs of education on the shoulders of students with disabilities. As the court noted in the *Mills* case:

“If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the...School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the ‘exceptional’ or handicapped child than on the normal child.”

Education is a basic right and must be provided to students at no cost to their families.

School districts receive money to educate *all* students, including students with disabilities, from taxes paid by state and local taxpayers. All students in the state of Washington, whether disabled or not, generate from the state a “basic education allocation” (which usually changes from year to year) for their local school district. In other words, the state gives each school district a fixed amount of money based on a “child count.” All students eligible for special education under the IDEA *also* generate federal dollars as a result of being disabled. These federal dollars are for every student with a disability, and the rate does not change based on the category of disability or needs of the student. At this time, school districts receive additional federal dollars for each preschool disabled child with an IEP. When local school districts accept state money for students with disabilities, they are required to follow all of the rules for educating students with disabilities. The state does not tie the money to the student. School districts have the flexibility to use the funds as they see fit and are not required to “prove” that every penny generated by a particular student goes to that student. Districts are required to *graduate* students based on the achievement of state standards. If a student is disabled, the school district must provide each student with an *appropriate* education.

In recent years, school districts have begun to use other sources of money to cover or contribute to the costs of educating students with disabilities. This has included using individual disabled students’ Medicaid benefits or their private health insurance benefits. This is allowable under federal and state regulations. School districts, however, cannot *require* parents to use their child’s Medicaid benefits or private health insurance benefits to pay for or contribute to the costs of special education and/or related services, particularly if use of the insurance poses a risk of financial loss to parent or child. School officials may *ask* parents to use their health insurance benefits, but districts cannot refuse to provide special education and related services to a student because a parent refuses to use his or her child’s insurance benefits. A parent is entitled to refuse the request for any reason.

Students with disabilities are funded by the state in two ways:

- By child count (like all students).
- By being counted as disabled.

All students with disabilities generate the same amount of money, despite the severity of their needs.

Appropriate

An appropriate education is **individually designed to meet the unique needs of each child with a disability**. No statute or regulation describes what an “appropriate” program is for any individual child. The law requires the completion of a series of steps that should result in a program that allows a child to **benefit** from his or her education. Interpretation of this requirement has generated a series of court cases—culminating in *Board of Education of the Hendrick Hudson School District v. Rowley*¹⁰—which will be discussed in depth later in this document.

Section 504 goes further than the IDEA in trying to define what appropriate means, but it does not provide much more information. The regulations say that **regular or special education and related aids and services must meet the unique needs of a person with a disability as adequately as the needs of nonhandicapped persons are met**.¹¹

The Section 504 regulations are consistent with the first prong test in the *Rowley* decision for deciding if a student’s education is appropriate. According to Section 504, to be appropriate, the child’s education must be *based upon following all of the requirements of*:

- Placement in the least restrictive environment.
- Evaluation procedures.
- Procedural safeguards for students and parents, including notice, hearing rights, and access to student records.¹²

Section 504 also requires school systems to provide students with disabilities *benefits and services comparable to those provided to nondisabled students*. “Discriminatory practices” are not allowed. Such practices include:

- Affording a disabled student an opportunity to participate in or benefit from an aid, a benefit, or service that is *not equal* to that afforded others.
- Providing a disabled student with an aid, benefit, or service that is *not as effective* as that provided to others.¹³

School districts must provide students with disabilities the same benefits and services provided to other students AND provide a program that meets the unique needs of the students with disabilities.

This means, for example, that school districts cannot provide students with disabilities a shortened school day because of transportation scheduling problems or educate students with disabilities in buildings or other facilities that are not comparable to those provided to students *without* disabilities. School districts should provide students with disabilities the same activities offered to other students who are not disabled, including sports programs and after-school programs. Parental attendance or assistance during class field trips or other school activities cannot be required as a condition of the participation of the student with a disability.

Public

The use of the term “public” was initially intended to acknowledge two issues. First, that it was the obligation of the public schools to provide an education to children with disabilities from kindergarten through high school. The assumption was that as a public, tax-supported institution, the public schools should provide the opportunity for *all* children to receive an education. The second issue was that the education of children with disabilities should take place in the **regular public school environment** and *not* in segregated and isolated settings.

Education

In the hearings that took place in the *PARC* and *Mills* cases, there was substantial debate concerning the term “education.” Until the early 1970s, children with mental retardation were classified as either “educable” or “trainable.” Psychologists argued that there was a difference between education and training—and that schools should only be obligated to provide education. It was thought that children who were “trainable” could not “benefit” from education and therefore could be excluded from participation in public school programs. Testimony provided by experts on behalf of children with disabilities convinced the court that no distinction between education and training should exist. Both involved the learning of new skills. The word “education” was used in the law to signal the end of the era in which children were divided between educable and trainable categories. Public schools provide **education**—period.

All students with disabilities have a right to a public education in the least restrictive environment.

What does the term “special education” mean?

As used in the IDEA, “special education” **does not refer to any particular classroom, school, or other physical setting in which children with disabilities are educated.** Special education is defined in WAC 392-172-045 as “specially designed instruction ... to meet the unique needs of a special education student and provided at no cost to the parents or student.”¹⁴ Despite the common practice of moving children with disabilities into separate physical settings, “special education” does not refer to a classroom. Special education is not a location or a place. **It is a set of services**—provided to the child in the regular classroom or in other classrooms and settings outside the regular classroom, if necessary.

Special education is a set of services—not a place.

What does the term “related services” mean?

Related services include “*transportation and such developmental, corrective, and other supportive services ... as may be required to assist a child with disabilities to benefit from special education.*” **WAC 392-172-055**

Under both the IDEA and Section 504, the particular related services a child receives at school must be based upon an *individualized* determination of his or her unique needs, not upon the category of his or her disability or other factors unrelated to the child’s particular needs. Both state and federal regulations define a long list of services that are considered to be related services. But the list is not intended to be exhaustive. If a child needs a particular service in order to benefit from special education and the service is “developmental, supportive, or corrective,” it is also “related” to the child’s education. It should be provided, regardless of whether or not it is specifically listed in the IDEA or its regulations.

Related services are those services required by a student to allow them to benefit from their special education program.

Where needed to address the needs of a child receiving special education under the IDEA, transportation includes:

- Travel to and from school.
- Travel in and around school buildings.
- Travel between schools when a student's educational program is provided at more than one site.
- Specialized equipment such as special or adapted buses, lifts, and ramps.¹⁵

Transportation must also be provided in the context of the least restrictive environment. If a student with disabilities can ride the regular school bus with some specialized instruction or supplementary aids and services, that option should be considered before placing a student on a segregated bus and route. Such decisions should be made on an individualized basis and should be made based on the unique needs of the student.

Developmental and Supportive Services

In the 1990 amendments to the IDEA, rehabilitation counseling services, social work services, and therapeutic recreation were added to the list of possible related services that could be provided to a student with a disability. The list of related services includes:

- Communication disorders services and audiology.
- Psychological services.
- Physical and occupational therapy.
- Recreation, including therapeutic recreation.
- Early identification and evaluation.
- Occupational therapy services.
- Counseling services, including rehabilitation counseling.
- Medical services for diagnostic or evaluation purposes.
- Orientation and mobility services.
- Physical therapy services.
- School health services.
- Social work services in schools.

Related services are determined on an individual basis.

- Parent counseling and training.
- Speech and language services.
- Classified staff services.

Assistive technology devices and services may also be considered a related service.¹⁶ The amount, frequency, and need for any related service is determined on an individual basis.

Parents may want to advocate for more or broader related services. School districts are increasingly aware of the sometimes very high cost of providing additional services. The tension between parental requests and the school district's financial constraints may be present. The focus should be on the unique needs of the individual child and not on the parent's unsupported request, or district issues such as availability of services, costs, or personnel shortage. Both the parent and the school district must address this issue in good faith discussion. Reasonable compromise, with ongoing written review of the child's progress at regular intervals defined in the IEP, should resolve most conflicts in this area. As long as this approach is accepted by both the parents and the district, the need for due process regarding related services should be minimized or eliminated.

Evaluation

“Before any action is taken with respect to the initial placement of a child with a disability in a program providing special education and related services, a full and individual evaluation of the child’s educational needs must be conducted ... ”

34 CFR 300.531

“The local district ... shall conduct childfind activities for the purpose of locating, evaluating and identifying students with a suspected disability, regardless of the severity of their disability, who are residing within the boundaries of the district ... and who are not currently receiving special education and related services.”

WAC 392-172-100

“ ... The evaluation of a student shall be in all areas related to the suspected disability, including but not limited to health, vision, hearing, social skills, emotional status, general intelligence, academic performance, communication skills, motor abilities, career, vocational, and the need for transition services.” **WAC 392-172-106**

“... the school district ... shall fully evaluate the student and arrive at a decision [regarding eligibility] within ... 35 school days after the date written consent for an evaluation has been provided by the parent(s) or adult student.” **WAC 392-172-104(2)(a)**

“Each special education student shall be reevaluated ... at a minimum, once every three years or more frequently if conditions warrant ... [and] upon request of the student’s parent or adult student, teacher, or individualized education program team.”

WAC 392-172-182

“A recipient ... shall conduct an evaluation ... before taking any action with respect to ... any subsequent significant change in placement.”

34 CFR 104.35(a)

“A parent or the adult student has the right to an independent educational evaluation at public expense when the parent or adult student disagrees with an evaluation results obtained by the school district.”

WAC 392-172-150(4)

The evaluation of a child suspected of having a disability is the foundation for developing an appropriate educational program. Children are referred for evaluation in a variety of ways, usually by their teacher or by their parent. But anyone can refer a child for evaluation if they suspect a child may be disabled.

Any time a school district wants to evaluate a child who is suspected of having a disability or wants to reevaluate a child who has already been identified as disabled, the school district must give a parent “notice” and obtain consent. It is important for school districts to take a closer look at a child through evaluation, but it is equally important for parents to understand what will happen and what to expect.

What is an evaluation?

Evaluations provide essential information about a child, his or her disability, abilities, and how she or he learns. Evaluations should not stop at providing just enough information to determine if a child is eligible for a categorical label. **Labels of disability have no education programming purpose under either state or federal law.** Because labels should not be used for education programming, a dispute over *which* category a child is eligible under is a futile and wasteful effort of energy on the part of both the district and parent. School districts determine which disability category describes the child.

Anyone may refer a child suspected of having a disability for an evaluation.

Evaluations provide essential information about a child’s learning skills and abilities, not just a label.

Evaluations should identify all of the information needed to develop an appropriate educational program. This includes information about the child's behavior and the ways in which the child learns. Evaluations using one test or measurement do not provide sufficient information for the development of an appropriate education program. When evaluations are incomplete, the result is that children may receive programs and be placed in classroom settings based upon their label and not based upon their individual needs. The regulations that establish the guidelines for evaluations are specifically directed at the development of information that will be useful in the creation of a highly individualized learning program for each student.

School districts must follow several requirements to ensure that the evaluation procedures used are not discriminatory. Those requirements are found in WAC 392-172-108 and include:

- Administering tests in a child's native language or primary communication mode, unless clearly not feasible to do so.
- Using more than one single test procedure to decide if a child requires special education services.
- Using evaluators who are knowledgeable about the child's suspected areas of disability.
- Using valid and racially or culturally unbiased testing materials and methods.
- Ensuring that the evaluation tests all of the areas of the child's suspected area of disability.

There are also special requirements and procedures for evaluating students suspected of having learning disabilities.

Recently, the 9th U.S. Circuit Court of Appeals was asked to look, in part, at the issue of who should be on a child's multidisciplinary team in *Seattle School District No. 1 v. B.S.*¹⁷ The court determined that the school district failed to include anyone on the evaluation team who had knowledge of B.S.'s psychiatric disability. The school district was then required to pay for an independent evaluation for B.S. which provided recommendations for educational programming which addressed B.S.'s psychiatric issues. In *Union School District v. Smith*,¹⁸ the 9th Circuit also cautioned school districts to ensure a "full and individual evaluation of the child's educational needs"¹⁹ is conducted. In *Union*, the parents were

More than one test or measurement is required to determine a child's disability.

Parents are not required to pay for an evaluation needed to identify or develop an educational program for a student with a disability.

not held responsible for providing information to the school district regarding their child's disability. The court noted that the district had a responsibility to gather all of the information it needed on its own.

When should an evaluation occur?

An evaluation should occur whenever a parent or someone from the school district suspects a child may have a disability. Once a student is determined eligible for special education and related services, a reevaluation must occur at least every three years. Additionally, a preschool child identified as developmentally delayed must be reevaluated prior to the age of eligibility for entry to first grade (WAC 392-172-114). Both the IDEA and Section 504 require an evaluation if a student's academic performance or behavior suddenly changes.²⁰ The Office for Civil Rights has also ruled that psychiatric hospitalization should trigger an evaluation of a student's need for special education and related services under Section 504.²¹

Initial Evaluation

School districts must request written consent, or permission, from a child's parent before performing an evaluation for the first time. The purpose of the evaluation is to determine if the child is disabled and requires special education and/or related services. The school district should explain to the parents the types of evaluations that will be performed. In Washington State, school districts have 35 school days from the date a parent provides consent to complete their initial evaluation and decide if the child is eligible for special education and/or related services unless another time period is agreed to by the parents and the districts.

Parents must agree to an initial evaluation of their child.

Reevaluation

School districts must reevaluate students with disabilities at least every three years. The school district must notify the parents of the results of a reevaluation within ten calendar days after the reevaluation is completed.

Students with disabilities must be reevaluated **at least** every three years.

Parents can play a vital role and make a critical contribution to a meaningful evaluation of their child. While parents may not be experts in all educational methodologies, they are the experts on their own children. Parents should write down, in their own words using a neatly written or typed format, the skills their child currently demonstrates. Can the child dress himself? Follow simple or multistep directions? How is the child's behavior at home, at cub scouts, at church, in the grocery store, and in other social settings? Each child will have a different array of skills and will use those skills differently in different settings. The parent should indicate how the child learned the array of skills presently demonstrated. Does the child require a good deal of verbal repetition? Do jobs given to the child need to be broken down into smaller steps? Are printed reminder notes or even pictures necessary to convey the information? What is effective to prevent difficult behaviors and what calms the child once a series of difficult behaviors have started? Parents know their child best, and they should take the time to analyze the information that is available to them every day in their interactions with their child. That information should be presented in a way that is understandable and useful to the district.

Parents should be very involved in providing information about their child to the school district.

School districts and parents should make sure the school district's evaluation "matches" with what the parents know about their child.

Independent Educational Evaluations

What is an "independent evaluation?"

When parents disagree with the school district's evaluation of their child, they have a right to a "second opinion" at public expense. This is called an independent evaluation. An independent evaluation is performed by a qualified evaluator who does not work for and is not affiliated with the school district.

Parents have the right to disagree with the school district's evaluation and ask for a second opinion.

Who pays for an independent evaluation?

Parents may request that the school district pay for an independent evaluation of their child if they disagree with any evaluation that has been performed by the school district. School districts must pay for an independent evaluation upon parent request unless the district requests a due process hearing to show that its evaluation of the child is appropriate. Parents should, but are not required to, notify the school district of their disagreement with the district's evaluation

"second opinions" may be paid for by the school district in most instances.

and their intent to request an independent evaluation at the school district's expense before obtaining the evaluation. School districts cannot refuse to pay for an independent evaluation because a parent has not notified them of the evaluation. Parents may request reimbursement from a school district for an independent evaluation they have paid for up-front or through their insurance company.

Can a school district refuse to pay for an independent evaluation?

School districts may challenge payment of an independent evaluation by requesting an administrative hearing. In Washington State, a school district must notify a parent of its intention to request a hearing to challenge payment of an independent evaluation no later than 15 calendar days after the parent has provided notice of their disagreement. If a hearing is requested, the school district has the opportunity to prove that its evaluation was appropriate. If the school district's evaluation is found to be appropriate, the district does not have to pay for the parent's evaluation. However, the school district must still consider all of the information provided in the independent evaluation for purposes of planning the child's individualized educational program.

If a school district requests a hearing to challenge payment for an independent evaluation, the school district must show its evaluation was complete and appropriate.

How often can a parent request an independent evaluation?

The right to an independent evaluation exists each time the school district evaluates a child with a disability, whether it is an initial evaluation, three-year reevaluation, or more frequent reevaluation. Independent evaluations may occur in each area the child is evaluated. For example, separate evaluations may occur for speech and language, occupational therapy, psychological testing, etc.

Who performs an independent evaluation?

Independent evaluators must be at least as "qualified" as the evaluators used by the school district. The IDEA prohibits school districts from applying different criteria to independent evaluators than it applies to evaluators who conduct evaluations for the district itself. School districts are required to maintain a list of "qualified independent evaluators" located within their community. Information must be provided to parents upon request about where an independent evaluation may be obtained.

Independent evaluators must be "qualified" and not employed by the school district.

Ideally, an independent evaluator should have no affiliations or professional conflicts that would impair the evaluator's ability to provide an impartial and objective evaluation of the child. School districts may impose a ceiling on the costs associated with independent evaluations paid for by the district. However, the maximum fee must allow parents to choose among the various evaluators in the community who are qualified to conduct an appropriate evaluation of the child. Only "unreasonably excessive" fees can be eliminated. The Office of Special Education Programs has stated that school districts cannot average the costs of fees typically charged by various evaluators in the community and declare that to be the maximum amount. Additionally, school districts must waive the cost criteria and pay for a more expensive evaluation where a child's unique circumstances require it. School districts may exclude certain evaluators from their list of qualified evaluators if the evaluator has previously produced unsatisfactory evaluation results or charged excessive fees. School districts should be cautious about any restrictions of this sort, however, if it might deny the parent's right to an independent evaluation. Parents are not ultimately limited to choose from the qualified independent evaluators listed by the school district and may choose a qualified evaluator not on the school district's list. However, parents are cautioned to carefully investigate the qualifications of the evaluator and costs associated with the evaluation prior to engaging the independent evaluator.

Do parents have to get approval from the school district before they obtain an independent evaluation?

No, parents may request payment for an independent evaluation after the evaluation is complete and without having notified the school district of their concerns. Washington State administrative regulations suggest, but do not require, that parents provide their school district written or verbal notice that they disagree with an evaluation performed by the school district and that they would like an independent evaluation at public expense. Parents are encouraged to express their concerns to the school district and look over the school district's list of qualified evaluators to ensure they are getting a qualified evaluator who does not charge excessive fees. This may also allow the school district and parents an opportunity to discuss the parent's concerns so a variety of options to address those concerns can be developed. Parents may also pay for an independent evaluation on their own. Any information provided to the

School districts must respond to a parent's request for an independent evaluation—by paying for one or requesting a hearing.

school district from an independent evaluation, whether the school district pays for the evaluation or the parents pay for it, must be considered by the school district and IEP team to determine any implications for educational programming for the child.

Implications for Parents and Educators

An independent evaluation can be an effective way to resolve disagreements over a child's educational program. Because of the additional, unpredictable costs associated with independent evaluations, some school districts are quick to challenge such requests by parents. The benefits of such evaluations should be carefully weighed against the costs. Generally, parents request independent evaluations when they believe school districts are "off the mark" in evaluating their child's needs. A second opinion may provide another valuable perspective and may allow for disagreements to be resolved without a due process hearing. School districts should also be realistic about their expectation that each district will have the personnel with the training and expertise necessary to assess and address the needs of every child with a disability in their local area. When a child challenges the expertise available within a school district, outside, professional experts can be extremely valuable in providing information necessary for educational planning. School districts do not have the option of simply refusing a parent's request for payment of an independent evaluation. A school district must either pay for the evaluation or request an administrative hearing. Hearings are expensive. They take away valuable staff time and administrative time otherwise spent on educating students. Hearings also place educators and parents in adversarial roles as part of the litigation process, sometimes costing them their relationship with one another. Hearings almost always cost more than any independent evaluation. School boards and administrators will want to carefully consider the expenses and results of litigation versus the expenses and results that may be acquired through payment for an independent evaluation.

If a school district requests a hearing to challenge payment for an independent evaluation, the school district must show its evaluation was complete and appropriate.

The Development of an Individualized Education Program (IEP)

“The IEP is the centerpiece of the IDEA’s education delivery system for disabled children.” *Honig v. Doe*, 9th U.S. Circuit Court of Appeals²²

How do you develop an individualized education program for a student with a disability?

There are four necessary components in the development of an appropriate educational program for a student with a disability. They include:

- Identification and evaluation.
- Development of an IEP.
- Placement.
- Monitoring with annual review.

Identification and Evaluation

Both Section 504 and the IDEA have requirements for states and school districts to “identify, locate, and evaluate” all children with disabilities who are in need of special education and related services. In 1975, this meant physically finding children with disabilities who were kept home or were denied access to public school and getting them to come to school. Public service announcements, notices to community groups and churches, and even mailmen were enlisted to notify families of school districts’ requirement to educate all children with disabilities. These announcements and notifications continue to occur in communities across the nation to satisfy the “child find” requirements for children with disabilities aged birth through 21.

It is important to note that suitable evaluation is the foundation for developing an appropriate and individualized education program for a student with a disability. A comprehensive evaluation provides enough information about a child’s strengths, weaknesses, behavior, and how the child learns to develop an individualized program that allows the student to progress over the course of a school year. Evaluations that do not provide enough information may lead to a poorly developed IEP and inappropriate educational placement.

An evaluation that identifies the student’s abilities and needs is the foundation for the IEP.

Development of the “IEP”

Development of the “IEP” can be viewed in two parts: (1) the IEP *meeting*, in which parents and educators participate on an equal basis, and (2) the development of a *document* that serves as a communication vehicle between parents and school personnel, enabling both, as equal partners, to decide upon what the child’s needs are, what educational services will be provided, and what the anticipated outcomes will be.

An IEP meeting occurs after the evaluation of a child is completed and the school district has determined that the child is eligible for special education and related services. IEP meetings are also held at least once a year to review the child’s progress and make any necessary changes to the IEP. IEP meetings can also be held at the request of a parent **at any time**. The school district must take steps to ensure that one or both parents of the student can be present at each IEP meeting and that they are given the opportunity to fully participate in the meeting. According to WAC 392-172-156, school districts must do this in several ways, including:

- Scheduling the meeting at a mutually agreeable time and place.
- Notifying the parent early enough to allow the parent to make arrangements to come to the meeting.
- Providing written notice to the parent before the meeting that includes the date, time, location, and purpose of the meeting. The notice must also include a list of the individuals who have been invited to the meeting.

If a parent cannot attend an IEP meeting, the school district must find other ways to make sure a child’s parent participates in the meeting and development of the IEP. These might include conference calls, telephone calls, or individual meetings with the parent. For parents with disabilities, Section 504 requires school districts to accommodate the needs of the parents in IEP meetings. This may include hiring an interpreter or finding other ways to communicate with the parents to make sure they understand and can contribute to the process of developing an IEP for their child.

There are two parts to developing the IEP.

- A meeting with parents.
- The development of a document to address the essential components of the child’s educational program.

School districts must document all of their attempts to meet with parents to develop an IEP before conducting an IEP meeting without the parents. All telephone calls, copies of correspondence, records of visits made to the parents' home or place of employment and the results of those visits must be kept in a record. Every attempt should be made to assist parents to participate in their child's IEP meeting.

In addition to the parent, there are some other individuals who are required to participate in the development of a child's IEP. They are listed below.

Participants in an IEP Meeting

- The student, if appropriate, especially if the student is an adult. The student must participate in the IEP in some way if transition services are being addressed.
- An administrator—other than the child's teacher—who is qualified to provide or supervise the provision of special education and commit the school district's resources.
- The child's general classroom teacher(s) must be invited.
- The child's special education teacher.
- If the child receives therapy services, the child's therapist.
- One or both of the child's parents.
- Others, at the discretion of the child's parents or the educational agency.
- Someone knowledgeable about the evaluation procedures used with the student and familiar with the results of the evaluation.

For an IEP that includes a transition program, representatives of other service-providing agencies must attend or otherwise participate.

WAC 392-172-156

IEP meetings must encourage full parental participation and must be held whenever an IEP is being developed or changed.

The 9th U.S. Circuit Court of Appeals decision in *W.G. v. Board of Trustees of Target Range School District No. 23*²³ also suggests that school districts should ensure that for those students who attend private school—and special education and related services are being determined or provided by the local school district—a representative of the private school is invited to attend the IEP meeting.

IEPs must include several components by law. They are listed below.

Contents of an IEP

- A statement of the child's present levels of educational performance.
- A statement of specific annual goals, including short-term instructional objectives which are stated in terms that provide for measurement of progress, expected levels of performance, and schedules for accomplishments of each goal and objective.
- A statement of the specific special education and related services to be provided to the child, based on the individual needs of the child determined through the evaluation process.
- A statement explaining the extent to which the child will participate in the regular education program, including physical education.
- A description of the modifications to be made to the regular education program.
- The projected dates for initiation of services and the anticipated duration of the services, including number of school days, the number of hours per day, and the length of the school year over which services will be provided.
- Appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis whether the short-term instructional objectives are being met.

IEPs must contain all of the components required by law.

- A description of any aversive therapy, where applicable, including a description of the positive interventions tried by the school district prior to the use of any aversive therapy.

WAC 392-172-160

- For those students aged 16 or older (or beginning in elementary school or sooner if appropriate) for whom transition services are being provided, the IEP must also include:
 1. A statement of the needed transition services, including goals and objectives based on a functional vocational evaluation and anticipated postschool outcomes.
 2. A statement of interagency responsibilities or linkages, or both, before the student leaves the school setting.
 3. A statement that explains why transition services are NOT needed and the basis for the decision if so determined.

WAC 392-172-160(d)

Section 504 does not require the development of an IEP document nor does it require an IEP meeting specifically. But the development and implementation of an IEP under Part B of the IDEA or, for some students, development and implementation of a “504 Plan” may demonstrate a school district’s compliance with the Section 504 statute and its regulations. A school district must be able to demonstrate in some way that it is providing a free appropriate public education to a student protected by this law.

Under the requirements of the IDEA, IEPs must be developed for all children eligible for special education and related services. Failure to develop an IEP, as well as failure to follow the specific procedures required by law, is a failure to provide a free appropriate public education.

Section 504 does not require an IEP, but a written plan based on the student’s need may be appropriate.

Placement

The decision of *where* to provide the special education and related services determined to be appropriate for a child with a disability occurs *after* a child's IEP is developed and after all other considerations for the child's special educational program have been discussed and finalized. This decision is one for which great potential for conflict exists and which remains an area of philosophical controversy for both parents and educators.

First and foremost, educators and parents must consider providing educational services to the child in the setting the child with a disability would attend *if the child were not disabled*. When all consideration of supplemental aids and services which could be provided in the regular classroom environment have been exhausted and an alternative setting for all or part of the school day is determined to be necessary, a continuum of alternative settings is provided for in the IDEA. They include:

"... instruction in regular classes, special classes, special school, home instruction, and instruction in hospitals and institutions; and ... supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement."

34 CFR 300.551(b)(1), (2)

Section 504 requires the following as well:

"A [school district] shall place a handicapped person in the regular classroom environment operated by the [school district] unless it is demonstrated by the [school district] that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a [school district] places a person in a setting other than the regular educational environment ... it shall take into account the proximity of the alternate setting to the person's home."

34 CFR 104.34(a)

Placement decisions are made **after** the IEP is written.

The IDEA and Section 504 also require consideration of placement when providing nonacademic and extracurricular services and activities, including meals, recess periods, counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, employment, and activities that are sponsored by the school district but contracted to outside agencies.

In plain terms, the more time a child with a disability is provided educational services in settings away from her nondisabled peers, the more restrictive a child's educational placement becomes. School districts are required to provide an appropriate education to a child with a disability in the least restrictive environment while considering any harmful effects on the child that may occur in nonseparate settings. School districts must equally consider the academic and nonacademic benefits of educating disabled and nondisabled students in the same environment.

Monitoring and Annual Review

Congress intended parents to play a significant role in the accountability of school districts toward the achievement of their child's goals. The effectiveness of a school district's special education program is demonstrated by the process of an "annual review" of every child's IEP. The goals and objectives, developed jointly by the parents and school district, should be helpful to both parents and school districts for checking on a child's progress. The IEP, however, is not intended to include all of the specifics about a child's educational program that occur on a daily, weekly, or even monthly basis. Parents are encouraged to obtain more specific information about their child's progress on an ongoing basis, through parent-teacher conferences, report cards, and other regular contact with their child's teacher and school. The IEP is not required to include specific checkpoints or meeting dates for review, but *can* include such intervals for review if it is helpful to do so. School districts must meet with parents at least one time each year to review and revise each child's IEP, but there should be as many meetings a year as the child needs and school districts should grant any reasonable requests for a meeting to discuss a child's IEP or educational program. (121 Congressional Record S20428-29 [Nov. 19, 1975] remarks by Senator Stafford).

Placement decisions are also made regarding extracurricular activities and nonacademic activities.

IEPs must be reviewed **at least** annually.

Many parents are concerned that waiting for a full year or even semester or quarter break before evaluating their child's progress toward satisfaction of goals and objectives places the child in jeopardy. Parents are aware that a child's time in special education is limited. They feel pressure to ensure that the educational program selected in the IEP is effective. They understand that the IEP is not a contract that guarantees the child's success. Parents, however, feel that if the educational program is effective, some amount of progress should be demonstrated quickly. The school district will gain credibility and the parent comfort by establishing a routine reporting mechanism to demonstrate that the child is or is not making progress. Weekly or monthly notes or telephone calls from the teacher will often be enough. If the spirit of cooperation on this issue is established early and the parent understands that the district is willing to change an educational program that is not demonstrating progress, alienation between the parent and the district can be significantly reduced. While not required in the regulations, it may be in the best interests of both the parent and the district to include these frequent informal communications as part of the IEP.

How to Prevent the Failure of an IEP

There are generally four reasons why IEPs fail once they are developed. They are as follows:

1. *The IEP has been drafted out of sequence with the requirements set forth in the law. If the sequence of evaluation, development of the IEP, and determination of placement was not followed in that order the goals and objectives in the IEP may not be based upon the child's individual evaluation results. The IEP may actually be more reflective of a generally accepted program or placement for students with similar needs, rather than the child's individual needs in this case.*

Solution: Make sure the sequence of (1) evaluation, (2) development of the IEP, then (3) placement determination are followed **in that order**.

IEPs may be reviewed more frequently and IEP meetings may be called as often as necessary to address the needs of a child.

IEPs must address the unique and individual needs of the student.

2. *The IEP has been drafted without parent participation.* In other words, parents were not an integral part of the **development** of the IEP. Sometimes, in an effort to be efficient and spend less time in meetings, school district personnel prepare IEPs before the IEP meeting. This IEP is then presented to the parent for approval in the IEP meeting—sometimes already typed or printed and signed by district personnel. While perhaps efficient, this excludes parents from the process of determining priorities for their child’s education. Parents realize that the district staff has obviously taken some time to produce the IEP and are often reluctant to request changes. School districts are encouraged to be prepared and have concrete suggestions, but should make every effort to elicit parental input as part of developing their suggestions.

Parents must participate in the development of the IEP.

Solution: Make sure parents are an integral part of deciding priorities for their child’s education and developing the IEP for their child.

3. *The IEP does not address the true educational and behavioral needs of the child.* Evaluations that only provide enough information to categorically label a child fall short of what is necessary to develop an appropriate educational program for an individual child with a disability. When the actual needs of the child are not properly identified, IEPs tend to reflect programs that are generally available rather than individual student needs. IEP teams need enough information about the “uniqueness” of the child to develop meaningful goals and objectives. Generalizations about disability category do not allow for individualization.

Evaluations that reflect **all** of the needs of the child are essential for IEP development.

Solution: Make sure evaluations go beyond categorical eligibility and result in providing meaningful information about the child’s strengths, weaknesses, behavior, and how the child learns.

4. *The IEP is not implemented correctly.* Some IEP meetings result in the development of strong and positive relationships between parents, teachers, administrators, and the other members of the child’s educational team. However, when the specific services of the IEP are not implemented on a daily basis by all of those who work with the child, the IEP will fail.

School districts are required to provide all services listed on the IEP.

Solution: Make sure the services and supports called for in the IEP are actually implemented.

There are two additional issues that commonly arise related to the development of an IEP. Other than noncompliance with the plain language of the law, these two issues tend to have the greatest impact upon the development of a student's IEP. They include the use of computerized programs to develop IEPs and the matter of parental signature on an IEP.

1. *Use of computerized IEPs.* Because school districts employ large numbers of individuals who are responsible for developing and implementing the law, school districts are challenged to ensure that **all** of their teachers and administrators know what is required and comply with each of those requirements for every child who is eligible for special education. In an attempt to ensure that the requirements for the contents of an IEP are met, many school districts have invested in computer programs that produce IEPs. This practice may inhibit the process of "individualization" required by the IDEA. While computerized IEPs may reduce the work required to write an IEP, school districts must ensure that each IEP that is developed is individualized to meet each particular child's needs.

Solution: When a school district uses a computer program to *assist* in the development of IEPs, it should ensure that the computer program provides enough flexibility to **individualize each aspect of the IEP**. The district should also strongly advise its teachers and other support staff to refrain from using the same or generic goals and objectives repeatedly for several students in a particular program.

Parents whose school districts use computerized IEPs should ensure that the goals and objectives proposed for their child address the **specific** areas of concern for their child. Goals and objectives, as well as all other parts of the IEP, should be in clear language understandable to parents.

Computer-generated IEPs may not address the individual needs of a child.

2. *Parental signatures.* The other issue that arises frequently between parents and educators involves signing the IEP. Many parents and educators believe that a parent's signature on the IEP is required **before** any services to a child with a disability can be provided. Unfortunately, this misconception often leads to holding the child's education hostage while parents and educators try to sort out their differences. Parents are often concerned that they are being asked to "sign off" on the IEP, indicating full agreement with the proposed plan or that they may be "signing away" their rights. A parent's signature is actually not a requirement of the IDEA or its regulations. **It is simply a way to demonstrate that parents have participated in the development of the IEP.** Other members of the IEP team are also asked to sign the IEP to demonstrate that all of the required members of the IEP team actually met to develop the IEP. A parent's signature on the IEP *can* be an indication of agreement, and if the IEP is *not* signed, the school district must document parent participation in some other way.

Parents do not "sign away" their rights when they sign the IEP.

When a child with a disability is *initially* provided special education, prior parental consent is required. Parental signature on the IEP is *one* way for a parent to consent to the initial provision of special education services and placement. At no other time is parental consent required prior to the provision of special education services. When school districts and parents cannot come to agreement on the content of a child's IEP after the parent has initially consented to services, the school district must move forward to provide what they believe to be appropriate special education services despite disagreements between school personnel and the child's parent. Every effort should be made to resolve differences between parents and school staff without resorting to due process hearings. However, parents who refuse to sign an IEP are indicating some disagreement with their child's proposed plan and should be informed of their due process rights. *Unless a parent requests a due process hearing, a school district is required to provide the educational services recommended on the IEP that are believed to be necessary for the child to receive an appropriate education, even without the signature of the child's parent on the IEP.* School districts, however, should keep in mind their requirements to provide parents with formal written notice of any refusal

Parental signature on an IEP **may** indicate initial consent to placement only.

If a parent refuses to sign an IEP, school districts are still required to provide an appropriate educational program.

to initiate or change the identification, evaluation, educational placement, or provision of a free appropriate public education to any child with a disability. The content of such a notice is described in 34 CFR 300.505. If a parent is in disagreement with the proposed IEP, it is the parent's option to request mediation or to request a due process hearing to resolve their disagreement.

Solution: Parents must understand that they do not "sign away" their rights when signing their child's IEP. If, as a parent, you participated in the development of your child's IEP, you should feel comfortable signing it, indicating that you participated. Parents who are not satisfied with the school district's proposed IEP—after trying to work out their differences—may request mediation or a due process hearing to resolve the areas of disagreement. If a parent refuses to sign the IEP, school districts must understand their obligation to provide the services on the proposed IEP, even without parental signature (except for initial placements). School districts should inform a parent of their rights and options for resolving disputes if a parent refuses to sign the IEP. School districts should also be aware of their obligation to provide **written notice of any refusal** to initiate or change the identification, evaluation, delivery or provision of special education and related services to the child, or the child's IEP.

The components addressed in this chapter as well as the suggestions for solutions to common issues that arise when developing an IEP comprise the basic elements of developing an individualized educational program. If there is a weakness in any one of these areas, the child's program will not be appropriate and the relationship between the district and the parent may deteriorate. The school district's strict compliance with the federal and state regulations is necessary, but not sufficient for an IEP to be successful. It is through the four stages of identification and evaluation, development of the IEP, placement, and monitoring/annual review that a basic foundation of communication and cooperation is established between the district and the parent. If all parties approach each other with a spirit of openness, honesty, respect, and compromise while addressing each of these components, the vast majority of personality-based conflict that arises between parents and school districts will be eliminated.

“Appropriate”

School districts must provide students with disabilities a “free appropriate public education.”²⁴ The meaning of “appropriate” is not defined in the IDEA, however. The U.S. Supreme Court examined this issue in the *Board of Education v. Rowley*—providing guidance for how to determine “how much” educational service and support is “enough” to allow a student to have a meaningful educational experience.

Board of Education v. Rowley **458 U.S. 176 (1982)**

In 1978, Amy Rowley was a first grade student at the Furnace Woods School in the Hendrick Hudson Central School District in Peekskill, New York. Amy was a very bright child with an IQ of 122, but she was also deaf with minimal residual hearing. She was the only hearing impaired child in her school, but her parents both had hearing impairments and used sign language. They taught Amy to use sign language at an early age. She could also read lips and she could process some verbal information through bilateral FM hearing amplification. After a successful year in kindergarten which included a two-week trial with a sign language interpreter in all of her classes, Amy moved on to first grade.

The school district developed an education program for Amy which called for placing her in a regular classroom with one hour of daily instruction from a tutor who was a certified teacher of the deaf, three hours per week of speech therapy, and the use of a wireless microphone tuned to Amy’s FM hearing aids. The school district also installed a TTD in the school office so Amy, the school, and her parents could interact.

Amy performed better than the average child in her classes and was obtaining regular education grades that would allow her to advance easily from grade level to grade level. However, it was also revealed that she was only processing approximately 40 percent of the words spoken in her classes. Amy’s parents requested that the school district provide a one-to-one sign language interpreter to allow Amy to maximize her intellectual potential, arguing that there was a substantial disparity between Amy’s achievement and her potential. The parents felt that in order for Amy’s program to

Amy Rowley was a bright, deaf first grader with some residual hearing.

She made passing grades in a regular class with some support.

Amy could only hear 40 percent of what was spoken in class. Her parents wanted Amy to achieve her full potential.

be appropriate, it must allow her to achieve to her full potential. The school district concluded that Amy did not need an interpreter in order to make reasonable progress in her school program.

Amy's parents requested "due process" and received a hearing before an independent examiner. The examiner agreed with the district, saying that an interpreter was not necessary because Amy was achieving educationally, academically, and socially without such assistance. The New York Commissioner of Education reviewed the decision and agreed with the school district. On appeal, the federal district court disagreed, based upon the disparity between Amy's achievement and her potential. The district court found that an appropriate education required "an opportunity to achieve full potential commensurate with the opportunity provided other children." The court's standard "requires that the potential of a handicapped child be measured and compared to his or her performance and that the remaining differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." This came to be known as the "maximization of potential" standard for determining what was necessary for a program to be considered appropriate.

Amy's case was one of several cases that had proceeded through due process to the district courts and even to the circuit courts on the issue of how far school districts had to go to create a program that could be considered appropriate for a disabled child. Because the decisions issued by the various courts were not consistent in adopting a single standard of appropriateness, the U.S. Supreme Court agreed to review the issue. It was the first special education case brought to the U.S. Supreme Court under the Education For All Handicapped Children Act.

The common way of discussing the issue of "How much is enough?" in the *Rowley* case was to talk about education as if it were transportation. You could get from Point A to Point B using a motor scooter, a Chevrolet, or a Cadillac. School districts were fond of saying that every parent wanted a Cadillac. Parents were fond of saying that school districts only wanted to provide a motor scooter. The implication from the court's decision is that "we go with the Chevrolet."

The court decided the IDEA does not recognize "maximizing" a child's potential.

For children with disabilities, passing grades are evidence of the provision of free and appropriate public education (FAPE).

The court struggled to determine what Congress had intended when they passed the Education For All Handicapped Children Act. Justice Rehnquist, writing the majority opinion for the court, determined that “Congress sought primarily to identify and evaluate handicapped children and to provide them with access to a free public education.” He went on to state, “Implicit in the Congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” This is known as the “educational benefit” standard, in contradiction to the “maximization of potential” standard established by the lower courts.

Justice Rehnquist did not determine how much educational benefit would be necessary for any child other than Amy Rowley. He noted the success that she had achieved in her educational program. The question of how much educational benefit was necessary in order for a program for any other student to be considered appropriate was left for a later day. The court’s opinion requires that in order for a program to be appropriate the district must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the state’s educational standards, must approximate the grade levels used in the state’s regular education, and must comply with the child’s IEP. The court heavily emphasized compliance with the procedures established in the act.

The primary initial interest in the *Rowley* case was generated over the issue of the definition of appropriateness. Both parent advocates and school districts tried to put the best interpretation on the court’s decision that they could. But ultimately, this portion of the decision came down to “we go with the Chevrolet.” Because this was the first case to come before the Supreme Court, the court’s opinion discussed an additional issue that had to do with how courts in the future would review special education appeals. Section IV of the decision establishes the burden and standard of proof to be applied in special education appeals to the courts. Justice Rehnquist stated, “Courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be afforded a handicapped child and for choosing the educational method most suitable to the child’s needs was left by the Act

For students with disabilities for whom grades are not appropriate, the court implied that minimal or trivial benefit is “not enough.”

Generally, the court felt that schools should be allowed to decide which methods to use to educate children.

to state and local education agencies in cooperation with the parent or guardian of the child ... therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.”

Implications for Parents and Educators

There are several key concepts to be considered by parents and school districts in light of the court’s decision in *Rowley*. First, in order for a school district’s proposed program to be considered appropriate, the school district must **comply with the procedures established in state and federal law**. Such things as proper and relevant evaluations, multidisciplinary team meetings, IEP meetings, IEPs that meet the requirements, placement decisions based upon the IEP, compliance with timelines, and full and meaningful parent participation are all required. School districts must show that each of these procedures has been properly carried out **before** a court can consider the substance of the proposed educational program. Second, the content of the program must be **“reasonably calculated to achieve educational benefit.”** The *Rowley* court did not define what type or how much benefit was required. For each child, the benefit to be achieved will be different and should best be *reflected in the goals and objectives set forth in the IEP*. **There must be more than minimal or trivial progress toward completion of the goals, but we know that maximization of the child’s potential is not required.**

Under the procedures set by the court, if a school district can demonstrate (1) that it has followed the state rules, (2) used reasonable professional judgment in the evaluation of the student and the design of the individual plan, and (3) that the plan is reasonably calculated to confer educational benefit to the child, the court is allowed to assume that the program is appropriate. The parent must then demonstrate why the school district’s program is *not* appropriate. The assumption of appropriateness provides the school district with an initial advantage in every case. The parent must overcome this assumption by a “preponderance of the evidence” if the parent is to be successful in showing that the program is not appropriate. *Courts are instructed to be very careful in substituting the court’s judgment for that of the school district in cases that involve questions of the specific educational methods to be used within an individualized education program.*

School districts must follow **all** the rules required by the IDEA.

More than minimal progress on IEP goals and objectives must be made to measure “appropriateness.”

In most cases in which “appropriateness” of the program is an issue, the school district will have an advantage. The school district must present credible testimony by its employees, demonstrating they have met all of the procedural requirements. School district professionals involved with the child must state that based upon their professional judgment, the program will confer reasonable educational benefit. In order to successfully challenge the school district’s program, the parent will have to prove either that the school district has failed to comply with the procedures or that the program is not likely to provide meaningful benefit to the student. As a practical matter, minor violations of the procedures will not generally result in a determination that the program is “inappropriate.” To show that a school district’s program is not appropriate, the parent will need to demonstrate that **both** substantial procedural violations have occurred *and* that the proposed program is unlikely to provide benefit to the student. For the second part of the parent’s burden, testimony by an outside expert will nearly always be required.

The system encourages parents to fully engage themselves in discussion or negotiation with the school district before taking any formal action. Formal legal challenges to educational programs on appropriateness grounds are time-consuming, financially burdensome, and emotionally draining for the child, the parents, and the school district. Parents and school districts should always consider mediation as an option to resolving disagreements about a child’s educational program before requesting an administrative due process hearing.

As difficult as conflicts over appropriateness are, they remain the single most important factor in protecting the rights of the disabled child. Students with disabilities must receive an educational program that is meaningful and provides them opportunities for developing skills that promote independence, future employment, and social interaction and integration. Parents and school districts must set aside personality-based conflict. School districts must reach full compliance with the procedural requirements of the law. Only then can the dialogue between caring parents, who are truly the experts in the needs of their individual children, and school district employees, who are free to express their best professional judgment in an environment where quality education is the main concern, result in the fulfillment of the promise of this act.

Parents may have to show why a school district’s program is “inappropriate” if the school district has complied with all the requirements of the IDEA.

Resolving conflicts over appropriateness of a child’s program is important and should be done thoughtfully.

Related Services

The Medical Exclusion

When Congress initially established IDEA, it was acknowledged that one reason children with disabilities were excluded from public school was that they may require services that may not typically be considered “educational.” Congress defined related services as:

“Transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, *except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a handicapped child to benefit from special education ... ” (emphasis added)
20 USC Sec. 1401(a)(17).

The definition contained in the federal regulations at 34 CFR 300.16 includes more specific services such as school health services, therapeutic recreation, rehabilitation counseling, social work services in schools, and parent counseling and training.

The type and amount of related services that any one child may require and whether a service might fall within the medical exclusion highlighted in the above definition has been addressed in legal cases around the United States. While there have been no state appellate or state Supreme Court decisions on this issue in Washington State, in *Irving Independent School District v. Tatro* (468 U.S. 883 [1984]), the U.S. Supreme Court was called upon to establish the boundaries of the school district’s obligation to provide related services.

Some students with disabilities may require services that are “medical” and not the responsibility of the school district to provide.

Irving Independent School District v. Tatro
468 U.S. 883 (1984)

Amber Tatro was born with spina bifida. She needed a catheter to empty her bladder. When she entered school at the age of 3, she was unable to catheterize herself and needed help. At least one time during the school day, Amber would have to be catheterized. Her parents requested that someone at school accompany Amber to the bathroom and assist her. School officials refused, arguing that catheterization was a medical procedure. They stated that since a doctor had prescribed the procedure, it was “medical” treatment which would not be required under the IDEA. The school district also felt the procedure was too risky to be performed by non-medical personnel who might cause serious injury to the child. Concerned about their liability, the school district refused to allow any school personnel to perform catheterization. Without such services and assistance, Amber could not attend school. The school district offered two alternatives. Amber could go to school and not receive catheterization, or she could remain home full-time and be taught there until she was old enough to self-catheterize.

Amber’s parents did not want Amber to experience years of homebound isolation. They had tried unsuccessfully to convince the local school board. So they placed her in a private school that would provide the necessary related service of catheterization. They then reluctantly began due process. In an administrative hearing, Amber’s parents won. However, the State Board of Education overturned the hearing decision and the Tatros had to appeal to U.S. District Court. In the District Court, the school argued that catheterization was not a related service because it did not arise out of a need to educate Amber. The school district stated that since Amber was of adequate intelligence and able to receive benefit from academic subjects, catheterization was not necessary to educate her and therefore not required. The District Court agreed with the school district and ruled against Amber’s parents. The District Court could not envision that Congress intended schools to get involved in a medical procedure such as catheterization and ruled that Section 504 did not require “the setting up of governmental health care for people to participate in federally funded programs.”

Amber Tatro at 3 years of age required assistance to care for her catheter when she was at school.

The school district was concerned about injuries to Amber from nonmedical personnel assistance.

Amber's parents appealed to the 5th U.S. Circuit Court of Appeals which quickly disagreed with the U.S. District Court's opinion, stating that catheterization was clearly a related service intended to be provided by the IDEA. They said that without the service Amber would not be able to attend class and benefit from special education. The circuit court also determined that the school district's refusal to provide the service was a violation of Section 504.

Because the hearing in District Court had simply been on a preliminary injunction, the circuit court sent the case back to the District Court to develop a full factual record and apply the legal principles stated by the circuit court. The school argued that a physician was required to provide catheterization and that if this service was required, then kidney dialysis would soon follow. By this time, the Texas Medical Association had entered the case as a "friend of the court" to explain that a nurse or other qualified person might administer clean intermittent catheterization (CIC) without engaging in the practice of medicine, even though a doctor had prescribed the procedure. The District Court relied on that information and determined CIC was not a medical service since a doctor was not needed to administer the procedure. The District Court clearly stated that a physician's involvement did not excuse the school district from providing catheterization or other services prescribed by a physician such as physical therapy or occupational therapy. Ruling within the restrictions imposed by the circuit court, the District Court found in favor of Amber's parents and ordered the school district to provide catheterization.

Still not satisfied, the school district appealed back to the 5th Circuit Court. The circuit court again concurred with Amber's parents and the school district appealed to the U.S. Supreme Court. The U.S. Supreme Court decided that services required to:

"... reach, enter, exit, or remain in school during the day are related to the offering of education and as such are essential related services. As for the medical aspects of the procedure, the Court noted that school nurses have long been a part of the educational system and concluded such services were not the sort of burden Congress intended to exclude as a 'medical service,' limiting such services to those provided by a physician or hospital. In response to the cost and liability issues brought forward

Amber's parents argued that catheterization could be performed by a school nurse or any other trained individual.

The U.S. Supreme Court determined that CIC is not an excludable medical service and must be provided by school districts when needed for a student to attend school.

by the District, the Court acknowledged that the 'introduction of handicapped students into a school creates numerous possibilities for injury and liability' ... Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks. Whether [the school district] decides to purchase more liability insurance or to persuade the state to extend the limitation on liability, the risks posed by CIC should not prove to be a large burden."

The Supreme Court's decision in *Tatro* did not resolve all of the possible conflicts that could arise over the many other types and amounts of related services that could be required for students with disabilities. A good example of the continuing inconsistency that exists between courts arises for students who may need assistance with breathing tubes (or tracheotomies).

Department of Education v. Katherine D.
727 F.2d 1195 (9th Cir. 1984)

Katherine D., born in 1976, was a resident of Hawaii who experienced cystic fibrosis and tracheomalacia. Her disability caused her windpipe to be floppy instead of rigid. From the age of 2, Katherine used a tracheotomy tube, which allowed her to breath and expel mucus secretions from her lungs two or three times a day. Among other services, Katherine needed assistance with taking medication, suctioning her tracheotomy tube, and reinserting the tube should it become dislodged. Katherine's parents wanted her to attend a public school program with related services that would meet her routine and emergency tracheotomy care needs. The Department of Education of the State of Hawaii proposed a homebound program consisting of one and one-half hours of speech therapy and 40 minutes of parent counseling per week.

Katherine D. needed a breathing tube and someone available and trained to care for her at all times at school.

No academic instruction was offered. Katherine's parents rejected the district's proposed IEP, enrolled her in a private school, and provided the needed care themselves.

The 9th U.S. Circuit Court of Appeals stated:

"Katherine was clearly capable of participating in regular classes with nonhandicapped children ... Services similar to those provided by Katherine's mother at (the private school) could have been made available in a public school setting without unduly burdening the public school system ... These services could have been provided by a 'school nurse or other qualified person' and thus fell squarely within the requirements of the Act."

In a footnote to the decision, the court found "it is indisputable that even a layperson could have been trained to provide the services Katherine required. Indeed, Katherine's mother, who had no medical training, had performed them for some time."

While this 9th Circuit decision is the controlling case in our state of Washington, schools around the country are challenging the provision of services that may arguably be considered medical. Another case to consider comes from the 6th U.S. Circuit Court of Appeals.

Samantha Neeley v. Rutherford County Schools
68 F.3d 965 (6th Cir. 1995)

Samantha Neeley, born on September 28, 1986, has congenital central hyperventilation syndrome, a dysfunction of the brain's regulation of breathing. As a result of this condition, she uses a tracheotomy tube for breathing which requires suctioning several times throughout the day.

Samantha wanted to attend a public school in Rutherford County, Tennessee. In her first year at school, one of her parents attended school with her every day to perform any necessary suctioning and to be available in the event of an emergency. Because Mr. and Mrs. Neeley had to care for two other children with serious health problems, they were unable to attend with Samantha on a daily basis during the next school year. They asked the school to provide the assistance. The school district's IEP indicated "every effort will

Samantha needed a breathing tube and someone to suction the tube throughout the school day.

be made to ensure that an educational assistant be hired with at least LPN (licensed practical nurse) training.” When Samantha’s parents took her to school at the beginning of the following year, they discovered that the educational assistant was not an LPN and was not trained to address Samantha’s needs. Mr. and Mrs. Neeley refused to place Samantha in a program they felt was unsafe and requested due process. Arguing that it was not legally required to hire an LPN to assist Samantha, the district offered to provide homebound services. A due process hearing found that the “nursing care” requested by Samantha’s parents would not be required under the IDEA. The U.S. District Court found to the contrary, but was reversed by the 6th Circuit which reinstated the due process finding in *Neeley v. Rutherford County* (68 F3d 965 [6th Cir. 1995]).

Under Tennessee law, the services required by Samantha were medical and excludable.

The 6th Circuit considered two questions in Samantha’s case. First, is the requested service a “supportive service required to assist the child to benefit from special education?” Second, is the service a “medical” service which is excluded by the act? All of the parties agreed that the services Samantha needed were supportive. Unfortunately, the parties also agreed that under Tennessee law the services had to be administered by a physician, registered practical nurse, licensed practical nurse, respiratory care therapist, Samantha’s parents, or Samantha herself. Tennessee law would not allow a school nurse to provide the service without the requisite license and training.

Based on remarkably similar facts, the circuit courts in the Katherine D. and Samantha Neeley cases reached decisions that are inconsistent. Washington law is shaped and controlled by the decision in *Katherine D.* since the state is under the jurisdiction of the 9th U.S. Circuit Court of Appeals. However, our courts will also consider the reasoning expressed in the *Neeley* decision. We are given some direction by the *Katherine D.* case indicating that at the time of the decision, our court favored a somewhat expanded concept of related service. This remains an unsettled issue, even in light of a U.S. Supreme Court decision that focuses the similar issues and concerns. Currently, what is clear from the 9th Circuit is that **nursing services** must be provided that:

The decision in *Katherine D.* determines decisions in similar cases for Washington State.

- Allow the child to attend school.
- Can be readily performed by a school health nurse or other lay person.

Issues Related to Psychiatric Services

Another issue that faces school districts is the increasing demand for psychiatric services and residential placements for students with significant mental health disorders. School districts are finding themselves faced with requests from parents to provide for educational placements in psychiatric facilities, many of which are located in hospitals. School districts have argued, sometimes successfully, that such placements are medical in nature, not educational, and not requested by federal and state law.

Psychiatric disorders in and of themselves do not automatically make a child eligible for special education and related services. A student must have a disability that meets the definition of one of the categories listed in the IDEA, such as “seriously emotionally disturbed” or “other health impaired,” and need special education and related services as a result of that disability. Section 504 also protects students who have a “mental impairment which substantially limits one or more major life activities.” Students who have been hospitalized due to such mental impairments are likely to qualify for protection under Section 504.²⁵ Related services needed by students who are covered by Section 504 and/or the IDEA must be provided when required for educational purposes. While psychotherapy is not specifically listed as a related service under the IDEA, it has been recognized in some cases as a related service that school districts must provide to assist the child to benefit from his or her education.²⁶ Psychotherapy also falls within the definition of “counseling services” and “psychological services,” both related services listed in the IDEA.²⁷

Psychiatric services are not listed as related services, but may be considered a related service for educational purposes.

As evidenced in the following cases, however, the courts are not in agreement regarding the medical v. the educational nature of all psychiatric services and placements.

In *Clovis School District v. Administrative Hearings*,²⁸ the 9th U.S. Circuit Court of Appeals determined that this student's placement in a particular psychiatric facility was for medical purposes. The placement was in a hospital that had no educational program. A medical team supervised by a licensed physician provided the student's program and treatment. The facility did not have a state-accredited educational component. Therefore, the school district was not required to pay for the residential portion of her program.

The 9th Circuit, however, has looked differently at the school district's obligation to pay for educational costs in psychiatric residential facilities in other cases. In *Seattle School District No. 1 v. B.S.*,²⁹ the 9th Circuit determined that an out-of-state residential program that addressed the educational needs of the student was not a "medical" program simply because it also treated the student's disabilities which were psychiatric in nature. The facility was an accredited educational institution and not primarily a psychiatric hospital. The court confirmed that the school district was responsible for the educational costs of the placement, but not the medically related costs.

In a similar case, the 9th Circuit also confirmed in *Taylor v. Honig*³⁰ that a long-term residential psychiatric facility was required to meet the student's educational needs. The original administrative law judge had ruled that the student's social, emotional, medical, and educational needs were intertwined and not severable. The 9th Circuit agreed, noting that the program provided at the residential facility was driven by the IEP designed by the school system. The facility operated a full-time school that was state-accredited.

The 9th Circuit in both *Seattle* and *Taylor* examined the "medical" nature of the services provided to the student and confirmed that the school district remains responsible for paying for the educational costs of an appropriate educational program and placement, even when other medical services may be provided to the student. School districts cannot automatically rule out a placement as noneducational simply because a facility is located in a hospital. But the expenses for services that are medical in nature provided by that facility may be excluded from the costs payable by the school district.

Students who require residential services because of their psychiatric needs may be entitled to have all or portions of their program paid for by the school district.

Implications for Parents and Educators

Some students with disabilities may require related services to address their physical, medical, or psychiatric conditions at school. Whether a particular service needed by a student is considered “medical” must be determined on an individual basis. Some guidelines have been provided by the courts to assist with this decision making. Services that are necessary to allow the student to attend school and that can be readily performed by a school health nurse or other trained lay person must be provided. Courts are currently examining specific issues related to breathing tubes and services required of students who need nursing services throughout their school day. At this time, there is a great deal of conflict between the circuit courts regarding students who need “constant” nursing care and the obligation of school districts to provide related nursing services to those students.

For those students who require psychiatric services or related services because of their psychiatric disorder, the issues are often complicated by the student’s additional need for residential services in a psychiatric facility. It is clear that the educational costs of such a residential placement are often required to be paid for by the school district, and that the medical costs that may be associated with the placement may be excluded. Again, an individual determination as to which costs are educationally related and which are medically related will have to be made in each case. So long as a child with a psychiatric disorder is eligible for special education and related services, related services necessary for the child to benefit from his or her education—including psychiatric services—will be required to be provided by school districts.

Related services that are necessary for a student to attend school and can be readily performed by a school nurse or trained lay person must be provided.

Psychiatric services may be related services necessary for a student to benefit from her education.

Least Restrictive Environment

The term “least restrictive environment” (LRE) is probably the least understood and most misused phrase in the field of special education. While some of the confusion can be attributed to both parental and school district resistance to placement of disabled children in “typical” educational settings, some confusion is justified, regardless of one’s personal philosophy. The term is not explicitly defined in statute or regulations. Its legal history is found in constitutional and legal theory associated with governmental intervention in personal rights. It is not derived from any educational theory applicable to students with disabilities. Perhaps some confusion also arises from trying to apply a general legal concept to specific individuals with vastly different needs and issues in an educational setting. Whichever the reason, the least restrictive environment will remain an issue for debate for some time.

Educators have attempted to “translate” the meaning of least restrictive environment into more understandable and concrete educational terms since the inception of the IDEA. *Mainstreaming* is the earliest educational term associated with LRE to describe what was believed to be the law’s intention. *Integration* became more popular in the 1980s, borrowing concepts from the civil rights movement for racial integration. Society’s movement from a system of “separateness” to having people take their place in “regular” society seemed to parallel the plight of the disabled in school. The term *full inclusion* has gained popularity in the 1990s. The intent is to recognize that providing a disabled student with a chair next to a nondisabled student will not necessarily promote any interaction between them. Physical closeness is not sufficient. Functional and social participation must be encouraged to result in the desired interaction. The term attempts to acknowledge the distinction between “belonging” as a member of a classroom and being a visitor to it.

To understand the legal concept of least restrictive environment, the term must be viewed as a gauge or measurement of the degree of opportunity a person has for proximity to and communication with, the ordinary flow of persons in our society.³¹ A fully or partially segregated program may be necessary, however, to provide an appropriate program which will meet the student’s individual educational needs. There may appear to be a conflict between

The term “least restrictive environment” is a legal concept, not derived from educational theory.

Educators must “translate” the LRE concept to the education for children with disabilities.

LRE is a measurement of the opportunities a person has to interact with the “ordinary flow” of persons in our society.

providing a student opportunities in the “ordinary flow” and providing an appropriate educational program. “LRE” and “appropriateness” are two separate but EQUAL requirements under the law. Both must be equally considered for every child.

The decision about where to educate a student occurs *after* the IEP is developed. This placement decision must be based on the specific elements detailed in the IEP, such as the goals and objectives and the extent to which the child can participate in the regular classroom environment. The IDEA and Section 504 specifically require school districts to place students in the least restrictive environment. As defined in statute and regulations, this includes consideration of the following:

“ ... as close to home as possible.”

34 CFR 300.552(b)(3)

“ ... in the same school he or she would attend if not handicapped.”

34 CFR 300.552(c)

“ ... to the maximum extent appropriate ... children with disabilities ... are educated with children who are nondisabled.”

34 CFR 300.550(b)(1)

“... in the regular educational environment unless it can be demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.”

34 CFR 104.34(a)

“... special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

20 USC Sec. 1415(5)(B)

School districts are required to educate students **with** disabilities with other students who do not experience disabilities to the **maximum** extent appropriate to meet the needs of the disabled child.

However, the IDEA does not require that every student with a disability be placed in the regular classroom regardless of individual needs and abilities. This is reflected in the IDEA's requirement that school districts make available a range of placement options known as the "continuum of alternative placements." Instruction can occur in a range of settings, including "... regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions" (34 CFR 300.551(b)(1)). The possibility that instruction may be necessary in a setting away from nondisabled peers is not inconsistent with the notion of placement in the least restrictive environment, so long as instruction occurs to the "maximum extent appropriate" in regular classes and the natural settings where instruction occurs for nondisabled peers. A child may be segregated from the nondisabled student body when the reasons for segregation are based on the goals and objectives in the child's IEP and not on administrative convenience, categorical labels, severity of disability, or disruptiveness or behavioral reasons unless it can be persuasively demonstrated that the student and everyone else around the student is unable to learn with the student in the classroom.

The courts have examined this issue in a variety of cases and provided guidelines for when a child can be educated in a separate setting and how to resolve the issue of "appropriateness" when it is placed in conflict with education in the least restrictive environment.

In the case of *Roncker v. Walter* (700 F2d 1058 [6th Cir. 1983]), Neill Roncker was 9 years old and severely mentally retarded. He had seizures under moderate control with medication and had a mental age of 2-3 years of age. He needed constant supervision because of his inability to recognize dangerous situations. His parents wanted Neill placed in his neighborhood school, Pleasant Ridge Elementary School. The school argued that Neill had already failed there and that a segregated county school had the services he needed. The court held that an examination of existing classes and services is not enough for determining placement. In what has come to be known as the "portability" test, the court looked at whether the special services could be brought to Neill, rather than removing Neill to the traditional site of such services. The *Roncker* court interpreted the act's least restrictive environment provisions as follows:

A continuum of alternative placements are to be available when instruction in a regular class does not meet the individual needs of a student.

The court looked at what special education services were to be provided to Neill in a regular school setting.

“The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference ... In some cases a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act’s mandate ... In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.”

The court did not limit Neill’s placement options to those that were available. It looked at all options appropriate for Neill.

The *Roncker* decision provided important but limited guidance, and it was not until the 1989 decision in *Daniel R.R. v. State Board of Education* (874 F2d 1036 [5th Cir., 1989]), that a court again stated a general theory regarding the least restrictive environment. Daniel was a kindergartner with Down Syndrome who had been educated in the previous year in a segregated special education preschool. The school had tested Daniel’s IQ and classified him as having “borderline retardation.” He had some speech and language delays and some developing behavior issues. In the spring, the school proposed continuing Daniel another year in the early childhood class, which provided 2 hours and 45 minutes a day of programming in a classroom that included only students with disabilities.

Daniel R.R. needed support to be successful in a regular classroom.

Daniel’s parents felt he was ready for a longer school day and needed more interaction with students without disabilities. After some pressing, the school district offered to let Daniel attend a pre-kindergarten class for part of the day and continue to attend the early childhood preschool class. The district cautioned Daniel’s parents that the pre-kindergarten class was for nondisabled students and that in their view, Daniel could not benefit from the curriculum. They also warned his parents that the teacher hired in that class was young and had never taught a child with a disability.³² The school district refused to work out any modifications to the

pre-kindergarten class in Daniel's IEP, stating that an IEP was for special education delivered in a special education class only and did not apply to a "regular" educational setting. The district contended that if Daniel were to participate, he would have to meet the same expectations as the other students in the class. The pre-kindergarten class included recess and lunch at school, and Daniel's parents, while excited by the potential opportunities those experiences would provide, knew he would need some help to be successful. But the school's position was that lunch and recess, like pre-kindergarten, was regular education and that only students who were ready for it should participate. If Daniel needed special help, then he should not be there.

Daniel started the pre-kindergarten class in the fall and also attended his early childhood special education class. He quickly deteriorated with no help in the "mainstream." The school soon stated that Daniel could only attend the early childhood special education class. Although the district offered to allow Daniel to come to lunch three times a week and to attend recess, he could only do so with his mother's accompaniment the entire time. Also, this time would be taken out of his early childhood special education class. So, Daniel's parents asked for a hearing. The hearing officer decided in favor of this district. Daniel's parents appealed to U.S. District Court. The District Court agreed with the hearing officer's decision and Daniel's parents appealed to the 5th U.S. Circuit Court of Appeals. The circuit court disagreed with the District Court in two ways. It recognized that more than academic benefits could be achieved in the regular classroom environment and that access to the regular classroom environment cannot be based on a child's academic achievement. The circuit court stated:

"The Act requires states to tolerate a wide range of educational abilities in their schools, and specifically, in regular education—the [IDEA's] preferred educational environment. Given the tolerance embodied in the [IDEA], we cannot predicate access to regular education on a child's ability to perform on par with nonhandicapped students ... educational benefits are not mainstreaming's only virtues. Rather mainstreaming may have benefits in and of itself."

The school district did not modify the regular curriculum and required Daniel to have the same skills as other students to participate in regular classes.

The 3rd U.S. Circuit Court of Appeals more recently examined the act's preference for placement in the least restrictive environment in the case of *Rafael Oberti v. Board of Education of the Borough of Clementon School District* (995 F2d 1204 [3rd Cir. 1993]). At the time this case was brought, Rafael Oberti was an 8-year-old child with Down Syndrome who was placed in a developmental kindergarten class in the Clementon School District in southern New Jersey. While making some academic and social progress, he experienced a number of serious behavioral problems, including repeated toileting accidents, temper tantrums, crawling and hiding under furniture, and touching, hitting, and spitting on other children, the teacher's aide, and the teacher. His IEP provided no plan for addressing his behavior problems, for special education consultation for the kindergarten teacher, or for communication between the kindergarten teacher and the special education teacher. As the kindergarten teacher's frustration increased, the district proposed a placement in a segregated special education class. Rafael's parents responded with a request for continued placement with supplementary aids and services in regular kindergarten in the neighborhood elementary school.

Rafael needed "supplemental aids and services" to be successful in the regular class.

Applying the testimony of the experts to the standards of the *Daniel R.R.* case, the circuit court held that the law prohibited a school from placing a child with disabilities outside of a regular classroom if educating the child in the regular classroom with supplementary aids and supportive services could be achieved satisfactorily. The circuit court held that if placement outside of a regular classroom is necessary for the child to receive educational benefit, the district may still be violating IDEA if it has not made sufficient efforts to include the child in the school programs with nondisabled children whenever possible. The circuit court placed the burden of proving compliance with the law on the school district regardless of whether the district or the parent was seeking court intervention. The main factor the circuit court appeared to consider in finding in favor of the parents was the evidence presented by the parents' experts that Rafael would not have had such severe behavior problems had he been provided with adequate aids and services in the kindergarten class.

The courts in all cases have placed the requirements for placement in the least restrictive environment on EQUAL ground with the requirements to provide an "appropriate program."

In placing the burden on the school district of proving that the student cannot be educated in a regular class, the circuit court established a two-part test as the standard:

“In sum, in determining whether a child with disabilities can be educated satisfactorily in a regular class with supplementary aids and service (the first of the two-part mainstreaming test we adopt today), the Court should consider several factors, including:

- (1) Whether the school district has made reasonable efforts to accommodate the child in a regular classroom;
- (2) The educational benefits available to the child in a regular class with appropriate supplementary aids and services as compared to the benefits provided in a special education class; and
- (3) The possible negative effects of the inclusion of the child on the education of the other students in the class.”

The second prong of the mainstreaming test the *Oberti* court adopted was: “Whether the school has included the child in the school programs with nondisabled children to the maximum extent appropriate.”

Most significant for the state of Washington is the recent 9th U.S. Circuit Court of Appeals decision in *Sacramento City Unified School District, Board of Education v. Rachel H.* (4F3d 1398 [9th Cir. 1994]). Rachel Holland was an 11-year-old girl labeled as moderately mentally retarded with a tested IQ of 44. Her parents sought a full-time placement in a regular education classroom with a part-time aide. The Sacramento Unified School District proposed a special education class for academic subjects and a regular setting for nonacademic activities, such as art, music, lunch, and recess. The district’s proposal would have required moving Rachel at least six times each day between two classrooms. When the district and the Hollands failed to agree on a program, the Hollands enrolled Rachel in a private school kindergarten class.

Rachel H.’s parents wanted her fully included in regular classes with supplementary aids and services, modifications to curriculum, and specialized instruction.

In order to determine the appropriate least restrictive environment for Rachel, the circuit court used a four-part test:

Holland Test

1. The educational benefits available to Rachel in a regular classroom supplemented with appropriate aids and services as compared with the educational benefits of a special education classroom.
2. The nonacademic benefits of interaction with children who were not disabled.
3. The effect of Rachel's presence on the teacher and other children in the classroom.
4. The cost of mainstreaming Rachel in a regular classroom.

The court found that the testimony of Rachel's experts was more credible "as they had more background in evaluating children with disabilities placed in regular classrooms and they had a greater opportunity to observe Rachel over an extended period of time under normal circumstances." The district did offer testimony on the cost of educating Rachel full time in a regular classroom, but the court determined that the cost estimates were unrealistic, inflated, and failed to address a true comparison of the costs for Rachel in a regular versus special placement.

Washington is located within the 9th U.S. Circuit Court of Appeals. Accordingly, implementation of LRE in the state of Washington will be controlled under the four-part test established in the 9th Circuit's decision in *Holland*.

Many commentators have suggested that there is a conflict between the law's requirement that a program be appropriate and the requirement that the program be provided in the least restrictive environment. The suggested conflict is resolved through a careful evaluation of the first two elements of the *Holland* test. The *Holland* court requires equal consideration of both "educational" benefit and "nonacademic" benefit. This shows us that traditional academic achievement and advancement (educational benefit) must be equally balanced with successful social interaction (nonacademic benefit). By

The court equally considered the **nonacademic** benefits of placement in the least restrictive environment with the academic benefits.

requiring the analysis of both *benefits*, the court brings the concepts of appropriateness and least restrictive environment together.

Implications for Parents and Educators

The *Holland* decision highlights the need for school districts to seriously consider the importance of the nonacademic benefits that placement in the least restrictive environment may provide. The *Holland* court noted that "... a child may be better able to learn academic subjects because of improved self-esteem and increased motivation due to placement in regular education."

It also emphasizes the importance of making placement decisions based on the child's IEP. In the *Holland* case, the school district's experts were less convincing to the court because they focused on Rachel's inability to learn functional skills, such as handling money, doing laundry, and using public transportation in a regular education environment. Rachel's experts argued that socialization, behavior, and communication skills would not be acquired if she were not placed in a regular educational environment. Rachel's experts convinced the court not because their philosophies were superior, but because socialization, behavior, and communication skills were in fact the skills targeted on Rachel's IEP.

Parents of children who fall within the categories of sensory impairment, including hard of hearing, hearing impaired, deaf, deaf-blind, visually impaired, and blind, often argue that the least restrictive environment for their children is in an educational setting that involves the use of language or communication methods used by the general community of individuals who have the same or similar disabilities. Some studies show that children in these categories will learn more subject matter content when taught using their primary mode of communication. Other studies argue that creating a separate mode of communication will cause the child to be isolated from the larger nondisabled community. Professional and advocacy groups can be found to argue either side of this educational debate. However, what must be clear is that the educational debate over the mode of communication primarily used in a child's educational setting is not relevant to the legal concept of least restrictive environment. Under the Fourteenth Amendment to the U.S. Constitution, as interpreted by *Brown v. Board of Education of*

School districts must provide necessary supplemental aids and services to a student in a regular class to allow the student to participate to the **maximum** extent possible.

"Separate" is not "equal" for many students with disabilities.

Topeka, PARC, Mills, and the IDEA and Section 504, children with disabilities are to be educated to the **maximum extent appropriate with children without disabilities**. “Separate but equal” is no more acceptable for individuals within the deaf or blind community than for those of any other minority group. This understanding must be an integral part of any decision to educate a child with a disability outside the regular classroom environment.

The legal concept of least restrictive environment—as reflected in the educational practice of full inclusion—is currently receiving a great deal of attention and support from many of the most outspoken advocates for disability rights. Providing educational opportunities which emphasize increasing the child’s independence and future success in society, living, and working has become critical in the survival of all children who experience disabilities. The critical nature of this issue does not rest on some transitory educational philosophy that may change next week or next year. For the first time in history, children with disabilities will routinely outlive their parents. Society no longer accepts or provides institutions in which individuals with disabilities will live out their lives in segregated and isolated settings. In all educational settings, rural and urban, large and small school districts, and regardless of the severity of disability, empirical research is clearly demonstrating that it is possible to provide meaningful educational services to children with disabilities in typical or regular educational settings. There are a wealth of studies available that demonstrate how full inclusion can be implemented in any district setting for even the most severely disabled children.

Historically, research has demonstrated that children with some cognitive disabilities lack the ability to generalize. That is, they tend to learn skills only in the settings in which the skills are taught and are often unable to apply the same skills in different settings. Educational services must be focused on increasing the likelihood of meaningful participation, and even physical survival, in the nondisabled community in which these children will reside as adults. They must be prepared for a life in which they may not be directly supervised by their parents or by state agencies. The first two factors in the *Holland* decision become even more important. We must provide services in the regular classroom so these children will learn what academic and social performance is expected of them in interacting now, and in the future, with their nondisabled peers.

How educators implement the concept of least restrictive environment affects the success of a student to live and work independently as an adult.

The realm of public education is once again being asked to shoulder the burden of being responsible for societal change. Certainly this is uncomfortable for both parents and educators who have not yet recognized the significance of the impact of (1) increased life expectancy, (2) movement away from historic dependency on parents or government programs, and (3) rapid withdrawal of state support systems for adults with disabilities. As these three factors are considered, the imperative for education in the least restrictive environment, or in the full inclusion model, becomes much clearer.

The education of all children, whether disabled or not, must prepare them for the future world in which they will live. The traditional training normally provided to both regular and special educators has not historically taken these new realities into consideration. Parents and educators must work together to create and implement new educational curriculums that will be relevant to the new reality. This requires a break with the traditional split administrative structure of public education where “special” education and “regular” education are rigidly divided. The implications of Section 504, the Americans with Disabilities Act, and anti-discrimination statutes in all 50 states inescapably lead to the conclusion that children with disabilities will not be relegated to live as adults in a rigidly divided or segregated society. The reorientation and integration of special education with regular education is our most difficult challenge in restructuring the current education system—and successfully providing a meaningful education to students with disabilities.

Societal attitude and change in the life expectancy of individuals with disabilities brings significant focus to the issue of least restrictive environment.

Infants and Toddlers with Disabilities:

Part H of IDEA (reauthorized as Part C, Infants and Toddlers with Disabilities, June 4, 1997)

In 1986 Congress enacted Public Law 99-457 which added “Part H” to the IDEA, creating a mandatory early intervention program for developmentally delayed infants and toddlers, aged birth to 3, and their families.

The provisions of Part H acknowledge the link between early childhood development and learning. It specifically seeks to enhance the development of infants and toddlers who demonstrate “developmental delays” or are “at risk of developmental delay.” Early intervention services are provided in order to minimize the potential delays such children may later experience. Having learned from the federally funded Head Start program, Congress included parents as critical players in the early intervention system and recognized that children must be evaluated and provided services within the context of their family.

Congress enacted Part H for the purpose of addressing five “urgent and substantial” needs:

1. To enhance the development of infants and toddlers with disabilities and to minimize their potential for developmental delay.
 2. To reduce the educational costs to our society, including our nation’s schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age.
 3. To minimize the likelihood of institutionalization of individuals with disabilities and maximize the potential for their independent living in society.
 4. To enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities.
 5. To enhance the capacity of state and local agencies and service providers to identify, evaluate, and meet the needs of historically unrepresented populations, particularly minority, low-income, inner-city, and rural populations.
- 20 USC Sec. 1471(a)(1)–(5)**

Infants and toddlers from birth to age 3 with developmental disabilities **and** their families are eligible for early intervention services.

Early intervention services are those designed to meet the developmental needs of each eligible child AND the needs of his family. The ultimate goal is to “enhance the development” of the child. Children are dependent on their families to grow and to develop. This relationship is an integral part of planning for a developmentally disabled child or a child at risk. The whole family unit involved with a child should be considered when deciding on the services to be provided. These services are selected in collaboration with the family and are identified in the “individualized family service plan” (IFSP). All services must be provided at no cost to the family and in “natural” environments to the maximum extent appropriate for the child. “Natural environments” are the same as those in which children without disabilities participate in the home and the community.

34 CFR 303.12

The IFSP is required to specify the major outcomes expected for the infant or toddler and her family, including the early intervention services needed to meet the unique needs of the child and family. Also included in the IFSP are the following:

- A statement of the child’s current levels of physical, cognitive, communication, social or emotional, and self-help skills development.
- A statement of the specific priorities and concerns regarding the enhancement of the child’s development.
- The duration, intensity, frequency, and method of service delivery.
- The natural environments in which services will be provided.
- Starting dates and expected duration of each service.

The IFSP is jointly developed by the family and qualified personnel involved in the provision of services to the child. Family participation in the development of an IFSP is voluntary.

In the state of Washington, the agency designated by the governor as being responsible for implementation of Part H is the Department of Social and Health Services, Division of Developmental Disabilities (DSHS-DDD). The school district in which the child resides should be a participant in the planning process during transition.

An individualized family service plan (IFSP) is developed for each child and his family voluntarily.

The IFSP must be based on a multidisciplinary evaluation of the child and an evaluation of the child's family needs. Criteria for deciding if the outcomes are being achieved as planned must also be included in the IFSP, and a case manager who is responsible for implementing and coordinating the plan must be identified. In Washington State, the case manager is called a family resource coordinator (FRC).

According to 34 CFR, Part 303.12, early intervention services include but are not limited to the following:

- Assistive technology
- Audiology
- Family training, counseling, and home visits
- Health services
- Medical services only for diagnostic or evaluation purposes
- Nursing services
- Occupational therapy
- Physical therapy
- Psychological services
- Service coordination (family resource coordination)
- Social work services
- Special instruction
- Speech language pathology
- Transportation and related costs
- Vision services

The IFSP must be reviewed at least every six months to determine if the expected outcomes are being achieved and to make any modifications or revisions in outcomes or services. Trained personnel are required to implement the services provided in the plan, and any steps that must be taken to assist the child to make a smooth transition from an early intervention program to a preschool program must be delineated. The school district in which the child resides is required to be a participant in the planning process during transition.

An IFSP must contain all the early intervention services needed by the child and support services for her family.

An IFSP must be reviewed at least every six months and revised as necessary to assist the child and family in achieving their expected outcomes.

The unique feature of Part H is the focus on children's needs in the context of the strengths and needs of their families. The requirements of the law are designed to assist families in meeting their children's special needs, to provide ongoing support to parents, and to involve parents as active participants in their children's development. The law also encourages the use of other parents to support newer and less experienced parents, capitalizing on the skills of more experienced parents.

The Part H program was introduced to states as a discretionary grant program that provided for a five-year implementation phase. Washington State is in full implementation of Part H and is required to meet all the requirements under Part H of IDEA. Every developmentally delayed infant and toddler from birth to age 3 is ensured an evaluation, an IFSP, and full implementation of the services called for in the IFSP by qualified and trained personnel.

In Washington State, the Governor designated the Department of Social and Health Services (DSHS) as the lead agency for IDEA, Part H. The following five participating agencies have developed an interagency agreement to address the implementation of Part H:

- Department of Social and Health Services (DSHS).
- Department of Community, Trade and Economic Development (CTED).
- Department of Health (DOH).
- Department of Services for the Blind (DSB).
- Office of Superintendent of Public Instruction (OSPI).

Permissive legislation allows school districts to provide special education and related services to infants and toddlers with disabilities. Many school districts have chosen to provide these services. Service delivery models vary from direct services by school district personnel to contracting with community agencies to provide appropriate special education services. If a district is not providing special education and related services for infants and toddlers with disabilities, they must still participate in the transition planning process.

The transition plan is individualized to meet each child's unique needs. The transition meeting must occur 90 days prior to the child's third birthday. The plan may include the child's transition to a Part B program, a community preschool, a Head Start program, an Early Childhood Education and Assistance Program (ECEAP), or other appropriate program to best meet the individual child's needs. Activities to facilitate the child's transition may include a visit to the future classroom, invitation extended to the parent to participate in parent activities, etc. Further details on transition are explained in the next chapter.

The transition plan facilitates the continued flow of services necessary to support the child and family when the child turns 3 years old.

Preschool Special Education

“The term ‘children with disabilities’ for children aged 3 through 5 may, at as state’s discretion, include children ... who are experiencing developmental delays ... in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; AND ... who, for that reason, need special education and related services.” (emphasis added)

20 USC Sec. 1401(a)(1)

“... Districts that provide preschool programs for nondisabled preschool children must ensure that the requirements of this chapter are met. Districts that do not operate programs for nondisabled preschool children are not required to initiate such programs solely to satisfy the requirements regarding the provision of services *in the least restrictive environment*. For these districts some alternative methods for meeting the requirements include:

- (1) Providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);
- (2) Providing such services to children with disabilities in private school programs for nondisabled preschool children or private school preschool programs that integrate children with disabilities and nondisabled children; and
- (3) Locating classes for preschool children with disabilities in general elementary schools.

In each case the district or other public agency must ensure that the provision of services for each child is in the least restrictive environment in which the unique needs of that child can be met, based upon the child's individualized education program, and meets all the other requirements of this chapter.” (emphasis added)

WAC 392-172-178

Children with disabilities who have been getting early intervention services from an infant and toddler program must be evaluated by their local school district when they turn 3 to determine if they are eligible for special education and related services.

The transition from early intervention services (found in Part H of the IDEA) to preschool services (provided under Part B of the IDEA) is not automatic. Not all children receiving early intervention services will necessarily require special education and related services or have a disability that meets one of the definitions for eligibility under Part B. In the state of Washington, preschoolers can be eligible for services as “developmentally delayed,” as defined in WAC 392-172-114, or may qualify as disabled under any of the other definitions used for school-age children (except learning disabled). State plans under Part B must ensure a smooth transition for children participating in early intervention programs under Part H, including making sure that when a child turns 3 and needs special education and related services, an IEP has been developed and is being implemented by the date of the child’s third birthday.³³

In Washington State, WAC 392-172-176 addresses school district responsibility in transitioning children from early intervention services to preschool special education services.

WAC 392-172-176: Transition to preschool program.

Each local school district or other public agency shall develop policies and procedures for the transition of children participating in the early intervention program under Part H of the Individuals with Disabilities Education Act who are eligible for participation in preschool programs under Part B of the Individuals with Disabilities Education Act.

If the child will participate in the school district and other public agency’s preschool program under Part B of Individuals with Disabilities Education Act at age three, an individual education program consistent with this chapter must be developed and implemented by the child’s third birthday. The district or other public agency must provide the family with information on the eligibility and evaluation requirements under Part B of the Individuals with Disabilities Education Act, including the parent’s and school district and other public agency’s rights regarding procedural safeguards.

The transition from an infant/toddler early intervention program to a school program occurs when a child with a disability turns 3 years old.

Each school district and other public agency's policies and procedures must include procedures for:

(1) Notifying the agency in which the child is being served, and the family of the need for transitional planning;

(2) Describing how the families will be included in the transitional plans;

(3) Convening, with the approval of the family, a transition conference with the agency, family, and district or other public agency, at least ninety days before the child is eligible for the preschool program under Part B of Individuals with Disabilities Education Act for the purpose of reviewing a child's program options for the remainder of the school year, and establishing a transition plan.

While some children will enter a special education preschool program from an early intervention Part H program, some children may not demonstrate apparent disabilities until they are 3 to 5 years of age. These children may be at home with their families or may be enrolled in a preschool program through a church or community school. For children who have not been part of an early intervention program or who have not yet been formally identified as having a disability before 3 years of age, a prompt referral to the school district is critical. A written request for evaluation should be initiated. Parents should provide the district with copies of all available records, including all medical records and any other reports or evaluations from clinics, specialized child care programs, therapy centers, and preschool teacher reports. Many school districts will have a designated early childhood special education program coordinator. Find out who that individual is in your district and make your request directly to that person. While it is appropriate to give the early childhood education coordinator a reasonable time (one-two weeks) to review the information, a follow-up phone call or visit could be beneficial.

A family not involved in a preschool program may suspect their child has a disability. School districts provide free community preschool screenings as a way to meet the federal requirements to identify and locate all children with disabilities in their community. If a parent suspects her preschool-age child may have a disability for any reason, she is encouraged to have her child participate in a screening to gather more information. If the screening reveals concerns, a formal referral for evaluation will follow. A direct referral for

Special avenues are available for early identification of special needs a child may have.

evaluation by a parent or concerned family member is also a way to determine if a preschool-age child has a disability.

Evaluation and assessment of young children who are culturally and linguistically diverse (CLD) presents complex responsibilities to early childhood professionals. Determining eligibility for special education and related services provides particular challenges. Critical questions related to this issue are raised again and again:

- What is the influence of culture on early development?
- How can we accurately identify language delays in children who speak a language other than English?
- What are the best evaluation and assessment procedures for young children from diverse family backgrounds?

The Office of Superintendent of Public Instruction has published the document *Evaluation and Assessment in Early Childhood Special Education: Children Who Are Culturally and Linguistically Diverse*, January 1997.

This manual is designed to provide procedures and resources for assessing birth to 6-year-olds who are culturally and linguistically diverse. Information on language learning, the impact of culture on behavior, information-gathering strategies, tests, and the referral process has been summarized from a variety of sources. The resources are intended to guide the evaluation of children who have immigrated from other countries, live in communities that have maintained non-Anglo cultural traditions, and speak primarily languages other than English.

An IEP will be developed for each preschool child with a disability who is eligible for services under the IDEA. The IEP team will work in equal partnership with parents to develop the IEP based on the evaluation results, which should include direct observations of the child and other information about the child gathered through the evaluation process. While the IFSP developed under Part H (see page 64) emphasizes the involvement of the child's family, the preschool IEP will focus on the educational needs of the young child. Goals and objectives will be focused on the child, and may not include family goals. Although the law does not require the development of an IFSP for 3- to 5-year-old children with disabilities, many preschool programs value the family-centered approach and include family resources, priorities, and concerns relating to their child.

IEPs focus on the needs of the child with family input.

The IDEA does not set standards for preschool education. It requires only that 3- to 5-year-olds, like older children with disabilities, receive a “free” appropriate public education. Washington State does not have special regulations or other standards regarding the nature, frequency, or duration of programming for 3- to 5-year-old children with disabilities. Wide variations in the kind and types of programming can result, as they do for older children. States and school systems *do* have an obligation, however, to keep abreast of promising new methods and strategies for meeting the educational needs of children with disabilities and to employ those methods and strategies in designing and implementing IEPs.³⁴ Decisions that determine the kind of program, how frequently a child attends, and the amount of time a preschooler will receive special education and related services should take into account the best available knowledge and research regarding child development and effective programs for this age group. Children aged 3 to 5 who meet the disability requirements of the regulations are entitled to the full protection of **all** of the IDEA regulations. Individualized decisions must be made about programming based on a child’s unique needs.

Eligible preschool children with disabilities are entitled to receive appropriate programs in the least restrictive environment. This may be difficult if a school district does not operate a preschool program of its own for children who *do not* have disabilities. It will be even more difficult for a school district which does not contract with nonpublic school preschool programs that serve all children in integrated settings. In such a situation, it will be challenging for a school district to provide services to young children with disabilities in the least restrictive environment. School districts may want to consider special contractual arrangements with Head Start and the Early Childhood Education Assistance Program (ECEAP), contracts with public or private preschool programs in the community, and other programs on elementary or secondary public school campuses.

An IEP must be developed and implemented by the date of a child’s third birthday.

School districts must provide appropriate programs in the least restrictive environment to 3- to 5-year-old children with disabilities.

School districts may be required to make therapists, special education teachers, paraeducators, and other educational specialists available to public and private preschool programs in the community where preschool students with disabilities attend, and they may be required to provide transportation services. Cooperation with ECEAP and Head Start programs in local communities is an effective way to meet the requirements of educating preschool children with disabilities in the least restrictive environment. ECEAP is a state-funded program that encourages the inclusion of children with disabilities in their programs. Head Start is a federally funded program that has requirements for educating preschool children with disabilities. While eligibility and income restrictions exist, Head Start is a viable program to consider for working out an interagency cooperative agreement to serve preschoolers with disabilities. It may be possible for school districts to establish a separate contract with a Head Start facility to serve Part B preschool children which is not subject to the federal income restrictions.

The provisions in the Americans with Disabilities Act will also aid school districts in their efforts to find private and public preschool programs in the community which can provide appropriate programs with some district support and meet the requirements of providing an educational program in the least restrictive environment.

Many school districts are also providing special education and related services at private child care centers. School district personnel provide services identified on an IEP to children at these child care sites if appropriate.

In addition to contracting with private preschools in the community or making special arrangements with Head Start/ECEAP programs, some school districts have found success placing preschool programs that provide special education services on elementary or high school campuses. Preschoolers are included in kindergarten, and sometimes pre-kindergarten, activities in elementary school campuses. Under staff supervisors, high schoolers make excellent caregivers and educators while learning from preschool-age children at the same time. These innovative programs show great promise for including preschool children with disabilities in a regular educational environment.

Requirements to place preschoolers in the least restrictive environment may mean school districts need to work with other preschool programs (e.g., Head Start, ECEAP).

Where parents and school districts have disagreements over the extent, duration, or content of preschool programs, formal due process is often not a good alternative. Special education litigation is a time-consuming process. While the due process rules generally require that a special education case be resolved within 45 days from the time the request for due process is filed, that timeline is almost never fully realized. Also, any appeals to a due process hearing decision by either party will take even longer. Because the child will attend preschool for a relatively short period of time, there is a significant likelihood that a 3- to 5-year-old may be out of the preschool program by the time that any conflict with the school district can be resolved in a formal proceeding. Mediation may be the most effective way to resolve a dispute in this area and should be seriously considered.

Under Section 504, preschool programs are treated separately in 34 CRS § 104.38. The requirements for preschoolers are different from those for elementary and secondary-aged students and they are *not* comparable. The obligation to provide a free and appropriate education, related services, transportation, residential placement, evaluation, placement in the least restrictive environment, and procedural safeguards only apply to school districts that operate a nondisabled preschool program. It is clear that less protection is available under Section 504 for preschool children with disabilities. Discriminatory practices, however, are barred by Section 504 and the regulations implementing the Americans with Disabilities Act. Preschool children with disabilities are protected by the ADA regulations which require a public entity to:

“make reasonable modifications in policies, practices, or procedures when ... necessary to avoid discrimination on the basis of disability, unless [it] can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”

Mediation may be the most effective way to resolve disputes between parents of preschoolers and school districts.

The ADA also prohibits the use of eligibility criteria that:

“screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying the service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”³⁵

School districts and parents should be aware of these regulations when providing services to and placing a child with a disability in a nonschool district-operated preschool program.

Private preschools must individually assess whether a preschooler with a disability needs reasonable accommodations.

Transition Services

“As used in this chapter, the term ‘transition services’ means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities. Some examples of appropriate post-school outcomes include:

- (a) Postsecondary education;
- (b) Integrated employment;
- (c) Supported employment;
- (d) Continuing and adult education;
- (e) Adult services; and
- (f) Independent living and/or community participation.”

WAC 392-172-060

“The coordinated set of activities shall be based upon the individual student needs, taking into account the student’s style preferences and interests, and shall include:

- (a) Functional vocational evaluation;
- (b) Instruction;
- (c) Vocational education/training;
- (d) Community experiences;
- (e) The development of employment and other post-school adult living objectives; and
- (f) Where appropriate, acquisition of daily living skills.”

WAC 392-172-060

The 1990 amendments to the IDEA demonstrate Congress’s recognition that special education should make a difference in the lives of students with disabilities—even after they leave school. For the past 20 years, most of the efforts on the part of schools have been put into complying with the basic mandates of finding all students with disabilities, developing IEPs for every student, and managing the multitude of services and programs that were required. During testimony for the 1995–1996 reauthorization of the IDEA, alarming statistics about the graduation rates, employment rates, and numbers of students with disabilities who enroll in post-secondary education programs brought into question whether the educational opportunities provided under the law were adequately preparing children with disabilities for economic survival and full community involvement. The underlying assumptions of the IDEA are that students with disabilities will advance into adult life living a more fulfilled,

The underlying assumptions of special education are that students with disabilities will develop skills that allow them to function as independent, productive, and fulfilled adults.

productive, and independent existence. Yet the current data doesn't support that young adult students with disabilities are achieving those goals. The overwhelming majority of students with disabilities are not successfully being included in their communities, staying employed, or living independently. Congress began to address this problem in 1990 by requiring schools to focus on its goals for these students through "transition services."

The IDEA now requires school districts to prepare students with disabilities for postschool existence by including in each student's IEP a statement of the transition services needed to support the student in his community. The transition planning process begins no later than the age of 16, or *at the age of 14 or younger*, if appropriate. In the state of Washington, transition services may be added to a child's IEP as early as elementary school if appropriate. Congress recognized that:

"... age 16 may be too late for many students, particularly those at risk of dropping out of school and those with the most severe disabilities. Even for those students who stay in school until age 18, many will need more than two years of transitional services. Students with disabilities are now dropping out of school before 16, feeling that the education system has little to offer them. Initiating services at a younger age will be critical."

The IDEA also requires school districts to coordinate with other agencies to arrange for the provision of whatever transition services are determined to be appropriate. For example, schools will have to work vigorously to include the Department of Social and Health Services (including the Division of Vocational Rehabilitation and the Division of Developmental Disabilities) and other agencies in IEP meetings and in planning and coordinating the transition services detailed in a student's IEP. School districts must invite to each student's IEP meeting representatives of any other agency that is likely to be responsible for providing or paying for transition services to each student. If a participating agency fails to provide agreed upon transition services contained in a student's IEP, the educational agency must initiate a meeting to identify alternative strategies to meet the transition objectives.

Transition planning may start as early as age 14 to ensure support to students with disabilities after leaving high school.

Congress emphasized that the student's preferences and interests must be considered when developing the student's transition plan. Students must be invited to all IEP meetings where transition services are discussed. If a student is unable to attend or participate in the IEP meeting in which the transition plan is developed, the school district must take other steps to ensure that the student's preferences and interests are expressed and considered in some other way.

Implications for Parents and Educators

A transition plan is more than just a set of objectives addressing employment. A viable transition plan must include more than traditional job training activities. It must address postsecondary or continuing education, integrated employment, adult services, independent living, and community participation. School districts need to devote time and effort into coordinating and obtaining these services, since the school district will not be released from the transition obligations set forth in the IEP simply because another agency fails to provide the services.

Extended School Year (ESY) Services

“Extended school year” refers to services that may be provided to some students with disabilities over a longer period of time than the traditional 180-day school calendar.

The questions that must be asked with regard to extended school year include:

- Who is eligible to receive extended school year services?
- What are regression and recoupment formulas? How do they apply to an individual child?
- What services should be provided?

When Congress originally enacted the IDEA, it clearly recognized that for some students with disabilities more time would be required to gain needed skills. The age ranges for services to students with disabilities were extended beyond traditional ages for mandatory school service. The IDEA requires services to children from 3 through 21 years of age and, with the Infants and Toddlers Amendment (or Part H of the IDEA), from birth to 3 as well. Consistent with that intention, services to some children with disabilities have been extended over the summer months to prevent loss of skills that would disrupt overall programming. Nowhere in the federal statute or regulations of the IDEA is there mention of “summer programming” or extended school year services. The requirement for the provision of these services has come from court decisions. If a child needs additional time in his or her school program to gain benefit from the educational services received during the course of the typical school year, then such services must be provided.

The 9th U.S. Circuit Court of Appeals has not fully explored the issue of extended school year programming. *Hoelt v. Tucson Unified School District* is one of the cases about extended school year that the circuit court has examined. The parents asked the circuit court to look at a school district policy about extended school year which provided for a uniform program for all students. The circuit court defined ESY as “educational programming which extends instruction beyond the conventional school year to prevent serious regression over the summer months.”³⁶ The 9th Circuit did not fully review this case because the parents had failed to complete all the required earlier legal proceedings. Nonetheless, the circuit

Some students with disabilities need services throughout the year to maintain progress and prevent regression.

court noted that *if* the school district’s policy was to provide the same amount of extended school year services to all students with disabilities and not provide ESY services based on individual need, such a policy would violate the IDEA’s requirements.³⁷

Other U.S. District Courts have examined the issue of extended school year more closely.

In *Armstrong v. Kline* (476 F. Supp. 583 [E.D. Pa. 1979]), the District Court said that:

“A handicapped student is entitled to an education program in excess of 180 days per year if regression caused by an interruption in educational programming, together with the student’s limited recoupment capacity, renders it impossible or unlikely that the student will attain the level of self-sufficiency and independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapping condition.”

The 3rd U.S. Circuit Court of Appeals reviewed the decision in the *Armstrong* case under the new name, *Battle v. Commonwealth of Pennsylvania* (629 F2d. 269 [3rd. Cir. 1980]). *Battle* was the first case to reach the circuit courts on the issue of extended school year.

In *Battle*, a lawsuit was brought on behalf of a class of students with disabilities that included two general groups: children who were severely and profoundly impaired by mental retardation and severely emotionally disturbed children. The State of Pennsylvania’s Department of Public Instruction had a regulatory policy limiting the school year to 180 days. The court decided that the act provided for more than the 180-day school year for some students and noted:

“Plaintiffs’ unique learning characteristics, together with the defendants’ 180 day rule, result in a never ending cycle of progress, interruption in programming, and regression, causing at best severely limited educational progress, and at worse, permanent and irreversible harm.”

Children with more severe disabilities may be likely to need extended school services. The need for ESY services must be considered for all students with disabilities.

The district in this case argued that it could not afford to provide extended school year services and should not be required to. The 3rd Circuit rejected the argument that costs are a legitimate reason for refusal to provide services that are determined to be necessary in order to provide an appropriate education to a child with a disability.

The decision in *Battle* acknowledged that without appropriate programming, some children would not be able to develop skills of independence and may, in fact, have shortened life expectancies. The court also allowed for the decision about extended school year to be based on future possibility of regression and recoupment concerns. That is, the actual experience of regression and insufficient recoupment was not necessary in order to make an argument for the need for extended school year services. Predictions of regression and recoupment problems based on professional expertise were relevant and must be considered.

Finally, the 3rd Circuit confirmed that extended school year services must be considered for each student with a disability:

“We believe the inflexibility of the defendants’ policy of refusing to provide more than 180 days of education to be incompatible with the Act’s emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, and establishing a reasonable program to attain those goals, the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child’s educational objectives. This, the Act will not permit.”

The next question for the courts to address involved the standards that would be used to determine whether a child required extended school year in order to benefit from education. How much regression over the summer months was necessary to support the need for extended school year services? Was some loss of skill by a child acceptable or would all regression have to be prevented?

The need for extended school year services can be predicted and does not have to be demonstrated.

The courts recognized that extended programming would not automatically be ordered where a student's regression was minimal. A child may regress in a way that is not significant or a child might catch up quickly in the fall, as most students do over the summer break, and soon be back on track. Schools must address the needs of children whose specific disabilities make them vulnerable to severe deterioration in the skills that they have attained. If this potential deterioration would place the previous year's benefit in question or hamper the start of the following year's programming and undermine the benefit anticipated in the IEP, then extended school year services are indicated. This rather technical evaluation of the student's regression during the absence of programming and recoupment of skills once programs resumed became known as the "regression/recoupment" formula. Some states even created complex mathematical formulas to determine when and under what circumstances extended school year must be offered.

In the case of *Alamo Heights v. State Board of Education* (790 F2d. 1152 [5th Cir. 1986]), the 5th U.S. Circuit Court of Appeals further explored the extent to which regression would have to be proven for extended school year to be required. Steven G. was born July 30, 1972. He lived with his mother, Beverly G., within the boundaries of the Alamo Heights Independent School District in Texas. Steven was born with cerebral dysplasia or hyperplasia, which is an abnormal development of the brain. Steven's hands and face were deformed. He had an unusual laxity in his joints, an uncoordinated gaze, a significant lack of muscle tone, and could walk only with assistance. He had been diagnosed as severely mentally retarded, had frequent tantrums, and could not communicate by oral expression. He communicated by pointing to pictures and symbols on a communication board.

For seven years prior to 1980 the Alamo Heights School District had offered a summer program to all special education students who were moderately or severely disabled. The decision to offer the program was made on the administrative level, as a matter of district policy, and any moderate to severely disabled child was eligible to attend. In the summer of 1980, when Steven would have been eligible for this program, the school district changed its policy and offered only a half-day one-month program without providing

Decisions for the need for extended school year must be made each year and on an individual basis.

Policies which address extended school year may violate the requirement to make decisions individually.

transportation. The decision to curtail the summer program was based on its cost and the apparent lack of interest on the part of teachers and eligible students in previous years.

During the summer of 1980, Steven stayed with a babysitter who had no training in special education. There was testimony that Steven's behavior deteriorated that summer and that he suffered regression in his ability to stand, point, and feed himself. The next summer, Mrs. G.'s request for summer services and transportation was refused by school officials without consultation with Steven's admission, review and dismissal (ARD) committee or with his teacher. Mrs. G. enrolled Steven in a private center for the summer and went forward to due process.

The circuit court in this case affirmed the U.S. District Court's decision to award extended school year services to Steven, examining the issue as follows:

"The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months."

The circuit court concluded that, "Without some kind of continuous, structured educational program during the summer months, Steven G. will regress in skills learned and knowledge gained in the previous 180 day academic year ... Although the Court has insufficient evidence to conclude that Steven G. would definitely suffer severe regression after a summer without such a program, neither can it conclude that he would not and there is evidence that shows that Steven G. has suffered more than the loss of skills in isolated instances, and that he has required recoupment time of more than several weeks after summers without continuous, structured programming."

The latest cases to address the issue of extended school year continue to confirm that it is not fair to make the child fail in order to get more services. In the 10th U.S. Circuit Court of Appeals, an ESY case called *Johnson v. Independent School District No. 4 of Bixby, Tulsa County, Oklahoma* (921 F2d 1022), has further broadened the considerations for extended school year services. The court noted:

All services on a child's IEP may be considered for extended school year.

“... [T]he regression-recoupment analysis is not the only measure used to determine the necessity of structured summer program ... the list of possible factors includes the degree of impairment, the degree of regression suffered by the child, the recovery time from this regression, the ability of the child’s parents to provide the educational structure at home, the child’s rate of progress, the child’s behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child’s curriculum which need continuous attention, the child’s vocational needs, and whether the requested service is extraordinary for the child’s condition, as opposed to an integral part of a program for those with the child’s condition. This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child’s IEP.”

Several factors should be considered when determining the need for extended school year.

Implications for Parents and School Districts

There is no doubt that some students with disabilities will need services that extend beyond the normal school year. Particularly, more severely disabled students may need services to prevent regression. All students with disabilities must be considered for the need for extended school year each year. The only real test of whether a child needs extended school year services is whether or not a child is receiving a free and appropriate public education. Each decision is determined individually, and what services to be provided are determined by each child’s needs. Our **Washington regulations** state:

“The length of the education program for special education students shall be at least as long as the education program for students who are not disabled in terms of both the number of school days in the general school year and the average number of hours per school day. If a special education student cannot attend school a full school day, the reason shall be documented in his or her records and addressed in the individualized education program. *The program length for a student during an extended school year shall be determined by the student’s individualized education program.*” (emphasis added)

WAC 392-172-210

There is no absolute standard or mathematical regression/recoupment formula that applies to every child in this area. Having a firm sense of what goals and objectives are important for a particular child and which are most critical to accomplish is the first step toward determining whether a child needs an extended school year program. The second step is determining whether the child is making reasonable progress toward those goals and whether a break in programming will jeopardize that progress. The courts have allowed for a “battle of the experts” in this area, and success in this area of the law will depend in large part on who is best able to demonstrate that they know the child’s individual educational and behavioral needs.

Make all extended school year decisions based on individual needs of the child and the IEP.

Out-of-District Placement

There may be instances when a child with a disability is educated outside of his or her local public school system. Generally, this happens for four reasons:

1. The local public school district in which a child with a disability resides determines that there are not adequate services within the school district to provide an appropriate educational program. In this situation, the district and the parent work together to determine first if there is another public school placement and, if not, a private placement which may meet the child's needs. The placing school district provides funding related to this type of a placement, just as they would if the placement were in the local public school.
2. A child with a disability is placed by his or her parents, with the school district's permission, in a school of the parent's choice that is not the child's neighborhood school. Parents may also request to place their child in another school district that is not the child's resident school district, with the receiving school district's permission. This is called placement by "choice". Under Washington State law, a parent may request to have her child educated in a public school that is different from the one the child would attend based upon where they live. The school board governing the district (and school) that a parent "chooses" or requests to have his child attend must approve the transfer. State and federal funds then follow the child to the school district the child attends by choice.
3. The child with a disability is placed by her parents in another school (usually a private school) unilaterally, without consent of the resident school district in order to provide the child an appropriate education, including special education and related needs. Often, parents in this situation feel the school district has not responded to their child's special and unique needs and on their own find another school which they believe meets those needs. Parents may request the local school district provide the costs related to a private, unilateral placement. In many instances, however, the local school district believes the program offered in the public school system is appropriate and a disagreement occurs. Unilateral parental placement is one of the most litigated areas of special education law.

OR

4. A parent places his child in a private school (sometimes a religious school) for personal reasons. In this case, the parent chooses a private placement but does not request the basic costs of educating his child, such as tuition. Often, however, the local school district is requested to pay for or assist with providing for the special education services and related services needed to educate the child in this setting. Such services are most often provided in public school buildings.

Consideration of each of these types of placement is critical to both parents and school districts. The ways in which parents and school districts address each of these situations is influenced by the individual needs of each child and the level of communication between the parent and school. Placements **outside** the local public school may need to occur in order to provide a student with a disability with a free appropriate public education. A better understanding of the obligations of the school district may help to prevent conflict. Each of these types of placements will be discussed below.

Cooperative Special Education Placements Between District and Parent

In the first situation, **when a public school district determines** it does not have the services within the district needed to appropriately educate a particular child with a disability, the school district may choose to contract with another public school district or public agency for the necessary services. If appropriate services can not be located in another school district they may contract with a private school (also referred to as a “nonpublic agency”) for the services.

In the state of Washington, WAC 392-172-222 requires that the private school or other public school district or agency that the public school district contracts with must complete application for approval by the State Board of Education. A list of approved public and private schools and other agencies is maintained by the Office of Superintendent of Public Instruction and is updated whenever additional schools or agencies become approved. The list is available to anyone

upon request. Private schools and other public agencies, even those out of the state, may complete application for nonpublic agency approval and should contact the Office of Superintendent of Public Instruction for application information.

When it is determined by the public school district that services from a nonpublic agency are necessary for a particular child, all of the costs associated with the provision of those services or placement must be paid for by the “sending” district or the district that is responsible for serving the child because the child resides within its boundaries. These costs may include expenses such as transportation, tuition, and nonmedical room and board if necessary. WAC 392-172-220 through 392-172-228 addresses this issue in more detail.

Special Educational Placements Made Through “Choice” Legislation Options

In response to nationwide parental pressure, many state legislatures have developed an option within the law for parents to send their children to the schools of their choosing, paid for by the same federal and state dollars that would fund a local public school placement by residence. Washington State law allows for “choice” placement requests in **public** school settings for *all* parents. Each district sets policies and procedures regarding “choice” as outlined in WAC 392-137-130 to 392-137-245.

To exercise a choice option after obtaining release from the resident district, a parent makes a formal request to the school district that governs the public school of choice that the parent desires. With approval, the parent may enroll her child in the out-of-residence public school of choice. For parents of students with disabilities, this option can be equally exercised. Antidiscrimination laws forbid school districts from denying approval for a parent’s school “choice” for reasons based on the child’s disability. State and federal **special education** and basic attendance dollars that would otherwise be provided to the school district of residence for the child are transferred to the school district where the parent enrolls the child by approval. Parents of children with disabilities should consider all of the services that can be offered by a school of choice *before applying for choice approval*, however. Schools that do not offer physical therapy, speech therapy, specialized classrooms, or other services that may be needed by the child

are not necessarily required to get those services simply because a student has been approved to attend by choice. Parents and school districts must work cooperatively in a choice situation, just as they would in a resident school situation, to ensure that the child's special educational needs are met and that a free appropriate public education is provided.

For students without disabilities whose parents exercise a choice option, transportation is the responsibility of the parent. However, for some students with disabilities, transportation is a related service provided for on the IEP. In these instances, a cooperative arrangement could be made between the parent and the two school districts to determine the extent and type of transportation required for the child to attend the school of choice. Otherwise, transportation as a related service is the responsibility of the "choice" school district.

Private Unilateral Parental Placements

A unilateral parental placement occurs when a **parent** places his child with a disability in a school, usually a private school, outside the local public school system **on his own**, without the cooperation or consent of the resident school district. In these situations, parents exercise a free-will choice to place their children in private schools. The parent believes that the school district is either implicitly or explicitly denying their child an appropriate education. The parent then finds a private school which he believes addresses the unique needs of the child. The parent takes *unilateral action* by removing his child from the local school district's attendance and places the child in a private program. The parent then requests the local district to pay all of the costs related to that placement. Several issues arise regarding the responsibilities of the local public school system when this type of placement occurs. Reimbursement or payment for a private school unilateral placement is by no means an entitlement. Parents are strongly cautioned to consider the financial risks involved in placing their child unilaterally in a private school and should be prepared to bear the burden of the financial costs of such a placement until a resolution with the local school district can occur.

From a legal perspective, school districts in this situation must demonstrate that the public school program that was provided to or offered to the student with a disability was appropriate and individually designed to meet the child's unique needs. Even if the parent "unreasonably" requests or makes a request "out of the blue" to have the local school district pay for a private unilateral placement, the school district must be prepared to show that the public school program offered is appropriate.

Parents must demonstrate why the public school program offering was or is *not* appropriate AND must also show that the private program being requested is appropriate in order to be entitled to the placement at public expense. From a legal perspective, the private or unilateral program cannot simply be *better* than the public school program. As long as the school district's program is considered appropriate, the school district is not required to pay for the private unilateral placement, even if the private placement is "better."

Private Parental Placements with Special Educational Support Provided by the Local Public School System

Some students with disabilities are placed in private schools by their parents solely for personal and/or religious reasons. Different from the private unilateral placement in which the parent requests full reimbursement for all costs in order to achieve FAPE, in these cases, parents place their child with a disability in a religious or private school for other reasons, and they do not expect the school district to pay for the tuition and transportation costs related to their choice. Often, the child's siblings attend the same private or religious school and the parent desires their child with a disability to attend the same school. While parents may be willing to pay for these educational costs, sometimes the chosen private or religious school cannot or does not provide all of the special education and related services needed by the child with a disability. Parents in these situations may request the local public school district to provide the **special education and related services** needed by their child.³⁸ When the issue of appropriateness is

eliminated, this parental choice raises the question: Are private school students entitled to publicly funded special education and related services? Since federal law clearly intends and requires states in their planning and service provision to provide students with disabilities in private school settings with equitable opportunities to participate,³⁹ this sort of a request is not unfair or unreasonable.⁴⁰

The IDEA requires that ALL children residing in the jurisdiction of the local educational agency who are disabled be “identified, located, and evaluated.” The statute also requires that “a practical method” be developed to determine which of those children identified are not currently receiving needed special education and related services (20 USC s. 1414). The Part B regulations clearly provide for full benefits when a student is placed in a private setting by the public educational agency in order to provide FAPE (34 CFR 300.401). However, there are separate regulations for a child who is placed privately by her parent when FAPE is not the issue:

“If a child with a disability has FAPE available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child’s education at the private school or facility. HOWEVER, the public agency *shall* make services available to the child as provided under Secs. 300.450–452.” (emphasis added)
34 CFR 300.403(a)

Sec. 300.452 states:

“Each LEA [local school district] *shall* provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.”

The regulations for parentally placed private school students do not require those children to receive a free appropriate public education, but rather state they are entitled to have

service “made available” to them. (34 CFR s. 300.403[a]). This section, coupled with the fact that the regulations contain a separate section for private school students and clearly distinguish parentally placed students from publicly placed students, has encouraged districts to believe that the provision of services is not meant to be equal, in compliance with U.S. Department of Education interpretations.

Many parents and their attorneys are turning to the EDGAR regulations (Educational Department General Administrative Regulations) to support their claims to special education and related services on the private school site. These regulations apply to all school districts. The EDGAR regulations require:

“... Students enrolled in private schools (be provided) with a genuine opportunity for equitable participation in accordance with (EDGAR regulations).”

34 CFR 76.651(a)(1)

EDGAR requires “consultation with representatives of private school students” to determine “which children shall receive benefits, how the child’s needs will be identified, what and how benefits will be provided, and how the project will be evaluated.” Procedures for devising an equitable method of allocating services must also be developed. EDGAR goes on to say that benefits must be provided to the selected private school students that are “comparable” in “quality, scope, and opportunity.” The “same” benefits must be provided to the selected private school students as are provided to students who have the same needs that are of the same grade, age level, attendance area, or group. “Different” benefits must be provided if needed by the private school students. School districts must spend the same average amount of program funds on private school students as are spent on public school students, or spend a different average amount if the average cost of meeting the needs of private school students is different from the average cost of meeting the needs of public school students. (34 CFR 76.651 through .655)

However, the Office of Special Education Programs (OSEP) has interpreted the phrase “genuine opportunity for equitable participation” to be something less than the full range of services offered to public school students. Even the right to a

hearing to argue this matter has been determined by OSEP to be unavailable under the IDEA when FAPE is not at stake.

School districts have relied on the First Amendment Establishment Clause of the Constitution to defend their denial of the full range of services to private school students placed in religious schools in particular. As well, the EDGAR regulations prohibit the use of IDEA funds for religious instruction (34 CFR 76.532). But the U.S. Supreme Court in *Zobrest v. Catalina Foothills School District* (509 U.S. 1 [1993]), has complicated this issue. In *Zobrest*, the Supreme Court determined that the Establishment Clause *does not prevent* a school district from providing a sign-language interpreter at a religious school.

Because difficulties arise when the private or religious school student with a disability needs special education and related services that cannot be easily separated from the everyday curriculum, some parents have been dissatisfied with the historical separation of services from the private or religious school campus. For instance, when a student with a disability requires an adapted curriculum, assistive technology, sign language interpretation, or an aide, it has been argued that under federal and state law these services could not be provided to the student with a disability.

Zobrest v. Catalina Foothills School District (509 U.S. 1 [1993])

Jim Zobrest lived in the Catalina Foothills School District in Arizona. He had been profoundly deaf since birth. Jim attended Grades 1 through 5 in a school for the deaf and Grades 6 through 8 in a public school operated by the Catalina School District. While he attended public school, the district furnished him with a sign-language interpreter. For religious reasons, and at their cost, Jim's parents privately enrolled him at Salpointe High School, a private Roman Catholic School operated by the Carmelite Order of the Catholic Church. Religious themes were reported throughout the classroom. Jim's parents requested that the district supply him with an interpreter at Salpointe, just as they had while Jim was in public school. The district referred the matter to the county attorney who concluded that providing an interpreter on the school's premises would violate the United States Constitution. The question was referred to the Arizona Attorney General who concurred in the county attorney's opinion. The district accordingly declined to provide the requested interpreter. The case made its way directly to U.S.

Zobrest v. Catalina
Foothills School
District

District Court with the agreement of both parties that administrative remedies would be a waste of time in this case. The Zobrests argued that the provision of interpreter services did not violate the Constitution's Establishment Clause separating church and state and that barring the services denied them their right to free exercise of their religion. The District Court, however, agreed with the school district noting "the interpreter would act as a conduit for the religious inculcation of Jim." The Zobrests appealed to the 9th U.S. Circuit Court of Appeals.

The 9th Circuit considered whether providing the interpreter to Jim would serve to advance religion by providing a "link" between government and religion. Would the implementation of this statute in such a way give impressionable youngsters the perception that the powers of government support the religious denomination operating the school? The circuit court observed that a public employee would be at Jim's side in each of his classes at the religious school, thus creating the appearance that government was a "joint sponsor" of the school's activities and teachings. Because the interpreter would be accompanying Jim to mass and classes in which teachers were encouraged to "assist students in experiencing how the presence of God is manifest," the interpreter would have the "primary effect" of advancing religion by conveying religious message and experience, which the circuit court found to be unacceptable.

What the U.S. Supreme Court had to balance was previous court decisions which have held that a statute might unconstitutionally infringe on a person's right to practice his religion under the Free Exercise Clause of the Constitution. If an individual is forced to choose between adhering to his religion and giving up state-provided benefits, or abandoning his religion to receive those benefits, such infringement of his religious freedom would exist, unless it could be justified by some compelling state interest. The Supreme Court reversed the 9th Circuit's decision by a narrow five to four majority in *Zobrest v. Catalina Foothills School District* (509 U.S. 1 [1993]). The Supreme Court determined that the Establishment Clause did not prevent a school district from providing a sign-language interpreter at a religious school.

Since the Zobrests had made a private decision to place their child at the school and were paying for tuition, the district-paid interpreter would only be there as a result of that decision. Since no district funds would "ever find their way

into the sectarian schools' coffers," the service was found to be neutral, and "in no way skewed towards religion." The court also found the services of the interpreter to be quite different from "that of a teacher or guidance counselor."

The *Zobrest* decision does not have much impact on the question of whether special education and related services must be provided onsite at parochial schools. While *Zobrest* expanded the scope of services that may permissibly occur in a religious education setting, the decision does not establish a definitive right to special education services in religious schools. The *Zobrest* decision only makes clear that school districts are not *prohibited* from providing certain special education services to private school services, but it does not require that they be provided.

Implications for Parents and School Districts

Students with disabilities may attend schools outside their local residence for a variety of reasons. How students become enrolled in programs outside their resident district and the costs associated with those placements tend to be the focus of discussion between parents and school districts. Outside placements may occur *cooperatively* between districts and parents, or *uncooperatively*. Outside placements which occur unilaterally by parents, without the cooperation of a school district, are one of the most litigated areas of special education. Both parents and school districts are encouraged to examine the reasons why such placements occur and work together as much as possible to minimize the occurrence of these expensive disputes.

In the situations where parents and school districts cooperate in making an out-of-district placement decision—whether the district controls the choice of school with the parents' input or the parents exercise their "choice" option—students are provided options and programs they would otherwise be unable to experience in their resident school district alone. This level of cooperation and communication between parents and school districts is desirable and effective in helping each student obtain an appropriate public education.

Unilateral placement occurs when parents decide to place their child in a private school because they are dissatisfied with the public placement can potentially be paid for by the local public school district. Parents have the right to ask for unilateral placements at public expense if the school district

has failed to provide an appropriate public education. But these requests are often litigated, and the costs of the unilateral placement are compounded by the costs—both emotional and financial—related to due process.

If a parent is successful in showing that the public school placement was not appropriate, and the private school placement is not simply “better,” but indeed appropriate, then the school district may be responsible for all of the costs of the unilateral placement, just as though it were a cooperative outside district placement. These types of conflicts will probably always exist between parents and school districts to some extent. However, school districts should take the extra steps to communicate with parents about any concerns or changes in behavior by the student. School districts should act quickly when it is discovered that a student is not making expected progress or significant changes in a student’s performance occur. Parents should work closely with a school district to communicate their concerns *before* removing their child from a public school setting since there are sometimes considerable financial costs associated with private placements. Reimbursement or payment for a private school unilateral placement is by no means an entitlement in every case.

The last category of out-of-district placements is the most discussed area at this time. When parents are not concerned about the appropriateness of the public school setting (for special education purposes), but simply choose to place their child in a private or religious school setting, the obligation of the public school system to provide special education services is complicated and unclear. The *Zobrest* decision does not have much impact on the question of whether special education and related services **must** be provided on-site at parochial or private schools. While *Zobrest* expanded the scope of services that may permissibly occur in a religious educational setting, the decision does not establish a definitive right to special education services in religious schools. The *Zobrest* decision only makes clear that school districts are not *prohibited* from providing certain special education services to private school services, but it does not *require* that they be provided.

OSEP acknowledges that the program benefits that a district provides for students voluntarily enrolled in private schools “must be comparable in quality, scope, and opportunity for

participation” to the benefits provided for students enrolled in public schools. But what does that mean? What are the limits of service provision, if any? OSEP has tried to clarify that school districts are not required to make the full range of services available to parentally placed students with disabilities, although districts must provide a “genuine opportunity for equitable participation” in programs carried out under the IDEA. Under what circumstances and which services are not included in the full range of services? In several cases now before the federal court of appeals in various circuits, the issue of a child’s “right” to services at a private or parochial school is being decided. This issue will be ripe for the U.S. Supreme Court in the future. The issues that need to be examined include (1) whether school districts are obligated to provide services to private school students at their chosen school site; (2) if so, does it matter *which* services are being requested? (3) Does it matter whether the school is religious or not? (4) what process does a school district need to follow to determine its obligation to serve a private school student? (5) when does the private school become responsible for providing aids and services as reasonable accommodations under Section 504 and the ADA?

There appears to be no absolute solution to the question of private school placements, whether it involves the provision of FAPE or simply a parental choice to educate their child with a disability in a private or religious school. School districts are cautioned not to develop absolute policies about providing (or not providing) services to students in private placements or reimbursing (or not reimbursing) private placements. The answer is no longer a simple “no” and school districts are encouraged to look practically at the situation in each case. Creative and equitable solutions may include a cost-benefit analysis. Will challenges in due process hearings and courts be more cost-saving in the end?

Discipline Issues

The proper disciplinary procedures to be used with children who are eligible for special education continues to be a controversial issue. The rules for discipline ARE different for disabled children than for nondisabled children. It is important to remember that ALL students, disabled and nondisabled, are entitled to certain rights before they can be excluded from school for any period of time.

As noted in a memorandum from the Office of Special Education Programs (OSEP Memorandum 95-16, 5/95), “For any student who misbehaves, a school should decide what action is most likely to correct the misconduct. For a disabled student, this decision may need to take into account the student’s disability.”

The legal cases which affect how to address this issue in Washington State are described below.

Honig v. Doe
484 U.S. 305, EHLR 559:231 (1988)

In *Honig*, Justice Brennan delivered an opinion on behalf of eight of the U.S. Supreme Court’s justices. Justice Brennan’s opinion included a description of the historical practices of school districts to remove children with disabilities from public school programs.

“Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes ... As the EHA’s legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by SCHOOLS ..., and one of the purposes of 1415(e)(3), therefore, was, to prevent SCHOOL officials from removing a child from the regular public school classroom pending completion of the review proceedings.”
(emphasis provided)

Disciplinary rules for children with disabilities are different.

Schools have historically excluded children with disabilities inappropriately.

John Doe was a special education student in the San Francisco Unified School District. John's IEP identified him as a "socially and physically awkward 17-year-old who experienced considerable difficulty controlling his impulses and anger." Among the goals set out in his IEP was "improvement in his ability to relate to peers and cope with frustrating situations without resorting to aggressive acts." Unfortunately, John's school career was filled with frustrating situations. His school records indicate that he had physical abnormalities, speech difficulties, and poor grooming habits which had made him the target of teasing and ridicule as early as his first grade. On November 6, 1980, John responded to the taunts of a fellow student in precisely the explosive and aggressive manner anticipated in his IEP. He assaulted the taunting student with sufficient force to leave abrasions on the child's neck and kicked out a school window while being escorted to the principal's office immediately afterwards. The principal suspended him for five days and the district student placement committee proposed permanent expulsion.

John Doe had a number of disabilities and a long history of behavioral incidents.

Jack Smith, another student in the same district, had been identified as being emotionally disturbed by the time he entered the second grade in 1976. School records noted that he could not control his verbal or physical outbursts and that he demonstrated severe disturbances in relationships with peers and adults. Jack had been physically and emotionally abused as a young child and even though he had above average intelligence, he was subject to academic and social difficulty as a result of his extreme hyperactivity and low self-esteem. By 1980, school records show that he was easily distracted, impulsive, and anxious. A half-day schedule was proposed. Despite that recommendation, at the beginning of the next school year, he was assigned to a full-day program and began misbehaving almost immediately. School officials reduced his program to the one-half day, warning Jack's grandparents, who were responsible for his care, that if he continued stealing, extorting money from fellow students, and making sexual comments to female classmates, they would expel him. On November 14, 1980, he was suspended and later expelled.

Jack Smith also had disabilities and a history of difficulties in school.

Attorneys for John and Jack appealed their expulsions directly to the U.S. District Court without an administrative due process request. The District Court judge issued a permanent injunction which prevented the school district from proceeding with the expulsions. The District Court determined that the proposed expulsions and indefinite suspensions of the two young men for conduct that was attributable to their disabilities deprived them of their congressionally mandated right to a free appropriate public education as well as their right to have that education provided according to the procedures set out in the IDEA. The District Court judge prohibited the district from taking any disciplinary action other than a two- or five-day suspension against any disabled child for any disability-related conduct. The 9th U.S. Circuit Court of Appeals agreed with the District Court with one exception: It allowed fixed suspensions of up to 30 days.

Both students were expelled or indefinitely suspended by their school.

Justice Brennan's opinion in this case confirmed the restriction against indefinite suspensions and expulsions of children with disabilities for behaviors related to their disability. The court's opinion modified the 9th Circuit's opinion by reducing the 30-day allowable suspension period to a maximum of *ten* school days.

The U.S. Supreme Court said students with disabilities could not be excluded for more than ten days.

9th Circuit Court Decisions

The courts continue to apply the reasoning in the Supreme Court's decision in *Honig* to other cases. The 9th Circuit has heard at least two additional cases which test the boundaries of the *Honig* decision.

In *Capistrano Unified School District v. Wartenberg* (59 F.3d 884, 22 IDELR 804 [9th Cir. 1995]), the court agreed with the original hearing officer's findings that the emotional and social problems experienced by this student could not be separated from the symptoms associated with his learning disability. The student's deficits in attention were found to substantially contribute to his behavioral problems. Although some of his behavior could be attributed to a diagnosed "conduct disorder," the court found that the student's behavior was related to his disability.

The 9th Circuit was unable to separate the learning disability from the emotional and behavioral issues.

In the case of *Parents of Student W. v. Puyallup School District No. 3* (F3d 1489, 21 IDELR 723 [9th Cir. 1994]), the 9th Circuit again allowed for a broader interpretation of the number of school days a school district can suspend a student, as it had originally ruled in *Honig v. Doe*. In *Parents of Student W.*, the circuit court dismissed a parent's challenge to the Puyallup School District's written suspension guidelines which permit a series of suspensions to exceed ten school days. The school district's guidelines allowed for suspensions up to 15 days per semester total, with monitoring and a multidisciplinary team (MDT) meeting after each suspension to determine the relationship between the behavior and the student's disability. The parent challenged the policy as written, not as it had been used with a particular student, and the circuit court found that the student could not demonstrate that the policy *as applied* had the effect of violating the student's rights. In making its decision the circuit court also appeared to rely on an Office for Civil Rights policy which provides that a series of suspension *may* amount to a change in placement.

The 9th Circuit allowed for longer suspensions than ten days with close monitoring and consideration by an MDT team.

Implications for Educators

Some educators are concerned that restricting their ability to suspend children with disabilities in excess of ten days, or to expel them, is an unfair and unequal limitation of the school's ability to respond to the student's inappropriate and potentially dangerous behavior. To attempt to address some of this concern, the Office of Special Education Programs (OSEP) in its May 1995 Memorandum provided a list of "steps" to take when educators believe action should be taken regarding a disabled student's behavior. OSEP first emphasized less formal ways to address a student's behavior:

"We ... believe that there are a number of positive steps that educators can take to address misconduct as soon as it appears to prevent the need for more drastic measures. For students whose disabilities have behavioral aspects, preventative measures such as behavior management plans ... teacher training initiatives in conflict management and behavior management strategies ... study carrels, time-outs, or other restrictions of privileges ... In addition, a disabled student may be suspended from school for up to ten school days. No prior determination of whether the misconduct was a manifestation of the student's

OSEP emphasizes preventative measures with disabled students and teaching training.

disability is required before any of the measures above can be implemented.”

When a school district believes further action is required, OSEP has recommended the school district take the following steps:

Steps to Take When a Student Is Being Considered for Suspension

1. A group of persons knowledgeable about the student’s disability must determine whether the student’s misconduct is a manifestation of his or her disability.
2. If this group determines that the behavior results from the disability, the student may not be expelled or suspended from school more than ten school days. Educators can still address the misconduct through instructional and/or related services, student and teacher training, and other measures so long as they are not inconsistent with the student’s IEP. As a last resort, change of placement procedures may be initiated. Schools also have the option of seeking a court order to remove the student or change the student’s placement if it believes that leaving the student in the current placement is dangerous and substantially likely to cause harm.
3. If this group determines that the behavior in question is not related or a manifestation of the student’s disability, then the student may be expelled or suspended according to applicable procedural safeguards. However, special educational services MUST be continued during the period of disciplinary removal. The Office of Special Education Programs has stated that even where the exclusion of a disabled student is made according to the rules, there can be no complete cessation of services during the expulsion period.

A group of persons knowledgeable about the student must be involved in all changes to a student’s program or placement.

Recent legislative amendments to the IDEA made by the Improving America’s Schools Act of 1994 do permit educators to make immediate interim changes of placement for up to 45 calendar days for students with disabilities who bring firearms to school. If the student’s parents request a due process

hearing, the student must remain in the interim placement until the completion of all proceedings, unless the parents and school agree on another placement.

The Gun-Free Schools Act of 1994 provides that “Each state ... shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school ... ” (20 USC Ch 70 Secs. 8921–8923) Under 18 USC 921(a)(3)—The term “firearm” means (a) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (b) the frame or receiver of any such weapon; (c) any firearm muffler or firearm silencer; or (d) any destructive device. Such term does not include an antique firearm.⁴¹

It is important to note that the 9th Circuit has stated when a school district determines that a student’s behavior is not related to a disability, expulsion may occur as it would for any other student.⁴² However, OSEP has consistently taken the position that the right to receive special education and related services may never be discontinued as long as a student remains eligible. The result of this conflict tends to lead to those students whose disabilities are “separable” from their behavior receiving special educational services in their home. Both school districts and parents struggle with the mixed messages that exist in this area.

Implications for Parents

Parents are often painfully aware that the disabilities their children experience can include challenging behaviors and actions that test the limits of an adult’s patience and may place the child or others in danger. Although these behaviors may be predictable, they are often not understood or easily addressed. Some behaviors can be “ignored” under certain circumstances, but at times a child with a disability has disruptive or harmful behaviors that require attention and action to protect the child, other people, or property in the educational setting.

A 45-day interim placement is allowed for a student who brings a firearm to school.

Special education services may never be discontinued so long as a student remains eligible.

The school district has an obligation to provide a safe learning environment for all of the children it educates. Districts must balance this obligation with the understanding that some behaviors may be a component of a child's disability. Districts must recognize that treating the child in the same way another child without a disability would be treated for the same behavior would be unfair and discriminatory. The courts have supported this "different treatment."

Parents should work closely with school district personnel to identify specific behaviors that may be predictable, identify situations when behaviors are more likely to occur, and strategize ways to anticipate and positively address the behavior when it occurs. A behavior plan should be developed and included in the IEP. Any ongoing strategies for dealing with behavior should be agreed to ahead of time in an IEP meeting and reviewed for effectiveness regularly. The goals for addressing the behavior should be clear, whether it is to develop, maintain or increase the frequency or type of appropriate behavior, or decrease the frequency or type of inappropriate behavior. The "function" of some behaviors may also need to be recognized. Sometimes behavior is the only way a child with a disability can communicate. The task of changing behavior without recognizing its possible communicative value may frustrate everyone involved with the child and potentially intensify the behavior. Behavior change should also be carried out with respect and the long-term consideration for the child with a disability.

A major issue in the area of discipline, sometimes inappropriately characterized as a "behavior modification tool," has been the use of "aversive" interventions. The most recent amendments to our Washington State special education regulations address proper and improper use of aversive behavior modification techniques and when and under what circumstances they may be properly applied. **WAC 392-172-388 through 392-172-398** defines aversive therapy and its forms, requirements for provision in the IEP, and a parent complaint process. The WAC reads in part:

"The purpose of [this regulation] is to assure that students with a disabling condition are safeguarded against the use and misuse of various forms of aversive therapy ... Aversive therapy, to the extent permitted, shall only be used as a last resort. Positive interventions shall be attempted by the district and described in the individualized education program

A behavior plan as part of the IEP may help educators anticipate behavior and address the behavior in a positive way.

All aversive therapy used with a student must be written in the IEP and should be reviewed regularly.

prior to the use of aversive therapy.”
(emphasis added)

Parents of children who experience difficult behaviors, particularly those children who are labeled as having pervasive developmental disability, autism, or related disabilities should pay particular attention to these regulations. Behavior modification technology has undergone extremely rapid change and development in the last ten years. While many educators continue to educate themselves with the latest changes in this area, some educators have not received adequate or current training in the application of effective and positive methods of behavioral intervention.

The school district’s authority to suspend or expel students whose behavior is determined to be unacceptable by the district remains an extremely controversial topic. The IDEA is currently subject to intense congressional scrutiny as part of the process of reauthorizing certain portions of the act. The outcome of the congressional debate over this issue is not yet known. However, it should be pointed out that even if Congress creates a provision by which children with disabilities can be suspended or expelled for behavior that is related to their disability, it is most likely that the courts will be asked to intervene. This issue is likely to be the most difficult special education legal question for the next several years. It is particularly unfortunate that Congress is engaging in the difficult debate over discipline at the same time that vigorous educational research is providing us with clearer answers and new methods for dealing with difficult behaviors within the context of the public school. New educational technology which involves analyzing the purpose of behavior and dealing with the conditions that create behavioral outbursts before the outbursts occur are demonstrating positive results.

When to discipline students with disabilities and how to fairly discipline them continues to be a challenge for both parents and school districts.

What Happens When Disagreements Occur?

Students are best served when parents and educators work together. Genuine collaboration increases the likelihood that the education programs and services provided are appropriate, increases parent and educator satisfaction with the program, and strengthens the relationship between home and school.

Sometimes parents and educators have different opinions about how best to serve a student with disabilities. Left unresolved, these differences in opinion can lead to serious conflicts which are costly in terms of time, money, stress, relationships, and frustration. All too often, the needs of the student are overlooked as the parents and educators struggle to convince each other of their position.

In this chapter a range of options that parents and educators can select in their efforts to resolve conflicts over the unique needs of children with disabilities will be presented. Ranging from the informal to the formal, the options include:

- Collaborative problem solving: The participants work together to solve the problem.
- Mediation: The participants invite a neutral third party to help them resolve the problem.
- Citizen's complaints: The state educational agency (OSPI) makes a determination about whether a district has violated special education laws (IDEA, Part B and corresponding state laws only).
- Office for Civil Rights (OCR): The OCR makes a determination about whether a district has discriminated against a person based on a disability (Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990).
- Due process hearing: An independent third party hears evidence and arguments between parties in a formal procedure and renders conclusions and findings based on legal requirements.

A few words about conflict:

Conflicts arise when our *interaction* with another person lead us to develop a *perception* of incompatible difference or a threat. On the basis of that perception, we then *choose to respond* in a manner which will either help resolve the conflict or will make the conflict worse. Here are two hypothetical situations:

Example 1:

- **Interaction:** In the past two days, I've left three messages on the parent's recorder, asking him to please call to discuss his child's difficulty in my reading class.
- **Perception A:** Since no one has returned my call, I guess they just don't care about education, they don't like me, and we've got a conflict. No wonder this student is having difficulty.
- **Response A:** Do nothing. When report cards come out in a month the parent will get the message.
- **Perception B:** That's strange. We've worked together in the past. I wonder why the parent isn't returning my call. I really want to know what's going on for this student.
- **Response B:** I'll verify the phone number and try again. I'll also send a note home with the student, inviting the parent to call to discuss ways we can work together to help ensure the student's success.

Example 2:

- **Interaction:** Your child has come home in tears, complaining about not being allowed to go to the zoo tomorrow. You call the school and the teacher says, "There's no way that we will include your student in the field trip. It's not safe!"
- **Perception A:** Once again, my child is not being included in a class activity. Her civil rights are being violated. It's not fair. They don't care about kids who are different.
- **Response A:** You are denying my student's rights. How dare you imply she is dangerous?
- **Perception B:** This is so disappointing. She really wants to go to the zoo. I wonder what's going on.
- **Response B:** When you say, it's not safe, what do you mean?

Based on their perception of the situation and intent of the other person, the respondents chose very different responses. When the perception was negative, the response (A) probably intensified the conflict. When the perception was curious and nonjudging, the response (B) probably served to clarify the situation and open the way to the parties working together to solve the problem.

We can choose how we interpret information and situations. We can choose how we respond to information and situations. The choice is ours.

COLLABORATIVE PROBLEM SOLVING

When parents and educators work together:

- They get the whole picture by bringing together multiple perspectives and understandings of the needs of the student.
- They acknowledge that no one party (parent or educators) can provide adequate services in isolation.
- They get better ideas.
- There is coordination and consistency between home and school.
- They avoid duplication of efforts.
- The costs of conflict (dollars, time, and human) are reduced.
- The student benefits because the adults are focusing on the needs of the student, not on the conflict.

Some hints for working together:

1. Set a positive tone:
 - Listen carefully.
 - Seek a positive, ongoing relationship.
 - Define the problem as mutual.
 - Openly request information.
 - Remain focused on the needs of the student.
 - Clarify the meaning of terms and statements.

2. Define the issues:

- In broad terms, what is the problem we are trying to solve?
- What are my needs or concerns?
- What are your needs or concerns?
- What interests might we have in common?
- What information might we need before we meet?
- What happens for me if there is no agreement? For you?
- What is our need for an ongoing relationship?

3. Use language that is collaborative:

- Let's see if I understand you ...
- What's your point of view on ...
- What are your reasons?
- How do you see it?
- Here's my concern ...
- My hope is ...
- Let's focus on (student) ...

Make sure you understand the other person's perspective:

- What is not working well for the student?
- How would the student benefit from a proposed action?
- On what items are we in agreement?
- What criteria shall we use to evaluate the options?

Develop options that work for both of you:

- Divide the problem into smaller parts.
- Divide the solution into smaller steps.
- Try new approaches.
- Evaluate smaller increments of the plan.
- Discuss future communication and problem solving.
- If agreement isn't forthcoming:
 - Agree to take a break and return at a specified time.
 - Gather additional information.

Bring specificity to your agreement:

- Review the agreement as a whole: Does it make sense?
- Make no assumptions! Who is going to do what, when, and how?
- Congratulate yourselves for your hard work.

Follow through:

- Be trustworthy. Uphold your end of the agreement.
- Maintain your communication. If the situation changes, get together to talk.

SPECIAL EDUCATION MEDIATION

When parents and school personnel disagree about the educational program for a student with special needs, either party may request a mediation to help them resolve their dispute. Mediation is a voluntary, optional alternative to a due process hearing. Funded by the Office of Superintendent of Public Instruction (OSPI), mediation is available statewide at no charge to parents or districts.

What is mediation? Mediation is a form of dispute resolution in which an impartial mediator assists disputing parties in a collaborative problem-solving process. Mediators help parents and school personnel resolve conflicts, clarify issues, and develop mutually acceptable agreements to best meet the educational needs of the student. A mediation session is more structured than a parent/school conference and less formal than a due process hearing.

How does the process work? Mediation may be requested by either party by calling the program administrators, Sound Options Mediation and Training Group, L.L.C. The intake coordinator will work with the parties to identify the necessary participants and determine a convenient date, time, and location for the mediation. Written confirmation will be sent to the participants and a mediator will be assigned to the case.

During the mediation, the mediator provides both parties the opportunity to present their views of the conflict. The mediator does not make decisions or settle the dispute. The mediator helps the parties develop solutions which they believe are best for the student. The agreements reached by the parties are documented in writing and signed by all

parties.

Is the agreement binding? To ensure the enforceability of the agreement, the parties are encouraged to incorporate the components into the student's individualized education program (IEP).

Mediation in special education can:

- Resolve disagreements concerning identification, evaluation, or education placement of a student.
- Provide participants with uninterrupted opportunities to present their point of view.
- Encourage mutual problem-solving efforts.
- Promote positive working relationships between parents and educators.
- Help parents and educators focus on what they have in common—the student's needs—rather than on issues that divide them.

Where are the mediations held? Special education mediation services are available throughout Washington State at locations that are mutually agreeable to parents and school personnel. Potential meeting places include schools, school district offices, and libraries.

Who are the mediators? In Washington State, 20 people are currently trained and serving as special education mediators. All mediators in the program have:

- Received training in state and federal laws and regulations related to the education of students with disabilities.
- Experience and training in conflict resolution, problem solving, and communication for the effective resolution of education disputes.

Mediators are assigned in consideration of the issues in dispute, special needs (e.g., language), geographic proximity, and the need to assure objectivity and neutrality.

How long does mediation take? Because special education issues are often complex, the mediations have averaged seven to nine hours in length. Accordingly, it is essential that participants set aside a full day for the mediation.

Is it successful? Agreement on all or part of the issues has

been reached in 90 percent of the cases to date. In addition, parents, educators, and advocates are finding that mediation helps them develop more productive levels of understanding between the participants. “We all have a better understanding of each other’s point of view... the process is friendlier and more supportive of parents and districts.”

Is mediation required? No. Federal regulations and OSPI Special Education recognize the value of mediation as a conflict resolution procedure and as an alternative to a due process hearing. Mediation is voluntary for both parents and school districts. Your decision to participate or to not participate in mediation does not restrict future legal action you may take.

What about investigations by the Office for Civil Rights? It is the policy of the Office for Civil Rights (OCR) to suspend its investigation pending the outcome of the mediation. Complainants may reactivate an investigation at the completion of the mediation.

What about due process hearings? Mediation is a voluntary, optional alternative to a due process hearing. Mediation may occur prior to or concurrent with a request for a due process hearing. Participation in mediation does not interfere with either the right to a due process hearing or with due process timelines.

THE CITIZEN COMPLAINT PROCESS

An individual has the right to file a citizen complaint. The citizen complaint process is described below.

- An individual or organization sends OSPI a written, signed complaint stating that a particular district has not followed special education laws. The complaint must include the specific facts that are the basis for the complaint.
- OSPI sends the district superintendent and the complainant letters stating that a complaint has been received, explaining the process, and asking the district to respond. Mediation is offered.

- After OSPI receives the district's response, staff decide if there is sufficient information from which to determine whether any of the applicable special education laws were not followed. If there is not enough information, OSPI staff will visit the district.
- Within 60 days of receiving the complaint, unless the timeline has been extended, OSPI issues a final decision.
- Either the complainant or the district may ask the Secretary to the U.S. Department of Education to review OSPI's final decision.

THE OFFICE FOR CIVIL RIGHTS COMPLAINT PROCESS

Who can file: Anyone who believes there has been an act of discrimination on the basis of disability against any person or group in a program receiving financial assistance from the U.S. Department of Education may file a complaint with the OCR.

Timeliness: A complaint must be filed within 180 calendar days of the date of the alleged discrimination, unless the time for filing is extended by OCR for good cause.

Institutional grievance procedures: Prior to filing a complaint with OCR against an institution, a potential complainant may want to find out about the institution's grievance process and use that process to have the complaint resolved. A complainant is not required by law to use the institutional grievance process before filing a complaint with OCR. If a complainant used an institutional grievance process and also chooses to file the complaint with OCR, the complaint must be filed within 60 days after the last act of the institutional grievance process.

How to file a complaint: Anyone wishing to file a formal complaint with OCR should submit in writing the following information in a letter or on the discrimination complaint form available from OCR regional offices:

- Your name and address (telephone number where you can be reached during business hours is helpful, but not required).
- A general description of the person(s) or class of persons injured by the alleged discrimination act(s). (Names of the injured person(s) are not required.)

- The name and location of the institution that committed the alleged discriminatory act(s).
- A description of the alleged discriminatory act(s) in sufficient detail to enable OCR to understand what occurred, when it occurred, and the basis for the alleged discrimination (disability).

A complaint should be sent to the regional office that serves the state in which the discrimination allegedly occurred. For Washington State, complaints should be addressed to:

**Office for Civil Rights, Region X
U.S. Department of Education
915 Second Avenue
Room 3310, 10-9010
Seattle, WA 98174-1099**

Retaliation: A person may not retaliate against any person who has made a complaint, testified, assisted, or participated in an investigation or proceeding under this statute.

DUE PROCESS HEARING

Who can file a request for a due process hearing? The parent (or an adult student) or a school district may initiate a hearing.

What can be the subject of a hearing? The identification, evaluation, and delivery of educational services to the student. When parents request an independent educational evaluation, a district may initiate a hearing to show that its evaluation of a student is appropriate.

How is a hearing requested? A hearing request must be in writing, specify the district against which it is filed, explain the concerns of the parent, and be mailed or provided directly to the Office of Superintendent of Public Instruction, Legal Services, Old Capitol Building, PO Box 47200, Olympia, WA 98504-7200. If the district is requesting the hearing, a copy of the request must be transmitted to the parent.

Administrative due process hearings are a formal, legal proceeding.

What happens then? The hearing officer will notify the parties as to the date, time, and place of the hearing; the issues to be addressed at the hearing; and the rights of both parties. The hearing officer will also provide a list of free and/or low-cost attorneys who may assist the parents in a hearing.

How long does the process take? Hearings must be completed within 45 days following the date the OSPI receives the request for a hearing. A hearing officer may grant specific extensions of time.

Who conducts hearings? Hearings are conducted by administrative law judges appointed by the Office of Administrative Hearings under contract with OSPI. Each hearing shall be conducted at a time and place which is reasonably convenient to the parents(s) and student involved.

What are the rights of parties to a hearing?

- Be accompanied and advised by persons with special knowledge of the problems of special education students.
- Be advised and/or represented by an attorney.
- Present evidence, including the opinion(s) of qualified experts, confront, cross-examine, and compel the attendance of witnesses.
- Prohibit the introduction of any evidence at the hearing that has not been at least five days before the hearing.
- Obtain a written or electronic verbatim record of the hearing at no cost, written findings of fact, conclusions of law, and judgments.
- Parents may have the student present and may request that the hearing be open to the public.

What happens if either party disagrees with the findings of the hearing? Any party aggrieved by the findings and decision made in a hearing has the right to bring a civil action in either state or federal court.

A hearing is conducted according to administrators rules and an administrative law judge makes a final decision.

Can I get attorney fees? Parents can recover attorney fees if they prevail in the due process hearing.

What happens to the student during a hearing? During the hearing unless the school district and the parent(s) of the student agree otherwise, the student remains in the educational program he or she was in at the time the hearing request was made.

Administrative due process hearings are the primary mechanism for formally resolving disputes about an individual child's special education program. Any issues related to the child's identification, evaluation, IEP, or placement can be addressed in an administrative hearing. These hearings provide for a nonbiased hearing officer, also referred to as an administrative law judge (ALJ), to listen to both sides and make an impartial decision based on the facts of the situation and the law. An administrative hearing is required to take place before any further "court action" can occur. In the state of Washington, if either party does not agree with the decision by the administrative law judge, they can appeal the decision to either state or federal district court. Hearings are not intended to be as formal as a court proceeding, but depending on the ALJ and the attorneys involved in the hearing, it can become very much like a trial in court.

Rules similar to those required in a court proceeding must be followed in an administrative due process hearing, but not all of the rules that apply in court apply to administrative hearings. The ALJ cannot be an employee of a school district or have any personal or professional interest that would compromise her ability to be objective. "Evidence" is presented by both parties and "witnesses" testify under oath. Witnesses can be confronted and cross-examined. Any evidence that is not disclosed to the other party at least five days before the hearing can be excluded or prohibited. The hearing will be recorded and transcriptions of the hearing, either in writing or on tape, can be provided to either party upon request. Both parties may be represented by an attorney and either party can be accompanied and advised by individuals with special knowledge about the needs of individuals with disabilities. (Both parties have the right to compel witnesses to attend the hearing and may depose witnesses prior to the hearing.)

Parents may collect attorney fees if they succeed; school districts must pay for their own costs.

Once the ALJ has listened to both sides of the case, a written decision is made. The ALJ will specify what issues are to be resolved by the hearing, what the facts of the case are, what relevant laws apply to the situation, and what the ALJ's conclusions are, based on the law. In cases when the parent's are the "prevailing party" or successful in hearing, attorney's fees may be awarded, but not by the ALJ. The prevailing party is usually identified in the ALJ's decision, but a separate action in federal court may be necessary to obtain specific awards of reasonable attorney's fees. School districts are never awarded attorney's fees in IDEA cases.

When an administrative due process hearing is requested, the student with a disability is required to remain in the same educational placement they were in when the request for hearing was made, unless there is agreement between the parents and the school district to place the child in a different setting. This requirement is referred to as the "stay put" rule. Stay put applies to all situations, including graduation and disciplinary actions such as suspension or expulsion. Parents who have the resources to do so may change the child's educational placement to an alternative setting such as a private school at their own expense if they desire. But parents who remove their child from the "then current" educational placement and put their child in a private school setting may not be reimbursed for those costs if the school's placement is determined to be appropriate. Unilateral private school placements made by parents prior to the hearing are not paid for by the school district during the hearing process. Unless by agreement, only private school placements made *by the school district* prior to the hearing request continue to be paid during the pendency of a hearing decision.

An administrative hearing must be completed and the ALJ's final decision must be made in writing to both parties *no later than 45 days* after the hearing request is received by the Office of Superintendent of Public Instruction, unless an extension of time is granted. In Washington State, parents who wish to request an administrative due process hearing must make their request in writing to the Office of Superintendent of Public Instruction. School districts may also initiate a hearing. Information about any free or low-cost legal services available in the state must be provided to the parents upon request or if a school district initiates the hearing.

A hearing decision should be issued no later than 45 days after the request for hearing.

Who exercises a child's right to due process?

Throughout this material, we have referred to provisions in statute, regulations, and case law that establish certain "rights" on behalf of children with disabilities. By legal definition, the majority of rights available to an individual who is under 18 years of age, "a child," must be exercised on that child's behalf by the child's parent. If the child has no parent, then a court can appoint a guardian on behalf of a child to exercise the child's rights. If the child is under the custody of the county juvenile court, the child's rights can be exercised through an advocate appointed by the court. The advocate may be designated as a guardian ad litem, and in some cases a foster parent may be appointed on behalf of a child.

Both parents and school districts must always keep in mind that the rights established in the law are solely for the benefit of the child. When a child reaches age 18, the child's parents no longer have the automatic right to advocate on the child's behalf. The child, now an adult, advocates on his own behalf unless his disability is determined by a court to be so severe that the appointment of a guardian is necessary.

There are some instances where educational decisions must be made on behalf of a child with a disability and no parent can be identified, even after reasonable efforts to discover the whereabouts of the parent. Children in the custody of the state also require someone to act in the role of "parent." The IDEA requires that a "surrogate" parent be assigned to every child in these situations to represent the child in all matters relating to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child. A surrogate parent must have no interest that conflicts with the interest of the child he or she represents and must have knowledge and skills that ensure adequate representation of the child. Surrogate parents may not be employees of the school district, although otherwise qualified individuals may be paid by school districts to act as a surrogate parent.

Surrogate parents are not required when family members, such as a grandparent or stepparent with whom the child lives, acts in the place of a parent or when a guardian has been assigned to the child by a court. Surrogate parents are *required* in all cases where a child is a ward of the state. Case

Parents exercise the educational rights of their child.

A surrogate parent must be assigned to all children with disabilities in state custody or for whom a parent cannot be identified.

Surrogate parents are assigned and trained by the school district.

workers, social workers, and other social services agency personnel are not allowed to act as surrogate parent or make educational decisions for a child with a disability unless specifically ordered by a court. Foster parents can be considered by a school district as appropriate for assignment as a child's surrogate parent so long as the foster parent has no interests that conflict with the child. School districts must actively train and recruit surrogate parents if necessary to meet the requirements of the IDEA. School districts make the decision as to whom to assign as surrogate parent for a child with disability who requires one, but most ensure that the individual assigned meets all of the requirements stated above. School districts are encouraged to work closely with the state educational agency in developing appropriate policies and training for surrogate parents.

What remedies are available to a child with a disability?:

The IDEA, Section 504, and the Americans with Disabilities Act all allow for such relief as "appropriate." Corrections may be as simple as modifying an IEP, implementing an existing IEP that has not been carried out, or providing for a particular placement or related service. Other ways school districts may be required to "make-up" for failure to provide appropriate services or for discriminatory actions include compensatory educational services and reimbursement for special education and related services that have been paid for by parents. Most recently, the statutes which apply to children with disabilities have also been interpreted to allow for "damages" or monetary awards (other than reimbursement or compensatory education) under certain serious circumstances.

The U.S. Supreme Court approved retroactive reimbursement to parents in the *Town of Burlington* case, allowing for the costs of obtaining an appropriate education when the school system has failed to provide one. Transportation costs, summer programming, tutoring, and even interest on educational loans used to finance tuition costs have all been ordered reimbursed in cases where parents have been found to have paid for services that should have been provided by school districts. Awards of additional special education and/or related services during summer vacation, other school breaks, and after regular school hours have also occurred to make up for time and services a school system has failed to provide. In some cases, courts have even extended the period of time of attendance

School districts may have to "make-up" services not provided to a child with a disability.

Private school and related costs may be required for some students to receive an appropriate education at public expense.

in school beyond the age of 21 to compensate students for educational time lost.

IMPLICATIONS FOR PARENTS AND SCHOOL DISTRICTS

Parents and school districts may have disagreements over the education their children should receive. For parents of children with disabilities, the issues can become even more basic. Learning to move, to communicate, to lift a spoon, to write their name, and to make friends are tasks of every day life that many take for granted their children will master. Due process hearings are sometimes a necessary way for parents to ensure their child receives the special education services required to achieve these skills. But options to due process hearings exist and several steps should be taken to resolve the differences between a school district and parent before a due process hearing is requested.

Clear communication with the school, compromise and negotiation, mediation, or assistance from a state agency should all be considered seriously before a parent contacts a lawyer or requests a hearing. The option of a “second opinion” through an independent evaluation may also be an appropriate way to resolve some specific issues. The financial and emotional costs of a due process hearing should not be taken lightly or ignored out of frustration with a situation.

Ultimately, we all have to learn, live, and work together. At what pace, in what way, and in what social situations are the questions parents of children with disabilities and educators continue to address for each individual child. Parents have the best interests of their child at heart. Educators are committed to quality education for each child. Educators must recognize the struggles, secrets, and lessons each parent brings about their child. Educators must balance the tolls and costs of educating many children and meet the needs of all of the children. Parents must acknowledge the collective experience of those who see thousands of children learn to talk, play, and run through their doors. While some disagreements cannot be resolved without assistance, with open communication, a resolve to compromise, and a never-wavering focus on the needs of the child, the vast majority of special education “legal challenges” can be eliminated.

¹ *Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972).

² *Mills v. Board of Education*, 348 F. Supp. 866 (D.C. 1972).

³ *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.

⁴ *Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972).

⁵ *Mills v. Board of Education*, 348 F. Supp. 866 (D.C. 1972).

⁶ *School Funding I, Seattle School District v. State of Washington*, 90 Wn.2d 476, 585 P.2d 71 (1978); *School Funding II, Seattle School District, et al. v. State of Washington*, Thurston County Cause No. 81-2-1713-1 (1983); *Washington State Special Education Coalition v. State of Washington*, Thurston County Cause No. 85-2-00543-8 (1988).

⁷ 34 CFR 104.3(j).

⁸ *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982).

⁹ 20 USC §1401.

¹⁰ *Rowley*, *ibid.*

¹¹ 34 CFR §104.33(b).

¹² 34 CFR §104.33(b)(1)(ii).

¹³ 34 CFR §104.4.

¹⁴ 20 U.S.C. §1401 (a)(16), (A) and (B).

¹⁵ 34 CFR §300.13 (b)(3).

¹⁶ *Inquiry of Goodman*, 16 EHLR 1317 (OSEP 8/10/90); 20 USC § 1401(a)(25) and (26).

¹⁷ *Seattle School District v. B. S.*, 24 IDELR 68 (1996).

¹⁸ *Union School District v. Smith*, 15 F. 3d 1519, 20 IDELR 987 (9th Cir. 1994), *cert denied*, 115 S. Ct. 428 (1994).

¹⁹ 34 CFR § 300.351.

²⁰ 34 CFR § 300.534 (b); 34 CFR § 104.35(a); as interpreted by OCR in 16 EHLR 86; 16 EHLR 668. Poor academic performance should trigger an evaluation; inappropriate and/or disruptive behavior should trigger evaluation.

²¹ EHLR 353:296 (1989).

²² *Honig v. Doe*, 484 U.S. 305, EHLR 559:231 (1988).

²³ *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479, 18 IDELR 1019 (9th Cir. 1992).

²⁴ 20 U.S.C. § 1401(a)(18).

²⁵ *Community Unit School District #300* EHLR 353:296.

²⁶ See *Clovis*, 903 F.2d at 645; *Max M.* 629 F. Supp. at 1519; *T.G. v. Board of Piscataway*, 576 F. Supp. 420, 423 (D.N.J. 1983) *aff'd*, 738 F. 2d 420 (3rd Cir.), *cert denied*, 469 U.S. 1086; *Papacoda*, 528 F. Supp. at 72; *Anrig* 651 F. Supp. at 430-431.

²⁷ 34 CFR §300.5(b).

²⁸ *Clovis School District v. Office of Administrative Hearings*, 903 F.2d 635, 16 EHLR 944 (9th Cir. 1990).

²⁹ *Seattle School District No.1 v. B.S.*, 24 IDELR 68 (1996).

³⁰ *Taylor v. Honig*, 910 F.2d 627, 16 EHLR 1138 (9th Cir. 1990).

³¹ EDLAW Briefing Paper Vol. II, Issues 9–10, March–April 1993, page 5.

³² *Extraordinary Children, Extraordinary Lives*, Reed Martin, J.D. Research Press, 1991.

³³ “Obtaining Appropriate Educational Services for Three to Five-Year-Old Children with Disabilities,” by Eileen Ordovery, Center for Law and Education, 6/92.

³⁴ *Timothy W. v. Rochester School District*, 875 F2d 954, 973 (1st Cir.), *cert. denied*, 110 S.Ct. 519 (1989). See also 20 USC s. 1413 (a)(3)(B); 34 CFR 300.385.

³⁵ 28 CFR s.35.130 (b)(8)

³⁶ *Hoelt v. Tucson Unified School District*, 19 IDELR 1, (9th Cir. 1992).

³⁷ The court cited the decision in *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 17 IDELR 170 (10th Cir. 1990) which discusses eligibility criteria and the purposes of extended school year programming.

³⁸ A recent Washington State regulatory interpretation of WAC 392-172-234 adds a new twist to the determination of what a school district’s responsibility is for students with disabilities placed in private schools. WAC 392-172-234 states that “each school district or other public agency shall provide special education and related services designed to meet the needs of private school special education students who attend a private school located within the school district and other public agency’s boundaries.” The Office of Superintendent of Public Instruction has determined that this regulation requires the school district in which the private school is located (not the school district in which the student is a resident) to actually provide the required special education and related services

necessary for students placed in a private school. So for students with disabilities who are placed in private schools outside the boundaries of their resident local public school district, parents should contact the public school district within which the private school is located and request an evaluation and development of an IEP from that school district, not the resident school district.

³⁹See 34 C.F.R. § 300.349; 34 C.F.R. § 300.403; and 34 C.F.R. § 300.450-.452; also WAC 392-172-230 through 392-172-248.

⁴⁰ See Letter to Moore, 20 IDELR 1213. Question: Is a local educational agency (LEA) obligated to provide a personal computer to a student with a disability who has been unilaterally placed by a parent at a parochial school? OSEP responded by explaining its interpretation of the IDEA regulations which address this issue and cited the relevant EDGAR regulations that pertain. OSEP stated “these regulations do not confer on every parentally-placed child with a disability an entitlement to services ... a public agency may elect not to serve every parentally-placed child residing in its jurisdiction. Further a public agency is not required to make the full range of services available to those parentally-placed students whom it has elected to serve ... (but) the services that the public agency provides to those students whom it has elected to serve must be comparable to those provided to public school students with disabilities.”

⁴¹ Note: The carrying of knives and other weapons into school is not subject to the automatic expulsion procedures of the Gun-Free Schools Act. The 9th Circuit Court’s decision in *Hacienda La Puente School District of Los Angeles v. Honig*, 976 F.2d 487, 19 IDELR 150 (9th Cir. 1992), should be analyzed in conjunction with this amendment. Although the court’s decision was rendered prior to the 1994 amendments, the case provides some insight into the court’s reasoning related to the issue of expulsion of special education students. In *Hacienda*, a student (who was not special education-eligible at the time) was expelled for frightening another student with a starter pistol. The student invoked stay-put and remained in school during the pendency of an evaluation which ultimately was found by a hearing officer to make him eligible as seriously emotionally disturbed. The behavior was found to be related to his disability.

⁴² *Doe v. Maher*, 793 F.2d 1470, EHLR 557:353 (9th Cir. 1986), aff’d as modified sub nom. *Honig v. Doe*, 484 U.S. 305, EHLR 559:231 (1986).

Appendix: A Guide to Legal Citations

Legal citations contain the basic information needed to find a specific court decision, statute, or regulation. For those who are not attorneys, the legal citations may not be clear. Following is an explanation of **where** to find written court decisions, statutes, and regulations and **how** to read legal citations.

WHERE TO FIND

Special Education Laws and Court Decisions

A standard set of volumes known as *reporters* contain **court decisions**. **Statutes and regulations** are found in bound volumes—organized by subject, volume number, and section. These volumes are found in law libraries, some public libraries, and most law offices. State agencies also provide reprinted collections of statutes and regulations upon request.

The reader is strongly encouraged to get a set of the Washington State regulations (WACs) pertaining to special education to refer to on a regular basis for assistance with answering questions about "what the law says." As written previously, the letter of the law is open to interpretation by courts and the facts in each specific case affect how the regulations are applied. But the plain language of the statute and regulations is often helpful in answering basic questions about what is required.

OSPI Special Education has printed a collection of the Washington State regulations (Washington Administrative Code [WAC]) that address special education. It is provided in larger print and bold writing for easier reading. Recent revisions to the WAC have made them more consistent with federal regulations and their sequence of organization is more logical than in previous years' versions. OSPI also maintains the *Individuals with Disabilities Law Reporter*, which contains bimonthly updates, citations, and summaries to selected decisions at all levels of due process.

HOW TO READ Legal Citations

Federal Statutes

The United States Code (USC) contains laws passed by the United States Congress that are put into volumes (or titles) by subject matter.

The federal statute known as the *Individuals with Disabilities Education Act* is found in 20 USC §1401, which means Section 1401 of Title (or Chapter) 20 of the United States Code.

The federal statute known as *Section 504 of the Rehabilitation Act* is found in 29 USC §794, or Section 794 of Title (or Chapter) 29 of the United States Code.

Federal Regulations

The Code of Federal Regulations (CFR) contains regulations made by federal executive agencies and departments to implement the statutes passed by Congress. Subjects are divided into volumes (or titles).

The regulations for IDEA are found in 34 CFR §300. This means Section 300 of Title 34 of the Code of Federal Regulations.

The regulations for Section 504 are found in 34 CFR §104, or Section 104 of Title 34 of the Code of Federal Regulations

State Statutes

Washington State statutes are those laws passed by the Washington State Legislature. They are cataloged in volumes known as the Revised Code of Washington (RCW). The state statutes that affect students with disabilities are found in Title 28A of the Revised Code of Washington, chapter 155. It is cited as chapter 28A.155 RCW.

State Regulations

Regulations made by Washington State agencies or departments to implement the state statutes are found in the Washington Administrative Code. Special education

regulations are found in chapter 392-172 WAC, which means Title 392, chapter 172.

Court Decisions

Court decisions are found in bound volumes called "**reporters.**" The decisions issued by the various levels or types of courts are each published in a separate series of "reporters." Cases in special education are also cited in special reporters, such as the *Individuals with Disabilities Law Reporter (IDELR)*, formerly known as the *Education for the Handicapped Law Reporter (EHLR)*. These special reporters publish select cases at all levels, including local due process hearing decisions, state and federal court decisions, decisions of the U.S. Department of Education/Office for Civil Rights (OCR), and select letters and policy statements from the U.S. Department of Education Office of Special Education Programs (OSEP). A typical cite from the IDELR looks like this: 23 IDELR 709, which means this case can be found in the 23rd volume of the IDELR, beginning on page 709.

Court decisions from the **U.S. Supreme Court** can be found in any one of three published reporters: The United States Reports (**U.S.**), the Supreme Court Reporter (**S.Ct.**), or the Lawyer's Edition (**L.Ed.**). For example, the leading federal case on includable related services is cited as *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, or 82 L.Ed. 2nd 664 (1984). This citation tells the reader that the decision can be found in volume 468 of the United States Reports beginning on page 883. The decision can also be found in volume 104 of the Supreme Court Reporter beginning on page 3371 or in volume 82 of the Lawyer's Edition 2nd Series Reporter beginning on page 664. The decision was reached in 1984.

Decisions from the **Federal Court of Appeals** are cited using "**F2d**" and "**Cir.**" in the citation. F2d means Federal Reporter, 2nd Series and Cir. indicate which circuit court made the decision. The federal courts of appeals are divided into 11 geographic regions across the United States. As an example, the decision in *Rafael Oberti v. the Board of Education of the Borough of Clementon School District* was decided in 1993 by the 3rd U.S. Circuit Court of Appeals and is found at 995 F.2d.1204 (3rd Cir. 1993) or in volume 995 of the Federal Reporter, 2nd Series beginning on page 1204.

Decisions from the **U.S. District Courts**, the lowest level of federal court system, also known as the “trial courts,” are reported in the Federal Supplement (**F.Supp.**). Each state has at least one federal district court. In states that have *only one* federal district court, a single “D.” will precede the state abbreviation in the cite. Other states will indicate North (N.D.), South (S.D.), East (E.D.), West (W.D.), Central (C.D.), or Middle (M.D.) accordingly. For example, in the case cited *Felter v. Cape Girardeau School District*, (E.D. Mo. 1993) 810 F. Supp. 1062, the reader knows the decision can be found in volume 810 of the Federal Supplement beginning on page 1062, and that it was decided in the Eastern District Court of Missouri in 1993.

Washington state court decisions are published in state reporters and follow the same citation system as the federal reporters. Citations will tell the reader whether the decision was made in the Washington State Court of Appeals (**Wash. App.**) or the Washington Supreme Court (**Wash.**). Superior court decisions, also known as trial court decisions, are not published in reporters, but are available directly from the court system upon request or sometimes from the attorneys who tried the case.

Effect and Weight of Court Decisions

Only the decisions of the courts that have authority in a particular geographical area represent the clear judicial interpretation of the law for that area. For example, schools in Seattle are obligated to follow the law as interpreted by the U.S. Supreme Court, the 9th U.S. Circuit Court of Appeals, the U.S. District Court (Western District), and relevant Washington State courts. Nevertheless, the decisions of courts in other geographical areas are relevant since they will usually be given *some* weight by courts in your area, depending upon the reasoning that was reflected in the court’s analysis and the similarity of the issues presented by the case.

Effect and Weight of the Decisions and Policies of Administrative Offices

The U.S. Department of Education, Office for Civil Rights (OCR), is charged with the enforcement of regulations and policy regarding the civil rights of individuals with disabilities through the Rehabilitation Act of 1973 and with the

Americans with Disabilities Act concerning school issues. The U.S. Department of Education, Office of Special Education Programs (OSEP), is charged with the enforcement of federal regulations for special education.

Each office investigates complaints and issues decisions—which may include corrective actions—related to violations by public school systems of federal policy or regulations for their respective agencies. Each office also issues policy letters to assist with the interpretation of regulations that appear to be generating a number of questions or corrective actions. Such decisions and policy statements are binding on states and the public schools unless successfully challenged in court.