

THE ADVOCATE'S CHALLENGE

Special Education Advocacy for Juveniles With Disabilities



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Carolina Legal Assistance is a private, tax-exempt, non-profit corporation that offers legal representation to children and adults with mental illness and developmental disabilities. Our mission is to empower and advocate for people with mental disabilities in achieving true freedom of choice and quality services in the least restrictive environment.

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I. INTRODUCTION

The goals in pursuing special education advocacy for juveniles with disabilities are to obtain appropriate educational services and reduce high school dropout and juvenile delinquency. A majority of youths in the juvenile justice system have both identified and undiscovered disabilities. Without special education and support, children with disabilities are at greater risk for illiteracy, high school expulsion or dropout, juvenile delinquency and criminal conviction. Juvenile court proceedings can provide a window of opportunity for determining a youth's unidentified disabilities and special education status.

Federal and state special education laws ensure juveniles with education-related disabilities a free, appropriate public education. A juvenile's right to receive special education services is not postponed or terminated when (s)he enters the juvenile justice system. Special education may offer a constellation of services that provides an eligible juvenile a safe and productive alternative to delinquency. For example, special education law mandates that eligible students are entitled to related services if they need them in order to benefit from educational services. Related services may include counseling and psychological services, speech and language therapy, and transportation. Eligible juveniles are also entitled to transition services, when needed, to help them progress from school to work, post-secondary education, and/or independence. Thus, special education law is a source of entitlements that can be used to access services as a substitute for detention and incarceration. The challenge for juvenile court advocates is to use special education law as a tool for keeping juveniles with disabilities in school, out of detention and, hopefully, to segue them into gainful employment and productive lives.

II. WHAT ARE THE FEDERAL AND STATE SPECIAL EDUCATION STATUTES?

A. IDEA

The Individuals with Disabilities Education Act (IDEA) was originally known as the Education of All Handicapped Act when enacted in 1975. The purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living[.]"¹ The 2004 amendments clarify that the purpose of IDEA is not only to prepare children with disabilities for employment and independent living, but also to prepare them for "further education."² FAPE is based on what the child needs, not on what programs, services or placement are available. The entitlement exists for eligible youths between the ages of 3 and 21, including youths who are involved in the juvenile justice system and/or who have been suspended or expelled from school. In other words, disciplinary action does not eliminate a student's entitlement to FAPE.

This federal special education statute was enacted, in part, because many children with disabilities were segregated from public school systems or had failed in the regular classroom

¹ 20 U.S.C. § 1400(d)(1)(A) (2002).

² 20 U.S.C. § 1400(d)(1)(A) (2004).

because their disabilities were never identified. IDEA's directive that students receiving special education services are to be taught, to the maximum extent appropriate, with children who are not disabled is known as the least restrictive environment (LRE) requirement. The removal of children (whether partial or total) from the regular classroom occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. IDEA ensures these entitlements through a system of detailed procedural due process safeguards.³

B. State Special Education Law

North Carolina's special education law⁴ parallels the federal law requirements with two notable exceptions. First, North Carolina's statute, which provides that "the policy of the State is to ensure every child a fair and full opportunity to reach his full potential," has been interpreted as setting a higher standard than the federal requirement that a child derive some educational benefit.⁵ According to case law, North Carolina's standard requires that special education and related services provide a child an educational opportunity to achieve his full potential that is as effective as that given other children.⁶ The North Carolina statute is also distinct from its federal counterpart in that eligible children are identified as having *special needs*, a phrase not included in IDEA. This difference is significant because "special needs" includes pregnant students who, because of their pregnancy, need special education and/or related services not provided under the general educational curriculum.⁷ Aside from these two differences, North Carolina's special education statutes mirror federal requirements and compliance with IDEA satisfies state law.

III. WHO AND HOW?

A. Who Are the Eligible Juveniles and How Do They Receive Services?

Under IDEA, all children with disabilities between the ages of 3 and 21, including those suspended or expelled from school, are entitled to a free appropriate public education. The severity of an individual's disability is irrelevant; therefore, an eligible child or youth cannot be denied educational services on the ground that (s)he is too severely disabled to benefit from them.⁸ The statute protects all children and juveniles who need special education and related services due to any of the following disabilities: mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.⁹

³ See Section (V), *infra*.

⁴ N.C.G.S. § 115C-106 *et seq.* (2005).

⁵ Harrell v. Wilson Co. Sch., 58 N.C. App. 260, 293 S.E.2d 687 (1982).

⁶ Ingrid M. Johnson, *Educating Students with Disabilities and Special Needs*, in EDUCATION LAW IN NORTH CAROLINA, B.9, 34 (Janine M. Murphy ed., 2001), citing Harrell, 58 N.C. App. at 265, 293 S.E.2d at 690.

⁷ N.C.G.S. § 115C-109 (2005).

⁸ EILEEN L. ORDOVER, EDUCATIONAL RIGHTS OF CHILDREN WITH DISABILITIES: A PRIMER FOR ADVOCATES, 2 (1991), citing Timothy W. v. Rochester Sch. Dist., 875 F.2d 954 (1st Cir. 1989).

⁹ 34 C.F.R. § 300.7 (2005).

The provision of special education services is most often triggered by a request for an evaluation of a child by the parents or school system. To qualify for special education services, a child must have a specific disability that affects his ability to learn and thereby requires special education and related services. A multi-disciplinary evaluation is required in order to determine a child's eligibility for assistance. If the child is found eligible, then the school, through a team composed of designated individuals including the child's parent, meets to develop an Individualized Education Program (IEP) of appropriate services.

IDEA also requires all local education agencies (LEAs) to locate, evaluate and identify all students with disabilities within their jurisdictions and provide FAPE to them.¹⁰ This "child-find" obligation applies to public schools, charter schools, the Department of Health and Human Services, the Department of Correction, and Department of Juvenile Justice and Delinquency Prevention agencies. Thus, agency staff who work with children in juvenile facilities are required by law to identify and provide appropriate educational services for children with disabilities.

Court decisions have long held that the fact of incarceration does not abrogate a juvenile's right to special education.¹¹ However, the 1997 amendments to IDEA seriously limit access to special education services for juveniles age 18 through 21 who are incarcerated in adult correctional facilities. States are not obligated to provide special education to a juvenile in this age group who, prior to his incarceration in an adult correctional facility, was not identified as an eligible student under IDEA or did not have an IEP.¹² Thus, it is imperative that children who fit this category be identified prior to incarceration so that they can receive the services they need. It is important to note that the 1997 amendments do not affect the special education rights of eligible juveniles who are confined in *juvenile* facilities.¹³

B. The Importance of Educational Evaluations & IEPs

For children with undiagnosed and unattended special education needs entering the juvenile system, advocates can use special education law to address underlying educational problems and to access needed services. For example, an attorney representing a child in a delinquency matter can request an educational evaluation to determine special education eligibility and address educational problems underlying delinquent behavior.

Educational evaluations are technical tests and procedures designed to appraise a child's strengths and weaknesses in specific areas of learning and behavior. They are used to determine the eligibility and initial classification (e.g.; learning disabled or behaviorally-emotionally disabled) of a child for special education services. Evaluations also provide information about the specific needs of an individual child. This information, in conjunction with anecdotal data gathered by teachers and family members, assists educators in the development of the IEP, in

¹⁰ 20 U.S.C. § 1412(a)(3)(A) (2004); 34 C.F.R. § 300.125(a)(i) & (ii) (2005).

¹¹ See Joseph B. Tullman & Mary G. Hynes, *Enforcing Special Education Law on Behalf of Children Incarcerated in Juvenile or Adult Facilities*, in SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM 5-4, n.17 (Tullman & McGee eds., 1998) for a list of relevant cases.

¹² *Id.* at 5-5, citing Pub. L. No. 105-17, § 612(a)(1)(B)(ii).

¹³ *Id.*

placement decisions and in the determination of strategies for dealing with challenging behaviors. Evaluations are also used to determine the need for related services, vocational programming, and transition services.

The importance of evaluations cannot be overstated. The juvenile's IEP is only as good as the underlying evaluations because the strategies to address a juvenile's needs must be based on an accurate identification of the juvenile's strengths and needs. All areas related to the juvenile's disability must be assessed, which means, as noted above, that the juvenile is entitled to a multidisciplinary evaluation. North Carolina's procedures identify specific evaluations to analyze a child for particular types of disabilities. Tests and procedures that are recommended or required are published by the North Carolina Department of Public Instruction (DPI) in a booklet called "Procedures Governing Programs and Services for Children with Special Needs." These tests are to be selected and administered in such a way so that they do not discriminate based on race or culture. The tests must be in the language or mode of communication understood by the child. Finally, these tests must be valid for the purpose for which they are used and must be conducted by qualified professionals who are knowledgeable about the child's suspected disability. Based upon information contained in these evaluations, juvenile court advocates can propose educational and treatment strategies in order to develop alternatives to delinquency adjudications and obtain services needed by the juvenile.

C. The Individualized Education Program (IEP)

There are two components to an IEP. The first is the IEP meeting, during which the IEP team, including the parents, makes decisions about the ingredients of a child's education program. Recent changes to IDEA excuse a member of an IEP team from attending an IEP meeting if the parent and LEA agree that attendance of such member is not necessary. In addition, states are given the opportunity in the 2004 amendments to allow parents and IEP team members the opportunity to develop a multi-year IEP, not to exceed three years, designed to coincide with natural transition points for the child. Natural transition points are defined as periods close to the time of transition for the child from preschool to elementary school, from elementary school to middle school, from middle school to high school, and from high school to post-secondary school. Such multi-year IEPs could limit parental participation by eliminating comprehensive annual IEP reviews. Furthermore, multi-year goals are likely to be less specific and more difficult to measure than annual goals, especially when considered in conjunction with the deletion of benchmarks and short-term objectives. For these reasons, caution should be used when considering multi-year IEPs.

The second component is the IEP document itself. An individualized education program is a document identifying the special education and related services a child will receive based upon the decisions made at the IEP meeting. The quality and thoroughness of an IEP directly impacts the child's opportunities for educational success. Prior to the 2004 amendments, an IEP included the following:

- A description of the child's present level of educational and behavioral performance, including an analysis of "how the disability affects the child's involvement and progress in the general curriculum (standard course of study) or appropriate activities;"

- “measurable annual goals, including benchmarks or short-term objectives,” related to meeting the child’s specified needs so that the child may be involved and progress in the general education curriculum (standard course of study);
- a list of needed related services and testing modifications (if needed);
- the projected beginning and ending dates of services; and
- a transition plan if the child is 14 years or older.

Under IDEA 2004, the IEP no longer requires short-term objectives or benchmarks except for those students with significant cognitive disabilities who take alternative assessments aligned to alternative achievement standards rather than the standard course of study. No Child Left Behind (NCLB) limits such alternative assessments to students with only the most significant cognitive disabilities. Thus, the new amendments have the effect of deleting benchmarks and short-term objectives from the IEP’s of many children with disabilities, and retaining them for less than one percent of students with disabilities. However, even if short-term objectives are no longer mandated by law, parents of children with disabilities can still request their child’s IEP team to identify such objectives. And, because IDEA 2004 still requires the IEP to describe how progress will be measured, parents can contend that short-term objectives are the answer. Parents will have to be more vigilant about their child’s progress and should argue that, without short-term objectives, it is difficult for parents and teachers alike to measure whether the child is progressing toward annual goals and what intervening steps should be taken to attain such goals.

With the permission of the parent and child, juvenile attorneys and court counselors, mental health case managers and other stakeholders should attend the IEP meeting to advocate for services and supports that can function as alternatives to detention or the delinquency system in general.¹⁴ For example, successfully advocating that the IEP include particular related and transition services may prevent a delinquency disposition that is ineffective. An IEP that provides for psychological counseling and other supports may offer needed supervision, structure, and programming that is not readily available in the juvenile justice or mental health systems.

D. Parents’ Rights

In the context of a juvenile court proceeding, a threshold consideration for the parent, child, and advocate is whether to pursue special education rights. With the consent of the juvenile and parent, an attorney can pursue special education strategies in an effort to obtain needed services for a juvenile with disabilities.

Written permission from a parent is required before there can be an initial evaluation to determine the child’s eligibility for special education. After this first evaluation is complete, IDEA requires school systems to give parents written prior notice whenever they propose to change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education (FAPE) to the child. This written notice must contain very specific information explaining the reasons for the school system’s decision affecting the child’s

¹⁴ See 20 U.S.C. § 1414(d)(1)(B)(vi)(2004) (parents may invite anyone with knowledge or special expertise regarding the child to participate on the team).

education program. The notice must be provided in a language the parents understand and written in an “easily understandable manner.”¹⁵

In contrast with the juvenile court system, the parent is an integral part of special education and, as such, is provided substantive and procedural rights to ensure the child’s educational progress. (See Section V. *infra.*). As a member of the IEP team and together with the school system, a parent can work to design an individualized education program. Alternatively, the parent can challenge any component of the juvenile’s education plan by pursuing one of a number of conflict resolution procedures. (See Section V *infra.*). For example, the parent may file a due process complaint if (s)he disagrees with the school about the evaluation, eligibility determination, IEP plan, services and/or placement decisions for the child.

E. Independent Evaluations

A parent who disagrees with the school’s evaluation has the right to an independent evaluation at public expense.¹⁶ This right is triggered when the parent makes a written request to the school. Parents then have the right to receive information about where and from whom an independent evaluation may be obtained. Independent evaluations must follow the same requirements that apply to school evaluations (e.g., qualifications of evaluator must be the same). The school system will pay for this evaluation unless the school system requests a due process hearing and shows at the hearing that its evaluation is appropriate. If the school system refuses to pay for an independent evaluation without being excused from doing so, the parent should request a due process hearing.

Regardless of who pays for the independent evaluation, it must be considered by the school system in connection with any decision regarding the child’s educational program. Independent evaluations may also be presented as evidence in a juvenile proceeding. Additionally, they may be used to underscore the juvenile’s right to care and rehabilitation and to address the issues that underlie the juvenile’s delinquency problems.

IV. THE MEANING OF FAPE

A. Special Education

Once identified, IDEA mandates that an eligible youth is entitled to FAPE. The entitlement, “free appropriate public education,” refers to special education and related services that:

- Have been provided at public expense, under public supervision and direction, and without charge;
- meet the standards of the state education agency;
- include an appropriate preschool, elementary, middle or secondary school education; and
- are provided in compliance with the child’s IEP.¹⁷

¹⁵ 20 U.S.C. § 1415(d)(2) (2004); 34 C.F.R. § 300.503 (2005).

¹⁶ 20 U.S.C. § 1415(b)(1)(2004); 34 C.F.R. § 300.502(b) (2005).

¹⁷ 20 U.S.C. § 1401 (9)(2004).

FAPE is provided through special education, related services, and, beginning at age 16, transition services designed to meet the individual needs of the child and prepare the child for employment, further education and independent living. Special education is defined as specially designed instruction to meet the unique needs of a child with a disability and extends to classroom instruction, instruction in physical education, home instruction, instruction in hospitals and institutions, and instruction in other settings. Specially designed instruction means tailoring content or delivery of instruction to each child with a disability in a way that ensures access to the general curriculum. Access to the general curriculum is required so that a child with a disability can meet the educational standards that apply to all children.

B. Related Services and Transition Services

In order to ensure that children with disabilities benefit from special education and achieve real-life outcomes, IDEA requires schools to provide both “related” and “transitional” services. Based upon the broad array of services available under the definitions of related and transition services, a fairly comprehensive plan can be provided for a juvenile with a disability when special education advocacy is pursued. For example, counseling, job supports, tutoring, transportation, remedial and vocational instruction provide an opportunity for moving juveniles out of the delinquency system. The development and implementation of these educational interventions may obviate the need for court intervention.

“Related services” include developmental, corrective, and other supportive services.¹⁸ The regulations implementing IDEA identify a wide variety of services to be provided for those students who are identified as needing them, including:

- **Speech-language pathology services** – These include speech and language services for the habilitation or prevention of communication impairments, as well as counseling and guidance of parents, children, and teachers regarding speech and language impairments.
- **Psychological services** – These include administering psychological and educational tests and other assessment procedures; planning and managing a program of psychological services, including psychological counseling for children and parents; and assisting in developing positive behavioral strategies.
- **Physical therapy** – This improves gross motor skills that depend on large muscles of the body involved in physical movement and range of motion to achieve maximum independence and function in educational activities.
- **Occupational therapy** – This improves, develops or restores fine motor ability to perform tasks for independent functioning if functions are impaired or lost.
- **Recreation, including therapeutic recreation** – This includes an assessment of leisure function, recreation programs in schools and community agencies, and leisure education.
- **Counseling services** – These include services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.
- **Rehabilitation counseling services** – These services focus on career development, employment preparation, independence achievement, and integration in the workplace and community.

¹⁸ 20 U.S.C. §1401(26)(2004).

- **Social work services in school** – These include providing group and individual counseling for the child and family; mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and assisting in developing positive behavioral intervention strategies.
- **Parent counseling and training** – This involves helping parents acquire the necessary skills that will allow them to support the implementation of their child’s IEP.

This list is not exclusive and may include other developmental, corrective, or support services as needed by the eligible child so that (s)he may achieve the maximum benefit from education. For example, some juveniles with disabilities may need assistive technology (such as a computer) or an aide as a related service. 2004 amendments added “interpreting services” and “school nurse services designed to enable a child with a disability to receive a FAPE as described in the IEP of the child” and specifically excluded medical devices that were surgically implanted. Under IDEA, related services are need-specific and not based upon the category of the student’s disability.

The term “transition services” means services that prepare students to successfully transition from school to adulthood. These services must focus on helping the student with disabilities achieve real-life outcomes like employment, post-secondary education and independent living.¹⁹ Previous law required age 14, but no later than age 16, a student’s IEP to include a statement of the transition services that (s)he needs in order to prepare for life after high school, also known as post-school outcomes. The new law deletes references to transition activities at age 14, changing the timing requirement to “not later than the first IEP to be in effect when the child is 16.”²⁰ Additionally, under the new law, the IEP must include “appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills.”²¹

The requirement for transitional services was implemented because of studies documenting the disproportionately high unemployment rates, substandard wages and benefits, economic instability, social isolation, and low levels of participation in postsecondary education and training programs experienced by students with disabilities after they leave school. These services are intended to address not only the employment future of students with disabilities, but also to enhance the chances for young adults with disabilities to achieve an adequate level of self-care, independence, self-sufficiency, and community integration. The 2004 amendments included a finding to the effect that as graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education becomes increasingly important.²²

Successful transitional service planning at the school requires the participation of the student, parents, and community services agencies. The regulations provide that “nothing in this part relieves any participating agency, including a state vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise

¹⁹ 20 U.S.C. §1401(34)(2004); 34 C.F.R. §§ 300.29(a), 300.27, & 300.348 (2005).

²⁰ 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(2004).

²¹ 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)(2004).

²² 20 U.S.C. § 1400(c)(14)(2004).

provide to students with disabilities who meet the eligibility criteria of that agency.”²³ In other words, state and local agencies, in addition to the LEA responsible for educating the student, will provide transition services and assume financial responsibility they may have in connection with providing those services. If, however, the other agency fails to provide transition services described in the student’s IEP, the LEA is responsible for reconvening the IEP team to identify alternative strategies to meet the transitional needs of the student.

Transitional service planning must be based on a thorough assessment of the student obtained through a variety of assessment approaches and tools such as:

- Achievement tests (information about student’s skill in reading, math and other academic subjects);
- observation (information about student’s dexterity, attitude, attentiveness and skill level); and
- vocational evaluations (information about a student’s vocational preferences and potential).

A thorough assessment will aid in the development of transitional goals that correspond to the student’s interests, preferences, needs, and aptitudes. The transitional service plan should include the following components:

- Instruction (including postsecondary education, vocational training and continuing adult education);
- Community experiences (e.g.; recreation and leisure activities, development of personal and social skills, and the discovery of residential options);
- Employment (such as learning to seek, secure and maintain employment, including supported employment);
- Post-school living objectives (such as using public transportation, obtaining medical care, and applying for public benefits like social security disability benefits); and
- Daily living skills (for example, dressing, grooming, household chores, shopping, and managing finances).

After reviewing the assessment information of the student, the IEP team may determine that services are not needed in one or more of these areas. If so, the IEP team must include a statement to that effect and state the reasons for its determination.

Depending on the nature of the underlying juvenile proceeding, focusing attention on the juvenile’s need for related and transition services can prove to be an effective alternative strategy for obtaining specialized services and opportunities for the juvenile with an education disability.

V. CONFLICT RESOLUTION PROCEDURES AND REMEDIES

A. Parents’ Rights

IDEA provides detailed substantive and procedural safeguards to ensure a child’s right to FAPE, including the right of parents to challenge school system decisions affecting their child’s

²³ 34 C.F.R. § 300.348(b) (2005).

education. Parents should receive a copy of the “**Parents Rights Handbook,**” which provides a full explanation of all the rights available to them, including the following:

- An independent educational evaluation;
- Prior written notice;
- Parental consent;
- Access to educational records;
- Stay-put placement during due process proceedings;
- Procedures for students who are subject to placement in an interim alternative educational setting;
- Requirements for unilateral placement by parents of children in private schools at public expense;
- Mediation;
- Due process hearings, including disclosure of evaluation results and recommendations;
- State complaint procedures, civil actions; and
- Attorney fees.

B. Conflict Resolution Procedures

1. IEP Meetings

A parent may request an IEP meeting whenever (s)he believes one is needed to review and/or revise the child’s IEP. A parent may choose to invite an advocate, attorney, or some other support person who is knowledgeable about the child. This support person may help and empower the parent to navigate the IEP process. The IEP team should use the meeting as an opportunity to resolve conflicts regarding the child’s IEP. At its best, the IEP meeting is an opportunity for parents to collaborate with school officials in developing an education program for the child. When there are disagreements between the parent and school, the meeting offers an informal and efficient mechanism for resolving these differences. The child will usually benefit when conflicts are adequately resolved at an IEP meeting because it means a tremendous saving of time, energy, good will, and resources for the parent and school system.

2. State Complaints

The Exceptional Children Division (ECD) is a state educational agency that will investigate a formal written complaint from a parent, individual, or public or private organization about a violation of special education law or procedure. The complaint must be in the form of a written statement, signed by the complainant, alleging a violation of the law related to the child’s identification, evaluation, special education and related services. This complaint is addressed to:

Director, Exceptional Children Division
Department of Public Instruction
6356 Mail Services Center
Raleigh, NC 27699-6356.

Following an investigation, including an on-site investigation if necessary, the state agency will issue a written decision responding to each of the allegations in the complaint within 60 days of when the complaint was filed.

If a complaint is substantiated through the complaint investigation process, a correction action plan will be required from the school or LEA. ECD is responsible for ensuring effective implementation of its decision including, for example, enforcing corrective action plans requiring future provision of services for an affected juvenile. This procedure offers parents and advocates an avenue for requesting compensatory services. This complaint must be sent within a year of the alleged violation unless the violation is continuing or a request for compensatory services is based on a violation that occurred not more than three years prior to the date the complaint is received by DPI. (See Section C, *infra.*).²⁴

3. *Mediation*²⁵

Mediation is a voluntary process offered by DPI in an attempt to resolve disagreements about the appropriateness of a child's identification, evaluation, educational placement, and/or services. The mediator is a neutral third party who attempts to assist the parties resolve their disagreements at no cost to the parents. Mediation is requested by completing a mediation request form and faxing or mailing it to the Director of the Exceptional Children Division at the address provided on the previous page.

Both federal and state special education laws encourage parents and schools to participate in mediation before filing a request for a due process hearing. However, mediation may still occur after a due process hearing is requested. Although the mediation process does not affect a parent's right to a hearing, parents should nonetheless consult with an advocate or attorney before deciding whether to pursue mediation. A mediation agreement is enforceable in state or federal court.

When a parent files a petition for a contested case hearing (due process hearing) before the Office of Administrative Hearings (OAH), the parties are invited by the Department of Public Instruction to attend a settlement conference. The purpose of this conference is to determine if there is a way to mediate the dispute before going through the due process hearing. The decision to participate in a settlement conference does not restrict or deny any right of the parent in connection with the due process hearing.

4. *Due Process Hearings*

State and federal law provides that a due process hearing before an Administrative Law Judge (ALJ) in the Office of Administrative Hearings (OAH) may be requested under the following circumstances:

- When a child has not been identified or evaluated or has been incorrectly identified and evaluated as a child with special needs;
- when the child's placement is not appropriate to meet his needs; or
- when the child is otherwise being denied a free appropriate public education.

²⁴ See 34 C.F.R. §§ 300.660, 300.661, & 300.662 (2005).

²⁵ 20 U.S.C. § 1415(e)(2004); 34 C.F.R. § 300.506(a) (2005); N.C.G.S. 115C-116(b)(2005).

Because it involves specific notice and time deadlines, a parent should seek legal representation when requesting a due process hearing.²⁶ The complaint (or petition), filed by the parent as petitioner, must include the following information:

- The name and address of the child and the name and address of the school the child is attending;
- a description of the nature of the child’s problem; and
- a proposed resolution of the problem to the extent such knowledge is available to the parents.

New to the 2004 amendments, parents are now required to attend a mandatory “resolution session” prior to a due process hearing in which the parents and LEA will discuss the complaint and the LEA given an opportunity to resolve the complaint.²⁷ The school district will convene a meeting with parents and relevant members of the IEP team who have specific knowledge of the facts in the complaint within 15 days of receiving the parent’s due process complaint. Unless the parent is accompanied by an attorney to this resolution session, the new law prohibits the LEA from bringing an attorney to the session. The resolution session may be waived if mediation is attempted or if the parties sign a written agreement to forgo the resolution session. If the complaint is resolved at the resolution session meeting, then the parties must execute a legally binding agreement enforceable in court. Parents are not entitled to attorney’s fees for resolutions reached at such meetings.

Except for specific timelines, the procedures used in a due process hearing are very similar to those used in civil court. Each party has the right to present evidence and to confront, cross-examine, and require the attendance of witnesses. After the hearing, both parties have 30 days to appeal the administrative law judge’s opinion to a review officer before seeking review in state or federal court.

C. Remedies

1. *Attorney Fees*

Subject to certain limitations, attorney fees (at market rate) are available for parents who prevail in due process hearings and in court hearings.²⁸ For attorneys practicing in juvenile court, attorney fees offer some financial incentive to pursue special education issues. Special education advocacy also allows the attorney to develop a wide range of problem solving strategies that are positive, therapeutic and not otherwise available in juvenile court. For some juveniles, appropriate special education and related services may constitute sufficient care and rehabilitation to justify diversion from juvenile court or probation. As mentioned above, attorney’s fees are not available for complaints resolved at resolution sessions. Under the 2004

²⁶ For example, in many circumstances, a parent must request a hearing within 60 days of the parent’s disagreement with school action.

²⁷ 20 U.S.C. § 1415(f)(1)(B)(2004).

²⁸ 20 U.S.C. §1415(i)(3)(B)(2004); 34 C.F.R. § 300.513 (2005).

amendments, a court may award attorney's fees to the prevailing SEA/LEA against the attorney of a parent or against a parent who files a frivolous or unreasonable complaint or cause of action presented for any improper purpose, for example to harass, to cause unnecessary delay or to needlessly increase the cost of litigation.²⁹

2. *Compensatory Education*

Courts have held that when a school system fails to provide a child with a free appropriate public education, (s)he may be entitled to compensatory education.³⁰ Compensatory education means additional services, educational and otherwise, that are provided to make up for the time during which the school failed to provide FAPE. Depending upon the circumstances of a particular case, compensatory education may include special education and/or related services during the school day, after school hours, or during the summer and scheduled vacation periods. It may also include the provision of services to a student even after (s)he turns 21, the age at which a student's entitlement to public education would otherwise end.

A juvenile's attorney may seek compensatory services in cases, for example, where a juvenile's history of school failure and a resulting delinquency petition are related to the school's failure to identify and address the juvenile's education-related disability. In such circumstances, counsel may have a basis for seeking a dismissal of the delinquency petition or, alternatively, to mitigate the length and severity of the delinquency disposition, especially when a school system initiated juvenile court proceeding for school conduct.

VI. IDEA'S SCHOOL DISCIPLINE SAFEGUARDS

A. Introduction

Disciplinary exclusion of children with disabilities is a contentious issue under IDEA. IDEA was enacted, in part, to protect students with disabilities from long-term and indefinite suspensions and expulsions. When school systems initiate juvenile proceedings for school conduct, delinquency, school discipline and disability issues may overlap in a variety of ways relating to the school's failure to identify and address the juvenile's education related-disability. Addressing school discipline issues under IDEA may become a strategy for obtaining appropriate educational services on behalf of an eligible juvenile. Those services may, in turn, be used as a disposition strategy in juvenile court.

B. Change of Placement

IDEA places substantive and procedural limitations on a school's authority to discipline students with disabilities. In *Honig v. Doe*,³¹ the U.S. Supreme Court held that IDEA prohibits schools from unilaterally subjecting students with disabilities to long-term disciplinary suspension. Specifically, disciplinary exclusion of an eligible student for more than 10 days constitutes a change in placement, thereby triggering the procedures mandated under IDEA.

²⁹ 20 U.S.C. § 1415(i)(3)(B)(i)(II)(2004).

³⁰ See ORDOVER, *supra* note 6, at 6, n.111 for a list of cases holding similarly.

³¹ 484 U.S. 305 (1988).

These procedures include notice and consent rights, access to records, the right to an independent educational evaluation, the right to file a complaint, mediation rights, due process hearing and appeal rights, the right to bring a civil action in court, the right to an attorney's fee award, and the right to have the child remain in school in the current placement during the pendency of a complaint.³² The 1997 Amendments to IDEA clarified that a "series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another" also constitute a change in placement.³³

C. Suspension for 10 Cumulative Days or Less

IDEA allows disciplinary placement changes or suspensions of 10 days or less for a child with a disability to the same extent that such exclusion would be applied to children without disabilities.³⁴ The IEP team may, however, meet to address issues related to the suspension such as, for example, to develop and implement a functional behavioral assessment and intervention plan. (See Section D, *infra*.)

D. Functional Behavioral Assessments

A functional behavioral assessment (FBA) is a specific type of evaluation that uses multiple strategies and techniques to understand the causes of behavior, including the biological, social, affective, and environmental factors that trigger, sustain, or end it. For students whose disabilities involve behavioral challenges triggering disciplinary suspension, functional behavioral assessments are crucial for predicting when the problem behavior may occur, identifying ways to prevent the problem behavior, and designing ways to respond to the problem behavior when it occurs.

Under IDEA, functional behavioral assessments address the behavioral problems of a child's disability as a component of FAPE so that a child receives special education and related services to address that behavior. IDEA requires the IEP team to conduct such an evaluation when a child has been suspended for more than 10 days, found in possession of a weapon, found in possession of drugs, or determined to be dangerous.

The functional behavioral assessment must provide information on the following:

- Strengths of the child,
- the target behavior requiring intervention,
- situational events influencing the behavior,
- antecedent behaviors,
- consequences of the behavior,
- behavioral function (needs),
- behavioral intervention plan.³⁵

³² 20 U.S.C. §1415 (2004).

³³ 34 C.F.R. § 300.519(b) (2005).

³⁴ 34 C.F.R. § 300.520(a) (2005); *see also* §§ 300.121(d)(1) & 300.523(a) (2005); 20 U.S.C. § 1415(k)(1)(B)(2004).

³⁵ *See* 20 U.S.C. § 1415(k)(1)(D)(ii)(2004).

The information obtained through this assessment is used to design an intervention plan that will provide the supports necessary to allow educational progress for the child. When a student with a behavioral intervention plan receives another disciplinary suspension, the IEP team must review the behavior plan to determine whether changes are necessary. Also, when any member of the IEP team, including the parent, believes the behavior plan needs to be revised, the team must meet and change the plan to the extent the team agrees such changes are necessary.

A functional behavioral assessment can also provide information to address behavior problems exhibited outside of school, including the delinquency behavior that triggered the juvenile proceeding. In the context of juvenile court, the ultimate purpose of these assessments and intervention plans is to address behavioral problems as a strategy for promoting educational success and preventing disciplinary exclusion and delinquency.

E. Manifestation Determinations

When a school seeks to exclude a disabled child for discipline, IDEA requires the school to first determine whether the behavior at issue was a manifestation of the child's disability.³⁶ A manifestation determination by the IEP team must occur before a child receives a disciplinary suspension from his or her current educational placement for more than 10 days, including where a shorter suspension is part of a pattern of exclusions that together exceed 10 school days in a school year. The purpose of the review is to determine whether a relationship exists between the behavior problem and the child's disability and educational program and services. If the IEP team determines the behavior was a manifestation, the child cannot be suspended or expelled. The IEP team may, however, propose changes in the student's IEP or in placement, consistent with IDEA's procedural safeguards. If the behavior is determined not to have been a manifestation, the student can be suspended or expelled in the same manner as a non-disabled child would be disciplined. However, a long-term suspended or expelled student with a disability must continue to be provided FAPE. Before the reauthorization of IDEA in 2004, the following factors were reviewed by the IEP team in connection with a manifestation determination review:

- Whether the student's IEP and placement are appropriate;
- whether the IEP was implemented;
- whether the student's disability prevented the student from understanding the impact and consequences of the behavior;
- whether the student's disability impaired the student's ability to control the behavior at issue;
- whether the student was told of the relevant school policy.³⁷

Under IDEA 2004, the factors to be considered are:

- whether the behavior was caused by, or has a direct and substantial relationship to, the disability;

³⁶ 20 U.S.C. § 1415(k)(1)(E)(2004).

³⁷ 20 U.S.C. §1415(k)(4); 34 C.F.R. §300.523(c)(1) & (2) (2005).

- whether the behavior was the direct result of the failure to implement the IEP.³⁸

Thus, consideration of whether the student's IEP and placement are appropriate no longer occurs, and henceforth the failure of the school to provide appropriate services and placement are no longer relevant. Additionally, language requiring the IEP team to consider whether the disability impaired the child's ability to control or to understand the impact and consequences of the behavior has been deleted. Previously, the LEA had to prove that the child's action resulting in the disciplinary infraction was not caused by the child's disability. New amendments have shifted the obligation to the parents to show that the child's action resulting in the disciplinary infraction was the direct result of the child's disability. For these reasons, the 2004 amendments therefore make it easier for schools to remove children for non-dangerous, non-weapon, non-drug related behaviors and to shift the burden of proof to parents to prove the connection between the behavior and disability. Parents will need to pay close attention to the behavioral needs of the child in developing the IEP, and may need to anticipate, consider and even spell out any concerns they may have about their child's possible emotional or behavioral responses.

If the actions are determined not to be a direct result of the disability, the child will be disciplined in the same manner and for the same duration as a non-disabled student. The child may be placed in an Interim Alternative Educational Setting (IAES). If a parent disagrees with the manifestation determination or the placement, the parent may request a hearing, at which the obligation is on the parent to show that the infraction was a direct result of the child's disability.

A new provision in the 2004 amendments also allows school personnel to consider any unique circumstances on a case by case basis when determining whether to change the placement of a child with a disability who violates a school code of conduct. Parents may cite this new provision when challenging a determination that a child's behavior was not a manifestation of his/her disability and remind the school that all circumstances should be considered when a change of placement is at issue.

F. "Stay-put" Provision

Previously, under IDEA, a parent invoked the "stay-put" provision when challenging a school system's disciplinary exclusion or manifestation determination. Through a due process hearing, the child was permitted to remain in his or her current educational placement until the hearing and any judicial proceedings ended under "stay-put", unless the parent and school agreed upon some other placement. Exceptions to stay-put rights occurred when students were involved with weapons, drugs or dangerous behavior.³⁹

Under the 2004 amendments, the stay put provision pending discipline due process hearings has been eliminated. While the appeal is pending, the child will remain in IAES. However, an expedited hearing is required. The hearing must be held within twenty school days of the request, and the decision must be rendered within 10 days of the hearing. Placement can be changed during this time if the parent and LEA agree. Unfortunately, moving back and forth between the current placement and IAES during an appeal can negatively affect children who have difficulty adjusting to transitions. Furthermore, for the purpose of reporting Adequate Yearly Progress under the NCLB Act, individual schools do not have to count children who are

³⁸ 20 U.S.C. § 1415(k)(1)(E)(i)(2004).

³⁹ 20 U.S.C. § 1415(k)(2002); 34 C.F.R. § 300.526 (2005).

transferred to alternative settings, and this could create an incentive for disciplinary actions against students with disabilities.

G. Interim Alternative Educational Setting (IAES)

A school system may unilaterally place a student in an interim alternative education setting for no more than 45 *school* days if the student is involved in a weapon or drug incident.⁴⁰ If the IEP team determines that the weapon or drug incident is not a manifestation of the student's disability, the school may suspend or expel the student. The school system, however, is obligated to continue to provide FAPE.

A student may also be removed to an interim alternative educational setting for 45 days when a hearing officer determines that the student is likely to injure himself or others and:

- keeping child in current placement is substantially likely to result in injury to the child or to others, and
- the school system has already made reasonable efforts to minimize the risk of harm in current placement, including the use of supplementary aids and services.⁴¹

The hearing officer determining whether to remove a child because maintaining his/her current placement is substantially likely to result in injury to self or others is no longer required to consider whether the school's proposed change in placement is based on a preponderance of the evidence. The amended statute also deletes the requirement for the hearing officer to consider whether the school has made reasonable efforts to minimize the risk of harm, including the use of supplementary aids and services. Under new law, schools can also unilaterally remove any student for "inflicting serious bodily injury" which is defined as involving a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental facility.⁴²

H. FAPE During Disciplinary Exclusion

The 1997 amendments to IDEA explicitly provide that students who are long-term suspended, expelled or placed in an interim alternative educational setting are entitled to receive FAPE. FAPE during disciplinary exclusion must meet the same statutory criteria discussed in Section IV above and must also include services to address and correct the behavior that prompted the disciplinary exclusion.⁴³ Thus, the obligation of schools to provide FAPE for students who are suspended or expelled and concurrently facing delinquency charges presents an opportunity to advocate for appropriate educational services as part of a disposition strategy in the juvenile court proceeding.

Under the 2004 amendments, the standard for services that must be provided to a removed student has been changed and now services must allow students "to progress toward meeting

⁴⁰ 20 U.S.C. § 1415(k)(1)(G)(2004); 34 C.F.R. § 300.520(a) (2)(2005).

⁴¹ *Id.*; 34 C.F.R. §§ 300.520(a)(2) & 300.521 (2005).

⁴² 20 U.S.C. § 1415(K)(1)(G)(iii)(2004);

⁴³ 20 U.S.C. § 1415(K)(1)(D)(i); 34 C.F.R. §§ 300.522(b) & 300.121(d)(2) (2005).

goals set out in child's IEP.”⁴⁴ This change is regarded by some advocates as a reduction in services.

I. Students Suspected of Having a Disability

A juvenile whose disability has not yet been identified may invoke IDEA protections against suspension or expulsion if the school system could be deemed to have had knowledge of the disability before the behavior at issue occurred due to any of the following circumstances:

- The parent expressed concern in writing to the school that the child was in need of special education services (oral communication when parent does not know how to write or has a disability that prevents writing);
- The parent requested an evaluation of the child; or
- a teacher or other school staff member expressed concern about the student.⁴⁵

Before the reauthorization of IDEA in 2004, a school was presumed to have knowledge of a child's eligibility for special education services when the child's behavior or performance demonstrated the need for such services. This section was deleted. This deletion is viewed by advocates as a reduction of discipline protections. This is critical for children whose disciplinary suspensions or school-initiated juvenile protections are related to the school's failure to identify and provide a FAPE to the child. In such cases, school systems are punishing and criminalizing students based upon its failures to identify and provide services to eligible youth.

VII. ADDITIONAL ADVOCACY TOOLS – SECTION 504 AND THE ADA

Section 504 of the Rehabilitation Act⁴⁶ and the Americans with Disabilities Act⁴⁷ are federal civil rights statutes that may also provide protections against unfair disciplinary exclusions for students with disabilities. Because the eligibility definition of disability is broader under these statutes than IDEA, more children are protected under Section 504 and the ADA. Thus, students who cannot receive appropriate services or accommodations under IDEA, such as students with epilepsy or AIDS, may be eligible for such services or accommodations necessary to ensure that they receive an education as effective as that provided non-disabled students.⁴⁸ Although fewer protections are available under Section 504 and the ADA as compared with IDEA, both 504 and the ADA ensure equal access to educational services.

Advocates may use Section 504 and the ADA on behalf of juveniles with disabilities who are ineligible for IDEA as an alternative source of substantive and procedural protections. These statutes, along with IDEA, may be used to advance the education rights of juveniles as an alternative to high school drop-out, expulsion, unemployment, and incarceration.

⁴⁴ 20 U.S.C. §1415(k)(1)(D)(i)(2004).

⁴⁵ 20 U.S.C. §1415(k)(5)(B)(2004); 34 C.F.R. § 300.527 (2005).

⁴⁶ 29 U.S.C. § 794 (2002).

⁴⁷ 42 U.S.C. §12132 (2002).

⁴⁸ 34 C.F.R. §§104.3(j), 104.4(b), 104.33, 104.35 & 104.36 (2005); 28 C.F.R. § 35.130(a),(b) & (d) (2005).

VIII. CONCLUSION

Without access to special education services, many juveniles will be unable to break the cycle of delinquent behavior. They may remain illiterate and eventually drop out of or be expelled from school. However, with caring, experienced advocates on their side, juveniles with disabilities can gain access to services that will provide them with the help they need to experience academic success. This success, in turn, may be the incentive many juveniles need to remain in school and out of the court system. Hopefully, many of these same youths will ultimately become productive adult members of our society. With an understanding of special education entitlements, juvenile court advocates can be the catalysts for this positive change.