THE EDUCATION of SPECIAL EDUCATION STUDENTS

Schools Legal Service
Orange County Department of Education

September, 2006

Inquiries regarding permission for use of material contained in this publication should be addressed to:

Ronald D. Wenkart
General Counsel
Orange County Dept. of Education
200 Kalmus Drive
Costa Mesa, California 92628
(714) 966-4220

Schools Legal Service Staff
Ronald D. Wenkart, General Counsel
Claire Y. Morey, Counsel
Lysa M. Salzman, Counsel
Mark R. Bresee, Counsel
Norma Garcia, Paralegal

THE EDUCATION OF DISABLED STUDENTS

Table of Contents

THE EDUCATION OF DISABLED STUDENTS

Table of Contents

THE EDUCATION OF DISABLED STUDENTS

Table of Contents

THE EDUCATION OF DISABLED STUDENTS

Table of Contents

HISTORY OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The Individuals with Disabilities Education Act (IDEA) traces its history to an amendment of the Elementary and Secondary Education Act of 1965, which dealt with the education of children with disabilities.[1] Congress gradually became more involved in the education of the disabled by making available more grants to the states for this purpose. Increased awareness of the educational needs of children with disabilities together with several landmark court decisions, led Congress to conclude that further legislation was needed.[2] Legal challenges by children with disabilities to the inequities in public education had their genesis in Brown v. Board of Education,[3] in which the United States Supreme Court discussed the importance of education by stating:

> "[Education] is a principal instrument in awakening the child to cultural values, in preparing him for later . . . 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. . . . [w]here the state has undertaken to provide it, [education] is a right which must be made available to all on equal terms."[4]

Although Brown does not establish the right to an education per se, it does require each state to provide equal opportunity to publicly supported education to all persons who qualify under state law.[5] Based on this premise, two lower courts have held that under the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth Amendment, states cannot deny children with disabilities access to public education.[6]

The federal district court, in Mills v. Board of Education,[7] held that where a state has compulsory school attendance laws, a state may not exclude children with disabilities who come within the provisions of that law. The Mills court emphasized this point by quoting from Brown v. Board of Education: "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. . . ."[8]

In addition, the Mills court required as a matter of due process that children receive a hearing prior to their exclusion or placement in a special education program.[9] The court also held that no

---

[1] Public Law 91-230, April 13, 1970, 84 Stats. 121, which is popularly known as the Elementary and Secondary Education Amendments of 1970.
[2] See, S.Rep., No. 168, 94th Congress, 1st Sess. 8 (1975), reprinted in 1975 U.S. Code Congressional and Administrative News, at 1432.
[3] 347 U.S. 483 (1954).
[4] Id. at 483, 493.
[5] Id.
[6] Mills v. Board of Education, 348 F.Supp. 866, 874 (D.D.C. 1972); Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972).
[7] 348 F.Supp. 866, 874 (D.D.C. 1972).
[8] Brown v. Board of Education, 347 U.S. 483, 493 (1954).
[9] Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972).

child with a disability could be excluded on the basis of a school district's insufficient resources and that each child must be individually assessed and placed in a publicly supported program suited to the child's needs. The court further indicated that each child should be placed in the least restrictive environment in which he or she can function.[10]

In Pennsylvania Association for Retarded Children v. Pennsylvania,[11] the federal district court took judicial notice of findings that mentally retarded persons are capable of benefiting from appropriate education programs and that there was no rational basis for excluding them from the public education system. With these cases in mind, Congress passed the Education for All Handicapped Children Act of 1975, also known as the Education of the Handicapped Act. In 1990, Congress renamed the Act the Individuals with Disabilities Education Act and amended several significant provisions. The term "handicapped" was replaced throughout the IDEA with the term "disabled" and "handicapped children" are now referred to as "children with disabilities."

PURPOSE OF THE IDEA

Congress stated that the purpose of the IDEA is to assure that all children with disabilities have available to them a free and appropriate public education which emphasizes special education and related services designed to meet their unique needs.[12] In addition, the IDEA is designed to assure that the rights of children with disabilities and their parents are protected, to assist states and local districts to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.[13]

The IDEA's main provisions provide that in order to be eligible for federal funds, states must meet the following conditions:

1. The state must insure that all children with disabilities have the right to a free and appropriate public education including children who have been suspended or expelled;[14]

2. The state must formulate a plan designed to locate, identify, and evaluate all children with disabilities within the state;[15]

3. The state must develop and maintain records of an appropriate individualized educational program for each child with a disability and must establish or revise the individualized educational program in accordance with the requirements of the IDEA;[16]

4. The state must establish procedural safeguards which:

[10] Ibid.
[11] 343 F.Supp. 279 (E.D. Pa. 1972).
[12] 20 U.S.C. § 1400(c).
[13] 20 U.S.C. § 1400(c).
[14] 20 U.S.C. § 1412(1).
[15] 20 U.S.C. § 1412(3).
[16] 20 U.S.C. § 1412(4).

a. provide an opportunity to the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child;

b. provide prior written notice to the parents or guardian of the child with a disability whenever a proposal to change the identification, evaluation or educational placement of the child is proposed or denied;

c. fully inform the parents or guardian of all procedures and rights available to them; and

d. provide an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child.[17]

The state must establish procedures to provide to the maximum extent appropriate that children with disabilities are educated with children without disabilities and that assessment and testing procedures are not discriminatory.[18]

KEY TERMS UNDER THE IDEA

The IDEA set forth the following definitions of key terms used in the IDEA:

1. Special Education: Specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings and instruction in physical education.[19]

2. Child with a Disability: A child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (emotional disturbance) orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason of their disability, need special education and related services.[20]

3. Related Services: Transportation, and such developmental, corrective, and other supportive services as may be required

[17] 20 U.S.C. § 1415(b)(1).
[18] 20 U.S.C. § 1412(5).
[19] 20 U.S.C. § 1401(25).
[20] 20 U.S.C. § 1401(3)(A).

to assist a child with a disability to benefit from special education, including the early identification and assessment of disabling conditions in children. Such services include speech-language pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services, counseling services, including rehabilitation services, orientation and mobility services and medical services for diagnostic and evaluation purposes only.[21] Related services does not include a medical device that is surgically implanted or the replacement of such device (e.g., cochlear implant).

4. Transition Services: A coordinated set of activities designed within an outcome results oriented process to promote a student's movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.[22]

5. Free Appropriate Public Education: Special Education and related services which:

   (a) Have been provided at public expense, under public supervision and direction and without charge;

   (b) Meet the standards of the state education agency;

   (c) Include an appropriate preschool, elementary, or secondary school education in the state involved; and

   (d) Are provided in conformity with the individualized education program required under the IDEA.[23]

6. Individualized Education Program (IEP): A written statement for each child with a disability that is developed, reviewed and revised in accordance with Section 1414(d).[24]

[21] 20 U.S.C. § 1401(22).
[22] 20 U.S.C. § 1401(30).
[23] 20 U.S.C. § 1401(8).

7. Assistive Technology Device: Any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability.[25]

8. Assistive Technology Service: The term "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.[26]

The IDEA and the federal regulations define "emotional disturbance" as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

1. An inability to learn that cannot be explained by intellectual, sensory or health factors;

2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

3. Inappropriate types of behavior or feelings under normal circumstances;

4. A general pervasive mood of unhappiness or depression;

5. A tendency to develop physical symptoms or fears associated with personal or school problems.[27]

The federal regulations go on to note that the term "emotional disturbance" includes "schizophrenia," but does not apply to children who are socially maladjusted, unless it is determined that they also have an emotional disturbance.[28]

The 2006 regulations, Section 300.7, add to the definition of a child with a disability. Section 300.7(c)(9) states that other health impairment means having limited strength, vitality or alertness including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment. Section 300.8(c)(9) goes on to state that other health impairments may be due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, Tourette Syndrome, and sickle cell anemia.

---

[24] 20 U.S.C. § 1401(12).
[25] 20 U.S.C. § 1401(1).
[26] 20 U.S.C. § 1401(2).
[27] See, 34 C.F.R. § 300.8(c)(4).
[28] Ibid.

These conditions must adversely affect a child's educational performance for the child to qualify for special education.

The definition of related services does not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g. mapping), maintenance of that device or the replacement of that device.[29] The public agency is required to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school and to routinely check the external component of the surgically implanted device to make sure it is functioning properly.[30]

The definition of interpreting services has been changed to clarify that the term includes transcription services, such as communication access, real time translation for children who are deaf or hard of hearing, and special interpreting services for children who are deaf-blind.[31] The definition of school nurse services has been expanded and renamed school health services and school nurse services. The expanded definition clarifies that school nurse services are provided by a qualified school nurse and school health services may be provided by a qualified school nurse or other qualified person.[32] The definition of supplementary aides and services has been modified to specify that aides, services, and other supports are also provided to enable children with disabilities to participate in extracurricular and nonacademic settings as well as regular education classes so that children with disabilities may be educated with nondisabled children to the maximum extent appropriate.[33]

The federal regulations require that physical education be made available to all children with disabilities receiving a free appropriate public education, unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades.[34]

STATE STATUTORY PROVISIONS

In 2005, the California Legislature amended numerous provisions in the Education Code regulating special education. The purpose of the legislation was to conform state law to federal law.[35]

The effect of the legislation is that California law in most respects is identical to federal law. Under California law, the term "special education" is defined as special designed instruction at no cost to the parent, to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instructional program, and related services, at

[29] 34 C.F.R. § 300.34(b).
[30] 34 C.F.R. § 300.34(b)(2).
[31] 34 C.F.R. § 300.34(c)(4).
[32] 34 C.F.R. § 300.34(c)(13).
[33] 34 C.F.R. § 300.42.
[34] 34 C.F.R. § 300.108.
[35] See, Stats.2005, c. 653 (A.B. 1662), effective October 7, 2005.

no cost to the parent, that may be needed to assist these individuals to benefit from specially designed instruction.[36]

In state law, the term "individual with exceptional needs" is used rather than "children with disabilities," but the definition is virtually the same as federal law. The state statute defines "an individual with exceptional needs" as:

> "'Individuals with exceptional needs' means those persons who satisfy all of the following:
>
> "(a) Are identified by an individual education program team as children with disabilities as that phrase is defined in paragraph 4 of subsection (a) of 1401 of Title 20 of the United States Code;
>
> "(b) Their impairment, as described by subdivision (a), requires instruction, services, or both which cannot be provided with modification of the regular school program;
>
> "(c) Come within one of the following age categories:
>
> "(1) Younger than three years of age and identified by the district, the special education local plan area, or the county office as requiring intensive special education and services, as defined by the State Board of Education;
>
> "(2) Between the ages of three to five years, and identified by the district, the special education local plan area, or the county office as requiring intensive special education and services as defined by the State Board of Education; or between the ages of three and five years, inclusive, and identified by the district, special education local plan area, or county office pursuant to Section 56441.11;
>
> "(3) Between the ages of 5 years and 18 years, inclusive;
>
> "(4) Between the ages of 19 and 21 years, inclusive; enrolled in or eligible for a program under this part or other special education program prior to his or her 19th birthday; and has not yet completed his or her prescribed course of study or who has not met proficiency standards or has not graduated from high school with a regular high school diploma . . ."[37]
>
> The 2005 Legislation redefined "designated instruction and services" to be identical to the term "related services" as used in federal law.[38]

[36] Education Code section 56031.
[37] Education Code section 56026.
[38] See, Education Code section 56363. See, also, 20 U.S.C. §1401(26), 34 C.F.R. § 300.24.

State law includes a list of permissive services:

These services may include, but are not limited to, the following:

"(1) Language and speech development and remediation; . . .

"(2) Audiological services;

"(3) Orientation and mobility services;

"(4) Instruction in the home or hospital;

"(5) Adapted physical education;

"(6) Physical and occupational therapy;

"(7) Vision services;

"(8) Specialized driver training instruct-ion;

"(9) Counseling and guidance services; including rehabilitation counseling;

"(10) Psychological services other than assessment and development of the individualized education program;

"(11) Parent counseling and training;

"(12) Health and nursing services . . . ;

"(13) Social worker services;

"(14) Specially designed vocational education and career development;

"(15) Recreation services;

(16) Specialized services for low incidence disabilities, such as readers, transcribers, and vision and hearing services; and

(17) Interpreting services."[39]

The term "designated instruction and services" and "related services" do not include a medical device that is surgically implanted, or the replacement of that device.[40]

[39] Education Code section 56363.
[40] Education Code section 56363(c).

FEDERAL FUNDING OF SPECIAL EDUCATION

In 1975, Congress passed the Education for All Handicapped Children Act, now known as the Individuals with Disabilities Education Act, or IDEA. The purpose of IDEA was to provide funding to educate the disabled, many of whom were receiving no education at all or who were being warehoused in inadequate programs.

The IDEA was envisioned as a federal-state partnership in which Congress would provide 40 percent of the cost and the states, 60 percent.[41] However, Congress has not funded IDEA at the promised 40 percent level. Congress even added additional requirements to IDEA in 1997, but did not boost federal funding to assist states in complying with the new mandates.[42] Twice Congress has chastised itself for its failure, once in a 1994 law and once in a 1999 resolution, but it has never increased funding to the 40 percent level.[43]

During most of IDEA's 30 plus years, Congress has provided 8 percent of the cost of special education. In response to the protests of education organizations and groups representing the disabled, funding was boosted in the 2001 fiscal year federal budget to 12 percent. While that is a step in the right direction, much more needs to be done.

The average cost of educating a disabled student in the 1997-98 school year was twice that of educating a student who is not disabled, and the number of disabled students continues to increase, thanks to improvements in medical treatment, new technology for the disabled, and increased parental awareness of programs for the disabled.[44]

The bipartisan failure of Congress to fund special education adequately prompted the California Legislature to take action. On August 16, 1999, the Legislature passed a joint resolution demanding that Congress keep its promise and provide the full 40 percent of funding for special education. The Legislature directed the chief clerk of the Assembly to transmit copies of the resolution to President Bill Clinton, Secretary of Education Richard Riley, and key members of Congress.[45]

The purpose of the resolution was to bring to the attention of Congress its failure to fulfill its commitment to the disabled. The resolution points out that California and other states have been required, as a result of Congress' breach of its promise, to transfer funds from other vital state and local programs to special education. The Legislature estimated that California was transferring almost $1 billion annually from regular education to special education.[46]

The resolution states that if Congress funded special education programs at the promised level, California would receive $1.8 billion annually. The receipt of these funds would allow California to increase spending on special education by $800 million and to use $1 billion in state

[41] 20 U.S.C. § 1411(a).
[42] Public Law 105-17, 111 Stat. 37 effective June 4, 1997.
[43] 20 U.S.C. § 6062; House Concurrent Resolution 84 (April 13, 1999).
[44] National Center for Education Statistics (National School Boards Association Issue Brief, 1999).
[45] Assem. Joint Res. No.12 (res. ch. 76) (1999).
[46] Ibid.

funds for educational reforms. Free of federal restrictions, these state funds could be used for school construction, teacher training, recruitment of new teachers, and the purchase of more books and supplies as determined by local school districts.[47]

The impact would be dramatic, allowing states and local school districts to hire additional special education teachers and to purchase more equipment to improve the quality of special education programs. The federal money would free up state funds to pay for education reforms, school construction, and other local needs without an increase in state or local taxes.

As additional state funds became available for education, local school boards would set local priorities for improving the quality of education for all students. The greatest impact would be felt in the inner cities, which have suffered most from aging facilities and inadequate books and supplies.

What we do know is that the continuing failure of Congress to keep its commitment has resulted in cutbacks in other education programs, particularly education reforms, at a time when the public expects improvements in regular education. Local schools take the blame while Congress – the source of the under-funding and the reason education reform is not adequately funded – escapes public attention or scrutiny on the subject. The fact that the public does not know the real source of the education-funding problem makes it much more difficult to solve.

In 2004, Congress made an attempt to address the issue and other issues related to funding. Section 611(i)[48] increases the federal funds authorized for special education but does not actually appropriate funds and does not make appropriations mandatory. The intent of this section is to increase funding to the promised 40% level by Fiscal Year 2011, but Congress is not required to do so.

Section 612(a)(20)[49] added language that a state may not use IDEA funds to satisfy state law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation. The exact meaning of this language is unclear, but it may mean that a state may not use federal funds to satisfy state law mandated funding obligations for growth in average daily attendance. If this language is interpreted in this manner, it may prohibit the State of California from using federal funds to fund growth in the number of special education students in California.

PERMISSIVE USE OF IDEA FUNDS

Sections 613(a)(4)[50] and 613(f)[51] permit a local educational agency to use IDEA funds for early intervening services up to 15% of the amount the agency receives to develop and implement coordinated early intervening services which may include interagency financing structures for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but

[47] Ibid.
[48] 20 U.S.C. § 1411(i).
[49] 20 U.S.C. § 1412(d)(20).
[50] 20 U.S.C. § 1413(a)(4).
[51] 20 U.S.C. § 1413(f).

who need additional academic and behavioral support to succeed in a general education environment.

In implementing coordinated, early intervening services, a local educational agency may carry out activities that include:

1. Professional development for teachers and other school staff to enable such personnel to deliver scientifically based academic instruction and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and

2. Educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

The legislation specifically states that nothing in the subsection relating to early intervening services shall be construed to limit or create a right to a free appropriate public education. Each local educational agency that develops and maintains coordinated early intervening services shall annually report to the state educational agency on the number of students served and the number of students served who subsequently receive special education and related services. The funds must be used to supplement, not supplant funds made available under the NCLB and may be used to carry out programs aligned with NCLB requirements and may be used to carry out programs aligned with NCLB requirements.

DUTY TO SEARCH FOR AND IDENTIFY DISABLED STUDENTS

The IDEA requires states to have policies and procedures to assure that all children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated.[52]

The federal regulations require states in their annual plan to include policies and procedures which will ensure that a practical method is developed and implemented to locate and identify children with disabilities who are not receiving special education and related services.[53] The annual plan must designate the agency responsible for identifying and locating children with disabilities and the activities and resources to be utilized to implement the plan.[54]

This requirement, commonly referred to as the "child-find system," applies to individuals with exceptional needs ranging in age from 0 through 21 years.[55] Each school district, special education local plan area or county office is required to establish written policies and procedures for a continuous child-find system.[56] A systematic referral system is also required to be established.[57]

[52] 20 U.S.C. § 1412(3).
[53] 34 C.F.R. § 300.125.
[54] 34 C.F.R. § 300.125.
[55] Education Code section 56300 et seq.
[56] Education Code section 56301.
[57] Education Code section 56302.

CHARTER SCHOOLS

The duty to serve special education students also applies to charter schools. The IDEA states that charter schools that are public schools of the school district must serve children with disabilities attending charter schools in the same manner as it serves children with disabilities in its other schools. In addition, the school district must provide funds to charter schools in the same manner as it provides funds to its other schools.[58]

The statutory language does not require that the charter school maintain special education programs for all disabled children, including low incidence disabilities, but it would require the charter school to maintain special education programs that are typically located in each public school in the district (e.g., RSP programs). In charter petitions that have been submitted to school districts in the past few months, many of the charter petitions make the assumption that all special education children will be served outside of the charter school, including RSP children. Such an approach violates the IDEA.

The regulations contain a number of provisions that refer to charter schools. Section 300.18 includes a public charter school established by a local educational agency within the definition of local education agency. As a result, all regulations which set forth requirements for local education agencies apply to public charter schools as well. Section 300.22 includes public charter schools that are not otherwise included as local education agencies within the definition of public agency. Section 300.312 states that children with disabilities who attend public charter schools and their parents retain all rights under the IDEA. Section 300.312(b) states that if the public charter school is a local educational agency (i.e., school district) that receives federal funding, the charter school is responsible for ensuring that the requirements of the IDEA are met, unless state law assigns that responsibility to some other entity. Section 300.312(c) states that if a public charter school is a school of the local educational agency and receives federal funding, the local educational agency is responsible for ensuring that the requirements of the IDEA are met, unless state law assigns that responsibility to some other entity. The state law in California is silent on this issue. Therefore, the responsibility for charter school compliance with the IDEA remains with the school district that granted the charter.

Section 300.241 states that the school district must have on file with the state education agency, information to demonstrate that it is carrying out the provisions of the IDEA with respect to charter schools. The document on file with the SEA must state that the local educational agency will serve children with disabilities attending charter schools in the same manner as it serves children with disabilities in its other schools and provide federal funds under the IDEA to charter schools in the same manner as it provides federal funds to its other schools.

Therefore, it is a violation of federal law for charter schools to refuse to serve special education students. Charter schools should serve special education children in the same manner as other schools in the district. Special education programs which are typically located at each school should also be located at the charter school. Special education programs which, due to the low incidence of the disability, are provided at a limited number of schools in the district or are regionalized may continue to be located in this manner.

[58] 20 U.S.C. § 1413(a)(5).

PAPERWORK REDUCTION PILOT PROGRAM

Section 609[59] establishes a pilot program that will allow states to identify ways to reduce paperwork burdens and other administrative duties that are directly associated with the requirements of the IDEA in order to increase the time and resources available for instruction and other activities aimed at improving educational and functional results for children with disabilities. States will be given the opportunity to apply for a waiver to participate in the program. A maximum of 15 states may apply. It is unknown at this time whether the State of California intends to apply for the waiver.

LOCAL EDUCATIONAL AGENCY RISK POOL

Section 611(e)(3)[60] establishes a local educational agency risk pool for the purpose of assisting local educational agencies in addressing the needs of high need children with disabilities. This section authorizes each state to reserve up to 10% of the state's allocation of federal funds to establish a high cost fund and make disbursements from the high cost fund to local educational agencies for high need children. The disbursements from the fund may not be used for legal fees, court costs, or other litigation costs. A high need child is to be defined by the State in consultation with local educational agencies and must, at a minimum be a child with a disability that costs three times the average per pupil expenditure in that State.[61]

The State plan for the high cost fund must include all of the following:

1. The financial impact of the high need child with a disability on the budget of the child's local educational agency.

2. Eligibility criteria for the participation of a local educational agency that, at a minimum, takes into account the number and percentage of high need children with disabilities served by a local educational agency.

3. A funding mechanism that provides distributions each fiscal year to local educational agencies that meet the criteria developed by the State.

---

[59] 20 U.S.C. § 1409.

[60] 20 U.S.C. § 1411(e)(3).

[61] The definition of "average per pupil expenditure" is set forth in the NCLB, 20 U.S.C. § 7801(2) which states: "The term "average per-pupil expenditure" means, in the case of a State or of the United States –

(A) without regard to the source of funds –

(i) the aggregate current expenditures, during the third fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the State or, in the case of the United States, for all States (which, for the purpose of this paragraph, means the 50 States and the District of Columbia); plus

(ii) any direct current expenditures by the State for the operation of those agencies; divided by

(B) the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year."

4. An annual schedule by which the State educational agency will make its distributions from the high cost fund each fiscal year.

The State is required to make its final State plan available to the public no less than 30 days before the beginning of the school year, including dissemination and posting on the State website. Funds in the pool that are not expended in a fiscal year must be allocated to local educational agencies for the succeeding fiscal year.

ELIGIBILITY FOR SPECIAL EDUCATION

The IDEA requires participating states to provide a free and appropriate public education to all children with disabilities between the ages of 3 and 21.[62] In California, students younger than 5 years are eligible for special education if they are in need of intensive special education and services, as defined in state regulations. Education Code Section 56441.11 states the eligibility criteria for students age 3 to 5:

> ". . . [I]f the child meets the following criteria:
>
> "(1) Is identified as having one of the following disabling conditions, as defined in Section 300.7 of Title 34 of the Code of Federal Regulations, or an established medical disability as defined in subdivision (d):
>
> "(a) Autism;
>
> "(b) Deaf-blindness;
>
> "(c) Deafness;
>
> "(d) Hearing impairment;
>
> "(e) Mental retardation;
>
> "(f) Multiple disabilities;
>
> "(g) Orthopedic impairment;
>
> "(h) Other health impairment;
>
> "(i) Serious emotional disturbance;
>
> "(h) Specific learning disability;
>
> "(k) Speech or language impairment in one or more: voice, fluency, language and articulation;

[62] 20 U.S.C. § 1412(1)(B).

"(l) Traumatic brain injury;

"(m) Visual impairment;

"(n) Established medical disability.

"(2) Needs specially designed instruction or services as defined in Sections 56441.2 and 56441.3;

"(3) Has needs that cannot be met with modification of a regular environment in home or school, or both, without monitoring or support as determined by an IEP program team member pursuant to Section 56431;

"(4) Meets eligibility criteria specified in Section 3030 of Title 5 of the California Code of Regulations;

"(5) A child is not eligible for special education and services if the child does not otherwise meet the eligibility criteria, and his or her educational needs are due primarily to:

"(a) Unfamiliarity with the English language;

"(b) Temporary physical disabilities;

"(c) Social maladjustment;

"(d) Environmental, cultural, or economic factors;

"(6) For purposes of this section, 'established medical disability' is defined as a disabling medical condition or congenital syndrome that the IEP team determines has a high predictability of requiring special education and services;

"(e) When standardized tests are considered invalid for children between the ages of 3 and 5 years, alternative means, for example, scales, instruments, observations, and interviews shall be sued as specified in the assessment plan."[63]

With respect to children aged birth to 4 years and 9 months, inclusive, the State Board of Education has established additional eligibility criteria:

"(1) The child must meet the standard eligibility criteria;

[63] Education Code section 56441.11.

"(2) The child must be in need of intensive special education and services. To be eligible for intensive special education and services, the child must meet one of the following criteria:

"(A) The child is functioning at or below 50 percent of his or her chronological age level in any one of the following skill areas:

"(1) Gross or fine motor development;

"(2) Receptive or expressive language development;

"(3) Social or emotional development;

"(4) Cognitive development;

"(5) Visual development.

"(B) The child is functioning between 51 percent and 75 percent of his or her chronological age level in any two of the skill areas identified in Section 3031(2)(A);

"(C) The child has a disabling medical condition or congenital syndrome which the Individualized Educational Program Team determines has a high predictability of requiring intensive special education and services."[64]

The California Early Intervention Services Act coordinates governmental agency programs to provide family centered early intervention services to children from birth to age two, who have or at risk of having disabilities.[65] Under this Act, the Department of Education was given the responsibility of providing services to children who have visual, hearing and severe orthopedic impairments or any combination thereof. These children must meet the eligibility criteria in Education Code Section 56026 and 56026.5, but not be eligible for services under the Lanterman Developmental Disabilities Act.[66] These children each shall have an individualized family service plan which takes the place of the IEP used for older children.[67]

Under the 2004 amendment to the IDEA school districts may use an alternative process for determining whether a child has a specific learning disability.[68]

Section 614(b)[69] states that in making a determination of eligibility for special education and related services, a child shall not be determined to be a child with a disability if the determinant factor for such a determination is a lack of appropriate instruction in reading, including in the

[64] 5 C.C.R. § 3031.
[65] Government Code sections 95001 and 95002; Individuals with Disabilities Education Act, Part H, 20 U.S.C. § 1471 et seq.
[66] Government Code sections 95008 and 95014(b)(1).
[67] Government Code section 95020.
[68] 20 U.S.C. § 1414(b).
[69] 20 U.S.C. § 1414(b).

essential components of reading instruction, as defined in Section 1208(3)[70] of the No Child Left Behind Act, lack of instruction in math, or limited English proficiency.

ELIGIBILITY OF STUDENTS WITH SPECIFIC LEARNING DISABILITIES

The IDEA states that when determining whether a child has a specific learning disability, a school district shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. In determining whether a child has a specific learning disability, a school district may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures.[71]

The federal regulations further clarify that a state may not require the use of severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability and must permit the use of process based on the child's response to scientific, research-based intervention and other alternative research-based procedures for determining whether a child has a specific learning disability.[72] The determination of whether a child suspected of having a specific learning disability is a child with a disability must be made by the child's parents and a team of qualified professionals which must include the child's regular teacher, or if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of that age, and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech language pathologist, or remedial reading teacher.[73]

The child's parents and a team of qualified professionals may determine that a child has a specific learning disability if the child does not achieve adequately for the child's age or meet state approved grade level standards in one of eight areas when provided with learning experiences and instruction appropriate for the child's age or state approved grade level standards. These eight areas are:

1. Oral expression;
2. Listening comprehension;
3. Written expression;
4. Basic reading skill;
5. Reading fluency skills;
6. Reading comprehension;
7. Mathematics calculation; and

[70] 20 U.S.C. § 6368(3), which defines the "essential components of reading instruction" as explicit and systemic instruction in phonemic awareness, phonics, vocabulary development, reading fluency, including oral reading skills and reading comprehension strategies.
[71] 20 U.S.C. § 1414(b)(6).
[72] 34 C.F.R. § 300.307(a).
[73] 34 C.F.R. § 300.308.

8. Mathematics problem solving.[74]

In order to ensure that the underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation, data that demonstrates that prior to, or as part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel.[75] The district must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty. At least one member of the group of professionals must conduct an observation of the child's academic performance in a regular classroom after the child has been referred for an evaluation and parental consent is obtained.[76]

The group of professionals must provide specific documentation of the eligibility determination of a specific learning disability that shows that the child is not achieving adequately for the child's age or is not meeting state approved grade level standards and the child is not making sufficient progress to meet age or state approved grade level standards.[77] The group of professionals must prepare a statement concerning the effects of a visual, hearing, or motor disability, mental retardation, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency on the child's achievement level.[78]

If the child participated in a process that assessed the child's response to scientific, research-based intervention, the documentation must include instructional strategies used, the student centered data collected and documentation that the child's parents were notified about the state's policies regarding the amount and nature of student performance data that will be collected, the general education services that will be provided, the strategies for increasing the child's rate of learning, and the parent's right to request an evaluation.[79]

INITIAL EVALUATION

Section 614(a)(1)[80] states that a parent of a child, a state educational agency, other state agency or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. The initial evaluation to determine the educational needs of the child and whether the child is a child with a disability shall be completed within 60 days of receiving parental consent for the evaluation, or if the state establishes a time frame within which the evaluation must be conducted within the state's timeframe.[81]

---

[74] 34 C.F.R. § 300.309(a).
[75] 34 C.F.R. § 300.309(b).
[76] 34 C.F.R. § 300.310.
[77] 34 C.F.R. § 300.311(a).
[78] 34 C.F.R. § 300.311(a)(6).
[79] 34 C.F.R. § 300.311(a)(7).
[80] 20 U.S.C. § 1414(a)(1);34 C.F.R. § 300.300.
[81] California Education Code section 56344 requires that the evaluation be completed within 60 days, not counting intersessions or school vacations in excess of five schooldays. Stats.2005, c. 653, AB 1662, effective October 7, 2005.

The applicable timeframe does not apply to a local educational agency if a child enrolls in a school served by the local educational agency after the relevant timeframe has begun, and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability, but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed, or the parent of a child repeatedly fails or refuses to produce the child for the evaluation.

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services. An agency that is responsible for making a free appropriate public education available to a child with a disability shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

If the parents of a child refuse to consent to an initial evaluation, the local educational agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under 20 U.S.C. section 1415, except to the extent inconsistent with state law relating to parental consent. If the parent of a child does not provide informed consent or fails to respond to a request to provide consent, the local educational agency shall not provide special education and related services by utilizing the due process hearing procedures and shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide the special education and related services for which the local educational agency requests such informed consent. In addition, the local educational agency is not required to convene an IEP meeting or develop an IEP under the IDEA for the child for the special education and related services for which the local educational agency requests such consent.

If the child is a ward of the state and is not residing with the child's parent, the local educational agency shall make reasonable efforts to obtain informed consent from the parent of the child for an initial evaluation to determine whether the child is a child with a disability. The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if:

1. Despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;

2. The rights of the parent of the child have been terminated in accordance with state law; or

3. The rights of the parent to make educational decisions have been subrogated by a judge in accordance with state law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

The federal regulations clarify a number of issues with respect to consent, initial evaluation, and reevaluation. The regulations require that a school district make reasonable efforts to obtain informed consent from the parent of the child before conducting an evaluation.[82] However, the district is not required to pursue an initial evaluation when the parent has failed to provide consent.[83] The school district is also required to make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services.[84]

With respect to reevaluation, if a parent refuses to consent, the public agency may, but is not required to, pursue the reevaluations by the using the consent override procedures. However, if the district does not pursue the evaluation or reevaluation it does not violate its obligations under the IDEA.[85] The school district must document its attempts to obtain parental consent.[86] Examples of documentation include detailed records of phone calls made or attempted and the results of those calls, copies of correspondence sent to parents and responses received, and detailed records of home visits.[87]

In Fitzgerald v. Camdenton R-III School District,[88] the Eighth Circuit Court of Appeals held that a school district may not seek to compel parents to consent to an evaluation of their child for special education services when the parents have withdrawn their child from public school and enrolled the child in a private school.

In Fitzgerald, the child was enrolled in public school for several years but did not receive special education services. The school district, based on observations of the child's behavior and academic performance, recommended an evaluation for special education. The parents refused to consent to an evaluation, withdrew the child from public school to educate him at home. The parents had the child evaluated privately and provided special education to the child through private sources. The parents expressly waived all benefits under the Individuals with Disabilities Education Act (IDEA).

The Court of Appeals noted that under the IDEA, school districts are required to enact policies and procedures to identify all children with disabilities including children attending private schools who are in need of special education and related services.[89] The district relied on a provision of the IDEA that states that if the parent of a child does not provide consent for an initial evaluation the local education agency may pursue the initial evaluation of the child by utilizing the due process hearing procedures.[90] The Court of Appeals noted that the IDEA uses the word "may" and stated:

---

[82] 34 C.F.R. § 300.300(a).
[83] 34 C.F.R. § 300.300(a)(3).
[84] 34 C.F.R. § 300.300(b).
[85] 34 C.F.R. § 300.300(c)(1).
[86] 34 C.F.R. § 300.300(d)(5); 34 C.F.R. § 300.322(d).
[87] 34 C.F.R. § 300.322.
[88] 439 F.3d 773(9th Cir. 2006).
[89] 20 U.S.C. § 1412(a)(3).
[90] 20 U.S.C. § 1414(a)(1); 34 C.F.R. § 300.505(b). The court indicated that for purposes of their decision, home school and private school programs should be treated in a similar manner.

"These requirements do not make sense for privately-educated children whose services have been waived."

The Court of Appeals stated, "Where a home schooled child's parents refuse consent, privately educate the child, and expressly waive all benefits under the IDEA, an evaluation would have no purpose."[91] The decision of the Eighth Circuit Court of Appeals is limited to parents who refuse consent and enroll their children in private schools or a home school program. The decision did not rule on public school children whose parents refuse consent.

The federal regulations take a similar position. The federal regulations prohibit a school district from using the consent override provisions when the parent of a home schooled child or a private school student refuses to consent to an initial evaluation or a reevaluation.[92]

REEVALUATION

A local educational agency is required to ensure that a reevaluation of each child with a disability is conducted in accordance with IDEA procedures if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation or if the child's parents or teacher request a reevaluation. A reevaluation shall occur not more frequently than once a year unless the parent and the local educational agency agree otherwise, and at least once every three years, unless the parent and local educational agency agree that a reevaluation is unnecessary.

With respect to reevaluation of a child with a disability, it is unclear what the effect of a parent's refusal to consent to a reevaluation would be. The statutory provision relating to reevaluations[93] states that a reevaluation of each child with a disability shall be conducted in accordance with the procedures for initial evaluation. The procedures for initial evaluation include the provisions that indicate that a parent's refusal to consent to services precludes a local educational agency from filing for a due process hearing to provide special education and related services. How this will affect children who are receiving services when the local educational agency seeks to reevaluate a child to determine if a modification in special education and related services is needed is unclear.

The 2006 regulations have clarified the issue somewhat. The regulations indicate that each public agency must obtain informed consent prior to conducting any reevaluation of a child with a disability. If the parent refuses to consent to the reevaluation, the pubic agency may, but is not required to, pursue the reevaluation by using the consent override procedures. The public agency does not violate its obligations under the IDEA if it declines to pursue the evaluation or reevaluation.[94]

[91] Id. at 777.
[92] 34 C.F.R. § 300.300(d)(4).
[93] 20 U.S.C. § 1414(a)(2)(A).
[94] 34 C.F.R. § 300.300(c)(1).

In M.T.V. v. Dekalb County School District,[95] the Court of Appeals affirmed a hearing officer's order requiring parents to consent to a school district's request to reevaluate a special education student or else forfeit the student's services under the IDEA. The Court of Appeals cited an earlier case, Gregory K. v. Longview School District,[96] in which the Court of Appeals held that if parents want their child to receive special education services under the IDEA they must permit the school district to assess or evaluate the student.

As discussed above, in Fitzgerald v. Camdenton R-III School District,[97] the Eleventh Circuit Court of Appeals held that a school district may not seek to compel parents to consent to an evaluation of their child for special education services when the parents have withdrawn their child from public school and have enrolled their child in a private school. However, in M.T.V., the same Court of Appeals made it clear that if the child is enrolled in public school and the parents wish to continue receiving special education services under the IDEA, they must permit a school district to evaluate the child.

The Court of Appeals stated:

> "We agree with these courts and hold the school district was entitled to reevaluate M.T.V. by an expert of its choice. M.T.V. was initially deemed eligible for OHI services in August 1999, making his triennial evaluation for continued OHI eligibility due in 2002. Conditions also warranted a reevaluation because M.T.V. had made significant progress on his OHI goals. Finally, the school district had a right to condition M.T.V.'s continued OHI services on a reevaluation by an expert of its choice because M.T.V.'s initial OHI eligibility was based primarily on evaluations provided by his parents. We agree 'the school district cannot be forced to rely solely on an independent evaluation conducted at the parent's behest.'"[98]

The school district had convened an IEP team meeting to discuss the child's continued eligibility under the IDEA. The IEP team questioned the child's continued eligibility for services due to progress the child had made. The parents had refused to consent to the reevaluation.

ASSESSMENT OF EDUCATIONAL NEEDS

Before any action is taken with respect to the initial placement of an individual with exceptional needs, an individual assessment of the pupil's educational needs must be conducted by qualified persons. The assessment must be conducted by persons competent to perform the assessment, as determined by the school district, county office, or special education services region.[99]

---

95 446 F.3d 1153 (11th Cir. 2006).
96 811 F.2d 1307, 1315 (9th Cir. 1987).
97 439 F.3d 773 (11th Cir. 2006).
98 446 F.3d 1153, 1160 (11th Cir. 2006).
99 34 C.F.R. §§ 300.520, 300.530; Education Code sections 56320, 56322.

Whenever an assessment for the development or revision of the IEP is to be conducted, the parent shall be given a written proposed assessment plan within 15 days of, the referral for assessment, not counting days between the pupils school sessions or vacation days in excess of five school days, unless the parent agrees in writing. In any event, the assessment plan shall be developed within ten days after the start of the next school year if a referral was made within ten days of the end of the regular school year. A copy of the notice of parents' rights and an explanation of the procedural safeguards must be attached to the assessment plan.[100] The proposed assessment plan must meet the following requirements:

1. Be in a language easily understood by the general public;

2. Be provided in the primary language of the parent or other mode of communication used by the parent unless to do so is clearly not feasible;

3. Explain the type of assessments to be conducted;

4. State that no IEP will result from the assessment without the consent of the parent.[101]

No assessment shall be conducted unless the final written consent of the parent is obtained prior to the assessment except where the public education agency has prevailed in a due process hearing relating such assessment. The parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision.[102]

Assessments or evaluations must be conducted before the initial provision of special education and related services to a child with a disability.[103] The initial assessment or evaluation shall consist of procedures to determine whether a child is a child with a disability as defined by the IDEA and to determine the educational needs of the child.[104] The school district must obtain the informed consent of the parent of the child before the evaluation is conducted. Parental consent for assessment shall not be construed as consent for placement for receiving special education and related services. If the parents of a child with a disability refuse to consent to an assessment, the school district may continue to pursue an assessment by filing for a due process hearing.[105]

School districts must insure that a reevaluation of each child with a disability is conducted if conditions warrant a reevaluation or if the child's parents or teachers request an evaluation at least once every three years except with the consent of the parent.[106]

In conducting the assessment, the school district is required to use a variety of assessment tools and strategies to obtain relevant, functional and developmental information including information provided by the parent that may assist in determining whether the child is a child with a

[100] Education Code section 56321.
[101] 34 C.F.R. § 300.532, Education Code section 56321.
[102] Education Code section 56321.
[103] 20 U.S.C. § 1414(a)(1).
[104] 20 U.S.C. § 1414(a)(1)(B).
[105] 20 U.S.C. § 1414(a)(C).
[106] 20 U.S.C. § 1414(a)(C)(2).

disability and the content of the child's IEP including information relating to enabling the child to be involved in and progress in the general curriculum or to participate in appropriate activities. The school district is required not to use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child and to use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors in addition to physical or developmental factors.[107]

Each school district is required to insure that tests and other evaluation materials used to assess a child are selected and administered so as to not be discriminatory on a racial or cultural basis and are provided and administered in the child's native language or other mode of communication unless it is clearly not feasible to do so. Any standardized tests that are given to the child must be validated for the specific purpose for which they are used, administered by trained and knowledgeable personnel and must be administered in accordance with any instructions provided by the producer of such test. The child must be assessed in all areas of suspected disability and assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child must be provided.[108]

Upon completion of the assessment, a determination by a team of qualified professionals and the parent of the child should be made to determine whether the child is a child with a disability and a copy of the assessment report and the documentation of eligibility should be given to the parent.[109] In making a determination of eligibility, a child shall not be determined to be a child with a disability if the determining factor for such determination is a lack of instruction in reading or math or limited English proficiency.[110]

If the IEP team and other qualified professionals determine that no additional data is needed to determine whether the child continues to be a child with a disability, the school district shall notify the child's parents of that determination and the reasons for it and the right of such parents to request an assessment to determine whether the child continues to be a child with a disability. The school district should not be required to conduct such an assessment unless requested by the child's parents.[111] However, a school district shall evaluate a child with a disability in accordance with the IDEA before determining that a child is no longer a child with a disability.[112]

The assessments are required to be conducted in accordance with requirements including, but not limited to, all of the following:

1. Materials and procedures are selected and administered so as not to be racially, culturally, or sexually discriminatory;

2. Tests and other assessment materials meet all of the following requirements;

[107] 20 U.S.C. § 1414(b).
[108] 20 U.S.C. § 1414(b)(3).
[109] 20 U.S.C. § 1414(b)(4).
[110] 20 U.S.C. § 1414(b)(5).
[111] 20 U.S.C. § 1414(c)(4).
[112] 20 U.S.C. § 1414(c)(5).

A. Be provided and administered in the pupil's primary language or other mode of communication, unless the assessment plan indicates reasons why such provisions and administration are not clearly feasible;

B. Have been validated for the specific purpose for which they are used;

C. Be administered by trained personnel in conformance with the instructions provided by the producer of such tests and other assessment materials, except that individually administered tests of intellectual or emotional functioning shall be administered by a psychometrist or credentialed school psychologist where available;

3. Materials include those tailored to assess specific areas of education need and not merely those which are designed to provide a single general intelligence quotient;

4. Tests are selected and administered to best ensure that when a test administered to a pupil with impaired sensory, manual or speaking skills produces test results that accurately reflect the pupil's aptitude, achievement level, or other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure;

5. No single procedure is used as a sole criterion for determining an appropriate educational program;

6. The pupil is assessed in all areas related to the suspected disability and a developmental history is obtained, when appropriate;

7. The assessment of a pupil, including the assessment of a pupil with a suspected low incidence disability, shall be conducted by persons knowledgeable of that disability. Special attention shall be given to the unique educational needs, including, but not limited to, skills and the need for specialized services, materials, and equipment.[113]

Assessments are required to be conducted as follows:

[113] Education Code section 56320.

1. Any psychological assessment of pupils shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed;[114]

2. Any health assessment of pupils shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed;[115]

3. Occupational therapy and physical therapy assessments shall be conducted by qualified medical personnel;[116]

4. Psychotherapy and other mental health assessments shall be conducted by qualified mental health professionals.[117]

Unless the parent agrees in writing to an extension, an IEP required as a result of an assessment shall be developed within a total time not to exceed 60 days (not counting days between the pupil's regular school sessions or school vacation in excess of 5 days from the date of receipt of the parent's written consent for assessment unless the parent agrees in writing to an extension). When a referral for assessment has been made 20 days or less prior to the end of the regular school year, an IEP shall be developed within 30 days after the commencement of the subsequent regular school year. In the case of school vacations, the 60 day time shall be commenced on the date that the pupil's school reconvenes.[118] The personnel who assess the pupil are required to prepare a written report or reports, as appropriate, of the results of each assessment. The report must include all of the following:

1. Whether the pupil may need special education and related services;

2. The basis for making the determination;

3. The relevant behavior noted during the observation of the pupil in an appropriate setting;

4. The relationship of the behavior to the pupil's academic and social functioning;

5. The educationally relevant health and development, and medical findings, if any;

[114] Education Code section 56324(a).
[115] Education Code section 56324(b).
[116] Government Code section 7572(b).
[117] Government Code section 7572(c).
[118] Education Code section 56344.

6. For pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services;

7. A determination concerning the effects of environmental, cultural, or economic disadvantage, when appropriate; and

8. The need for specialized services and equipment for pupils with low incidence disabilities. [119]

DISCLOSURE OF ASSESSMENT INFORMATION

Parental consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies, unless information is contained in educational records, and the disclosure is authorized without parental consent under FERPA regulations.[120] Parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of the IDEA.[121] Parental consent must be obtained before personally identifiable information is released to officials of participating agencies that provide or pay for transition services.[122] Parental consent must be obtained before any personally identifiable information is released between officials in the local educational agency where the private school is located and the local educational agency of the parent's residence with respect to parentally placed private school children with disabilities.[123]

INDEPENDENT EDUCATIONAL EVALUATION

The IDEA states that the procedural safeguards required under the IDEA must include the right of a parent to obtain an independent educational evaluation of the child. The regulations clarify these rights.[124]

The 2006 regulations state that upon request for an independent educational evaluation, each public agency shall provide the parents information about where an independent educational evaluation may be obtained and the agency criteria applicable to independent educational evaluations. An independent educational evaluation is defined as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. Public expense is defined as meaning the public agency either pays for the full cost of the independent educational evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.[125]

---

[119] Education Code section 56327.
[120] 34 C.F.R. § 300.622(a).
[121] 34 C.F.R. § 300.622(b)(1).
[122] 34 C.F.R. § 300.622(b)(2).
[123] 34 C.F.R. § 300.622(b)(3).
[124] 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502.
[125] 34 C.F.R. § 502.

Section 300.502(b) states that a parent has a right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. If the parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either initiate a hearing to show that its evaluation is appropriate or ensure that an independent educational evaluation is provided at public expense unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria. If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation but not at public expense. If a parent requests an independent educational evaluation, the public agency may ask the parents why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the school district evaluation.

Section 300.502(c) provides that if the parent obtains an independent educational evaluation at private expense, the results of the evaluation must be considered by the public agency (if it meets agency criteria) in any decision made with respect to the free appropriate public education provided to the child and may be presented as evidence at a hearing under the IDEA regarding that child.

Section 300.502(d) states that if a hearing officer requests an independent educational evaluation as part of the hearing, the costs of the evaluation must be at public expense. Section 300.502(e) states that if an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation to the extent those criteria are consistent with the parent's right to an independent educational evaluation. A public agency may not impose conditions or time lines related to obtaining an independent educational evaluation at public expense other than the criteria the public agency uses when it initiates its own evaluation.

The federal regulations clarify that a parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.[126] The public agency must consider the evaluation obtained by the parent if it meets agency criteria in any decision made with respect to the provision of the free appropriate public education to the child.[127]

OBSERVATION BY INDEPENDENT EVALUATOR

In Benjamin G. v. Special Education Hearing Office,[128] the Court of Appeal held that a school district must allow an expert witness retained by the parents the opportunity to observe the school district's proposed placement before a due process hearing. The Court of Appeal held that

[126] 34 C.F.R. § 300.502(b)(5).
[127] 34 C.F.R. § 300.502(c).
[128] 131 Cal. App.4th 815, 32 Cal.Rptr.3d 366, 200 Ed.LawRep. 277 (2005).

both federal law and state law require a school district to provide an opportunity to the parents' expert to observe the proposed placement prior to the due process hearing.

The student in Benjamin G. was a 10 year old autistic child in the Long Beach Unified School District. Benjamin G.'s parents asked the Long Beach Unified School District to refer the student for an assessment to determine his eligibility for IDEA services.

While the assessment request was still pending, the student's parents enrolled the student in a private school. The district gave the parents a written assessment plan proposal in which the student was to be assessed by a school psychologist through classroom observation. The parents accepted the proposal and a district-employed school psychologist twice observed the student in the private school setting.

Later that year, the district convened an IEP meeting and found the student eligible for IDEA services and offered the student a full-time placement in a special day class in one of the school district's schools. The parents accepted the eligibility finding but did not consent to the public school placement and requested a due process hearing before the California Special Education Hearing Office (SEHO).

Prior to the hearing, the parents submitted a request to have their expert psychologist observe the proposed public school placement. The school district denied the request. The parents then alleged in the pending SEHO proceedings that the proposed public school placement was not appropriate for the student's needs and asked for an order compelling the district to pay for the student's private school placement. In preparation for the hearing, the parents then filed a formal motion in the pending SEHO proceedings asking for an order to compel the district to allow the parent's psychologist to observe the proposed public school placement. The district opposed the motion and the motion was denied by SEHO. SEHO ruled that Education Code section 56329 only provides a student's expert an opportunity for observation for a proposed special education placement if the observation is undertaken in conjunction with an independent educational assessment.

The parents then filed a petition for a writ of mandate in Los Angeles County Superior Court asking for an order compelling SEHO and the school district to allow the parents' psychologist to observe the proposed public school placement. The trial court dismissed the parents' petition without leave to amend.

The parents appealed to the California Court of Appeal and the Court of Appeal reversed.

The Court of Appeal noted that school districts are required to locate potentially eligible children, assess and evaluate them, determine which children are eligible for IDEA benefits, develop IEPs for eligible children, and propose school placements for them. Parents who suspect their children have a qualifying disability are entitled to refer their children for assessment to participate in meetings of any group that determines a child eligibility to refuse to consent to any assessment proposed for their child and to participate as members of the IEP team that determines their child's placement. If the parents disagree with the school district's assessment of their child, the parents have a right to an independent educational assessment at the district's expense (i.e., an evaluation by someone other than a district employee, but using the same criteria as the district's

evaluation). If the parents disagree with the school district's proposed placement, the parents may unilaterally enroll their child in a private school and seek reimbursement from the district upon a showing (at an administrative hearing) that both the proposed public placement violated the IDEA and that the private school placement was proper under the IDEA.

The Court of Appeal noted that the IDEA acknowledges the fact that the school districts have better access to information and more educational expertise than parents and thus provides for a due process hearing that "levels the playing field" by permitting the parents to present all the evidence they can muster to challenge the district's decision. To that end, IDEA gives the child and their parents the right to be advised by experts, to have those experts testify at their due process hearing, and to have someone other than a district employee as a hearing officer.

The Court of Appeal noted that Education Codes section 56329[129] gives the parents the right to have their expert observe the proposed placement without regard to whether their child is present so that they need not remove the child from the present placement while they are in the midst of challenging the proposed placement.[130] Section 56329(b) states in part:

> "If a public agency observed the child in conducting its assessment or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding."

The Court of Appeal rejected the school district's contention that the student's right to have his expert observe the district's proposed placement is contingent upon the student's exercise of his right to conduct an independent educational assessment.

The Court of Appeal went on to state that expert testimony is often critical in IDEA cases and that the IDEA procedural safeguards ensure that children and parents have the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to children with disabilities. Therefore, the Court of Appeal ruled that the student and his parents had a statutory right to have their expert observe the district's proposed placement and that the district was obligated to allow the observation. The Court of Appeal noted that there was obvious harm to the student and their parents if they were forced to participate in a due process hearing with a partially prepared expert.

As a result of this decision, districts should allow parents' experts to observe placements proposed by the school district. Districts may have district personnel accompany the parents' experts so as to minimize any disruption to the educational program. Districts may also set reasonable time limits on such observations.

---

[129] Stats. 2003, ch. 368.
[130] Education Code section 56329(b).

STATE PERFORMANCE GOALS AND INDICATORS

Section 612(a)(15)[131] requires states to establish goals for the performance of children with disabilities that promote the purposes of the IDEA, are the same as the State's definition of adequately yearly progress, including the State's objectives for progress by children with disabilities under the NCLB,[132] address the graduation rates and dropout rates, as well as such other factors as the State may determine and are consistent, to the extent appropriate, with any other goals and standards for children established by the State. The State is also required to establish performance indicators that the State will use to assess progress toward achieving the goals set forth in the NCLB, including measurable annual objectives for progress by children with disabilities under the NCLB and will annually report to the United States Secretary of Education and the public on the progress of the State and of children with disabilities in the State, toward meeting the goals established under the IDEA and the NCLB.

STANDARDIZED TESTING AND ACCOMMODATION OF SPECIAL EDUCATION STUDENTS

Special education students are entitled to reasonable accommodations in the administration of standardized tests, but the need for accommodations must be balanced against the necessity of test validity. What is a reasonable accommodation must be decided on an individualized basis by an IEP team taking into consideration the validity of the test. Therefore, school districts should consider including input from a school administrator familiar with the issues of test validity in preparation for IEP meetings in which test accommodations for a special education student will be discussed.[133]

The Individuals with Disabilities Education Act, as reauthorized in 1997, places additional emphasis on increased performance expectations by children with disabilities and access to the general curriculum. The IDEA also requires that students with disabilities be educated with their nondisabled peers and in general education classes to the maximum extent appropriate.[134] Students with disabilities are to be placed in settings other than the regular classroom only when the nature or severity of the disability requires that the student cannot be educated successfully in the regular classroom with the use of supplementary aides and services.[135] The IDEA emphasizes the importance of testing to determine whether the child is eligible for special education, to determine what accommodations are needed in the classroom or in testing, and what is the appropriate placement for the child. The IDEA requires that special education students be included in district-wide assessment programs.[136] The U.S. Department of Education has concluded that it would violate the IDEA to exclude students with disabilities from participation in high stakes testing programs.[137]

In Brookhart v. Illinois State Board of Education,[138] the Court of Appeals upheld the State of Illinois graduation requirement that all students pass a minimal competency test. The court held that

---

[131] 20 U.S.C. § 1412(a)(15).
[132] 20 U.S.C. § 6311(b)(2)(C).
[133] See, Letter to Chief State School Officers, 34 IDELR 293 (2001).
[134] 20 U.S.C. § 1412(a)(5)(A).
[135] Ibid.
[136] 20 U.S.C. § 1412(a)(17); 13 C.F.R. § 300.138.
[137] See, Joint Policy Memorandum on Assessments, 27 IDELR 138 (1997).
[138] 697 F.2d 179 (7th Cir. 1983).

the school district had the authority to establish minimum standards for the receipt of a diploma, and that such a requirement did not violate the IDEA.[139] The Court of Appeals also found that the graduation test requirement did not violate Section 504 of the Rehabilitation Act. The court in Brookhart held that school districts were not required to alter the content of the graduation exam to accommodate an individual's inability to learn the tested material due to his disability. The court held that this would be a substantial modification of the testing requirement, and would not be required under Section 504. The court held that the denial of a diploma because of an inability to pass a graduation exam is not discrimination under Section 504.[140]

Modifications are usually defined as changes that lower or fundamentally or substantially alter the standards or requirements.[141] As the court noted in Brookhart, modifications would be a fundamental alteration of the program:

> "Altering the content of the test to accommodate an individual's inability to learn the tested material because of his handicap would be a 'substantial modification' as well as a 'perversion' of the diploma requirement. A student who is unable to learn be cause of his handicap is surely not an individual who is qualified in spite of his handicap."[142]

The ruling in Brookhart is consistent with federal regulations,[143] which state:

> "Aides, benefits and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped persons and non-handicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs."

The purpose of accommodations is to provide access to tests, but not to guarantee passage of the test. Therefore, altering or modifying the content of the test (i.e., lowering the standards) is not required by the IDEA, Section 504 or the ADA.[144]

A number of accommodations have been held to be unreasonable by the Office for Civil Rights (OCR) of the U.S. Department of Education. For example, in Nevada State Department of Education,[145] OCR upheld the State of Nevada's determination that computational skills were an essential part of the State's educational program, and that to provide a calculator to a disabled student would be a significant alternation or modification of the testing program and would not be a

---

[139] Id. at 183.
[140] Id. at 184.
[141] See, Wynne v. Tufts University School of Medicine, 932 F.2d. 19 (1st Cir., 1991), 976 F.2d 791, 77 Ed.Law Rep. 1136 (1st Cir. 1992); Guckenberg v. Boston University, 974 F.Supp. 106, 121 Ed.Law Rep. 541 (D.Mass. 1997); Zukle v. Regents of the University of California, 166 F.3d 1041, 132 Ed.Law Rep. 81 (9th Cir. 1999).
[142] Id. at 184.
[143] 34 C.F.R. § 104.4(2).
[144] See, Brookhart v. Illinois State Board of Education, 697 F.2d 179 (7th Cir. 1983).
[145] 25 IDELR 752 (OCR 1996).

reasonable accommodation. In Alabama Department of Education,[146] OCR upheld that the State of Alabama's policy of denying the use of reading devices for the Alabama High School exit exam because it would invalidate the test. OCR found that having another person read the test to the disabled student would not provide a valid assessment of the student's ability to read and would invalidate the test.

In many cases, test accommodations will mirror those used by the student in school. However, on high stakes tests or standardized tests, permissible accommodations may be more limited so as not to invalidate the test.[147] In Florida State Department of Education, OCR upheld the State of Florida's guidelines prohibiting reading or explaining the communications portion of the an exam to a student on the basis that it would invalidate the test. OCR found no violation of either Section 504 or the ADA, even though the student was allowed such accommodations in other test situations in school.

Generally, the use of Braille, additional time on the test, dividing the test into smaller sections administered over several days, and providing a quiet distraction-free environment are considered to be permissible, reasonable accommodations. Reasonable accommodations should be made on an individualized basis based on the individual student's needs. Blanket districtwide policies have been held to be violations of Section 504.[148]

In summary, accommodations on high stake or standardized tests should be provided on an individual basis as determined by the student's IEP or Section 504 plan. Accommodations regularly used in the classroom may be denied for use on a high stakes test or standardized test if the accommodation would invalidate the test. The IEP team should consult with a school administrator who is knowledgeable in the validity of standardized tests before agreeing to accommodations which might invalidate the results of the test.

PARTICIPATION OF SPECIAL EDUCATION STUDENTS IN STATEWIDE ASSESSMENTS

Section 612(a)(16)[149] requires that all children with disabilities are included in all general state and districtwide assessment programs, including assessments described in the NCLB,[150] with appropriate accommodations and alternative assessments where necessary and as indicated in their respective individualized education programs (IEPs). The State (or, in the case of a districtwide assessment, the local educational agency) is required to develop guidelines for the provision of appropriate accommodations. The State (or, in the case of a districtwide assessment, the local educational agency) must develop and implement guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments with accommodations as indicated in their respective individualized education programs (IEPs).

---

[146] 29 IDELR 249 (OCR 1998).
[147] See, Florida State Department of Education, 28 IDELR 1002 (OCR 1998).
[148] See, Hawaii State Department of Education, 17 EHLR 360 (OCR 1990); Letter to Chief State School Officers, 34 IDELR 293 (2001).
[149] 20 U.S.C. § 1412(a)(16); See, also, Education Code section 56385.
[150] 20 U.S.C. § 6311.

The guidelines for alternate assessments must provide that:

1. The alternate assessment is aligned with the State's challenging academic content standards and challenging student academic achievement standards; and

2. If the State has adopted alternate academic achievement standards permitted under the NCLB regulations,[151] the alternate standards measure the achievement of children with disabilities against those standards.

The State is required to conduct the alternate assessments and make available to the public, with the same frequency and in the same detail as it reports on the assessment of non-disabled children, the following:

1. The number of children with disabilities participating in regular assessments, and the number of those children who are provided accommodations in order to participate in those assessments.

2. The number of children with disabilities participating in alternate assessments that are aligned with the State's challenging academic content standards and challenging student academic achievement standards.

3. The number of children with disabilities participating in alternate assessments that include alternate academic achievement standards and measure disabled children against those standards.

4. The performance of children with disabilities on regular assessments and on alternate assessment (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

The state educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and administering any alternate assessment.

[151] 20 U.S.C. § 6311(b)(1).

THE CALIFORNIA HIGH SCHOOL EXIT EXAM AND SPECIAL EDUCATION STUDENTS

On January 30, 2006, Governor Schwarzenegger signed Senate Bill 517[152] amending statutory provisions relating to the High School Exit Exam. The legislation was passed as an urgency measure and took effect immediately on January 30, 2006.

The legislation added Education Code section 60852.3 which states that notwithstanding any other provision of law, a school district must grant a high school diploma to a pupil with a disability who is scheduled to graduate from high school in 2006, has not passed the High School Exit Exam, and has not received a waiver if all of the following criteria exists:

1. The pupil has an IEP adopted pursuant to the Individuals with Disabilities Education Act (IDEA) or a plan adopted pursuant to Section 504 of the Rehabilitation Act of 1973.

2. According to the IEP or Section 504 plan of the pupil, that is dated on or before July 1, 2005, the pupil is scheduled to receive a high school diploma with an anticipated graduation from high school in 2006.

3. The school district certifies that the pupil has satisfied, or will satisfy all other state and local requirements for the receipt of a high school diploma in 2006.

4. The pupil has attempted to pass the high school exit examination at least twice after grade 10, including at least once during grade 12, with the accommodations or modifications, if any, in the IEP or 504 plan.

5. The pupil has received either remedial or supplemental instruction focused on the high school exit exam either through the school of the pupil, private tutoring or other means or the school district failed to provide the pupil with the opportunity to receive that remedial or supplemental instruction.

6. If the pupil received remedial or supplemental instruction, the pupil has taken the high school exit exam at least once following the receipt of that remedial or supplemental instruction, except if following the receipt of that remedial or supplemental instruction, there is no further administration of the examination on or before December 31, 2006.

7. The pupil, or the parent or legal guardian of the pupil, if the pupil is a minor, has acknowledged in writing that the pupil is

[152] Stats.2006, c. 3.

entitled to receive free appropriate public education up to, and including, the academic year during which the pupil reaches 22 years of age, or until the pupil receives a high school diploma, whichever event occurs first.

Section 60852.3(b) requires each school district to report to the State Superintendent of Public Instruction all of the following information:

1. Documentation of the procedure used to implement Section 60852.3.
2. The number of pupils granted diplomas pursuant to Section 60852.3.
3. Any additional information determined to be in furtherance of Section 60852.3.

Section 60852.3 remains in effect only until December 31, 2006, and as of that date is repealed unless a later enacted statute, that is enacted before December 31, 2006, deletes or extends that date.

A legal challenge to the CAHSEE has been filed on behalf of all students and is pending in the courts.

OVER-IDENTIFICATION OF MINORITY STUDENTS IN SPECIAL EDUCATION

Section 612(a)(24)[153] requires states to adopt policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in Section 602 (e.g., mental retardation, emotional disturbance).

PROHIBITION ON MANDATORY MEDICATION

Section 612(a)(25)[154] requires the state educational agency to prohibit state and local educational agency personnel from requiring a child to obtain a prescription for a controlled substance[155] as a condition of attending school, receiving an evaluation or receiving services under the IDEA. However, nothing in this section shall be construed to create a federal prohibition against teachers or other school personnel consulting or sharing classroom based observations with parents regarding their student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under the child find requirements of the IDEA.

[153] 20 U.S.C. § 1412(a)(24).
[154] 20 U.S.C. § 1412(a)(25).
[155] See, the Controlled Substances Act, 21 U.S.C. § 801 et seq.

IEP REQUIREMENTS

A. Annual Progress

Section 614(d)[156] adds a requirement that a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

The requirement for benchmarks or short-term objectives is now limited to children with disabilities who take alternative assessments aligned to alternate achievement standards. Benchmarks or short-term objectives in addition to annual goals will not be required for all other children with disabilities.

B. Alternate Assessment

If the IEP team determines that the child will take an alternate assessment on a particular state or districtwide assessment of student achievement, the IEP team must draft a statement of why the child cannot participate in the regular assessment and the particular alternate assessment selected is appropriate for the child must be included in the IEP.

C. Transition Services

The legislation repealed the requirements that beginning at age fourteen, a statement of transition service needs of the child must be included in the IEP. The legislation now requires that beginning not later than the first IEP to be in effect when the child is sixteen, and updated annually thereafter, the IEP should include appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills and the transition services (including courses of study), needed to assist the child in reaching those goals. Beginning not later than one year before the child reaches the age of majority under state law, a statement that the child has been informed of the child's rights under the IDEA, if any, that will transfer to the child on reaching the age of majority under state law should be included in the IEP.

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP, the local educational agency shall reconvene the IEP team to identify alternate strategies to meet the transition objectives for the child set out in the IEP.

D. Additional Information

The legislation adds a provision that states that nothing in Section 614[157] shall be construed to require that additional information be included in a child's IEP beyond what is explicitly required under Section 614 and nothing in Section 614 should be construed to require the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

---

[156] 20 U.S.C. § 1414(d).
[157] 20 U.S.C. § 1414.

E. Attendance at IEP Meetings

Section 614 also states that a member of the IEP team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of that IEP team member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. A member of the IEP team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to, or a discussion of the member's area of the curriculum or related services, if the parent and the local educational agency consent to the excusal and the member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting. The parent's agreement to excuse a member of the IEP team must be in writing.

In addition, public agencies must ensure that each regular teacher, special education teacher, related service provider, and any other service provider who is responsible for the implementation of the child's IEP, is informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications and supports that must be provided for the child in accordance with the child's IEP.[158] If changes are made to a child's IEP without an IEP meeting, the child's IEP team must be informed of the changes.[159]

When conducting a review of the child's IEP, the child's IEP team must consider the same factors it considered when developing the child's IEP.[160]

F. Preschool Children

In the case of a child who has previously served under Part C of the IDEA (preschool programs), an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system, to assist with the smooth transition of services.

At the beginning of each school year, each local educational agency, state educational agency, or other state agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program. In the case of a child with a disability age 3-5 (or, at the discretion of the state educational agency, a 2 year old child with a disability who will turn age 3 during the school year), the IEP team shall consider the individualized family service plan that contains the material that is developed in accordance with Section 636,[161] and the individualized service plan may serve as the IEP of the child if using that plan as the IEP is consistent with state policy and agreed to by the agency and the child's parents.

G. Transfer of Students and Records

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same state,

[158] 34 C.F.R. § 300.323(d).
[159] 34 C.F.R. § 300.32(a)(4).
[160] 34 C.F.R. § 300.324(b).
[161] 20 U.S.C. § 1436.

the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with federal and state law.

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who has an IEP that was in effect in another state, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation, if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with federal and state law.

To facilitate the transition for a child who transfers from another school, the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, and the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such requests from the new school.

H. Changes to the IEP

In developing each child's IEP, the IEP team, in addition to considering the strengths of the child and the results of the initial evaluation or most recent evaluation of the child, the IEP team is required to also consider the concerns of the parents for enhancing the education of their child and the academic, developmental, and functional needs of the child.

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP. To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP team meetings for the child. Changes to the IEP may be made either by the entire IEP team or by amending the IEP rather than redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

I. Pilot Program – Multi-Year IEPs

In those states that have applied for a waiver to participate in the pilot program authorizing multi-year IEPs, there are certain requirements. The purpose of the program is to provide an opportunity for states to allow parents and the local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed three years, that is designed to coincide with the natural transition points for the child. In order to carry out the purpose of the pilot program, the United States Secretary of Education is authorized to approve not more than fifteen proposals from states to carry out the activity.

A state desiring to participate in the program must submit a proposal to the Secretary of Education at such time and in such manner as the Secretary may reasonably require. The proposal must include the following:

1. Assurances that the development of a multi-year IEP is optional for parents.

2. Assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed.

3. A list of required elements for each multi-year IEP, including measurable goals, coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability and measurable annual goals for determining progress toward meeting the goals coinciding with natural transition points for the child.

4. A description of the process for the review and revision of each multi-year IEP, including:

    a. A review by the IEP team of the child's multi-year IEP at each of the child's natural transition points;

    b. In years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the child's annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

    c. If the IEP team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP team carries out a more thorough review of the IEP within 30 calendar days; and

    d. At the request of the parent, a requirement that the IEP team shall conduct a review of the child's multi-year IEP before rather than after or subsequent to an annual review.

Beginning two years after the date of enactment of this legislation, the Secretary of Education is required to submit an annual report to the Committee on Education and the Workforce

of the House of Representatives and the Committee on Health, Education, Labor and Pensions of the Senate, regarding the effectiveness of the pilot program and any specific recommendations for broader implementation of the program, including:

1. Reducing the paperwork burden on teachers, principals, administrators and related service providers and noninstructional time spent by teachers in complying with the pilot program;

2. Enhancing longer term educational planning;

3. Improving positive outcomes for children with disabilities;

4. Promoting collaboration with the IEP team members; and

5. Ensuring satisfaction of family members.

The term "natural transition points," is defined as those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than three years.

J. Video Conferences and Conference Calls

When conducting IEP team meetings and placement meetings and carrying out administrative matters (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability in a local educational agency may agree to use alternate means of meeting participation, such as video conferences and conference calls.

DEVELOPMENT OF THE IEP

The 2004 amendments to the IDEA,[162] outline the new requirements with respect to the development of the IEP and the review and revision of the IEP. Section 1414(d)(3) states that in developing each child's IEP, the IEP team shall consider the strengths of the child and the concerns of the parents for enhancing the education of their child and the results of the initial evaluation or most recent evaluation of the child.

In addition, the IEP team must include positive behavioral intervention strategies and supports in the case of a child whose behavior impedes his or her learning or that of others and consider, when appropriate, strategies, including positive behavioral interventions, strategies and supports to address the child's behavior. In the case of a child with limited English proficiency, the IEP team must consider the language needs of the child as such needs relate to the child's IEP. In the case of a child who is blind or visually impaired, the IEP team must provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's

[162] 20 U.S.C. § 1414(d)(3) and (4).

reading and writing skills, needs and appropriate reading and writing media, that instruction in Braille or the use of Braille is not appropriate for the child. The IEP team must consider the communication needs of the child and in the case of a child who is deaf or hard of hearing, consider the language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode. The child's academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode must also be considered. The IEP team must also consider whether the child requires assistive technologies, devices and services.[163]

Section 1414(d)(1) sets forth the requirements for the contents of the IEP. The IEP must include:

1. A statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum. For preschool children, the IEP must include, if appropriate, how the disability affects a child's participation in appropriate activities.

2. A statement of measurable annual goals, including benchmarks or short term objectives, related to:

    a. Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

    b. Meeting each of the child's other educational needs that result from the child's disability.

3. A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child:

    a. To advance appropriately toward obtaining the annual goals;

    b. To be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities; and

    c. To be educated and participate with other children with disabilities and nondisabled children in

[163] 20 U.S.C. § 1414(d).

extracurricular activities and other nonacademic activities.

4. An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in extracurricular activities and other nonacademic activities.

5. A statement of any individual modifications in the administration of state or district-wide assessments of student achievement that are needed in order for the child to participate in such assessment, and if the IEP team determines that the child will not participate in a state or district-wide assessment of student achievement, a statement of why the assessment is not appropriate for the child and how the child will be assessed.

6. The projected date for the beginning of the services and modifications and the anticipated frequency, location and duration of those services and modifications.

7. Not later than the first IEP to be in effect when the child is sixteen, and updated annually thereafter, a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages. Beginning at least one year before the child reaches the age of majority under state law, a statement that the child has been informed of his or her rights that will transfer to the child on reaching the age of majority.

8. A statement of:

    a. How the child's progress toward the annual goals will be measured; and

    b. How the child's parents will be regularly informed of their child's progress toward the annual goals and the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year. The progress reports must be provided at least as often as reports are provided to parents of nondisabled children.

REPORT CARDS, GRADES AND TRANSCRIPTS OF DISABLED STUDENTS

It is permissible, under certain circumstances, for a school district to identify special education classes on a high school student's transcript, or to indicate on a student's report card that a student took a special education class.

These issues are governed by the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794(a), which states in part:

> "No otherwise qualified individual with a disability . . . shall, solely be reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ."

The federal regulations implementing Section 504 prohibit discrimination in any aid, benefit or service on the basis of handicap.[164] Section 104.4(b) prohibits the provision of different or separate aid, benefits or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits or services that are as effective as those provided to others. In addition, school districts may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different from those provided to non-handicapped persons.

There is no case law interpreting Section 504 and the 504 regulations with respect to transcripts and report cards. The Office for Civil Rights (OCR) which administers Section 504 on behalf of the federal government, has issued a letter interpreting Section 504 with respect to report cards and transcripts. Letter to Runkel.[165] In the OCR letter, OCR stated that a school district may not identify special education classes on a student's transcript in order to indicate that the student has received modifications in the general classroom. However, course designations with more general connotations which do not give rise to a suggestion of special education programs are not violative of Section 504 and Title II of the Americans with Disabilities Act (ADA) (e.g., basic, independent study, modified curriculum, honors, independent learning center). OCR also stated that a school district can use asterisks or other symbols on a transcript to designate a modified curriculum in general education provided the grades and courses of all students are treated in a like manner, and a school district may disclose the fact that a student has taken special education courses to a post-secondary institution if the parent and the student have prior knowledge of what information is on the transcript and have given written consent.

In addition, OCR stated in Letter to Runkel that a student with a disability enrolled in a general education class for reasons other than mastery of the course content may be excluded from the class grading system and evaluated on the goals and objectives of the IEP. OCR indicated that the IEP team may determine that the student may take the class for no credit and may be evaluated based upon criteria outlined in the student's IEP. OCR also stated that a general education teacher

[164] 34 C.F.R. § 104.4.
[165] 25 IDELR 387 (1996).

and a special education teacher, in a collaborative grading effort, may assign the grade for a student with a disability in a general education classroom. OCR indicated that this issue should be addressed in the IEP.

OCR indicated in the Letter to Runkel that grades earned in special education classes or in general education classes with the support of special education services must be included in districtwide grade point average standings that lead to a ranking of students by grade point average for honor roll and college scholarship purposes but that the grades may be weighted based on objective rating criteria. OCR stated that special education students may not be summarily disregarded or excluded but school districts may implement a system of weighted grades. Districts may assign points to a letter grade based on the degree of difficulty of subject matter completed so long as the system is based on objective rating criteria. OCR indicated that advanced courses or honors courses may be worth more points than basic curriculum courses. The criteria should be based on the difficulty of the course content.

In Ann Arbor Public School District,[166] the Office for Civil Rights advised the school district that classes on a transcript which were designated as Independent Learning Center classes due to the difference in content between those classes and regular classes do not violate the ADA or Section 504. OCR found that the Independent Learning Center classes used similar materials but covered less information and focused on different concepts. OCR found that in the independent learning center Math course, for example, approximately 30 percent of the material contained in the textbook was covered. In addition, more simple math concepts were covered in the Independent Learning Center math course. In addition, the school district used the terms "AC" and "AP" for accelerated courses and advanced placement courses on its transcripts. OCR concluded, "In such limited circumstances where designation for a special education course is shown to be based on a difference in course content, rather than the manner in which the course is taught, such designations do not arise to the level of a violation of Section 504 and the ADA."

PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA defines "free appropriate public education" as special education and related services provided at public expense, under public supervision and direction, without charge, which meet the standards of the state education agency and include an appropriate preschool, elementary or secondary school education provided in conformity with the individualized education program (IEP).[167] A free appropriate public education must be available to any child with a disability who needs special education and related services, even though the child has not failed or been retained in a course, and is advancing from grade to grade.[168]

In Board of Education v. Rowley,[169] the United States Supreme Court held that the Education of the Handicapped Act's requirement of a "free appropriate public education" is satisfied when the state provides personalized instruction with sufficient support services that permits the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided

[166] 30 IDELR 405 (1998).
[167] 20 U.S.C. § 1401(18).
[168] 34 C.F.R. § 300.101(c).
[169] 102 S.Ct. 3034, 3049-51 (1982).

at public expense, must meet the state's educational standards, must approximate grade levels used in the state's regular education program and must comport with the child's IEP as formulated in accordance with the Act's requirements. The United States Supreme Court summarized its view of the term "free appropriate education" by stating:

> "When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a state is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing 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 comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[170]

The United States Supreme Court thus rejected the argument that school districts were required to provide the best possible education to disabled children under the IDEA.

Under the federal regulations, each public agency is required to ensure that its disabled children have available to them a variety of education programs and services, including residential placement, if necessary.[171] Each state must ensure that each public agency establishes and implements a goal of providing full educational opportunity to all disabled children including a range of program options similar to those available to non-disabled children, including art, music, industrial arts, consumer and homemaking education and vocational education.[172]

Each public agency is required to provide non-academic and extracurricular services and activities in a manner which will afford disabled children an equal opportunity for participation in those services and activities, including counseling services, athletics, transportation, health services, recreational activities, and school clubs.[173] Physical education must also be provided to each disabled child either in a regular physical education program or in a specially designed physical education program prescribed in the child's IEP.[174]

The IDEA law sets up procedural safeguards to ensure that disabled children receive a free appropriate public education.[175] These procedures include allowing the parents an opportunity to examine all relevant records, to obtain an independent educational evaluation of the child, prior

[170] Id. at 3049.
[171] 34 C.F.R. § 300.302.
[172] 34 C.F.R. §§ 300.304 and 300.305.
[173] 34 C.F.R. § 300.306.
[174] 34 C.F.R. § 300.307.
[175] 20 U.S.C. § 1415.

written notice to the parents whenever the school district seeks to change or refuses to change the identification, evaluation or educational placement of the child, a procedure to fully inform the parents of their rights under the IDEA in their native language unless it is clearly not feasible to do so, and an opportunity to present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child and an administrative hearing process.[176]

In determining what constitutes a free appropriate public education, the courts will look at the individual needs of the child and the recommendations of school officials. In Wilson v. Marana Unified School District,[177] the Court of Appeals upheld the school district's proposed transfer of a disabled student from her neighborhood school to a school thirty minutes from the child's home. The school district proposed that the child be placed in a classroom which employed a special education teacher who was certified in physical disabilities. The Court of Appeals found that the proposed placement urged by the school district was appropriate under the IDEA.

In Springdale School District v. Grace,[178] the Court of Appeals held that the school district complied with the IDEA when it provided a deaf child with a certified teacher of the deaf even though the child might learn more quickly at the School for the Deaf. The Court of Appeals cited Rowley and held that the school district was not required to provide the best possible education to the child. In placing the child in her home school, the school district was acting in conformance with the Act's "mainstreaming" provisions which state as a goal that disabled children should be educated with non-disabled children to the maximum extent that is appropriate.

With respect to extracurricular activities, in Retting v. Kent City School District,[179] the Court of Appeals held that a school district was not obligated to provide extracurricular activities to a disabled student where the student, because of lack of interest, would receive no significant educational benefit from extracurricular activities. The Court of Appeals held that the IDEA did not absolutely require that a disabled child be provided with each and every special service available to non-disabled children. Rather, the Court of Appeals held that the applicable test under Rowley is whether the disabled child's IEP, when taken in its entirety, is reasonably calculated to enable the child to receive educational benefits.

In Cain v. Yukon Public Schools,[180] the Court of Appeals held that the school district had offered the child an appropriate placement. The Court of Appeals held that in determining whether the school district had offered a free appropriate public education under the Education of the Handicapped Act (now the IDEA), the court must consider whether the state complied with the procedures set forth in the Act and whether the IEP developed through these procedures was reasonably calculated to enable the child to receive educational benefits. The Court of Appeals held that the school district's offer to establish a special multi-handicapped program for the child at the school met the requirements of the Act. The Court of Appeals ruled that the proposed program should have been tried even though the prior program operated by the school district had not resulted in educational benefits for the student. The Court of Appeals ruled that even though a private residential school undoubtedly offered the disabled student a superior educational program which

[176] 20 U.S.C. § 1415.
[177] 735 F.2d 1178 (9th Cir. 1984).
[178] 693 F.2d 41 (8th Cir. 1982).
[179] 788 F.2d 328 (6th Cir. 1986).
[180] 775 F.2d 15 (10th Cir. 1985).

would maximize the child's potential, such an educational program was not required under the Act.[181]

In Mark A. v. Grant Wood Area Education Agency,[182] the Court of Appeals held that a school district was not required to place a disabled child in a private program serving both disabled and non-disabled children even though the private program may have offered the best educational opportunity for the child. The Court of Appeals held that the public educational program serving only disabled children could be an appropriate placement so long as it met the requirements of the Education of the Handicapped Act (now IDEA) and provided educational benefits to the child. The Court of Appeals held that the Act does not compel states to establish an entire new level of public education services to satisfy the Act's mainstreaming requirements.[183]

In Gregory K. v. Longview School District,[184] the Court of Appeals held that if the school district's program reflects the child's needs, provides some benefit and comports with the IEP, the district has offered a free appropriate public education, even if the parents prefer another program and even if the parent's preferred program would result in greater educational benefit. In Gregory K., the court stated:

> "Even if the tutoring were better for Gregory than the district's proposed placement, that would not necessarily mean that the placement was inappropriate. We must uphold the appropriateness of the district's placement if it was reasonably calculated to provide Gregory with educational benefits."[185]

In Cypress-Fairbanks Independent School District v. Michael F.,[186] the Fifth Circuit held that the IDEA reference to educational benefit means the benefit must be likely to produce progress, not regression or trivial (or *de minimis)* educational advancement.

In that residential placement dispute, the hearing officer held that the school district had not proposed an appropriate IEP and ruled in favor of the parents. The District Court reversed, holding for the school district based on a four-part test proposed by a special education expert:

1. Whether the program is individualized on the basis of the student's assessment and performance?

2. Was the program administered in the least restrictive environment?

3. Were the services provided in a coordinated and collaborative manner by "key stakeholders"?

4. Were positive academic and non-academic benefits demonstrated?

---

[181] Ibid.
[182] 795 F.2d 52 (8th Cir. 1986).
[183] Ibid.
[184] 811 F.2d 1307, 1314 (9th Cir. 1987).
[185] Id. at 1314.
[186] 118 F.3d 245 (5th Cir. 1997).

On appeal, the Fifth Circuit affirmed, implicitly adopting and weighing the four factors in determining whether the child's IEP was appropriate. The court noted that at the time the parents unilaterally placed the student in a residential placement the student was receiving passing grades, and was able to attend lunch and pass through the halls between class unaccompanied by school staff. The court emphasized that those "objective" examples of educational benefit were, in its view, "significant" and "produced more than a modicum of educational benefit."

Additionally, the student's October 1993 IEP was reasonably calculated to provide appropriate educational benefit for the student, based on the opinion of those individuals who had the most immediate knowledge of his performance during his enrollment at the school. Those persons included the teachers who worked with him on a daily basis, the assistant principal who was primarily responsible for administering the student's discipline plan and the school psychologist who counseled the student during this period of time. The court also found testimony of the student's attending psychiatrist persuasive on the issue.

The teacher testified that the student was receiving passing grades in three of his five classes. The assistant principal testified that the student's behavior management plan was working and that the student's disruptive behavior was decreasing. Finally, the district psychologist opined that the student's behavior problems were lessening, the student was more cooperative in counseling sessions and the student had appeared to develop a rapport with his teachers, assistant principal and the staff.

Since the Court of Appeals found that the IEPs developed for the student's seventh-grade year were specifically tailored to his individual needs and placed him in the least restrictive educational environment consistent with those needs, it ruled that the District Court committed no reversible error in determining that both his IEPs and his placement within the public school district were appropriate under the IDEA.

Also concluding that an appropriate education was being delivered to a student with learning disability, the Fifth Circuit found in Houston Independent School District v. Bobby R.,[187] that there were demonstrable academic and nonacademic benefits from the IEP.

Importantly, the court also reiterated that the Cypress-Fairbanks four-part test for meaningful education benefit is the standard in the Fifth Circuit. The court further instructed that the child's development should be measured not in relation to the rest of the regular education class, but rather with respect to the individual student. It rejected the argument that declining percentile scores on standardized tests represented a lack of educational benefit, stating that declining percentile scores only show that the child's disability prevented him from maintaining the same level of academic progress achieved by his nondisabled peers. The panel noted that it could be unrealistic to expect that a child with a disability would not experience declining percentile scores, and that such a goal was "not mandated by the IDEA."

The Court of Appeals held that the District Court correctly focused on the fact that the students' test scores and grade-levels in math, written language, comprehension, calculation, applied problems, dictation, writing, word identification, broad reading, basic reading, and proofing

[187] 200 F.3d 341 (5th Cir. 2000).

improved over a period of time. The child's test scores showed that while he was in the sixth grade his test scores ranged from the second- to fourth grade level, and that the child also had made progress over the previous three year period. The court further noted that it is not necessary for the child to improve in every area to obtain an educational benefit from his IEP.

In sum, the Fifth Circuit found that the student's IEP, based on documented improvement in his test scores, was reasonably calculated to provide him with a meaningful educational benefit, in accordance with the IDEA.

Education benefit also can be shown by comparing the progress of children with similar disabilities. In Tucker v. Calloway County Board of Education,[188] the Sixth Circuit held that since an appropriate public education indisputably does not mean the absolutely best or potential maximizing education for the individual child, the court's review must necessarily focus on the district's proposed placement, not on the alternative that the family preferred. The court stated that the school district's proposed placement must be upheld if it was found to be reasonably calculated to provide the child with educational benefits.

The school district proposed a placement consisting of a self-contained unit with 10 other students, all between the ages of 5 and 8. Those 10 students had a range of disabilities. The classroom had a certified special education teacher with 14 years of teaching experience along with three full-time aides. The classroom had three computers and a full-time speech and language therapist.

The student's 1994-95 IEP agreed to by all the parties, provided for daily one-on-one speech and language therapy and for occupational and physical therapy two times each week. The parents had unilaterally placed the student at the Learning and Cognitive Development Center (LCDC) in Boston and sought reimbursement. However, LCDC could not and did not provide speech and language therapy and occupational and physical therapy and had no computers. The teachers at LCDC had not been certified for special education and the children in the classroom were several years younger than the child whose development was at issue.

The district presented expert testimony that most children with pervasive development disorder (PDD) were educated in a public school setting and that the classroom proposed by the school district was typical of the classroom setting in which PDD students had been successfully educated.

The Sixth Circuit observed that the case law was clear the parents were "not entitled to dictate educational methodology or to compel a school district to supply a specific program" for their child with a disability. It ruled that the District Court properly concluded that the school district's proposed placement in its special education elementary school classroom was an appropriate placement within the meaning of the IDEA's free appropriate public education requirement.

[188] 136 F.3d 495 (6th Cir. 1998).

In Walczak v. Florida Union Free School District,[189] the Second Circuit emphasized that although the IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP, the Supreme Court in Rowley rejected the contention that appropriate education required states to maximize the potential of children with disabilities.

The Second Circuit noted that in Lunceford v. District of Columbia Board of Education,[190] Justice Ruth Bader Ginsburg stated that because public resources are not infinite, federal law does not secure the best education money can buy, but calls upon government more modestly to provide an appropriate education for each disabled child. The Court held that the door of public education must be opened for a child with a disability in a meaningful way and that this is could not be accomplished if an IEP afforded the opportunity for only trivial advancement. The Court held that an appropriate public education under the IDEA is one that is likely to produce meaningful progress, not regression. The Walczak court held that the judiciary should conduct an independent review of a challenged IEP without impermissibly meddling in the state educational methodology. In doing so, it must examine the record for any objective evidence indicating whether the child was likely to make progress or regress under the proposed plan. If the child was placed in a mainstream class, the court should look to see if the child has attained passing grades and regular advancement from grade to grade. When the child was educated in a self-contained special education class, the court could look to test scores and similar objective criteria. In such circumstances, the court underscored that the record must be viewed in light of the limitations imposed by the child's disability.

The evidence in the record in Walczak demonstrated that the student had progressed from the first grade level in reading and mathematics to a second- to third- grade level in a structured self-contained classroom at the school district. The court held that these objective academic achievements were not trivial. Instead, the achievements were impressive considered in light of the significant social problems that impeded the student's academic progress when she first entered the program.

The court took note of the fact that when the child entered the program, her social behavior was bizarre and almost psychotic. She was unable to follow simple directions or focus on an assigned task. She could not express herself intelligibly. After two years of concentrating on these social problems, the teacher testified that the child was less disruptive, that she was more focused, and that she was even able to work independently. The child could now speak more clearly and she was beginning to make academic progress.

The court held that the IDEA favors the least restrictive environment which would be a day program, rather than a residential program, noting that while the teacher's testimony acknowledged the difficulties encountered in teaching the student, the overall picture was plainly one of improvement, not regression. The court ruled that the parents could not establish the inadequacy of the IEP by simply arguing that the child would make greater progress in a residential placement.

The IDEA, the court stated, required states to provide a child with a disability with meaningful access to an education but it cannot guarantee totally successful results. The court went on to state that a child with a severe disability did not need to be placed in a classroom with children

[189] 142 F.3d 119 (2nd Cir. 1998).
[190] 745 F.2d 1577, 1583 (D.C. Cir. 1984).

who have the same disorder. Such a child could be placed with children with a wide variety of problems, but who had characteristics in common, such as slow learning. Each of the children in that case needed a highly structured, multi-sensory program with constant reinforcement in order to grasp the material presented that was precisely the approach in the school district's program.

Case law, the Walczak court concluded, was unequivocal that the parents were not entitled to dictate educational methodology or to compel a school district to supply a specific program for child with a disability. The Court of Appeals affirmed the District Court's decision that the school district's proposed placement of the student in the special education classroom at one of its elementary schools was an appropriate placement under the IDEA.

Test scores also played a key role in O'Toole v. Olathe District Schools Unified School District No. 233.[191] There, the Tenth Circuit held that the school district had offered the student a free appropriate public education, finding it important that both the hearing officer and the reviewing officer concluded that the student made various degrees of progress during the disputed school year.

While the student's progress was not steady in all areas and the parents testified as to the student's general difficulties, emotional and otherwise, that she had with school and schoolwork, the court found that the record fully supported the hearing officer's conclusions that progress was being made by a preponderance of the evidence. The court noted that while the improvement may not have been as great as the parents wished or expected, the test scores did not show regression or failure to progress.

The Tenth Circuit concluded that the fact that the student made more progress in the unilateral residential placement did not mean that the placement was appropriate placement for the child under the IDEA. Further, a child was not entitled to placement in a residential school merely because the residential school would enable him to reach his full potential. The court labored to make clear that an IEP was not inadequate simply because the parents could show that a child was able to make more progress in a different program.

In the wake of Rowley, the four-part test promulgated in Cypress-Fairbanks provides further helpful guidance for attorneys and others in determining whether a child with a disability has received an "appropriate education" under the IDEA. In Bobby R., the Fifth Circuit again made it clear that sufficient progress or educational benefit must be viewed in terms of the individual student and the nature of the disability, and not in comparison to regular education students. In addition, there is agreement that progress does not have to be achieved in all areas for a student to receive a meaningful educational benefit under the IDEA.

[191] 144 F.3d 692 (10th Cir. 1998).

CHILDREN WITH AUTISM - PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION

The case law defining free appropriate public education is of particular importance in the area of educating autistic children. In Gregory K. v. Longview School District,[192] the Court of Appeals held that the courts must review the school district's proposed program to determine if it meets the child's needs, provides some benefit and complies with the child's IEP. In Gregory K., the Court of Appeals held that even if the parents prefer another program and the parents' preferred program would result in greater educational benefit, the IDEA does not require school districts to implement the program. In many cases involving autistic children, the parents have preferred an in-home program developed by Dr. Ivar Lovaas.

Dr. Lovaas' Discreet Trial Training (DTT) is a form of behavior modification based upon a correlation of very intensive, repetitive requests or stimuli, followed rapidly and consistently with reinforcement with desirable consequences, or with negative consequences for improper responses, or with loud redirection if the child's attention wanders or resorts to self-stimulatory behavior. It emphasizes early intervention, heavy parental involvement, and treatment in the home or elsewhere in the community, rather than in the school or clinical setting. Each trial consists of giving the child a discreet instruction (e.g., "stand up," "look at me") and waiting for a response and then providing an appropriate consequence.[193] Discreet Trial Training is considered one approach to educating children with autism.[194]

As noted by the Court of Appeals in Amanda J. v. Clark County School District,[195] autism is a developmental disorder of neurobiological origin that generally has life long effects on how children learn to be social beings, to take care of themselves, and to participate in the community. The disorder is present from birth or very early in development. It affects the child's ability to communicate ideas and feelings, to use their imagination, and to establish relationships with others. No single behavior is characteristic of autism, and no single known cause is responsible for its onset. In addition, there is no known cure for autism.

The main characteristics that differentiate autism from other developmental disorders include behavioral deficits in eye contact, orienting to one's name, joint attention behaviors, pretend play, imitation, nonverbal communication and language development. With adequate time and training, the diagnosis of autism can be made reliably in two year olds by professionals experienced in the diagnostic assessment of young children with autistic disorders. Early diagnosis is crucial because education is the primary form of treatment, and the earlier it starts, the better. Education covers a wide range of skills or knowledge including not only academic learning, but also socialization, adaptive skills, language and communication, and reduction of behavior problems to assist the child to develop independence and personal responsibility.[196]

Without early identification and diagnosis, children suffering from autism will not be equipped with the skills necessary to benefit from educational services. A report by the National

---

[192] 811 F.2d 1307, 1314 (9th Cir. 1987).
[193] Renner v. Board of Education, 185 F.3d 635, 639 (6th Cir. 1999).
[194] Amanda J. v. Clark County School District, 267 F.3d 877, 159 Ed.Law Rep. 562 (9th Cir. 2001).
[195] Ibid.
[196] Ibid.

Research Council analyzed ten educational intervention models for children with autistic disorders. All ten programs emphasized the importance of starting intervention at an early age. These studies show that intensive early intervention can make a significant difference for many children. All of the models presented positive and remarkably similar findings, which included better than expected gains in IQ scores, language, autistic symptoms, future school placements, and several measures of social behavior. At least two retrospective studies have found less restrictive placement outcomes for children who began intervention at an early age. Thus, the available research strongly suggests that intensive early intervention can make a critical difference to children with autistic disorders.[197]

Awareness of autism is a relatively recent phenomenon and, therefore, there are few federal appellate cases. The earliest appellate case, Drew P. v. Clarke County School District,[198] found that the school district did not have an appropriate placement for an autistic child, and ordered residential placement. At that time, the school district did not have trained personnel or appropriate programs in place that would meet an autistic child's needs. Later cases show that school districts began developing programs in their schools to meet the unique needs of autistic children, and as a result, residential placement of autistic children was no longer necessary. However, as shown by the decision in Union School District v. Smith,[199] procedural errors, such as failing to communicate a formal written placement offer to the parents, can result in an order requiring the school district to pay for the residential placement of an autistic child. Also, failure to provide the parents with the district's assessment of the child identifying the child as autistic, and recommending an independent assessment can also result in an order requiring the district to reimburse parents for expenses and provide compensatory education for failure to provide a free appropriate public education to the child.[200]

Beginning in 1997 the appellate courts began ruling in favor of school districts and the placements proposed by school districts as appropriate for autistic children. In Hartmann v. Loudoun County Board of Education,[201] the Court of Appeals held that the school district had developed an appropriate program for an autistic child. In Hartmann, the hearing officer upheld the school district's proposal to transfer the autistic student from the regular classroom to a specially structured classroom for autistic children at a nearby elementary school, which would allow for interaction between autistic children and nondisabled students. The proposed class would have included five autistic students working with a special education teacher and at least one full-time aide. Under the proposed IEP, the student would have received academic instruction and speech in the self-contained classroom, and would be mainstreamed for art, music, physical education, library, and recess.

The parents refused to approve the IEP, claiming that it failed to comply with the mainstreaming requirements of the IDEA. The school district initiated a due process hearing, and the hearing officer upheld the school district's proposed transfer. The hearing officer found that the student's behavior was disruptive in the regular classroom, and that, despite enthusiastic efforts of school district employees, the student obtained no academic benefit from the regular education classroom. The state review officer affirmed the decision. The district court reversed the hearing

[197] Ibid.
[198] 872 F.2d 927 (11th Cir. 1989).
[199] 15 F.3d 1519 (9th Cir. 1994).
[200] Amanda J. v. Clark County School District, 267 F.3d 877, 157 (9th Cir. 2001).
[201] 118 F.3d 996 (4th Cir. 1997).

officer's decision and rejected the administrative findings and concluded that the student could receive significant educational benefits in a regular classroom.

The Court of Appeals reversed the district court, holding that the district court did not give sufficient deference to the findings of the hearing officer and state review officer. The Court of Appeals further found that mainstreaming is not required where the disabled child would not receive an educational benefit from the regular class, and any marginal benefit from mainstreaming would be significantly outweighed by benefits which could be obtained in a separate educational setting. The Court of Appeals also held that where a disabled child is a disruptive force in a regular classroom setting, the regular classroom setting may not be appropriate. The Court of Appeals held that the school district's proposed placement was carefully tailored to ensure that the autistic student was mainstreamed to the maximum extent appropriate and was designed to meet the student's needs.[202]

In Renner v. Board of Education,[203] the Court of Appeals upheld the school district's proposed placement for an autistic child. The school district identified the child as eligible for preschool services at an early age, and at approximately age two, the child was evaluated as autistic. The parents retained the services of Dr. Patricia Meinhold, a behavior psychologist and Assistant Professor at Western Michigan University, who the court described as a dedicated follower of the Lovaas methodology.[204] Dr. Meinhold recommended extensive home treatment with parental involvement. The parents, on their own, instituted a Lovaas-type discreet trial program in their home in March, 1995. By the end of the school year, the parents had increased the hours of the DTT program in their home from 10 hours to about 25 hours per week. During the spring of 1995, the parents met with Dr. Meinhold and felt that the child was making progress in the DTT program.

In September, 1995, the school district placed the child in a four hours a day, five day a week school program, which included some DTT instruction. The parents approved the IEP authorizing the program. Soon after, the parents objected to the school program and claimed that the student's behavior was deteriorating. An IEP meeting was held in September, 1995, to address the parents' concerns and a new class was proposed, which provided for increased classroom construction, a ratio of seven students to one teacher, and four aides. In addition, a speech and language teacher was provided two days a week and a speech therapist once a week. Discreet Trial Training was incorporated into part of each day, and the student's teacher visited the student's home to meet with the home tutors. Another IEP meeting was held in December, 1995, but no agreement was reached. The parents then requested a due process hearing, and withdrew the student from the school program. The parents then proceeded to increase their home-based Discreet Trial Training program. At the time of the due process hearing, the student received at least 35 hours a week of home Discreet Trial Training.[205]

In the due process hearing, the parents requested that the school district pay for Dr. Meinhold's independent evaluation, which was completed in March, 1996, after several

---

[202] Ibid. See, also, Metropolitan Board of Public Education v. Guest, 193 F.3d 457, 463 (6th Cir.1999) (district court exceeded its authority by admitting additional evidence of later IEPs and educational placement proposals without requiring parties to seek a due process review hearing).
[203] 185 F.3d 635 (6th Cir. 1999).
[204] Id. at 637.
[205] Id. at 638-639.

observations. Dr. Meinhold stated in her evaluation that the school district's IEP was inadequate and inappropriate and she recommended the following:

1. Forty hours of Discreet Trial Training a week, divided between the home and school environments.

2. An extended school year.

3. Weekly team meetings between the school, the parents and the tutors.

4. Staff training and supervision by a consultant with experience in implementing Discreet Trial Training with young autistic children.

5. Recorded trial by trial data on the student's responses to Discreet Trial Training.

6. Appropriate opportunities for interaction with nondisabled peers.[206]

Dr. Meinhold, in her evaluation, stated the Lovaas style package of Discreet Trial Training programs is the only available intervention for young children with autism and related disorders, which has been subjected to an empirical outcome study with strong positive findings. The local hearing officer ruled in the parents' favor and ordered one-on-one Discreet Trial Training sessions over an extended school year, and reimbursement to the parents for their costs of home program and independent evaluations. The state review officer reversed the local hearing officer and concluded that the school district's IEP was adequate and valid. The state review officer found that the burden of proof belonged to the parents to show that the school district's IEP was inadequate.[207]

The local hearing officer's findings, which were reviewed by the Court of Appeals, acknowledged that there was an academic debate among experts on autism as to the best method for working with autistic children. The Court of Appeals found that the local hearing officer relied heavily upon Dr. Meinhold's opinions, and upon the opinions of the parents, and was selective in his references to the testimony of the school district's expert, Dr. Mesibov, referring to Dr. Mesibov's testimony generally when perceived to be in agreement with Dr. Meinhold. The local hearing officer found that the school district's IEP team did not have the background experience and training to assess the autistic child's needs properly because they, individually and collectively, lacked experience in autism and Discreet Trial Training. The Court of Appeals noted:

> "The LHO gave very strong emphasis to one particular approach, which he conceded was academically and professionally challenged as to its efficacy, and concentrated on this approach and its intensive application to the virtual exclusion of other approaches

[206] Id. at 639.
[207] Ibid.

and opinions in his analysis and what he deemed as his 'conclusions of law.'"[208]

The Court of Appeals noted that the state hearing review officer found neither procedural nor substantive violations of the IDEA, and in reversing the local hearing officer, found that the school district had an adequate and lawful plan. The state hearing review officer found that the local hearing officer did not give sufficient weight to the views of the school district's expert, Dr. Mesibov and to the testimony of the student's teacher. The state hearing review officer also found that the school district's IEP team had sufficient knowledge and expertise in the area of autism, and did not need to have any additional experts with respect to autism or Discreet Trial Training. The Court of Appeals also noted that Dr. Meinhold's recommendation of forty hours of one-on-one Discreet Trial Training per week was her usual and customary program for all young autistic children with general needs, and was not geared individually to the student. The Court of Appeals found that the school district properly relied on the opinions of Dr. Mesibov and that Dr. Mesibov and the school district had "legitimate concerns about the effectiveness of the Lovaas methods."[209]

The Court of Appeals upheld the decision of the state hearing review officer and the district court and found that the district's proposal was designed to meet the individual needs of the child and provide the child with educational benefit and thus, provide the child with a free appropriate public education under the IDEA.[210]

In Adams v. State of Oregon,[211] the Court of Appeals upheld the school district's proposed program for an autistic child. The school district was providing early intervention services to the autistic preschool student, 12.5 hours per week of home services by a behavioral consultant or associate, and speech therapy. After consenting to the 12.5 hour per week plan, the parents requested that the services be extended to 40 hours per week, and exclusively employ Discreet Trial Training methods developed by Dr. Lovaas. The school district refused and the parents requested a due process hearing.

The Court of Appeals noted that the school district employed an early intervention case manager and an autism consultant to develop the child's program. The school district's consultant relied on research which examined eight examples of model early intervention programs for children with autism, including Discreet Trial Training and developmentally sequenced services and individualized behavior programs. The parents continued to seek 40 hours per week of Discreet Trial Training, based on the research of Dr. Lovaas.[212]

Members of the IEP team felt that the 40 hours per week prescribed by Lovaas would be too punitive and intense for a young child, and that the Lovaas method did not take into account functional ways to analyze behavior. The autism consultant recommended to the school district that they reduce the intensity of the Discreet Trial Training for the child, who was 2.5 years old at the time. The child was considered to be a fairly typical two year old in that he was not happy to see his tutors when they arrived, he would shut the door when he saw them, and he wanted to stay with his

[208] Id. at 641.
[209] Id. at 642.
[210] Id. at 642-645.
[211] 195 F.3d 1141 (9th Cir. 1999).
[212] Id. at 1144.

mother. He was often tired and uncooperative, as any two year old would be. Additionally, he often had tantrums when staff worked with him. The school district's autism consultant believed that if the child received more intense services, he might experience more severe behavior problems.[213]

As a result, the autism consultant recommended 12.5 hours per week of home services by a behavioral associate or consultant, and the continuation of speech therapy, play group, tutors, home services, behavior consultation, occupational therapy evaluation, working group meetings with the autism consultant, family consultation, and transportation. At the six month review in May, 1996, it was noted that the child was doing satisfactorily.[214]

The hearing officer, following the due process hearing, concluded that the child's IEP was sufficient to confer a meaningful benefit on the child, as required by the IDEA. The hearing officer applied the standard in Gregory K. v. Longview School District,[215] and held that the school district does not have to provide the best possible services for the child, or a program preferred by the parents, and noted that there are many available programs which effectively assist autistic children.[216]

The Court of Appeals also found that the school district's unilateral reduction of the program from 12.5 to 7.5 hours per week, between July 26 and September 16, 1996, due to staff vacations, rather than the needs of the child, violated the IDEA.[217]

In Dong v. Board of Education,[218] the Court of Appeals held that the IEP offered to an autistic child provided the child with a free appropriate public education in the least restrictive environment. The child was evaluated at age three by the school district and enrolled in a special education early intervention program. In May, 1995, the school district assessed the child as autistic. In October, 1995, the IEP team changed the child's eligibility to autistic, and the child was enrolled in a public school program for autistic impaired children and began attending 13 hours per week.[219]

At the same time, the child's parents began a home program. The parents consulted Patricia Meinhold, a psychologist with experience in the Lovaas methodology, and Rebecca Lepak, a speech therapist. In November, 1995, the child was receiving 10 hours of one-on-one home training in the Discreet Trial Training format. It was gradually increased to 20 hours per week by May, 1996. At the same time, the child was attending school 13 hours per week.[220]

On May 15, 1996, an IEP meeting was held and the parents requested more one-on-one instruction. The IEP team adjourned and reconvened on June 21, 1996, and the IEP team noted that the child had made substantial improvements in virtually every skill area from November, 1995 to June 1996. The parents requested more one-on-one time, but did not specifically request the Discreet Trial program, or the Lovaas method, or 40 hours per week of Discreet Trial Training. The school district's autistic program supervisor did not read the memo as a request for 40 hours of Discreet Trial Training, and the IEP team recommended 27.5 hours per week in the school program,

[213] Id. at 1145.
[214] Id. at 1145.
[215] 811 F.2d 1307, 1314 (9th Cir. 1987).
[216] Id. at 1147.
[217] Id. at 1148.
[218] 197 F.3d 793 (6th Cir. 1999).
[219] Id. at 795.
[220] Ibid.

beginning August, 1996. The school program would also include 9.5-10 hours of individualized instruction.[221]

After the June 21, 1996 IEP meeting, the parents sent the school district's autistic program supervisor a letter clarifying that they were requesting a 40 hour per week Discreet Trial Training program. The school district rejected the proposal and reaffirmed its support for the IEP, which was signed on June 21, 1996. The parents signed the IEP in disagreement and continued to unsuccessfully advocate for the 40 hour per week Discreet Trial Training program. The parents then chose to remove the student from the school and the student began a 30-40 hour home based Discreet Trial Training program during the 1996-97 school year.[222]

The Court of Appeals noted that the school district's program, known as TEACCH, is a classroom based method that stresses a cognitive approach as opposed to behavioral. The hearing officer, following six days of hearing, concluded that the school district's proposed IEP offered the student a free appropriate public education, and that the school district had complied with the procedural requirements of the IDEA. The parents appealed to the state hearing review officer, who affirmed the decision of the local hearing officer. The parents appealed to the federal district court and then the United States Court of Appeals.[223]

The Court of Appeals held that the school district did not fail to have persons knowledgeable about the child and the meaning of the evaluation data and placement options. The parents had alleged that the failure to invite Dr. Meinhold or Ms. Lepik to participate in the IEP meeting violated the IDEA. The Court of Appeals stated: "We reject the contention that the district must include an expert in the particular teaching method preferred by the parents in order to satisfy the requirement that the IEPC include persons knowledgeable about 'placement options.'"[224]

The Court of Appeals noted that the school psychologist, speech pathologist, and teacher were extremely well qualified in the area of autism treatments, and they were fully qualified to determine if a group or one-on-one setting would be best. The Court also noted that the supervisor of the autistic program was familiar with the Discreet Trial Training method and the Lovaas program.[225]

The Court of Appeals held that the decision not to provide more intense one-on-one behavioral therapy that the parents requested was not a failure to address the child's unique needs. The Court of Appeals found that the school district's recommended program was a 27.5 hour per week program with a staff to student ratio of one to two, and a mix of one-on-one and small group instruction, mainstreaming and reverse mainstreaming in a functional language based program. The staff working with the child would include paraprofessionals, a teacher, a speech pathologist, and an occupational therapist. The Court of Appeals noted that the school staff saw the TEACCH program as an opportunity for the student to learn generalization of language and spontaneous communication, independence, and social interaction, none of which would be stressed in a Discreet

[221] Ibid.
[222] Id. at 799-800.
[223] Id. at 800.
[224] Id. at 802.
[225] Id. at 802-803.

Trial Training program. Therefore, the Court of Appeals concluded that the school district's program addressed the child's individual needs.[226]

In Burilovich v. Board of Education,[227] the Court of Appeals held that the primary responsibility for formulating the educational program for disabled children, including autistic children, was left to state and local agencies. The Court of Appeals held that administrative findings in an IDEA case were only to be set aside if the administrative decision was not based on the agency's presumed educational expertise or testimony. Reviewing the testimony, the Court of Appeal concluded that the school district's proposal was designed to allow the child to receive educational benefit.

The school district provided a preschool program for the child. The parents consulted Patricia Meinhold, a psychology professor at Western Michigan University, who concluded that the student was an appropriate candidate for Discreet Trial Training developed by Dr. Lovaas and suggested that the parents request these services from the school district. In September, 1994, an IEP meeting was held and the child was placed in the school district's pre-primary impaired program 2.5 hours a day, 4 days a week, with 40-80 minutes per week of speech and language therapy. The parents requested that part of the child's school day be used for Discreet Trial Training, but the school district did not include Discreet Trial Training in the IEP. The child's teacher did provide Discreet Trial Training therapy for half hour before the school day began.

The parents began providing a home program for the child of at least 20 hours per week of Discreet Trial Training. The parents reduced the child's school participation to two days a week, following Christmas vacation, and increased his Discreet Trial Training to 20-25 hours per week. By the last half of 1995, the student was averaging 25-30 hours of home-based Discreet Trial Training.

On May 17, 1996, an IEP meeting was held and the school district proposed placing the student in a mainstream kindergarten program without Discreet Trial Training. The parents requested a due process hearing. The local hearing officer decided in favor of the parents. However, the state hearing review officer reversed the local hearing officer and found that the May, 1996 IEP was valid. The state hearing officer held that the May, 1996 IEP was developed without procedural or substantive violations and provided a free appropriate public education to the student.

The parents filed an appeal in the district court, which granted the school district's motion for summary judgment. The court determined that the parents had the burden of proof and held that the student's recertification as autistic was acceptable, that the school district had conducted a proper evaluation of the student, and the professionals involved were qualified. The court found that the student's parents were sufficiently included in the IEP process and that the school district had a right to conduct staff meetings without the parents to discuss the child's placement and recommendations to be made at an IEP meeting with the parents. The court also found that the district's proposal was designed to meet the student's unique needs. The Court of Appeals also found that the school district staff was not required to be thoroughly familiar with Discreet Trial Training simply because

[226] Id. at 804.
[227] 208 F.3d 560 (6th Cir. 2000).

the parents preferred that educational method. The court found that overall the school district staff had experience with autism and educating autistic students.[228]

The Court of Appeals found that the school district's program took into consideration the student's unique needs by setting goals for the student and creating a detailed daily schedule to address each of the goals. In contrast, the court noted that the parents' proposed program of 40 hours of Discreet Trial Training appeared to be a standard program and not tailored to the student's needs. The court also found that the state review officer gave proper weight to Dr. Meinhold's views and the district's expert Dr. Mesibov. Dr. Mesibov testified that there were problems with Discreet Trial Training because it emphasized the student's deficits and not his strengths, and isolated the student. The Director of Special Education testified that the staff opposed Discreet Trial Training because they thought it would not be good for the student, because it was not in a natural environment, there was no peer reinforcement, and because it did not appear to be individualized to meet the student's needs.[229]

The Court of Appeals concluded that the state review officer's decision deserved due weight and concluded that the IEP was designed to allow the student to receive educational benefit, and that the parents had failed to show that the IEP was inappropriate.

In Gill v. Columbia 93 School District,[230] the Court of Appeals upheld the school district's proposed program for an autistic child. The parents requested 40 hours of Lovaas Discreet Trial Training. The school district met with the student's teachers and therapists, and consulted with an expert on autism and offered to make substantial modifications to the child's IEP. The school district proposed increasing the student's time in the self-contained classroom to 12 hours each week, and adding 17 hours in a reverse mainstream classroom, in which nondisabled students were mixed in with disabled students. The school district also offered more one-on-one training in school and proposed hiring an additional aide for the classroom. These proposals were summarized in an IEP dated March 21, 1997. The parents agreed to implement the proposed services.[231]

The parents continued to request 40 hours of Lovaas Discreet Trial Training, but the school district believed that the home-based program was not appropriate for the student. In December, 1997, the parents requested a due process hearing. A three member hearing panel ruled in favor of the school district and held that the IEP offered by the school district was appropriate. The district court made extensive findings based on the evidence presented to the state hearing panel. The court acknowledged that the competing methods of instruction might impart different skills, but declined to decide which of these skills should be emphasized, deferring to the expertise of the administrative panel. The Court of Appeals affirmed the district court decision and stated:

> "Children with autism have difficulty in developing cognitive, linguistic, and social skills. Although early diagnosis and therapy improve the outlook for such children, autism experts have a variety of opinions about which type of program is best. Federal courts must defer to the judgment of education experts who craft and review a

[228] Id. at 567.
[229] Id. at 569.
[230] 217 F.3d 1027 (8th Cir. 2000).
[231] Id. at 1030.

child's IEP, so long as the child receives some educational benefit, and is educated alongside his nondisabled classmates to the maximum extent possible."[232]

REMEDIES EMPLOYED BY THE COURTS

The courts will employ a number of different remedies to compensate parents and children with disabilities where a violation of the IDEA occurs. In Burlington School Committee v. Department of Education,[233] the United States Supreme Court held that parents may be reimbursed for the expenses incurred in unilaterally placing their child in a private school, if the court ultimately determines that the private placement was proper. The United States Supreme Court held that the courts have the equitable power under the IDEA to fashion an appropriate remedy.[234] Another remedy is compensatory educational services. In Miener v. State of Missouri,[235] the Court of Appeals held that a disabled child has a right to compensatory educational services if the child prevails on the child's claim under the Education of the Handicapped Act (now IDEA).

Another appropriate remedy is injunction. In Doe v. Brookline School Committee,[236] the Court of Appeals held that the courts retain equitable injunctive powers to fashion an appropriate remedy such as ordering the interim placement of a student. In Honig v. Doe,[237] the United States Supreme Court held that a school district could not suspend a disabled student for more than ten days without utilizing the IEP process for change of placement under the Act. The Supreme Court noted that the remedy of injunctive relief was still available to school districts:

> "In short, then, we believe that school officials are entitled to seek injunctive relief under Section 1415(e)(2) in appropriate cases. In any such action, Section 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others."[238]

The federal appellate courts are split on whether parents of special education students and special education students may recover monetary damages under Section 1983 for statutory violations of the IDEA. In addition, at least one California court has ruled that a plaintiff may not recover monetary damages for a violation of the IDEA under Section 1983.[239]

---

[232] Id. at 1034, see, also, Blackmon v. Springfield R-XII School District, 198 F.3d 648, 655 (8th Cir. 1999) (IDEA does not require a school district to provide a child with the specific educational program the parents prefer).
[233] 105 S.Ct. 1996 (1985).
[234] Ibid. See, also, Florence County School District v. Carter, 114 S.Ct. 361, 86 Ed.Law Rep. 41 (1993) in which the United States Supreme Court held that the court may order reimbursement for parents who unilaterally place their child in a private school even if the private school is not approved by the State.
[235] 800 F.2d 749 (8th Cir. 1986); see, also, Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988).
[236] 722 F.2d 910 (1st Cir. 1983).
[237] 108 S.Ct. 592 (1988).
[238] Id. at (1988).
[239] White v. State of California, 195 Cal.App.3d 452, 471, 240 Cal.Rptr. 732 (1987).

The Second and Third Circuits have held that when Congress amended the IDEA, Congress intended to allow the parents of special education students to bring lawsuits under Section 1983. However, the Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have held that the parents of special education children may not bring suit under Section 1983 for alleged violations of the IDEA.[240] Despite the rulings of the Ninth Circuit,[241] in a recent district court case in California, a federal district judge ruled that the parent of a special education student may recover damages against a director of student services under Section 1983.[242]

The California Government Code provides that in civil actions, public agencies, including school districts, are required to provide a legal defense for public employees when the action is brought against them in their official or individual capacity on account of an act of omission in the scope of their employment for the school district. This duty would include the defense of Section 1983 lawsuits.[243]

Whether or not damages are available for a violation of the IDEA, it should be noted that under California law, a public agency has a legal duty to defend and indemnify a public employee sued under Section 1983 in their individual or personal capacity. This means that except under extraordinary circumstances (e.g., a malicious or intentional act), any award of damages will be paid by the public agency, not the officer or employee.

RELATED SERVICES

In Irving Independent School District v. Tatro,[244] the United States Supreme Court addressed the meaning of related services under the IDEA. The United States Supreme Court held that clean intermittent catherization was a related service because it could be provided by a lay person and did not require the services of a physician. The Court noted that Congress did not intend to require school districts to provide medical services that might be unduly expensive or beyond their range of competence. However, children with serious medical needs are still entitled to an education and school districts are required to provide instruction in hospitals and at home. The Court stated:

> "By limiting the 'medical services' exclusion to the services of a physician or hospital, both far more expensive, the secretary has given a permissible construction to the provision."[245]

The Court went on to state:

---

[240] Sellers v. School Board, 141 F.3d 524, 529, 125 Ed.Law Rep. 1078 (4th Cir. 1998); Padilla v. School District No. 1, 233 F.3d 1268, 113 Ed.Law Rep. 559 (10th Cir. 2000); Charlie F. v. Board of Education, 98 F.3d 989 (7th Cir. 1996); Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996); Crocker v. Tennessee School Athletic Association, 980 F.2d 382, 79 Ed.Law Rep. 389 (6th Cir. 1992); Witte v. Clark County School District, 197 F.3d 1271 (9th Cir. 1999); Robb v. Bethel School District, 308 F.3d 1047 (9th Cir. 2002).

[241] Witte v. Clark County School District, 197 F.3d 1271 (9th Cir. 1999); Robb v. Bethel School District, 308 F.3d 1047 (9th Cir. 2002).

[242] Goleta Union Elementary School District v. Ordway, 166 F.Supp.2d 1287, 158 Ed.Law Rep. 254 (2001); see, also, Goleta Union Elementary School District v. Ordway, 248 F.Supp.2d 936 (C.D.Cal. 2002).

[243] Williams v. Horvath, 16 Cal.3d 834, 129 Cal.Rptr. 453 (1976).

[244] 104 S.Ct. 3371 (1984).

[245] Id. at 3378 (1984).

> "To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears. First, to be entitled to related services, a child must be handicapped so as to require special education. See 20 U.S.C. Section 1401(1); 34 C.F.R. Section 300.5 (1983). In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act. See 34 C.F.R. Section 300.14, Comment (1) (1983).
>
> "Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless of how easily a school nurse or layperson could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it.
>
> "Third, the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician. See 34 C.F.R. Sections 300.13(a), (b)(10) . . .
>
> "Finally, we note that respondents are not asking petitioner to provide equipment that Amber needs for CIC (citation omitted). They seek only the services of a qualified person at the school."[246]

In Cedar Rapids Community School District v. Garret F.,[247] the United States Supreme Court ruled that school districts are required to provide continuous nursing care to special education students while they are in school. The court held that continuous nursing services came within the definition of "related services" as defined in 20 U.S.C. section 1401(a)(17).

In Clovis Unified School District v. Office of Administrative Hearings,[248] the Court of Appeals held that school districts are not required to pay for hospitalization of special education students in private psychiatric hospitals. The court held that such services are excluded "medical services." The court stated:

> "We agree with the Detsel court, that under the analysis in Tatro, the Shorey's argument for limiting medically excluded services to those requiring a physician's intervention must fail. The Court in Tatro did not hold that all health services are to be provided by other than a licensed physician. (citations omitted) Rather, the Court held only that services which ***must*** be provided by a licensed physician, other than those which are diagnostic or evaluative, *are*

[246] Tatro, 104 S.Ct. at 3378-3379 (1984).
[247] 526 U.S. 66 (119 S.Ct. 992) (1999).
[248] 903 F.2d 635 (9th Cir. 1990).

excluded and that school nursing services of a simple nature are not excluded. In reaching this decision the Court considered the extent and nature of the services performed, not solely the status of the person performing the services. We must do the same.

"Despite the Shoreys' arguments, we see no reason why the 'licensed physician' distinction should take on special significance in cases, such as this, which involve intensive psychological rather than physiological disability. A child hospitalized for ear surgery or kidney dialysis who, the Shoreys concede, is not entitled to subsidy of the costs of hospitalization, frequently must receive care by other than licensed physicians. The services of hospital nurses, dieticians, physical therapists, orderlies and other aids constitute integrated medical services in the treatment of a physical illness requiring the 'medical' intervention of licensed professionals. Clearly all such services, including the strictly medical or surgical services themselves, 'support' a child's education. But it would do havoc to the structure of the Act to exclude only the services of licensed physicians in such circumstances, and to require the school district to pay for all other services. At oral argument, the Shoreys conceded that the services of the aforementioned hospital personnel are excluded as medical, not because they are provided by doctors (because they are not), but rather because their institutional efforts are involved in the curing of a physical illness.

"However, the Shoreys assert that when a child is psychologically or psychiatrically handicapped, as distinguished from a child who suffers a physical handicap, there is no single point at which the needs of the child become medical. They argue that a continuum of educational needs dictates that school districts must pay for the psychiatric hospitalization of such children under the Act's mandate to provide related services to all children 'regardless of the severity of their handicap.' According to the Shoreys, this continuum of needs exists, and a child's educational needs remain unsegregable from her needs for treatment (and thus by hypothesis 'related') unless or until those needs must be addressed by licensed physicians.

"We cannot accept as reasonable a definition of 'medical' which ultimately turns on the distinction between physiological illness and mental illness. Such a definition would mandate huge expenditures by local school boards aimed at 'curing' psychiatric illness but not require similar expenditures for treating children with physical problems who require the more traditional 'medical' services. The clear intention of the Act is to provide access to

education for *all* handicapped students on an equal basis. Section 1412(2)(B) precludes such an unfair result."[249]

However, in Taylor v. Honig,[250] the Ninth Circuit Court of Appeals found that the Garden Grove Unified School District had to pay the entire cost of hospitalization for a seriously emotionally disturbed student at the San Marcos Treatment Center in San Marcos, Texas. The distinguishing factor was that in Taylor, the child was placed for educational, rather than medical, reasons. The court ruled that the San Marcos Treatment Center was a school rather than a hospital because it operated a full-time school on the premises.

UNILATERAL PLACEMENT

The IDEA place limits on retroactive reimbursement for unilateral placements by parents. This provision allows courts to reduce or deny retroactive reimbursement if the parents did not inform the IEP team that they were rejecting the school district's proposed placement and did not inform the IEP team of their intent to enroll the child in a private school at public expense.[251] The courts may also limit or deny reimbursement if, ten business days prior to the removal of the child from the public school, the parents did not give written notice to the school district. The court may also reduce or deny retroactive reimbursement if, prior to the parents' removal of the child from the public school, the public agency informed the parents of the school district's intent to evaluate the child and the parents did not make the child available for assessment or if the court makes a judicial finding that the parents acted unreasonably when they unilaterally placed the child. The court may not reduce or deny reimbursement to parents if:

1. The parent is illiterate and cannot write in English;

2. Compliance with the provision requiring notice be given to the school district would likely result in physical or serious emotional harm to the child;

3. The school district prevented the parent from providing such notice; or

4. The parents had not received notice, pursuant to Section 1415, of the notice requirements in this provision.

The final regulations contain identical language.[252]

RESIDENTIAL PLACEMENT

The IDEA and federal regulations require school districts to pay for residential placements, if such placements are necessary for the children with disabilities to benefit from special education.[253]

[249] Clovis Unified School District, 903 F.2d at 644.
[250] 910 F.2d 627 (9th Cir. 1990).
[251] 20 U.S.C. § 1412(a)(10)(C).
[252] 34 C.F.R. § 300.403.

The school district is liable for the cost of the program ". . . including non-medical care and room and board."[254]

The courts have held that where the social, emotional, and educational needs are intertwined and cannot easily be separated, the school must pay the entire cost of the residential placement.[255]

However, where the primary reason for the child's placement is medical, not educational, the school districts are not liable.[256]

In Clovis Unified School District, the court stated:

> "Michelle was hospitalized primarily for medical, i.e. psychiatric, reasons, and therefore the District Court erred when it determined hospitalization to be a 'related service' for which Clovis was responsible under the Act.
>
> "The psychotherapeutic services Michelle received at King's View may be qualitatively similar to those she would receive at a residential placement, and it is clear that some psychological services are explicitly included within the definition of related services under the Act when pupils need such services to benefit from their special instruction. However, the intensity of Michelle's program indicates that the services she received were focused upon treating an underlying medical crisis. Where, as here, a child requires six hours per day of intensive psychotherapy, such services would appear 'medical' in that they address a medical crisis.
>
> "Further, although Michelle could be helped by treatment by psychologists rather than psychiatrists, it stands to reason that the high cost of her placement is due to the status of King's View as a medical facility, requiring a staff of licensed physicians, a high staff to patient ratio, and other services which would not be available or required at a placement in an educational institution. . . .
>
> "Furthermore, King's View hardly provided Michelle with any educational services. Rather, the local school district sent both regular and special education teachers to King's View to meet the educational needs of Michelle and other children who were patients there. Because King's View does not provide its patients with educational services, it differs substantially from facilities found by other circuits to be residential placements within the ambit of 34

---

[253] 20 U.S.C. §§ 1412(2)(B); 1413(a)(4)(B); 34 C.F.R. § 300.302.
[254] 34 C.F.R. § 300.302.
[255] Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981); San Francisco Unified School District v. State of California, 131 Cal.App.3d 54 (1982).
[256] Clovis Unified School District v. California Office of Administrative Hearings, 903 F.2d 635 (9th Cir., 1990). See, also, Taylor v. Honig, 910 F.2d 627 (9th Cir. 1990), in which the Court of Appeals held that the placement was for educational rather than medical reasons.

> C.F.R. section 300.302 for which school districts are financially responsible. . . ."[257]

In Capistrano Unified School District v. Wartenberg,[258] the Court of Appeals held that a student who suffered from a learning disability, attention deficit disorder, was entitled to be placed in a private school even if there was no finding that the learning disability or attention deficit disorder caused the behavior which necessitated the need for a private school. The school district contended that the need for a private school was a result of the student's oppositional defiant or anti-social behavior, not his disabilities, and the IEP the school district developed could meet the student's needs if the student chose to cooperate. The court rejected the school district's position and held that the IDEA's requirement to provide a free appropriate public education means that once the student is found eligible under the IDEA, all of the child's intertwined needs, whether they are disabilities under the IDEA or not, must be addressed in the student's IEP.

Another perplexing legal issue is raised when residential placement in psychiatric hospitals is sought, particularly where these facilities contain locked units. When a court orders placement in the locked unit of a psychiatric hospital, has the court, in effect, civilly committed the disabled student?

In O'Connor v. Donaldson,[259] the United States Supreme Court held that a state under the United States Constitution cannot confine an individual who is not dangerous and who can live safely in society alone or with the help of family members or friends. In Addington v. Texas,[260] the Court held that to meet the due process requirements of the Fourteenth Amendment, the standard for use in civil commitment hearings must be greater than the preponderance of evidence standard applicable to cases under the IDEA. Thus, when a hearing officer or court orders a school district to pay for the hospitalization of a disabled student in a psychiatric hospital, basing the judgment on a preponderance of evidence standard, the hearing officer may be in violation of the court's holding in Addington v. Texas.[261] The court in Addington stated:

> "This court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection . . . Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.
>
> "The state has a legitimate interest . . . in providing care to its citizens who are unable because of emotional disorders to care for

[257] Clovis Unified School District, 903 F.2d at 645-46.
[258] 59 F.3d 884 (9th Cir. 1995). In a strongly worded dissent, Judge Fergusen wrote that there should be a causal link between the child's qualified disability and the need for the service.
[259] 422 U.S. 563 (95 S.Ct. 2486) (1975).
[260] 441 U.S. 418 (99 S.Ct. 1804) (1979).
[261] Ibid.

> themselves . . . Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear as to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings."[262]

The Court in Addington went on to state that the standards for civil commitment may vary from state to state and held that the procedures must be allowed to vary, as long as they meet the constitutional minimum. In California, the standard of proof in a civil commitment hearing is beyond a reasonable doubt, the standard used in criminal proceedings.[263]

LICENSED CHILDREN'S INSTITUTIONS AND NONPUBLIC SCHOOLS UNDER CALIFORNIA LAW

California law contains many additional requirements for licensed children's institutions and nonpublic schools. Assembly Bill 1858[264] amends and adds numerous provisions to the Education Code relating to licensed children's institutions for foster children and nonpublic schools for special education students effective January 1, 2005.

Section 56155.7 states that a licensed children's institution may not require that a child be identified as an individual with exceptional needs as a condition of admission or residency.

Section 56157(a), states that in providing appropriate programs for special education students residing in licensed children's institutions or foster family homes, the local educational agency shall first consider services and programs operated by public education agencies for special education students. If these programs are not appropriate, special education and related services shall be provided by contract with a nonpublic, nonsectarian school.

Sections 56157(c) and (d) state that if a special education student residing in a licensed children's institution or foster family home is placed in a nonpublic, nonsectarian school, the local educational agency that made the placement shall conduct an annual evaluation, in accordance with federal law as part of the annual individualized education program process, of whether the placement is the least restrictive environment that is appropriate to meet the pupil's needs. If the special education student residing in a licensed children's institution or foster family home is placed in a nonpublic school, the nonpublic school shall report to the local educational agency that made the placement, on a quarterly or trimester basis, as appropriate, the educational progress demonstrated by the student towards the attainment of the goals and objectives specified in the student's IEP. Pursuant to federal law, no local educational agency shall refer a pupil to a nonpublic school unless the services required by the IEP can be assured.

Section 56341.5 states that as part of the participation of a special education student in the IEP process, the student shall be allowed to provide confidential input to any representative of his or her IEP team.

---

[262] Id. at 1809.
[263] Waltz v. Zumwalt, 176 Cal.App.3d 835 (1985); Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1981).
[264] Stats. 2004, ch. 914.

Education Code section 56366(a) states that the master contract with a nonpublic school shall include teacher-to-pupil ratios and an individual services agreement for each student placed by a local educational agency that will be negotiated for the length of time the nonpublic school or nonpublic agency services specified in the child's IEP. The master contract shall include a description of the process being utilized by the local educational agency to oversee and evaluate placements in nonpublic schools. The description shall include a method for evaluating whether the pupil is making appropriate educational progress. At least once every year, the local educational agency shall:

1. Evaluate the educational progress of each student placed in a nonpublic school, including all state assessment results.

2. Consider whether or not the needs of the student continue to be best met at the nonpublic school and whether changes to the IEP of the student are necessary, including whether the student may be transitioned to a public school setting.

In the case of a nonpublic school that is owned, operated by or associated with a licensed children's institution, the master contract shall include a method for evaluating whether the nonpublic school is in compliance with the requirement that the licensed children's institution shall not require the student to be enrolled in the nonpublic school as a condition for residing at the licensed children's institution.

Section 56366(a)(8) states that a nonpublic school is subject to the alternative accountability system developed by the Superintendent of Public Instruction in the same manner as public schools and each student placed in a nonpublic school by the local educational agency shall be tested by qualified staff of the nonpublic school in accordance with the accountability program. The test results shall be reported by the nonpublic school to the California Department of Education.

Beginning in the 2006-2007 school year testing cycle, each nonpublic school shall determine its STAR testing period. The nonpublic school shall determine this period based on the completion of 85 percent of the instructional year at the nonpublic school. Each nonpublic school shall notify the district of residence of a pupil enrolled in the school of its testing period. Staff at the nonpublic school who shall administer the assessments shall attend the regular testing training sessions provided by the district of residence. If staff from a nonpublic school have received training from one local educational agency, that training will be sufficient for all local educational agencies that send pupils to the nonpublic school. The district of residence shall order testing materials for its pupils that have been placed in the nonpublic school. The State Board of Education shall adopt regulations to facilitate the distribution of and the collecting of testing materials.

Section 56366(a)(9) states that with respect to a nonpublic school, the school shall prepare a school accountability report card in the same manner as public schools.

Section 56366.1(b)(1) states that a nonpublic school applying for state certification shall provide the SELPA where the applicant is located with written notification of its intent to seek state certification or renewal of its certification. The applicant shall submit, on a form developed by the California Department of Education, a signed verification by the local educational agency

representatives that they have been notified of the intent to certify or renew certification. The signed verification shall provide assurances that the local educational agency representatives have had the opportunity to provide input on all required components of the application and that the LEA had at least 60 calendar days prior to submission of an initial application or at least 30 calendar days prior to submission of a renewal application to provide input.

Section 56366.1(i)(2) states that the Superintendent of Public Instruction shall conduct an investigation, which may include an unannounced on-site visit of the nonpublic school, if the Superintendent receives evidence of a significant deficiency in the quality of the educational services provided or noncompliance with state law. The Superintendent of Public Instruction shall document the complaint and the results of the investigation and shall provide copies of the documentation to the complainant, the nonpublic school, and the contracting local educational agency.

Section 56366.1(i)(3) states that violations or noncompliance that are documented by the Superintendent of Public Instruction shall be reflected in the status of the certification of the school, at the discretion of the Superintendent of Public Instruction, pending an approved plan of correction by the nonpublic school. The California Department of Education shall retain for a period of 10 years, all violations pertaining to certification of a nonpublic school or agency. The Superintendent of Public Instruction is required to monitor the facilities, the educational environment and the quality of the educational program, including the teaching staff, the credentials authorizing service, the standards-based core curriculum being employed, and the standard focused instructional materials used of an existing certified nonpublic school or agency on a three year cycle as follows:

1. The nonpublic school shall complete a self review in year one.

2. The Superintendent shall conduct an on-site review of the nonpublic school or agency in year two;

3. The Superintendent shall conduct a follow-up visit to the nonpublic school or agency in year three.

Section 56366.1(l) states that commencing July 1, 2006, notwithstanding any other provision of law, the Superintendent of Public Instruction may not certify or renew the certification of a nonpublic school or agency unless all of the following conditions are met:

1. The entity operating the nonpublic school or agency maintains separate financial records for each entity that it operates, with each nonpublic school or agency identified separately from any licensed children's institution that it operates.

2. The entity submits an annual budget that identifies the projected costs and revenues for each entity and demonstrates that the rates to be charged are reasonable to support the operation of the entity.

3. The entity submits an entity-wide annual audit that identifies its costs and revenues, by entity, in accordance with generally accepted accounting and auditing principles. The audit must clearly document the amount of moneys received and expended on the educational program provided by the nonpublic school.

4. The relationship between various entities operated by the same entity are documented, defining the responsibilities of the entities. The documentation shall clearly identify the services to be provided as part of each program, for example, the residential or medical program, the mental health program, or the education program. The entity shall not seek funding from a public agency for a service, either separately or as a part of a package of services, if the service is funded by another public agency, either separately or as part of a package of services.

Section 56366.1(n) states that notwithstanding any other provision of law, only nonpublic schools and agencies that provide special education and designated instruction and services utilizing staff who hold a certificate, permit, or other document equivalent to that which staff in a public school are required to hold in the service rendered are eligible to receive certification.

Section 56366.5(c) states that any educational funds received from a local educational agency for the educational costs of special education students that the local educational agency placed in a nonpublic school shall be used solely for those purposes and not for the costs of a residential program.

Section 56366.10 states that in addition to the certification requirements, a nonpublic school that provides special education and related services to special education students shall certify in writing to the Superintendent of Public Instruction that it meets all of the following requirements:

1. It will not accept a special education student if it cannot provide or ensure the provision of services outlined in the student's IEP.

2. Students have access to the following educational materials, services and programs to the extent available at the local educational agency in which the nonpublic school is located, including standards-based, core curriculum and the same instructional materials used by the local educational agency in which the nonpublic school is located, college preparation courses, extracurricular activities (such as art, sports, music and academic clubs), career preparation and vocational training (consistent with transition plans), supplemental assistance (including individual academic tutoring, psychological counseling, career and college counseling).

3. The teachers and staff provide academic instruction and support services to students with the goal of integrating students into the least restrictive environment.

4. The school has and abides by a written policy for student discipline which is consistent with state and federal law and regulations.

Section 56366.11 states that the California Department of Education shall implement a program to integrate special education students in nonpublic schools into public schools, as appropriate. Under the program, a student placed in a nonpublic school and each individual who has a right to make educational decision for the student shall be informed of all their rights relating to the educational placement of the student. Existing dispute resolution procedures involving public school enrollment or attendance shall be explained to a student placed in nonpublic school in an age and developmentally-appropriate manner. The Foster Child Ombudsman shall disseminate the information on educational rights to every foster child residing in a licensed children's institution or foster family home.

Following the development of the next statewide assessment contract, the California Department of Education shall submit to the Legislature a report on the academic progress of students attending nonpublic schools serving special education students. Using the results of the two most recent years of the STAR program and the California Alternative Performance Assessment, the report shall summarize by district the achievement of all students attending a nonpublic school. The Department shall ensure that the report does not violate the confidentiality of individual pupil scores. In addition, the report shall include an Academic Performance Index score for all students attending nonpublic school for each district.

Section 56366.12 states that a nonpublic school shall ensure private and confidential communication between a student of the nonpublic school and members of the student's IEP team, at the student's discretion.

Health and Safety Code section 1501.1 states that a licensed children's institution may not require, as a condition of placement, that a child be identified as a special education student.

Welfare and Institutions Code section 16014 states that it is the intent of the Legislature to maximize federal funding for foster youth services provided by local educational agencies. The State Department of Education and the State Department of Social Services are required to collaborate with the County Welfare Directors Association, representatives from local educational agencies, and representatives of private, nonprofit foster care providers to establish roles and responsibilities, claiming requirements, and sharing of eligibility information eligible for funding under various federal programs. The state agency shall also assist counties and local educational agencies in drafting memorandums of understanding between agencies to access funding for case management activities associated with providing foster youth services for eligible children. The federal funding shall be an augmentation to the current program and shall not supplant existing state general funds allocated to the program. School districts shall be responsible for 100 percent of the nonfederal share of payments received under the Social Security Act.

Section 17 of the Legislation states that public schools are encouraged to apply for all available, federal, state, and local supplemental sources of funding to accomplish the goals set forth in Assembly Bill 1858, including funding available for neglected or delinquent students who are at risk of dropping out of school, homeless students, Social Security and IDEA funding.

EXTENDED SCHOOL YEAR

Generally, the courts have held that special education and related services shall be provided on an extended year basis for each student with a disability who has unique needs and requires special education and related services in excess of the academic year.

In Crawford v. Pittman,[265] the Court of Appeals held that a state policy which barred consideration of extending educational programs beyond 180 days per year for disabled children violated the IDEA. The court declared the State of Mississippi's policy to be invalid and directed the district court to enter an order requiring each child's IEP to be individually designed pursuant to the requirements of the IDEA. In Georgia Association of Retarded Children v. McDaniel,[266] the Court of Appeals affirmed the decision of the district court ordering the State of Georgia to reverse its policy of refusing to consider the needs of mentally retarded children for education in excess of the traditional 180 day school year. The Court of Appeals affirmed the granting of the injunction against the challenged policy.

In California, regulations state that individuals who have disabilities which are likely to continue indefinitely or for a prolonged period or where interruption of the pupil's educational programming may cause regression and, coupled with limited recoupment capacity, render it impossible or unlikely that the pupil will attain the level of self sufficiency and independence that would otherwise be expected in view of his or her disabling condition, are eligible for extended school year. The IEP team is empowered to determine the need for an extended year program.[267] An extended year program is provided for a minimum of 20 instructional days including holidays up to a maximum of 55 instructional days for the severely disabled and 30 instructional days for other eligible pupils.[268]

GRADUATION OF SPECIAL EDUCATION STUDENTS

The courts generally have upheld state laws requiring disabled students to pass a minimal competency test in order to receive a high school diploma if sufficient notice was given to the students in advance. In Board of Education v. Ambach,[269] a New York court held that the state law requiring disabled students to fulfill graduation requirements including the passage of basic competency examinations in order to receive a high school diploma did not violate the Rehabilitation Act of 1973 or the IDEA, where the students were given three years notice of the

[265] 708 F.2d 1028 (5th Cir. 1983).
[266] 716 F.2d 1565 (11th Cir. 1983); see, also, Yaris v. Special School District, 728 F.2d 1055 (8th Cir. 1984).
[267] 5 C.C.R. § 3043.
[268] Ibid.
[269] 458 N.Y.S.2d 680 (Sup. 1982).

requirement. However, in Brookhart v. Illinois State Board of Education,[270] the Court of Appeals held that one and a half years' notice of the test requirement was not sufficient.

The 2006 IDEA regulations state that a student's right to a free, appropriate public education is terminated upon graduation with a regular high school diploma but does not include an alternative degree that is not fully aligned with the state's academic standards.[271] The 2004 amendments to the IDEA require that a school district provide a student with a summary of the child's academic achievement and functional performance and recommendations on assisting the child to meet their postsecondary goals.[272]

In California, Education Code section 56390 states that a school district may award an individual with exceptional needs a certificate or document of educational achievement or completion if:

1. The individual has satisfactorily completed a prescribed alternative course of study approved by the governing board of the school district and identified in his or her IEP;

2. The individual has satisfactorily met his or her IEP goals and objectives during high school as determined by the IEP team; and

3. The individual has satisfactorily attended high school, participated in the instruction as prescribed in his or her IEP and has met the objectives of the statement of transition services.

Education Code section 56391 states that an individual with exceptional needs who meets the criteria for a certificate or document of educational achievement or completion shall be eligible to participate in any graduation ceremony and any school activity related to graduation in which a student of similar age, without disabilities, would be eligible to participate. The right to participate in graduation ceremonies does not equate to a certificate or document of educational achievement or completion with a regular high school diploma.

Education Code section 56392 states that it is not the intent of the Legislature to eliminate the opportunity for an individual with exceptional needs to earn a standard diploma issued by the school district when the pupil has completed the prescribed course of study and has passed the proficiency requirements with or without differential standards.

[270] 697 F.2d 179 (7th Cir. 1983).
[271] 34 C.F.R. § 300.101(a)(3).
[272] 20 U.S.C. § 1414(c)(5)(B).

CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS

Section 612(a)(10)[273] amends the requirements for providing services to children enrolled in private schools by their parents. This section, as amended, authorizes the use of federal funds for direct services to parentally placed private school children by the local educational agency. The amount expended for providing these services is required to be equal to a proportion of the amount of federal funds made available by the federal government.

In calculating the proportionate amount of federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools, shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.[274] The child find process is required to ensure the equitable participation of parentally placed private school children with disabilities and an accurate account of such children.

The consultation with private school representatives during the design and development of special education and related services for private school children must include the following:

1. The child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

2. The determination of the proportionate amount of federal funds available to serve parentally placed private school children with disabilities, including the determination of how the amount was calculated;

3. The consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how the process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;

4. How, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of the types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned

[273] 20 U.S.C. § 1412(a)(10). See, also, 34 C.F.R. § 300.130 et seq.
[274] As discussed below, state law conflicts with this provision by requiring the local educational agency where the private school student resides to be responsible. See, Education Code section 56171.

if funds are insufficient to serve all children, and how and when these decisions will be made; and

5. How, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency choose not to provide services directly or through a contract.[275]

When timely and meaningful consultation has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the state educational agency. A private school official shall have the right to submit a complaint to the state educational agency if the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official. If the private school official wishes to submit a complaint, the private school official shall provide the basis of the noncompliance by the local educational agency to the state educational agency, and the local educational agency shall forward the appropriate documentation to the state educational agency. If the private school official is dissatisfied with the decision of the state educational agency, such official may submit a complaint to the United States Secretary of Education by providing the basis of the noncompliance by the local educational agency to the Secretary of Education, and the state educational agency shall forward the appropriate documentation to the Secretary of Education.[276]

The provision of equitable services to parentally placed private school children shall be provided by employees of the public agency or through contract by the public agency with an individual, association, agency, organization or other entity. Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, must be secular, neutral and nonideological.

The changes to this section will require more extensive consultations with private schools.

The regulations state that no private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.[277]

The regulations state that services provided to private school children with disabilities may be provided on site at a child's private school, including a religious school to the extent consistent with law.[278] The trend in the courts is to allow services to be provided at the religious school site.[279]

[275] 20 U.S.C. § 1412(a)(10).
[276] 20 U.S.C. § 1412(a)(10); 34 C.F.R. § 300.134.
[277] 34 C.F.R. § 300.137.
[278] 34 C.F.R. § 300.139.

A private school child with a disability must be provided transportation from the child's school or the child's home to a site other than the private school and from the service site to the private school or to the child's home depending upon the timing of the services. However, school districts are not required to provide transportation from the child's home to the private school. The cost of the transportation may be included in the proportionate amount of federal funds spent on private school students.

The regulations state that the due process hearing requirements do not apply to complaints that a school district has failed to meet the requirements of these regulations relating to the education of private school students, including the provision of services indicated on the child's services plan. The due process procedures do apply with respect to evaluating and determining special education eligibility for private school students.[280]

The regulations state that federal IDEA funds may not be used for classes that are organized separately on the basis of school enrollment or religion if the classes are at the same site and the classes include students enrolled in public schools and students enrolled in private schools. The regulations further state that federal funds may not be used to finance the existing level of instruction in a private school or to otherwise benefit the private school. The regulations also state that a school district may use federal funds to make public school personnel available for private school children with disabilities if those services are not normally provided by the private school.[281]

The regulations state that a school district may use funds available to pay for the services of an employee of a private school to provide services to children with disabilities if the employee performs the services outside of his or her regular hours of duty and the employee performs the services under public supervision and control. The regulations require a school district to keep title to and exercise continuing administrative control of all property, equipment and supplies acquired with federal funds for the benefit of private school children with disabilities. The school district may place equipment and supplies in a private school for a temporary period of time. The school district must ensure that the equipment and supplies placed in a private school are only used for IDEA purposes and can be removed from the private school without remodeling the private school facility. The school district shall remove equipment and supplies from a private school if the equipment or supplies are no longer needed for IDEA purposes or removal is necessary to avoid unauthorized use of the equipment and supplies for other than IDEA purposes. No funds under the IDEA may be used for repairs, minor remodeling or construction of private school facilities.[282]

In Zobrest v. Catalina Foothill School District,[283] the United States Supreme Court held that a school district may provide an interpreter to a student attending a private Catholic high school without violating the Establishment Clause of the First Amendment. The Court held that giving aid to a broad class of persons is permissible under the Establishment Clause even where the parochial school may be indirectly benefited.

---

[279] See, Zobrest v. Catalina School District , 113 S.Ct. 2462, 83 Ed.Law Rep. 930, (1993), (Establishment Clause of the First Amendment does not prohibit school district from providing a sign language interpreter at parochial school).
[280] 34 C.F.R. § 300.140.
[281] 34 C.F.R. §§ 300.141, 300.142, 300.143.
[282] 34 C.F.R. § 300.144.
[283] 113 S.Ct. 2462 (1993).

In California, the Attorney General stated that in its opinion,[284] state law does not impose any further requirements upon school districts in California. The Attorney General stated:

> "We conclude that a school district is directed to provide special education programs to such children only to the extent the programs may be purchased with the proportionate share of funds made available to the district under federal law."[285]

The Attorney General noted that Education Code section 56171 requires districts to locate, identify and assess all private school children with disabilities, including religiously affiliated school-age children who have disabilities and are in need of special education and related services. Section 56173 states that each district shall spend on providing special education and related services to private school children with disabilities enrolled by a parent in a private elementary and secondary school an amount of federal state grant funds allocated to the state under the IDEA that is equal to a proportionate amount of federal funds made available under the Part B grant for local assistance. In addition, Education Code section 56000 states that it is the intent of the Legislature that nothing in state law shall be construed to set a higher standard of educating individuals with exceptional needs than that established by Congress in the IDEA.

The Attorney General concluded that state law was consistent with federal law in 2000 and did not impose any additional requirements beyond what was required by federal law.[286] In essence, school districts are required to utilize a proportionate share of federal funds to provide services to children with disabilities who have been enrolled by a parent in a private school.

PROCEDURAL SAFEGUARDS NOTICE REQUIREMENTS

A. Procedural Safeguards

The IDEA requires states to adopt certain procedural safeguards to assure that parents receive a free appropriate public education for their disabled children.[287] These safeguards include:

1. An opportunity for the parents or guardian of a disabled child to examine all relevant records;

2. Appointment of a surrogate for the parents or guardian where appropriate;

3. Prior written notice to the parents or guardian of the child whenever the school district proposes to initiate or change or refuses to initiate or change the identification, evaluation or

[284] 83 Ops.Cal.Atty.Gen. 132 (2000).
[285] Id. at 132.
[286] In 2004, Congress amended 20 U.S.C. §1412(a)(10) to require the local educational agency where the private school is located to be responsible for providing services to students enrolled in the private school. Education Code section 56170 has not been amended to conform to this change in federal law and state law still places the responsibility for providing services to children enrolled in private schools on the local educational agency of residence.
[287] 20 U.S.C. § 1415.

educational placement of the child or the provision of a free appropriate public education to the child;

4. Procedures designed to assure that all prior written notice of procedural safeguards given to the parents or guardian of a disabled child is in their native language unless it is clearly not feasible to do so;

5. An opportunity for mediation of any disputes;

6. An opportunity to present complaints with respect to any matter relating to identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child.

7. A requirement that the parent or attorney representing the parent provide the state education agency and the school district the name, address and school of the child, a description of the problem and a proposed solution.

8. A state complaint form to assist parents in filing a complaint.[288]

B. Transmittal of Notice

Section 615(d) modifies the procedural safeguards notice requirements to state that it shall be given to parents only one time a year, except that a copy also shall be given to the parents upon initial referral, parent request for evaluation, upon the first occurrence of the filing of a complaint, or upon the request of a parent. A local educational agency may place a current copy of the Procedural Safeguards Notice on its Internet website if such website exists.

The federal regulations require the procedural safeguards notice to be given to the parent upon the receipt of the first due process complaint or compliance complaint or if discipline procedures are implemented.[289]

C. Contents of Notice

The contents of the Procedural Safeguards Notice requirements has been modified slightly to require that they include the opportunity to present and resolve complaints including the time period in which to make a complaint, the opportunity for the agency to resolve the complaint, and the availability of mediation.

With respect to mediation, the legislation clarifies that the written agreement resolving the complaint through the mediation process must be legally binding and state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any

[288] 20 U.S.C. § 1415(b).
[289] 34 C.F.R. § 300.504.

subsequent due process hearing or civil proceeding. The written agreement must also be signed by both the parent and the representative of the agency who has the authority to bind such agency and must be enforceable in any federal or state court.

Section 615(c)[290] states that the contents of the written prior notice to the parents which is required whenever a local educational agency proposed to initiate or change or refuses to initiate or change the identification, evaluation, or educational placement of a special education child, or the provision of a free appropriate public education to the child has been modified to include the following:

1. A description of the action proposed or refused by the agency;

2. An explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

3. A statement that the parents of a child with a disability have protection under the procedural safeguards of the IDEA, and if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

4. Sources for parents to contact to obtain assistance in understanding the provisions of the IDEA;

5. A description of other options considered by the IEP team and the reasons why those options were rejected;

6. A description of the factors that are relevant to the agency's proposal or refusal.

D. The 2006 Regulations

The federal regulations[291] require that written notice must be given to the parents of a special education child a reasonable time before the public agency proposes to do any of the following:

1. Initiate or change the identification, evaluation or educational placement of the child for the provision of a free appropriate public education to the child.

2. Refuse to initiate or change the identification, evaluation or educational placement of the child for the provision of a free appropriate public education to the child.[292]

[290] 20 U.S.C. § 1415(c).
[291] 34 C.F.R. § 300.503.

If the action proposed by the school district also requires parental consent, the school district must give notice at the same time it requests parental consent. The notice is required to include the following:

1. A description of the action proposed or refused by the agency;

2. An explanation of why the agency proposes or refuses to take the action;

3. A description of any other options that the agency considered and the reasons why those options were rejected;

4. A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

5. A description of any other factors that is relevant to the agency's proposal or refusal;

6. A statement that the parents of a child with a disability have protection under the procedural safeguards of the IDEA and the means by which a copy of the description of the procedural safeguards can be obtained, and;

7. Sources for parents to contact to obtain assistance in understanding the provisions of the IDEA.[293]

The notice must be written in language that is understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication, that the parent understands the content of the notice and that there is written evidence that the requirements have been met.

[292] See, also, 20 U.S.C. § 1415(b)(1)(c); Union School District v. Smith, 15 F.3d 1519 (9th Cir. 1994) (school district required to make formal written offer of appropriate educational placement even when parents have expressed an unwillingness to accept the placement).
[293] 34 C.F.R. § 300.503.

DUE PROCESS PROCEDURES

A. Grounds for Filing Due Process Complaint

A parent or a public agency may file a due process complaint on any matters relating to the identification, evaluation, or educational placement of a child with a disability or the provision of a free appropriate public education to the child. A parent or public agency may file a due process complaint when a public agency proposes to initiate or change the identification evaluation or educational placement of the child or the provision of a free appropriate public education to the child or refuses to initiate or change the identification evaluation or educational placement of a child or the provision of a free appropriate education to the child.[294]

The federal regulations state that disagreements between a parent and a public agency regarding the availability of a program appropriate for a child with a disability, and the question of financial reimbursement, are subject to the due process procedures.[295] The due process procedures and compliance complaint procedures apply to child find requirements as well.[296]

B. Surrogate Parent

Section 615(b)[297] states that when the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the state, including the assignment of an individual to act as a surrogate for the parents, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of a child who is a ward of the state, such surrogate may alternatively be appointed by the judge overseeing the child's care, provided that the surrogate meets the requirements of Section 615(b)(2) [298] and in the case of an unaccompanied homeless youth, as defined in Section 725(6) of the McKinney-Vento Homeless Assistance Act,[299] the local agency shall appoint a surrogate in accordance with Section 615(b)(2).[300] The state shall make reasonable efforts to ensure the assignment of a surrogate not more than thirty days after there is a determination by the agency that the child needs a surrogate.

C. Two Year Statute of Limitations for Due Process Complaints

Section 615(b)(6)[301] states that parents shall have an opportunity to present a complaint (e.g., a due process complaint) to the state educational agency with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child, which sets forth an allegation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged

[294] 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a)(1).
[295] 34 C.F.R. § 300.148(b).
[296] 34 C.F.R. § 300.140.
[297] 20 U.S.C. § 1415(b).
[298] 20 U.S.C. § 1415(b)(2).
[299] 42 U.S.C. § 11434(a)(6).
[300] 20 U.S.C. § 1415(b)(2).
[301] 20 U.S.C. § 1415(b)(6).

action that forms the basis of the complaint, or, if the state has an explicit time limitation for presenting such a complaint under this part, in such time as the state law allows, except that the exceptions to the timeline described in Section 615(f)(3)(D) shall apply to the timeline described in Section 615(b)(6).[302] Education Code section 56505 provides for a two year statute of limitations for due process complaints.[303]

D. Filing Due Process Complaints

The legislation amends Section 615(b)(7)[304] with respect to the filing of a due process complaint and, in addition to requiring a description of the nature of the problem, including facts relating to such problem, and any proposed resolution to the problem, the due process complaint notice must now also include a requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of Section 615(b)(7)(A).[305]

Each state education agency is required to develop model forms for filing a due process complaint but may not require the use of the forms.[306]

E. Sufficiency of Due Process Complaint

The due process complaint notice filed by either party shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of Section 615(b)(7)(A).[307]

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, the local educational agency shall, within ten days of receiving the complaint, send to the parent a response that shall include:

1. An explanation of why the agency proposed or refused to take the action raised in the complaint.

2. A description of other options that the IEP team considered and the reasons why those options were rejected.

3. A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action.

---

[302] Education Code section 56500.2 establishes a one year statute of limitation for compliance complaints in conformity with 34 C.F.R. §300.662(c).
[303] Education Code section 56505 provides for a two year statute of limitations effective October 9, 2006. If a parent participates in mediation between October 9, 2005, and October 9, 2006, a three year statute of limitations will apply, otherwise, the statute of limitations is two years.
[304] 20 U.S.C. § 1415(b)(7).
[305] 20 U.S.C. § 1415(b)(7)(A). These requirements require the party to include the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending, and in the case of a homeless child or youth, available contact information for the child and the name of the school the child is attending. See, also, Education Code section 56502.
[306] 34 C.F.R. § 300.509.
[307] 20 U.S.C. § 1415(b)(7)(A), see, also, Education Code section 56502.

4. A description of the factors that are relevant to the agency's proposal or refusal.

A response filed by a local educational agency shall not be construed to preclude such local educational agency from asserting that the parents' due process complaint notice was insufficient where appropriate. The non-complaining party shall, within ten days of receiving the complaint, send to the complainant a response that specifically addresses the issues raised in the complaint. The party providing a hearing officer notification (i.e., that the due process complaint was not sufficient) shall provide the notification within fifteen days of receiving the complaint. Within five days of receipt of the notification alleging insufficiency, the hearing officer shall make a determination on the face of the notice of whether the notification meets the sufficiency requirements of Subsection (b)(7)(A) (i.e., a sufficient description of the nature of the problem and the underlying facts), and shall immediately notify the parents in writing of such determination.

A party may amend its due process complaint notice only if the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B) or the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs.

The applicable timeline for a due process hearing shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).[308]

F. General Hearing Requirements

The right to an administrative hearing includes the right to a mediation conference, the right to examine pupil records, the right to a fair and impartial administrative hearing at the state level before a person knowledgeable in the laws governing special education and administrative hearings under contract with the State Department of Education, the right to have the pupil present at the hearing and the right to a hearing open to the public.[309] Under California law, the request for a hearing must be filed with the State Superintendent of Public Instruction.[310]

The administrative hearing is conducted in accordance with the rules and regulations adopted by the board at a time and place reasonably convenient to the parent and the pupil.[311] During the pendency of the hearing proceedings the pupil shall remain in his or her present placement unless the public agency and the parent agree otherwise.[312] At the hearing, the parties have the following rights:

1. The right to be advised by counsel;

2. The right to present evidence, written arguments and oral arguments;

[308] 20 U.S.C. § 1415(f)(1)(B); see, also, Education Code section 56502.
[309] Ibid.
[310] Education Code section 56502.
[311] Education Code section 56505.
[312] 20 U.S.C. § 1415(e)(3); 34 C.F.R. § 300.513(a); Education Code section 56505(d).

3. The right to confront, cross-examine and compel the attendance of witnesses;

4. The right to a written or electronic verbatim record of the hearing;

5. The right to written findings of fact and the decision;

6. The right to prohibit the introduction of evidence at the hearing that has not been disclosed to a party at least five days before the hearing.[313]

Under California law, the hearing must be completed and a written decision mailed to the parties within 45 days from the receipt of the superintendent of the request for a hearing. Either party to the hearing may request that the hearing officer grant an extension. The extension shall be granted upon a showing of good cause. Any extension shall extend the time for rendering the final administrative decision for a period only equal to the length of the extension.[314]

The administrative proceeding is the final administrative determination and binding on all parties.[315] Under California law, in decisions relating to placement, the person conducting the state hearing shall consider costs in addition to other factors that are considered.[316]

Any party may appeal the findings and decision of the administrative hearing to a federal district court without regard to the amount in controversy or to a state court.[317] The court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party and base its decision on the preponderance of the evidence.[318]

During the pendency of any proceedings, unless the state or local education agency otherwise agree, the child remains in the current educational placement. However, the parent or guardian may be entitled to retroactive reimbursement for unilateral placement of the child in another program if the parent or guardian ultimately prevails.[319] A court may change the current education placement of the child during the pendency of the proceedings by issuance of a preliminary injunction.[320]

On appeal, the courts must consider the findings of the administrative hearing and after such consideration, the courts are free to accept or reject the findings in whole or in part.[321]

---

[313] 34 C.F.R. § 300.508; Education Code section 56505(e).
[314] Education Code section 56505(f)(3).
[315] Education Code section 56505(h); 20 U.S.C. § 1415(e)(1).
[316] Education Code section 56505(i).
[317] 20 U.S.C. § 1415(i)(2).
[318] 20 U.S.C. § 1415(i)(2).
[319] School Committee of Town of Burlington v. Department of Education, 105 S.Ct. 1996, 471 U.S. 359 (1985).
[320] Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983).
[321] Town of Burlington v. Department of Education, 736 F.2d 773, 792 (1st Cir. 1984) affirmed 105 S.Ct. 1996 (1985); Gregory K. v. Longview School District, 811 F.2d 1307 (9th Cir. 1987).

G. Resolution Session/Resolution Meeting

Prior to the opportunity for an impartial due process hearing, the local educational agency shall convene a meeting with the parents and the relevant members of the IEP team within fifteen days of receiving notice of the parents' complaint, that includes a representative of the public agency who has decisionmaking authority on behalf of such agency (without an attorney for the local educational agency, unless the parent is accompanied by an attorney), where the parents of the child may discuss their complaint, the specific issues that form the basis of their complaint and the local educational agency is provided the opportunity to resolve the complaint, unless the parents and the local educational agency agree in writing to waive such meeting or agree to use the mediation process. If the local educational agency has not resolved the complaint to the satisfaction of the parents within thirty days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing shall commence. If an agreement is reached to resolve the complaint at the meeting, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the local educational agency who has the authority to bind such agency and is enforceable in state or federal court.[322]

Either party may void the legally binding agreement that has been executed within three business days of the agreement's execution.

The failure of a parent in filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and the due process hearing until the meeting is held unless the parties have jointly agreed to waive the resolution process or to use mediation.[323] If the local educational agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the local educational agency may, at the conclusion of the thirty (30) day resolution period, request that a hearing officer dismiss the parent's due process complaint.[324] If the local educational agency fails to hold the resolution meeting within fifteen (15) days of receiving notice of the parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing office to begin the due process hearing timelines.[325] The federal regulations set forth three exceptions to the thirty (30) day resolution period:

1. Where both parties agree in writing to waive the resolution meeting;

2. If either the mediation or resolution meeting starts, but before the end of the thirty day period, the parties agree in writing that no agreement is possible; or

3. If both parties agree in writing to continue the mediation at the end of the thirty day resolution period, but later, the

[322] 20 U.S.C. § 1415(f); see, also, Education Code section 56501.5.
[323] 34 C.F.R. § 300.510(b)(3).
[324] 34 C.F.R. § 300.510(b)(4).
[325] 34 C.F.R. § 300.510(b)(5).

parents or public agency withdraws from the mediation process.[326]

A written settlement agreement may be enforced at any state court of competent jurisdiction or through any other state mechanism that permits the party to seek enforcement of resolution agreements.[327]

H. Disclosure of Evaluations

Not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing. A hearing officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.[328]

I. Qualifications of Hearing Officers

A hearing officer conducting a hearing shall, at a minimum, not be an employee of the state educational agency or the local educational agency involved in the education or care of the child or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing. The hearing officer shall possess knowledge of, and the ability to understand, the provisions of the IDEA, federal and state regulations pertaining to the IDEA, and legal interpretations of the IDEA by federal and state courts. The hearing officer shall possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice and possess the knowledge and ability to render and write decisions in accordance with appropriate standard legal practice.[329]

J. Conduct of Hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the due process notice unless the other party agrees otherwise. A party or agency shall request an impartial due process hearing within two years of the date the party or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the state has an explicit time limitation for requesting such a hearing under the IDEA, in such time as the state law allows.[330] The two year timeline shall not apply to a parent if the parent was prevented from requesting the hearing due to specific representations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required under the IDEA to be provided to the parent.[331]

---

[326] 34 C.F.R. § 300.510(c).
[327] 34 C.F.R. § 300.510(d)(2).
[328] 20 U.S.C. § 1415(f).
[329] 20 U.S.C. § 1415(f).
[330] Under California law, Education Code section 56505(j) authorizes a three year timeline for requesting a hearing.
[331] 20 U.S.C. § 1415(f).

K. Decision of Hearing Officer

The decision of the hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies impeded the child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parent's child or caused a deprivation of educational benefits. A hearing officer, however, is not precluded from ordering a local educational agency to comply with procedural requirements under the IDEA, nor is a parent prohibited from filing a compliance complaint with the state educational agency, alleging procedural violations.[332]

L. Appeal of Hearing Officer's Decision

Any party bringing a civil action in court must file the action within ninety days from the date of the decision of the hearing officer, or if the state has an explicit time limitation for bringing such action under the IDEA, in such time as the state law allows.[333]

THE BURDEN OF PROOF IN IDEA DUE PROCESS HEARINGS

Prior to 2005, the courts were split as to the appropriate burden of proof in due process hearings under the Individuals with Disabilities Education Act (IDEA).

The First, Fourth, Fifth, Sixth and Tenth Circuits held that the burden of proof should be bourn by the party seeking a change in the status quo.[334] The Second, Third, Eight and Ninth Circuits held that the burden of proof is always on the school district.[335] In 2005, the U.S. Supreme Court ruled that the burden of proof should be bourn by the party seeking relief.[336]

A. Burden of Proof – In General

Burden of proof (sometimes referred to as the burden of persuasion) is generally defined as the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the hearing officer or court. In a civil case, the party with the burden of proof must convince the trier of fact (e.g., jury, judge, or hearing officer) that its version of a fact is more likely than not the true version. If this requisite degree of proof is not achieved, the court or hearing

---

[332] 20 U.S.C. § 1415(f), see, also, Education Code section 56505(f).

[333] Cal. Education Code section 56505(k) states that civil actions must be filed within 90 days from the date of the decision of the hearing officer. See, also, 34 C.F.R. §300.516(b).

[334] Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983); Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153, 1158 (5th Cir. 1986); Doe v. Board of Education, 9 F.3d 455 (6th Cir. 1993); Johnson v. Independent School District No.4, 921 F.2d 1022 (10th Cir. 1990); Schaffer v. Weast, 377 F.3d 449, (4th Cir. 2004); cert. granted 2005 U.S. LEXIS 1454 (February 22, 2005).

[335] Walczak v. Florida Union Free School District, 142 F.3d 119 (2nd Cir. 1998); Carlisle Area School District v. Scott P., 62 F.3d 520 (3rd Cir. 1995); E. S. v. Independent School District No. 196, 135 F.3d 566 (8th Cir. 1994); Clyde K v. Puyallup School District No. 3, 35 F.3d 1396 (9th Cir. 1994).

[336] Schaffer v. Weast, 126 S.Ct. 528 (2005).

officer must assume the fact is not true. Burden of proof is different from burden of producing evidence which is defined as the obligation of a party to go forward with the evidence or introduce evidence sufficient to avoid a ruling against them on an issue.[337]

The general rule in civil proceedings is that the proponent of a rule or order or the person making a claim has the burden of proof.[338] Unless there is a specific statute or provision of law, the general rule in most administrative proceedings is that the moving party has the burden of proof.

In Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries,[339] the Unites States Supreme Court interpreted the provisions of the Administrative Procedures Act and held that the portion of the statute that states, ". . . except as otherwise provided by statute, the proponent of a rule or order has the burden of proof . . ." refers to the burden of persuasion.[340]

The Supreme Court rejected the Department of Labor's argument that the phrase "burden of proof" in the statute meant the burden of production or the burden of going forward with the evidence. The court traced the history of the phrase "burden of proof" and noted that while the phrase "burden of proof" was ambiguous in the nineteenth century and the early twentieth century, that by 1946, when the Administrative Procedures Act was enacted by Congress, the concept of burden of proof was well settled as the burden of persuasion. In Hill v. Smith,[341] the United States Supreme Court resolved the ambiguity. The United States Supreme Court held that burden of proof was, ". . . now very generally accepted, although often blurred by careless speech."[342] The court in Greenwich Collieries noted:

> "In the two decades after Hill, our opinions consistently distinguished between burden of proof, which we defined as burden of persuasion, and an alternative concept, which we increasingly referred to as the burden of production or the burden of going forward with the evidence."[343]

The court cited several treatises which defined the burden of proof prior to 1946 as the duty of the person alleging the case to prove it.[344] The court held that the Department of Labor's application of a rule called the "true doubt" rule, which has shifted the burden of persuasion to the party opposing a benefits claim under the Black Lung Benefits Act, violated Section 7(c) of the Administrative Procedures Act, which stated that except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.[345] The court concluded that in administrative hearings under the Administrative Procedures Act, the burden of proof (i.e., the burden of persuasion) rests with the petitioner or party making the claim.

---

[337] McCormick on Evidence, Vol. 2, section 336, p. 409 (1999); 29 Am Jur 2d Evidence section 155, p. 181 (1994).
[338] See, 5 U.S.C. § 556.
[339] 512 U.S. 267 (114 S.Ct. 2251) (1994).
[340] Id. at 276.
[341] 260 U.S. 592 (43 S.Ct. 219) (1923).
[342] Id. at 219.
[343] Id. at 274.
[344] See, W. Richardson, Evidence 143 (6th Edition 1944); J. McKelvey, Evidence 64 (4th Edition 1932)
[345] 5 U.S.C. § 556(d).

Many state courts have adopted the same rule in connection with state administrative proceedings.[346]

B. Burden of Proof Under the IDEA

In Schaffer v. Weast,[347] the United States Supreme Court held that the burden of proof or the burden of persuasion in an administrative hearing challenging an IEP should be placed upon the party seeking relief, whether it is the disabled child or the school district.

The Court held that because the IDEA is silent on the allocation on the burden of persuasion, the Court applied the general rule that the party filing the claim bears the burden regarding the essential aspects of their claims. Absent some reason to believe that Congress intended to modify the general rule and place the burden of persuasion elsewhere, the Court held that it must conclude that the general rule applies and the burden of persuasion is on the party seeking relief.

The Court noted that in numerous other areas of the law, the Court has held that the burden of persuasion or the burden of proof rests with the party seeking relief. The Court noted that shifting the burden of proof in all cases to school districts would increase litigation and administrative expenditures. The Court noted that litigating a due process complaint costs school districts approximately $8,000 to $12,000 per hearing.[348] The Court noted that in 2004 Congress added a mandatory "resolution session" prior to any due process hearing as a means of reducing litigation costs.

The Court did not address whether states, by state law, could base the burden of proof on school districts in all cases. The Court held that since the parties did not raise the issue and the State of Maryland (the state in which the case arose) did not have such a law that the Court should not address the issue.

In closely contested administrative hearings, the allocation of the burden of proof can determine which party prevails.

ATTORNEY FEES

In Smith v. Robinson,[349] the United States Supreme Court held that the parents of a disabled child were not entitled to an award of attorney fees under the Education of the Handicapped Act (now the IDEA). Effective August 5, 1986 (and retroactive to July 3, 1984), Congress amended the Act, to allow courts to award attorneys' fees to the parents of disabled children.[350]

---

[346] National Retail Transportation, Inc v. Pennsylvania Public Utility Commission, 530a.2d 987 (PA. Commw. 1987); Crossroads Recreation, Inc. v. Broz, 149 N.E. 2d 65 (NY 1958); Pennsylvania Labor Relations Board v. Sansome House Enterprises, Inc., 106a.2d 404 (PA 1954); State Utilities Commission v. Carolina Power and Light Company, 109 S.E. 2d 253 (N.C. 1959); McCoy v. Board of Retirement, 183 Cal.App. 3d 1044, 228 Cal.Rptr. 567 (1986).

[347] 126 S.Ct. 528 (2005).

[348] The Court cited the U.S. Department of Education, J. Chambers, J. Harr, and A. Dhanani, "What Are We Spending on Procedural Safeguards in Special Education," 1999-2000, p. 8 (May 2003) (Prepared under contract by American Institute for Research, Special Education Expenditure Project).

[349] 104 S.Ct. 3457 (1984).

[350] 20 U.S.C. § 1415(e)(4).

The amendments authorize an award of attorney fees and related costs to a parent or guardian who is the prevailing party and who was substantially justified in rejecting an offer of settlement proposed by the school district. Attorney fees may not be awarded when the court finds that the parent or guardian during the course of the action or proceeding unreasonably protracted the final resolution of the controversy or the amount of the attorney fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community or the time spent and legal services extended were excessive considering the nature of the action or proceeding. No bonus or multiplier may be used in calculating the fees awarded.[351]

The courts have held that parents who prevail at an administrative hearing are entitled to an award of attorney fees.[352]

The United States Supreme Court in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,[353] held that in order for a plaintiff to receive an award of attorneys fees under federal statutes which authorize the award of attorneys fees to the "prevailing party," the plaintiff must have obtained a judgment on the merits or a court ordered consent decree. The Court's decision in Buckhannon overturns lower court decisions around the country (including decisions in the Ninth Circuit which includes California) that had authorized awards of attorneys fees under federal statutes under the so-called "catalyst theory" where there had been a settlement and the defendant had made some changes in its policies or practices.

In Shapiro v. Paradise Valley Unified School District [354], the United States Ninth Circuit Court of Appeals held that the United States Supreme Court's holding in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources,[355] applies to special education cases brought under the Individuals with Disabilities Education Act (IDEA).

In Buckhannon, the United States Supreme Court held that in order for a plaintiff to receive an award of attorneys' fees under federal statutes which authorize the award of attorneys' fees to the "prevailing party," the plaintiff must have obtained a judgment on the merits or a court ordered consent decree. The decision in Buckhannon overturned lower court decisions around the country that had authorized awards of attorneys' fees under federal statutes under the so-called "catalyst theory" where there had been a settlement and the defendant had made some changes in its policies or practices.[356]

There had been some question as to whether the U.S. Ninth Circuit Court of Appeals would apply the Buckhannon decision to special education cases due to the fact that in Barrios v. California Interscholastic Federation,[357] the Court of Appeals held that a plaintiff is a "prevailing party" under

---

[351] Ibid.
[352] See, Duane M. v. Orleans Parish School Board, 861 F.2d 115 (5th Cir. 1988); McSomebodies (No. 1) v. Burlingame Elementary School District, 897 F.2d 974 (9th Cir. 1989); Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir. 1990); Mitten v. Muscogee County School District, 877 F.2d 932 (11th Cir. 1989); Eggers v. Bullitt County School District, 854 F.2d 892 (6th Cir. 1988).
[353] 121 S.Ct. 1835 (2001).
[354] 374 F.3d 857, 189 West's Ed.Law Rep. 524 (2004).
[355] 121 S.Ct. 1835 (2001),
[356] See, e.g., Barrios v. California Interscholastic Federation, 277 F.3d 1128, 161 Ed.Law Rptr. 47 (9th Cir. 2002); Lucht v. Molalla River School, 255 F.3d 1023 (9th Cir. 2000); Barlow-Gresham Union High School District No. 2 v. Mitchell, 940 F.2d 1280 (9th Cir. 1991).
[357] 277 F.3d 1128, 161 Ed.Law Rep. 47 (9th Cir. 2002).

the Americans with Disabilities Act where the plaintiff entered into a legally enforceable settlement agreement with defendant and thus the plaintiff may recover attorneys' fees.

In Shapiro, the Court of Appeals noted that other circuits had applied Buckhannon to special education cases and held that in order to be considered a "prevailing party" after Buckhannon, a parent must not only achieve some material alteration of the legal relationship of the parties, but that change must also be judicially sanctioned. In Shapiro, the court found that the parents were the prevailing party and awarded attorneys' fees.

In Park v. Anaheim Union High School District,[358] the Court of Appeals held that where the parents of a special education student prevailed only on minor issues, the parents could not be considered the prevailing party and were not entitled to an award of attorneys' fees. The Court of Appeals affirmed the decision of the District Court that the District prevailed on all significant issues and, therefore, the parents were not entitled to attorneys' fees.

A hearing officer of the California Special Education Hearing Office conducted a full hearing, both sides presenting witnesses and evidence. The hearing officer found:

1. The District conducted appropriate assessments and tested the student in all areas of suspected disability;

2. The student was denied a free appropriate public education for the 2001-2002 extended school year because the District failed to establish that it made a clear written offer of placement at the Hope School for that period;

3. The student was denied a free appropriate public education from the first week of September through November 6, 2002 because the individualized education plan had not been implemented;

4. The proposed individualized education plan, in place as of November 6, 2002, was appropriate but the District needed to add self help goals for buttoning, zipping and toilet training;

5. The District must provide compensatory education services to the student's teachers for the student's benefit; and

6. The District prevailed on every issue but provision of a free appropriate public education for Extended School Year 2001-2002 and September through November 2002 and compensatory services.

[358] 444 F.3rd 1149, 208 Ed.LawRep. 121 (9th Cir. 2006).

The parents appealed to the United States District Court and the U.S. District Court made the following findings:

1. The student was not prejudiced by any of the alleged violations of the IDEA procedural safeguards;

2. The Individualized Education Plan implemented in November 2002 did not deny the student of free appropriate public education;

3. Compensatory education services were properly awarded directly to the school teachers; and

4. The District is not required to pay attorneys' fees to the parents for the cost of the due process hearing.

The Court of Appeals held that the District had assessed the student in all areas of suspected disability, that the District properly assessed the student's vision and found that his vision was not hindering the student's education, and that an IEP had been developed for him as a result of his records, observations and assessments by qualified individuals and participation by his parents. The Court of Appeals also found that the District did not violate the IDEA when it conducted a suitable functional behavioral assessment and subsequently proposed a behavior intervention plan. The Court also found that the assessment was properly conducted in English and there was no procedural violation of the IDEA. The Court also found the award of compensatory education to the teachers of the student for further training in specific areas was appropriate to the needs of the child and was designed to compensate the student for the District's violation by better training the student's teachers to meet the student's particular needs.

The Court of Appeals concluded that the District Court did not abuse its discretion by finding that the District prevailed on all significant issues, and that the relief the parents obtained was minimal. The Court of Appeals also upheld the District Court's refusal to award attorneys' fees to the parents.

In P.N. v. Seattle School District, No. 1,[359] the Court of Appeals held that a parent who resolved her differences with the school district and entered into a settlement agreement which did not receive any judicial approval, was not a prevailing party entitled to recover attorney's fees under the Individuals with Disabilities Education Act (IDEA).

In P.N., the conflict between the parents and the school district was resolved by a settlement agreement signed only by the parties. Prior to signing the agreement, the parent, through legal counsel, had requested a due process hearing under the IDEA. In the settlement agreement the school district agreed to reimburse the parent for the costs of the child's independent psychological evaluation and attendance at a private school. The settlement agreement expressly reserved any issue of attorney's fees and costs to a later time and subsequently the administrative law judge, at the

[359] ___ F.3d ___ (9th Cir. 2006).

parent's request, dismissed the due process proceeding.

The parent then filed an action in United States District Court to recover attorney's fees and costs. The parent sought $13,653.00 for attorney's fees incurred in the due process proceedings and in the federal action to recover fees. The district court denied the parent's request for fees and the Court of Appeals affirmed on appeal. The Court of Appeals held that the United States Supreme Court's decision in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources[360] applied to actions brought under the IDEA.[361] The Ninth Circuit's decision in P.N. is consistent with decisions of the other Circuits.[362]

In Ford v. Long Beach Unified School District[363] the Court of Appeals held that a parent/attorney performing legal services for their own child is not entitled to attorney's fees under the IDEA. In Ford, the mother of the child represented her child in a due process proceeding. The matter was settled and the attorney/parent filed an action in federal court to recover attorney's fees. The Ninth Circuit cited decisions of other Circuits which also concluded that an attorney/parent is not entitled to attorney's fees and denied relief to the attorney/parent.[364]

In Aguirre v. Los Angeles Unified School District,[365] the Court of Appeals held that the trial courts must consider the "degree of success" of the parents' attorney when awarding attorneys fees under the Individuals with Disabilities Education Act (IDEA). The Court of Appeal remanded the matter back to the district court to award fees based on that standard.

In Aguirre, the parents' attorneys raised 27 issues in their due process hearing complaint. The 27 issues included failure to provide the child with a free appropriate public education because the district failed to prepare daily reports on the student's work and behavior, failure to provide the student with a one-on-one aide and failure to provide occupational therapy. The parents sought to recover tuition and other expenses incurred when the parents took the student out of public school and enrolled the student in a private school.

The parents ultimately prevailed on 4 of the 27 issues. The Special Education Hearing Office (SEHO) ruled that the Los Angeles Unified School District failed to provide the student with a free appropriate public education insofar as it failed to conduct a timely assessment for assistive technology and failed to provide the technology. SEHO denied Aguirre's request for tuition and

---

[360] 532 U.S. 598, 600; 121 S.Ct. 1835 (2001).

[361] See, also, Shapiro v. Paradise Valley Unified School District, 374 F.3d 857, 865 (9th Cir. 2004); Carbonell v. INS, 429 F.3d 894, 899 (9th Cir. 2005).

[362] See, Doe v. Boston Pub. Sch., 358 F.3d 20, 30 (1st Cir. 2004) (holding that Buckhannon applies to the IDEA and that IDEA plaintiffs who achieve their desired result via private settlement may not, in the absence of a judicial *imprimatur*, be considered "prevailing parties"); J.C. v. Reg'l Sch. Dist. 10, 278 F.3d 119, 125 (2d Cir. 2002) (holding that Buckhannon governs plaintiff's claims pursuant to the IDEA); John T. v. Del. County Intermediate Unit, 318 F.3d 545, 555 (3d Cir. 2003) (holding that Buckhannon applies to the IDEA's fee-shifting provision); T.D. v. LaGrange Sch. Dist. No. 102, 349 F.3d 469, 478 (7th Cir. 2003) (holding that Buckhannon is applicable to the IDEA); and Alegria v. Dist. Of Columbia, 391 F.3d 262, 263 (D.C.Cir. 2004) (holding Buckhannon applies to the IDEA's fee-shifting provisions).

[363] ____ F.3d ___ (9th Cir. 2006).

[364] See, S.N. v. Pittsford Central School District, 448 F.3d 601 (2nd Cir. 2006); Woodside v. School District of Philadelphia Board of Education, 248 F.3d 129 (3rd Cir. 2001); Dell v. Board of Education of Baltimore County, 165 F.3d 260 (4th Cir. 1998).

[365] ___ F.3d ___ (9th Cir. 2006).

other expenses and awarded the student the use of assistive technology for a period not to exceed eight months. The student was not awarded compensatory counseling as it was found that the student was making excellent progress. The hearing officer concluded that the District prevailed on all the issues except to the extent that it failed to provide an assistive technology assessment and provide technology devices (e.g. computer) in a timely manner. Neither the District nor the parents appealed the underlying SEHO decision.

After the hearing, the parents sent the District a bill for attorneys' fees and costs totaling $42,104.92. The school district requested a detailed billing statement and the attorneys failed to provide the statement. The parents then filed an action in the United States District Court seeking attorneys' fees. The district court granted the parents $21,104.24. The sum awarded was calculated based on fees and costs incurred on and after the issue of assistive technology was raised but it did not appear that the district court considered the degree of success obtained by the parents. The parents appealed seeking to recover all of their attorneys' fees.

On appeal, the Court of Appeals held that in order for a district court to award attorneys fees, the parents must be a "prevailing party" and be seeking reasonable attorneys' fees. The Court of Appeals held that the District Court properly found that the parents were a prevailing party under the IDEA but disagreed with the district court on the standard to be used to determine a reasonable fee. The parents claimed that they were entitled to recover all of their fees because they prevailed on a significant issue.

The Court of Appeals held that the standard established by the United States Supreme Court in Hensley v. Eckerhart[366] applies to attorneys' fees awards under the IDEA. The Court of Appeals noted that under Hensley, a prevailing party may not recover fees for unsuccessful claims and that the prevailing party's success is relevant to the amount of fees to be awarded.

The Court of Appeals noted that the attorneys' fees language in the IDEA[367] is almost identical to the general attorney fee-shifting statute[368] and that Congress is presumed to be aware of administrative and judicial interpretations of a statute when it enacts a similar statute. In addition, the Court of Appeals noted that the legislative history of the IDEA attorneys' fees provision indicates that it was the intent of Congress that the IDEA's attorneys' fees provisions should be interpreted in a manner consistent with Hensley.[369] Seven other circuit courts have also held that Hensley's "degree of success" standard applies in IDEA cases.[370]

The Court of Appeals also indicated that there are several policy reasons for applying Hensley in IDEA cases. The Court noted that Hensley represents an established standard and will guide the courts in establishing a consistent process for awarding reasonable attorneys fees. The

---

[366] 461 U.S. 424 (1983).
[367] 20 U.S.C. § 1415(i)(3)(B).
[368] 42 U.S.C. § 1988.
[369] H.R. Rep. No. 105-95, at 105-106 (1997); H.R. Rep. No. 99-687 at 5-6 (1986).
[370] See, Linda T. v. Rice Lake Area School District, 417 F.3d 704, 708 (7th Cir. 2005); Wikol v. Birmingham Public School Board of Education, 360 F.3d 604, 612 (6th Cir. 2004); Neosho R-V School District v. Clark; 315 F.3d 1022, 1030-31 (8th Cir. 2003); Holmes v. Mill Creek Township School District, 205 F.3d 583, 595-96 (3rd Cir. 2000); Jason D.W. v. Houston Independent School District, 158 F.3d 205, 208-09 (5th Cir. 1998); Urban v. Jefferson County School District R-1, 89 F.3d 720-729 (10th Cir. 1996); In re Conklin, 946 F.2d 306-316 (4th Cir. 1991).

Court stated:

> "The Hensley standard will help deter submission of multiple, nonmeritorious claims. It is understandable that without cost considerations, parents facing litigation would bring as many claims as possible, hoping to secure a larger share of the district's resources-whether in the form of reimbursements, additional staff time, or educational technology –than would be otherwise allotted to their children. Lawyers may also have incentive to bring baseless claims in order to increase billable hours devoted to a case. Acquiring a client with one strong claim should not give special education attorneys the green light to bill time on every conceivable issue. All children suffer when the schools' coffers are diminished on account of expensive, needless litigation. In order to balance the needs of IDEA claimants and school districts, Hensley offers parents and their lawyers an incentive to avoid making frivolous claims while preserving their ability to raise meritorious claims."

The Court of Appeals went on to state that there is no precise rule or formula for determining the amount of hours but suggested that the district court attempt to identify specific hours that should be eliminated or simply reduced the award to account for the limited success of the parents. The court then remanded the matter back to the district court to make an award of attorneys fees based on the Hensley standard.

This case should help reduce the amount of frivolous claims filed by attorneys against school districts and reduce the amount of attorneys' fees awards in future cases.

The practical implications of the these decisions is unclear as to whether it will make it more difficult or less difficult to settle special education cases. Attorneys representing parents and students may still insist on attorneys' fees or refuse to settle. It may also encourage parent attorneys to realistically assess the merits of their case before filing and may encourage early settlements.

The 2004 amendments to the IDEA[371] state that an award of reasonable attorneys fees may be made to a prevailing party that is a state educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation, or to a state or local educational agency against the attorney of a parent or against the parent, if the parents' complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

The 2004 amendments also expanded the limitation on the award of attorneys fees for mediation at the discretion of the state. Previously, Section 1415(i)(3)(D)(ii) stated that a court could not award attorneys fees for a mediation that was conducted prior to the filing of a due process complaint. Section 1415(i)(3)(D)(ii), as amended, now states that attorneys fees may not be awarded

[371] 20 U.S.C. § 1415(i).

relating to any meeting of the IEP team unless such meeting is convened as the result of an administrative proceeding or judicial action, or, at the discretion of the state, for all mediations. Therefore, it will be necessary to obtain state legislation to prohibit a court from awarding attorneys fees for mediations.

In addition, a meeting conducted prior to the filing of a due process complaint shall not be considered as a meeting convened as a result of an administrative hearing or judicial action or an administrative hearing or judicial action for the purposes of awarding attorneys fees. Therefore, attorneys fees cannot be awarded for attending these meetings.

Federal funds cannot be used to pay either party's attorney's fees. Under California law, the hearing decision must state the extent to which each party prevailed on each issue that was heard and decided.[372]

EXPERT WITNESS FEES

In Arlington Central School District Board of Education v. Murphy,[373] the United States Supreme Court held that the Individuals with Disabilities Education Act (IDEA) does not authorize parents to recover expert fees. The court held that the provisions in the IDEA that provide that a court may award reasonable attorneys' fees as part of the cost to parents who prevail in a lawsuit brought under the IDEA does not authorize prevailing parents to recover fees for services rendered by experts in IDEA proceedings.[374]

The parents filed an action under the IDEA against the school district to pay for their son's private school tuition. The parents prevailed in the United States District Court and the U.S. Court of Appeals for the Second Circuit affirmed. The District Court held that the educational consultant, Marilyn Arons, a non-lawyer, could be compensated only for time spent on expert consulting services, not for time spent on legal representation. The Court of Appeals affirmed, even though other circuits had taken the opposite view. The United States Supreme Court reversed and held that the parents were not entitled to any fees for the cost of the educational consultant.

The United States Supreme Court based its decision on the statutory language of the IDEA itself. The court noted that the IDEA was passed pursuant to the Spending Clause of the United States Constitution[375] and that when Congress attached its conditions to a state's acceptance of federal funds, the conditions must be set out unambiguously.[376] The court noted that legislation enacted pursuant to the spending power is in the nature of the contract, and therefore to be bound by federally imposed conditions, recipients of federal funds must accept the conditions voluntarily and knowingly. States cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain. Therefore, the court stated:

"Thus, in the present case, we must view the IDEA from the

[372] Education Code section 56507.
[373] 126 S.Ct. 2455 (2006).
[374] 20 U.S.C. Section 1415(i)(3)(B).
[375] U.S. Const., art. I, section 8, clause 1.
[376] Penhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

> perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case."

The court held that the language of the IDEA did not give notice to state officials, that expert fees would be considered part of "costs" and that generally the term "costs" in its ordinary usage, does not include expert fees. The court noted that in prior cases it had interpreted the term "costs" as not including expert witness fees and limiting the discretion of the courts to award cost.[377]

MAINSTREAMING

Under the IDEA, states must place children with disabilities with other children who are not disabled, to the maximum extent appropriate.[378] However, the Court of Appeals recognized in Greer v. Rome City School District,[379] that the statutory preference for mainstreaming or placement in regular classrooms may not provide an education which meets the unique needs of the child, which is the other main goal of the IDEA. The court used a two-part test for determining compliance with the mainstreaming requirement: (1) whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if education in the regular classroom cannot be achieved satisfactorily with the use of supplemental aids and services, it must be determined whether the school district has mainstreamed the child to the maximum extent appropriate.[380]

The Ninth Circuit in Sacramento City Unified School District v. Rachel H.,[381] enunciated four factors to determine what placement was appropriate for a child with a disability. These factors are:

1. The educational benefit to the child from a regular classroom placement with appropriate aides and services as compared to a special education classroom;

2. The non-academic benefits of interaction with non-disabled children;

3. The effect of the disabled child's presence on the teacher and other children in the classroom; and

---

[377] Crawford Fitting Company v. J.T. Gibbons Inc., 482 U.S. 437 (1987); West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991).
[378] 20 U.S.C. § 1412(5)(b).
[379] 950 F.2d 688 (11th Cir. 1991).
[380] Greer v. Rome City School District, 950 F.2d 688 (11th Cir. 1991); Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1045 (5th Cir. 1989).
[381] 14 F.3d 1398 (9th Cir. 1994).

4. The cost of mainstreaming.

The Rachel H. case involved a child who was eleven years old and moderately mentally retarded. For four years, she attended a variety of special education programs in the school district. In the Fall of 1989, her parents sought to increase the time Rachel spent in a regular classroom and requested that she be placed full time in a regular classroom. The district rejected the parents' request and proposed a placement that would have divided Rachel's time between a special education class for academic subjects and a regular class for non-academic activities such as art, music, lunch and recess. This plan would have required moving Rachel at least six times each day between the two classrooms. Instead her parents enrolled Rachel in a regular kindergarten class at the Shalom School, a private school. She had been there three years by the time the court rendered its opinion.[382]

In determining an appropriate placement for Rachel, the district court applied the four-part test. With respect to the first factor, the district court found that the educational benefits to Rachel weighed in favor of placing her in a regular classroom. The district court found that the testimony of the parents' experts was more credible because they had 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. Rachel's private school teacher also testified that Rachel was a full member of the class, was making progress on her IEP goals and that her communication abilities and sentence lengths were also improving.[383]

With respect to the second factor (non-academic benefits), the district court found that Rachel had developed her social and communication skills, as well as her self-confidence from placement in a regular class.

The district court then addressed the third factor-the issue of whether Rachel had a detrimental effect on others in a regular classroom. The court looked at two aspects of this issue, whether there was a detriment because the child was disruptive, distracting or unruly and whether the child would take up so much of the teacher's time that the other students would suffer from lack of attention. Both parties agreed that Rachel followed directions, was well behaved and not a distraction in class. The private school teacher testified that Rachel did not interfere with her ability to teach the other children and therefore, the district court found in favor of the parents on this issue.[384]

With respect to the fourth factor (cost), the district court found that the district had not offered any persuasive or credible evidence in support of its claim that educating Rachel in a regular classroom with appropriate services would be significantly more expensive than educating her in the district's proposed setting. The district court found that the school district had failed to seek a waiver from the California Department of Education with respect to funding and had inflated the cost estimates.[385]

---

[382] Id. at 1400.
[383] Id. at 1401.
[384] Id. at 1401.
[385] Id. at 1401-02.

The school district appealed to the Ninth Circuit Court of Appeals. The Court of Appeals adopted the four-part balancing test. It rejected the school district's contention that Rachel must be taught by a special education teacher as counter to the Congressional preference that children with disabilities be educated in regular classes with children who are not disabled.

Based on this case, it appears, that in the future, disabled children who are mainstreamed into regular classrooms can be taught by regular education teachers who do not possess special education credentials.

CURRENT EDUCATIONAL PLACEMENT – "STAY-PUT" RULE

The stay-put provision of the IDEA is one of the most unique and controversial provisions of the IDEA. The stay-put provision limits the ability of school administrators to unilaterally transfer or change the placement of special education students.

School administrators view the stay-put rule as a hindrance or impediment to maintaining order and a safe environment in public schools. School administrators view the stay-put rule as a blunt federal intrusion into their traditional authority to unilaterally make decisions at the local level. Parents and advocates for the disabled see the stay-put rule as a check on the unfettered power of school administrators to transfer special programs without parental input and without consideration of the child's disability and special needs. Parents and advocates for the disabled cite past examples of abuses at the local level as justifying federal intervention.

The stay-put provision states:

> "Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardians otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed."[386]

The federal regulations[387] contain similar language.

In Honig v. Doe,[388] the United States Supreme Court stated there were no legislative exceptions to the stay-put rule and held that a special education student could not be suspended from school more than ten days without parental permission or a court order. As a result of this decision, districts have had to seek court orders when students bring guns or knives to school or engage in violent behavior.

---

[386] 20 U.S.C. § 1415(j).
[387] 34 C.F.R. § 300.513.
[388] 108 S.Ct. 592 (1988).

The Court in Honig stated:

> "The language of Section 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardians of a disabled child otherwise agree, the child shall remain in the then current educational placement."[389]

Since the Honig decision, Congress has legislatively enacted exceptions to the stay-put rule. These changes set forth in 20 U.S.C. Section 1415(k) authorize school administrators to order a change in placement to an appropriate interim alternative educational setting under certain conditions. The unilateral authority granted to school administrators is severely limited and can only be exercised after a number of procedural hurdles have been overcome.

A. What Constitutes a Change in Placement

While the stay-put provision of the IDEA may limit the ability of administrators to unilaterally change a special education student's educational placement, it does not prevent all transfers of students.[390] The court in Sherri A.D., held that the purpose of the stay-put rule was to prevent the alteration of the child's educational placement during the pendency of a dispute under the IDEA, not alteration of the child's residence or the location of their educational program.[391] The court held that an educational placement for the purposes of the IDEA has not changed unless a fundamental change in or elimination of a basic element of the educational program has occurred.[392] In Lunceford, the Court of Appeals held that the transfer of a severely disabled special education student from one residential placement to another was not a change in educational placement even where the new placement could not provide the same high level of service with respect to the child's feeding program.

In Lunceford v. District of Columbia Board of Education, the Court of Appeals held that the transfer of a student from a private hospital to a government run institution which had the same day time education did not constitute a change in educational placement. The court held that there must be, at a minimum, a fundamental change in or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement.[393]

In Weil v. Board of Elementary and Secondary Education,[394] the Court of Appeals held that the stay-put provision of the IDEA applies only to changes in "educational placement" not physical location. The Court of Appeals stated:

> "We are not persuaded that the cited notice provisions were mandated in the instance of Kimberly's transfer from Cooley to Kiroli because that transfer did not constitute a change in

[389] Id. at 604.
[390] Sherri A.D. v. Kirby, 1975 F.2d 193 (5th Cir. 1992); Honig v. Doe. 108 S.Ct. 592, 606, EHLR 559:231 (1988).
[391] Id. at 206.
[392] Id. at 206. See, also, Lunceford v. District of Columbia Board of Education, 745 F.2d 1577 (D.C. Cir. 1984).
[393] Id. at 1582.
[394] 931 F.2d 1069, (5th Cir. 1991).

> 'educational placement' within the meaning of 20 U.S.C. section 1415(b)(1)(C). The programs at both schools were under OPSB supervision, both provided substantially similar classes, and both implemented the same IEP for Kimberly. We conclude that the change of schools under the circumstances presented in this case was not a change in 'educational placement' under section 1415."[395]

In Concerned Parents and Citizens v. New York City Board of Education,[396] the Court of Appeals reversed a lower court decision barring the transfer of special education students to a number of other schools in the district. The district court found that the schools to which the students were transferred did not, in all respects, duplicate the "extremely innovative educational program" formerly provided to the handicapped children at P.S. 79. However, the Court of Appeals held that the reference to "educational placement" in Section 1415 refers to the general educational program in which a child is enrolled, rather than variations in the program itself. The Court of Appeals held that there are strong policy considerations for narrowly interpreting the meaning of educational placement in Section 1415. The Court of Appeals criticized the district court for considering the removal of any of the above programs at the school as constituting a change in educational placement requiring prior notice and a hearing under Section 1415. The Court of Appeals stated:

> "Such an interpretation of the Act would virtually cripple the board's ability to implement even minor discretionary changes within the educational programs provided for its students; that interpretation would also tend to discourage the board from introducing new activities or programs or from accepting privately sponsored programs . . .
>
> "Thus, we conclude that the term 'educational placement' refers only to the general education program in which the handicapped child is placed and not to all various adjustments of the program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary.
>
> "Given this interpretation, we do not believe on the record before us that the transfer of students from P.S. 79 constituted a change in placement sufficient to trigger the prior notice and hearing requirements of Section 1415(b) . . .
>
> "Accordingly, we conclude that the board was not required under the Act to give parents of handicapped children at P.S. 79 prior notice and a full due process hearing before the transfer of such students to other regular schools within the district."[397]

---

[395] Id. at 1072.
[396] 629 F.2d 751 (2nd Cir. 1980).
[397] Id. at 755-756; see, also, A.W. v. Fairfax County School Board, 373 F.3d 674 (4th Cir. 2004), in which the Court of Appeals held that transfer of a gifted student from one school to another did not violate the "stay put" provisions of the IDEA where the student's special education program remained the same.

In DeLeon v. Susquehanna Community School District,[398] the Court of Appeals held:

> "The touchstone in interpreting Section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience."[399]

In Thomas v. Cincinnati Board of Education,[400] the Court of Appeals held that the term "current educational placement" refers to the last implemented placement of the child. An IEP that was developed or revised but had not been implemented would not constitute the current educational placement of the child.[401] The Court of Appeals stated:

> "Because the term connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then the program's placement will be the one subject to the stay-put provision. And where, as here, the dispute arises before any IEP has been implemented, the current educational placement will be the operative placement under which the child is actually receiving instruction at the time the dispute arises. . . ." [402]

In Drinker, the Court of Appeals adopted the test in Thomas and held that where a dispute arises before the proposed IEP has been implemented, the current educational placement is the placement which is actually functioning when the "stay-put" order is sought. The Drinker court held that while the "stay-put" order is in effect and until a final order is entered by the district court, the school district must pay for the child's placement.[403]

However, where the parents have not appealed or disputed the school district's proposed change in placement, the parents may not invoke the "stay-put" rule.[404] The court held that the parent must initiate a due process hearing alleging that the current educational placement is the appropriate placement and should not be changed as the school district has proposed. The court stated, "To appeal a decision, which one otherwise has not disputed, in order to keep a child in a residential psychiatric program and avoid family conflict undermines the purposes of the 'stay-put' provision of the Act."[405]

The courts have not applied the stay-put rule to enjoin the closing of a school or to require the provision of transportation. In Tilton v. Jefferson County Board of Education,[406] the Court of Appeals held that where a state or local agency must discontinue a program or close a facility for purely budgetary reasons, the stay-put rule of the IDEA does not apply. The court held that even

---

[398] 747 F.2d 149 (3rd Cir. 1984).
[399] Id. at 153.
[400] 918 F.2d 618 (6th Cir. 1990).
[401] Id. at 625.
[402] Id. at 625-626. See, also, Drinker v. Colonial School District, 78 F.3d 859, 867 (3rd Cir. 1996).
[403] Id. at 867.
[404] See, Tennessee Department of Mental Health and Mental Retardation v. Paul B., 88 F.3d 1466, 1473, 24 IDELR 452 (6th Cir. 1996).
[405] Id. at 1474.
[406] 705 F.2d 800, 10 Ed.Law Rptr. 976 (6th Cir. 1983).

though the parents had shown that the programs at alternative schools were not comparable to the original program since they did not provide year round instruction, the district court was not required to enjoin the closing of the original placement facility. Rather, the court held that the school district was required to provide the child with a free appropriate public education at another facility.

The federal district court in Brookline School Committee v. Golden,[407] held that modification of an after school program did not constitute a change in educational placement because it did not significantly affect the child's learning experience.

In DeLeon v. Susquehanna Community School District,[408] the Court of Appeals held that a change in the method of transportation of a severely disabled child to and from school did not constitute a change in educational placement under the IDEA and could be instituted without affording parents a prior due process hearing.

B. The Current Educational Placement During the Appeal Process

As discussed above, the stay-put rule states that the disabled child shall remain in the current educational placement "during the pendency of any proceeding conducted pursuant to this section. . . ." Section 1415 refers to three types of proceedings-state administrative reviews, due process administrative hearings and civil actions seeking review of the administrative decisions in federal or state court.[409] In Andersen, the Court of Appeals held that although an appeal is part of a civil action, the statutory language suggests that Congress intended the stay-put provisions to apply only to civil actions in the trial court.[410] The court in Andersen reasoned that the stay-put rule was intended to protect children from unilateral displacement by school authorities and was not intended to limit judicial power to fashion a remedy.[411]

The court in Andersen stated:

> "Once a district court has rendered its decision approving a change in placement, that change is no longer the consequence of a unilateral decision by school authorities; the issuance of an automatic injunction perpetuating the prior placement would not serve the section's purpose. Once a district court has resolved the issue of appropriate placement, the child is entitled to an injunction only outside the stay-put provision, i.e., by establishing the usual grounds for such relief."[412]

In cases where the parents are not seeking to block a unilateral change in placement by the school district but are seeking a change in placement over the school district's objections, the portion of the stay-put rule that states, ". . . unless the State or local education agency and the parent otherwise agree . . ." comes into play. The courts have interpreted this phrase to mean that when a

[407] 628 F.Supp. 113 (D.Mass. 1986).
[408] 747 F.2d 149 (3rd Cir. 1984).
[409] See, Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989).
[410] Id. at 1023.
[411] Id. at 1024.
[412] Id. at 1024.

state hearing officer issues a decision changing a child's placement, it constitutes agreement between the state education agency and the parent. In School Committee of the Town of Burlington v. Department of Education,[413] the United States Supreme Court stated:

> "The [administrative panel] decision in favor of the [parents] and the [private school] placements would seem to constitute agreement by the State to the change of placement."[414]

In Susquenita School District v. Raelee S.,[415] the Court of Appeals cited Burlington and held that following an administrative decision in favor of the parents seeking a change in placement, the school district must pay for the ordered placement prior to the conclusion of the litigation. The court held that the policies underlying the IDEA favor imposing financial responsibility upon the school district as soon as there has been an administrative panel or judicial decision establishing the pendent placement. The court held that the same policy concerns that convinced the U.S. Supreme Court in Burlington to approve retroactive reimbursement as a remedy, favor approving interim assessment of school district financial responsibility as a remedy under the IDEA.[416] The court held that failure to grant interim relief would defeat the purpose of the IDEA to ensure every child a free appropriate public education since many parents are not able to fund a child's private education while court appeals are pending. The court expressly stated that it would not rule on whether a school district could recover the cost of private education from the parents if the school district ultimately prevails on appeal.[417]

In Clovis Unified School District v. Office of Administrative Hearings,[418] the Court of Appeals held that a school district could not recover the cost of private education even though the school district prevailed on appeal. The court held that the school district and the state are responsible for the student's private placement during the court review proceedings regardless of which party prevails on appeal. The court held that under the stay-put provisions of the IDEA, the school district was financially responsible following an administrative decision that the private placement was appropriate until a court ruled otherwise.[419]

The Clovis court cited Burlington and ruled that once the hearing officer decided that the parents' private placement was appropriate, it became the current educational placement under the stay-put rule through the appellate process. The court held that an administrative ruling in the parents' favor constitutes an agreement by the State to change the placement of the child, and thus becomes the current educational placement of the child within the meaning of the stay-put rule.[420]

---

[413] 471 U.S. 359 (105 S.Ct. 1996) (1985).
[414] Id. at 2004.
[415] 96 F.3d 78, 84 (3rd Cir. 1996).
[416] Id. at 86.
[417] Id. at 87, n.10.
[418] 903 F.2d 635, 641 (9th Cir. 1990).
[419] Id. at 641.
[420] Id. at 641.

C. Limitations on the Stay-Put Rule

In Board of Education v. Illinois State Board of Education,[421] the Court of Appeals held that the stay-put rule does not apply when a child reaches the age of 21. The Court noted that the only exception would be where there is a pending claim for compensatory education. The Court of Appeals stated:

> "We think that the stay-put provision does indeed cease to operate when a child reaches the age of 21. Except for the judge created remedial exception for claims for compensatory education, the entitlement created by the Individuals with Disabilities Education Act expire when the disabled individual turns 21."[422]

Compensatory education is the only benefit that extends beyond the age of 21. The statutory protections are limited to individuals under 21 years of age.

In Drinker v. Colonial School District,[423] the Court of Appeals held that the stay-put rule does not apply if the underlying placement decision is not appealed. Where the school district has prevailed and the parents have not appealed the placement decision, they may not invoke the stay-put rule unless they appeal the underlying decision. In Drinker, the underlying decision allowed for a transitional period to the new placement. Under the circumstances, the Court of Appeal held that the stay-put rule could be invoked until the transition period either ended as a result of the underlying decision or by court order.

In a similar case, the Court of Appeals held that the stay-put rule could not be invoked when there was no genuine appealable issue. In Tennessee Department of Mental Health and Mental Retardation v. Paul B.,[424] the Court of Appeals stated:

> "We believe the District Court erred because it failed to see that the stay-put rule is not designed to prolong the current educational placement unless there is a genuine appealable issue that the current educational placement is the appropriate placement under the act and should not be changed. To appeal a decision, which one otherwise has not disputed, in order to keep a child in a residential psychiatric program and avoid family conflict undermines the purposes of the stay-put provision of the act."[425]

In Paul B., the parents made no argument that the residential facility was the appropriate placement and should not have been changed or that he had been denied special education or related services under the IDEA. The Court held that without such an argument, the stay-put provision of the IDEA does not come into play and the parent cannot allege they were harmed by the lack of notice of the stay-put rule.

---

[421] 79 F.3d 654 (7th Cir. 1996).
[422] Id. at 659.
[423] 78 F.3d 859 (3rd Cir. 1996).
[424] 88 F.3d 1466 (6th Cir. 1996).
[425] Id. at 1474.

D. Issuance of a Preliminary Injunction

The courts will issue a preliminary injunction to transfer a student to a more restrictive placement where there is a substantial likelihood to cause injury to others. In Light v. Parkway C-2 School District,[426] the Court of Appeals upheld the lower court's removal of such a child from the classroom.

Lauren Light was a 13 year old child with multiple mental disabilities. She had been diagnosed at various times as demonstrating behavioral disorder, conduct disorder, pervasive developmental disorder, mild to moderate mental retardation, certain features of autism, language impairment, and organic brain syndrome. She engaged in impulsive, unpredictable and aggressive behavior. She was sometimes defiant, easily frustrated, irritable, impulsive and easily distracted.[427]

Lauren was enrolled in a self-contained classroom for students with mental disabilities at a public middle school. In addition to the classroom teacher, Lauren's IEP required that she be accompanied by one full-time teacher and one full-time teacher's assistant throughout the school day.

She received a variety of special program as well. Nonetheless, Lauren exhibited a steady stream of aggressive and disruptive behaviors, such as biting, hitting, kicking, poking, throwing objects and turning over furniture. The teacher reported that the class was rarely able to complete lesson plans due to Lauren's disruptive behavior. The parents of other students complained that the classroom environment had become tense and stressful, and that their children's academic and social progress had been slowed or halted.[428]

Lauren's IEP team recommended a change of placement. The parents objected. The parents invoked the "stay-put" provision of the IDEA and requested a due process hearing.[429]

Lauren tugged the hand of another special education student, and then hit the student three times on the head. She was suspended for 10 days. Lauren's parents brought an action in the federal district court seeking to have the suspension lifted. The school district counterclaimed, and then invoked the court's equitable power to remove Lauren from that school pending the resolution of the parents' administrative challenge to the proposed revisions to Lauren's IEP, including the proposed change in placement.

The school district argued that Lauren's aggressive behavior presented a substantial risk of injury to herself and others in her current educational placement. The court granted the school district's motion for an injunction to move Lauren to a different placement, finding that maintaining her current placement was substantially likely to result in injury either to herself or others.[430]

---

[426] 41 F.3d 1223 (8th Cir. 1994).
[427] Id. at 1224-1225.
[428] Id. at 1225-26.
[429] Id. at 1226.
[430] Id. at 1226.

The parents appealed arguing that a disabled child must be shown to be truly dangerous as well as substantially likely to cause injury. This argument was rejected by the Court of Appeal, which stated:

> "We reject . . . the contention of Lauren's parents that a disabled child must be shown to be 'truly' dangerous as well as substantially likely to cause injury. Their argument derives from a misreading of Honig and warrants no extensive rebuttal. . . .
>
> "In sum, a school district seeking to remove an assertedly dangerous disabled child from her current education placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury. Where injury remains substantially likely to result despite the reasonable efforts of the school district to accommodate the child's disabilities, the district court may issue an injunction ordering that the child's placement be changed pending the outcome of the administrative review process."[431]

The Light case should assist school districts in removing disruptive children from the classroom.

DISCIPLINE OF SPECIAL EDUCATION STUDENTS

A. The Stay-Put Rule and Discipline

The IDEA[432], sets forth a general rule that during the pendency of any proceedings conducted under the IDEA, the child shall remain in the current educational placement unless the state or local education agency and the parents agree otherwise. If the child is applying for initial admission to a public school, the child shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed. The United States Supreme Court in Honig v. Doe,[433] has interpreted this provision as requiring parental permission or a court order if the child is to be removed for more than ten days from the child's current educational placement. The Court in Honig v. Doe noted that at that time, Congress had made no exceptions to the stay-put rule. Since the Court's decision in Honig v. Doe, Congress has amended the IDEA, most notably in 1997, to provide for a number of exceptions to the stay-put rule which are discussed below.

The Court in Honig left unanswered whether the limit of ten school days applied to a single incident or to the entire school year. The final regulations state that a change of placement occurs if the child is removed for more than ten consecutive days or the child is subjected to a series of removals that constitute a pattern of exclusion. In determining whether there is an impermissible

[431] Id. at 1228.
[432] 20 U.S.C. § 1415(j).
[433] 108 S.Ct. 592, 43 Ed.Law Rep. 857 (1988).

pattern of exclusion, 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 will be considered. In the proposed regulations, the U.S. Department of Education had sought to limit suspensions to ten days in a school year. However, due to pressure from school organizations, the United States Department of Education modified the proposed regulations to give school districts more flexibility and to allow removals for separate incidents beyond ten school days in one year. However, the United States Department of Education will look to see if there is a pattern of removals in excess of ten days for the same incident or conduct. Under state law, school districts may suspend students up to twenty days in a school year.[434]

Based on the language of the IDEA and the 1999 federal regulations, it appears that districts may suspend students in excess of ten school days in a school year for separate incidents of misconduct.

B. Change of Placement

Section 615(k)[435] states that school personnel may consider any unique circumstances on a case by case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

School personnel may order a change in the placement of a child with a disability who violates a code of student conduct, to an appropriate interim alternative educational setting, another setting, or suspension for not more than ten school days, to the extent that such alternatives are applied to children without disabilities.

If school personnel seek to order a change in placement that would exceed ten school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which the procedures would be applied to children without disabilities except that services to suspended or expelled students must be provided, although such services may be provided in an interim alternative educational setting.

A child with a disability who is removed from the child's current placement, irrespective of whether the behavior is determined to be a manifestation of the child's disability, shall continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP and receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not occur again.

[434] Education Code section 48903(a).
[435] 20 U.S.C. § 1415(k), see, also, Education Code section 48915.5.

C. Manifestation Determination

The legislation requires a manifestation determination within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. The IEP team shall review all relevant information in the student's file, any information provided by the parents, and teacher observations, to determine if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

If the local educational agency, the parent, and relevant members of the IEP team determine that the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP, the conduct shall be determined to be a manifestation of the child's disability.

If the local educational agency, the parent and the relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team shall:

1. Conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such an assessment prior to such determination before the behavior that resulted in a change of placement.

2. In the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior.

3. Return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan, except if the child's conduct involved carrying or possessing a weapon, knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance, or the student inflicted serious bodily injury upon another person while at school.

D. Interim Alternative Educational Setting

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child:

1. Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a state or local educational agency;

2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency; or

3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency.

The legislation adds to the IDEA a definition of "serious bodily injury." "Serious bodily injury," for purposes of the IDEA, is defined as bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.[436]

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and all of the procedural safeguards accorded under Section 1415(k).

The alternative educational setting shall be determined by the IEP team. The parent of a child with a disability who disagrees with any decision regarding disciplinary action, placement, or the manifestation determination, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing. The hearing officer may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others or may return the child to the placement from which the child was removed.

When a parent or local educational agency requests a hearing regarding the interim alternative educational setting or a manifestation determination, the child shall remain in the interim educational setting pending the decision of the hearing officer, or until the expiration of the 45 day time period, whichever occurs first, unless the parent and the state or local educational agency agree otherwise. In such cases, the state or local educational agency shall arrange for an expedited hearing which shall occur within 20 school days of the date the hearing is requested and a decision shall be made within 10 school days after the hearing.

The federal regulations clarify that school personnel, in consultation with at least one of the child's teachers, will determine which services will be provided to the child when the child is removed from their current educational placement and will not specify the location in which the services will be provided.[437] The regulations also indicate that the IEP team will determine which services will be provided to students who are removed from their placement but not the location where the services will be provided.[438] The regulations also state that if the local educational agency, the parent, and the members of the child's IEP team determine that the child's behavior was the

[436] See, 18 U.S.C. § 1365(h)(3).
[437] 34 C.F.R. § 300.530(d)(4).
[438] 34 C.F.R. § 300.530(d)(5).

direct result of the local educational agency's failure to implement the child's IEP, the local educational agency must take immediate steps to remedy those deficiencies.[439]

Unless the parents and the local educational agency agree in writing to waive a resolution meeting or agree to use the mediation process, the resolution meeting must occur within seven (7) days of receiving notice of the due process complaint and the hearing may proceed within fifteen (15) days of receipt of the due process complaint unless the matter has been resolved to the satisfaction of both parties when an expedited due process hearing is requested.[440] The school district is required to make a determination, on a case by case basis, whether a pattern of removals constitutes a change in placement and that determination is subject to review through the due process and judicial process. It is not required that the child's behavior have been a manifestation of the child's disability before determining that a series of removals constitutes a change in placement.[441]

E. Child Not Yet Eligible for Special Education

A child who has not been determined to be eligible for special education and related services under the IDEA and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for under the IDEA if the local educational agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.[442] A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:

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

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

3. The teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the Director of Special Education of such agency or to other supervisory personnel of the agency.

The 2004 amendments to the IDEA deleted a fourth basis of knowledge that was in previous law which stated, "The behavior or performance of the child demonstrates the need for such services." The deletion of this criteria is a positive one, since this criteria was vague and overly broad.

[439] 34 C.F.R. § 300.530(e)(3).
[440] 34 C.F.R. § 300.532(c)(3).
[441] 34 C.F.R. § 300.536.
[442] 20 U.S.C. § 1415(k)(5).

If a local educational agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors. However, if a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the IDEA, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

F. Referral to Law Enforcement Officials

The IDEA states that nothing in the IDEA shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a child with a disability. A school district reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.[443]

The regulations contain similar language with additional language that states that any school district reporting a crime may transmit copies of the child's special education and disciplinary records only to the extent that transmission is permitted by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. Section 1232g. Under FERPA and California law, generally, parental permission would be required to send the student's records to law enforcement authorities.

However, under the Education Code the records could be sent to a probation officer or district attorney for the purposes of conducting a criminal investigation, declaring a person a ward of the court or involving a violation of a condition of probation.[444]

HEALTH INSURANCE

The federal regulations state that a noneducational public agency may not disqualify eligible services for Medicaid reimbursement because that service is provided in the school context.[445] If a public agency other than an educational agency fails to provide or pay for the special education and related services, the school district shall provide or pay for these services to the child in a timely manner. The school district or state education agency may then claim reimbursement for the services from the noneducational public agency that failed to provide or pay for these services and that agency shall reimburse the school district or state agency in accordance with the terms of the interagency agreement or other mechanism established by the state. These mechanisms may be established by state statute, state regulation, signed agreements between respective agency officials

[443] 20 U.S.C. § 1415(k)(9).
[444] 34 C.F.R. § 300.529; Education Code section 49076(a)(9).
[445] 34 C.F.R. § 300.142(b).

or other appropriate written methods as determined by the governor of the state or the designee of the governor.[446]

The federal regulations state that a public agency may use Medicaid or other public insurance benefits programs in which a child participates to provide or pay for services required by the IDEA as permitted under the public insurance program. However, the public agency may not require parents to sign up for or enroll in public insurance programs in order for their child to receive a free appropriate public education under the IDEA and the public agency may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-payment incurred in filing a claim for services but the public agency may pay the cost that the parent otherwise would be required to pay. The public agency may not use the child's benefits under a public insurance program if that use would decrease average lifetime coverage or any other insured benefit, result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school, increase premiums or lead to the discontinuation of insurance or risk loss of eligibility for home and community based waivers based on aggregate health related expenditures.[447]

The regulations state that a public agency may access a parent's private insurance proceeds only if the parent provides informed consent. Each time the public agency proposes to access the parent's private insurance proceeds, it must obtain parental consent and inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.[448]

The regulations state that if a public agency is unable to obtain parental consent to use the parent's private insurance or public insurance when the parent would incur a cost for a specified service required under the IDEA, the public agency may use its federal IDEA funds to pay for the service. The public agency may use federal IDEA funds to pay the cost the parents otherwise would have to pay to use the parents' insurance (e.g., the deductible or co-pay amounts) to avoid financial costs to the parents who would otherwise consent to use private insurance.[449]

Under the regulations, proceeds from public or private insurance will not be treated as program income. If a public agency spends reimbursements from federal funds such as Medicaid for services under the IDEA, those funds will not be considered state or local funds for purposes of the maintenance of effort provisions.[450]

The regulations state that nothing in the IDEA regulations should be construed to alter the requirement imposed on a state Medicaid agency or any other agency administering a public insurance program by federal statute, regulations or policies.[451]

---

[446] 34 C.F.R. § 300.142(c).
[447] 34 C.F.R. § 300.142(e).
[448] 34 C.F.R. § 300.142(f).
[449] 34 C.F.R. § 300.142(g).
[450] 34 C.F.R. § 300.142(h).
[451] 34 C.F.R. § 300.142(i)

The federal regulations state that a school district must obtain parental consent each time access to the parent's public benefits or insurance is sought and notify parents that refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.[452]

MEDIATION

The IDEA establishes procedures for a mediation process in each state. The mediation must be voluntary on the part of the parties and not used to deny or delay a parent's right to a due process hearing or deny any other rights afforded under the IDEA. The mediation must be conducted by a qualified and impartial mediator trained in effective mediation techniques. In addition, local education agencies or state agencies may establish procedures to require parents who choose not to use the mediation process to meet at a time and location convenient to the parties with a disinterested party who is under contract with a parent training or information center or an appropriate alternative dispute resolution entity to encourage the use and explain the benefits of the mediation process to the parents. California already has in place a voluntary mediation process. It will be necessary to amend state law to provide for parent training and information center or alternative dispute resolution involvement.[453] The final regulations contain similar language.[454]

STATE COMPLAINT PROCEDURES

The federal regulations require each state education agency (SEA) to adopt written procedures for resolving any complaint including a complaint filed by an organization or individual from another state by providing for the filing of a complaint with the SEA. At the SEA's discretion, the SEA may review the public agency's decision on the complaint.[455]

The state's procedures shall be widely disseminated to parents and other interested individuals including parent training and information centers, protection and advocacy agencies, independent living centers and other appropriate entities.

The regulations state that in resolving a complaint in which the state has found a failure to provide appropriate services, SEA must address:

1. How to remediate a denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child.

2. Appropriate future provision of services for all children with disabilities.[456]

[452] 34 C.F.R. § 300.154(b).
[453] 20 U.S.C. § 1415(e)(2).
[454] 34 C.F.R. § 300.506.
[455] 34 C.F.R. § 300.660.
[456] 34 C.F.R. § 300.660(b).

The regulations require each SEA to include in its complaint procedures a time limit of 60 days after a complaint is filed to carry out an independent on site investigation if the SEA determines that an investigation is necessary. The procedure must also include:

1. Giving the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.

2. Reviewing all relevant information and making an independent determination as to whether the public agency is violating a requirement of the IDEA.

3. Issuing a written decision to the complainant that addresses each allegation in the complaint and contains findings of fact and conclusions and the reasons for the SEA's final decision.[457]

The regulations state that the SEA's procedures must also:

1. Permit an extension of the time limit only if exceptional circumstances exist with respect to a particular complaint.

2. Include procedures for effective implementation of the SEA's final decision, including, if needed, technical assistance activities, negotiations and corrective actions to achieve compliance.[458]

The regulations state that if a written complaint is received that is also the subject of a due process hearing, or contains multiple issues, one of which is part of a due process hearing, the state must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of that hearing. However, any issues in the complaint that are not part of the due process action must be resolved within the time limit and procedures set by the state. If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the state education agency must inform the complainant to that effect. A complaint alleging a public agency's failure to implement a due process decision must be resolved by the SEA.[459]

The regulations state that an organization or individual may file a signed written complaint. The complaint must include a statement that a public agency has violated the requirements of the IDEA and the facts on which the statement is based. The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received unless a longer period is reasonable because the violation is continuing or the complainant is requesting

[457] 34 C.F.R. § 300.661(a).
[458] 34 C.F.R. § 300.661(b).
[459] 34 C.F.R. § 300.661(c).

compensatory services for a violation that occurred not more than three years prior to the date the complaint was received.[460]

The regulations state that each state educational agency's complaint procedures must provide the public agency with an opportunity to respond to a complaint including, at a minimum, an opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation.[461] The sixty (60) day timeline for filing a state complaint may be extended if the parent and the public agency agree to engage in mediation or to engage in other alternative means of dispute resolution.[462]

If a written complaint is received that is also the subject of a due process hearing, the state must set aside any part of the compliance complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the compliance complaint that is not part of the due process hearing must be resolved using the time limit and procedures described in the state complaint procedures.[463]

In Porter v. Board of Trustees of Manhattan Beach Unified School District,[464] the Court of Appeals held that the parents of a special education student were not required to exhaust California's compliance complaint resolution process before filing a lawsuit in federal court. The Court of Appeals held that the parents could file a complaint directly in the United States District Court to enforce a hearing officer's decision that had not been appealed.

In Porter, the parents alleged in their lawsuit that the Manhattan Unified School District had failed to comply with a previous hearing officer's decision that awarded the student compensatory education during the 1999-2000 school year. The parents alleged that due to the school district's failure to implement a full compensatory education program, the parents were forced to hire a private tutor for the student at their own expense. On August 7, 2002, the parents filed their lawsuit. The lawsuit was dismissed by the United States District Court and the parents appealed.[465]

The Court of Appeals reversed holding that he parents were not required to file a compliance complaint with the California Department of Education and exhaust that process before filing the lawsuit. The Court of Appeals held that the IDEA creates and enforceable right in federal court, and that Congress did not intend to require parents to exhaust the compliance complaint procedure prior to filing a lawsuit.[466]

The Court of Appeals based its decision on the United States Department of Education's interpretation of its own regulations which state that the compliance complaint procedure was intended to allow parents and school districts to resolve differences without resorting to more costly litigation, but not to create a mechanism that must be exhausted in addition to the due process system and the court system. The Court of Appeals noted that under California's compliance

---

[460] 34 C.F.R. § 300.662.
[461] 34 C.F.R. § 300.152(a)(3).
[462] 34 C.F.R. § 300.152(b)(1).
[463] 34 C.F.R. § 300.152(c).
[464] 307 F.3d 1064, 170 Ed.Law Rep. 152 (9th Cir. 2002).
[465] Id. at 1065.
[466] Id. at 1066.

complaint procedure, if the local school district refuses to comply with the state's directives, only the Superintendent of Public Instruction is authorized to file a lawsuit to enforce the compliance order. The other enforcement measure available under the compliance complaint procedure is for the state to withholding of funds may prevent the district from providing the services to the parent's child and other children.[467]

Thus, the Court of Appeals concluded that the parents were not required to exhaust California's compliance complaint process before filing a lawsuit and reversed the District Court's decision and returned it to the District Court for further proceedings.[468]

As a result of the Porter decision, parents may file suit in federal or state court to enforce a hearing officer's decision that has not been appealed.

AGE OF MAJORITY

The IDEA requires that the IEP, beginning at least one year before the child reaches the age of majority (age 18 in California), include a statement that the child has been informed of his or her rights under the IDEA with respect to transfer of those rights upon the age of majority. Section 1415(m) provides that states may establish a procedure under state law that allows parents to retain control over the child if it has been determined that the child does not have the ability to provide informed consent with respect to the educational program of the child. The IDEA states that the state procedure need not require that the child be determined to be incompetent, but authorizes the state to adopt an alternative procedure for appointing the parent of the child, or another appropriate individual to represent the educational interest of the child after the child reaches the age of majority and throughout the period of eligibility under the IDEA.[469]

California presently has no such procedures and it will be up to the California Legislature to establish such procedures. Presently, California has guardianship procedures and conservatorship procedures which generally require a showing of incompetence.

The federal regulations require each state to establish procedures for appointing the parent of the child with a disability, or if the parent is not available, another appropriate individual, to represent the educational interests throughout the child's eligibility under the IDEA if, under state law, the child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.[470]

[467] Id. at 1073.
[468] Id. at 1073-1075
[469] 20 U.S.C. §§ 1414(d)(1), 1415(m)(2).
[470] 34 C.F.R. § 300.520(b).

SECTION 504 OF THE REHABILITATION ACT, THE AMERICANS WITH DISABILITIES ACT AND THE PROVISION OF A FREE APPROPRIATE PUBLIC EDUCATION

Since the decision of the United States Supreme Court in Smith v. Robinson[471] and the subsequent amendments to the IDEA, there has been considerable debate as to whether Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities (ADA) impose additional obligations on school districts to provide a free appropriate public education.

A review of the history of Section 504 and the ADA reveal that Section 504 and the ADA were intended to prohibit discriminatory practices in a broad range of programs but impose no affirmative obligations with respect to specific educational programs. By contrast, the IDEA contains specific requirements for providing a free appropriate public education to disabled children.

The 1986 amendments to the IDEA allowed the awarding of damages under Section 504, if applicable, and attorneys' fees. However, Section 504 was not amended to explicitly provide for a substantive right to a free appropriate public education, nor did Congress include a substantial right to a free appropriate public education when it enacted the ADA. Therefore, it does not appear that the ADA or the language in Smith v. Robinson which states that Section 504 does not add anything to a disabled child's substantive right to a free appropriate public education has been modified by Congress to provide for a right to a free appropriate public education under these statutes.

The origins of Section 504 of the Rehabilitation Act of 1973 can be traced back to World War I. Proposals were raised in Congress to rehabilitate soldiers who were disabled as a result of injuries sustained during World War I. The first legislation addressing the needs of disabled war veterans and industrially disabled civilians was enacted in 1920. Additional programs were enacted in 1943, 1954, 1965, 1967, and 1968 and became part of the Social Security Act in 1935.[472]

Although Congress has estimated that over three million handicapped people were rehabilitated under those programs, many severely handicapped individuals were not being reached.[473] As stated in the legislative history of the Rehabilitation Act of 1973, "The key to the intent of the Bill is the Committee's belief that the basic vocational rehabilitation program must not only continue to serve more individuals, but place more emphasis on rehabilitating individuals with more severe handicaps."[474]

In School Board of Nassau County v. Arline,[475] the United States Supreme Court noted that the purpose of the Rehabilitation Act was to provide disabled Americans with opportunities for an education, transportation, housing, health care and jobs that other Americans take for granted.

---

[471] 468 U.S. 992 (104 S.Ct. 3457), 82 L.Ed.2d 746 (1984).
[472] 1973 U.S. Code Congressional and Administrative News, at 2082.
[473] Id. at 2084-2086.
[474] Id. at 2092.
[475] 480 U.S. 273 (107 S.Ct. 1123), 94 L.Ed.2d 307 (37 Ed.Law Rep. 448) (1987).

The Court noted:

> "To that end, Congress not only increased federal support for vocational rehabilitation, but also addressed the broader problem of discrimination against the handicapped by including Section 504, an anti-discrimination provision patterned after Title VI of the Civil Rights Act of 1964."[476]

The ADA was signed into law on July 26, 1990. It is a comprehensive statutory scheme designed to prohibit discrimination against the disabled in a wide range of activities conducted by both public and private entities.[477]

It is expected that the ADA will have its greatest impact in the private sector, since the provisions of the ADA are patterned after the provisions of Section 504 of the Rehabilitation Act of 1973, which already prohibit discrimination against the disabled by agencies receiving federal financial assistance.[478]

The United States Supreme Court decision in Southeastern Community College v. Davis[479] also supports the thesis that the provisions of Section 504 and the ADA do not set a higher standard than the IDEA in providing a free appropriate public education to disabled students. Davis suffered from a serious hearing disability and sought training as a registered nurse. She was denied admission to the nursing program of Southeastern Community College, a state institution that received federal funds because the college believed that her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients. She could only understand speech directed to her by lip reading.

The United States Supreme Court held that the decision to exclude Davis from the community college's nursing program was not discriminatory within the meaning of Section 504 of the Rehabilitation Act of 1973. The United States Supreme Court stated:

> "Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an otherwise qualified handicapped individual not be excluded from participation in a federally funded program solely by reason of his handicap, indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context . . .
>
> "An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap."[480]

---

[476] Arline, 107 S.Ct. at 1126.
[477] 42 U.S.C. §§ 12101-12213.
[478] 29 U.S.C. § 794.
[479] 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979).
[480] Id. at 2366-67.

The Court noted that legitimate physical qualifications may be essential to participation in particular programs. It found that the ability to understand speech without reliance on lip reading is necessary for patients' safety during the clinical phase of the program and is indispensable for many of the functions that a registered nurse must perform. The Court rejected Davis' contention that Section 504 required the community college to undertake affirmative action that would dispense with the need for effective oral communication. She was also not entitled to individual supervision by faculty members whenever she attended patients directly.

The Supreme Court held that Section 504 does not require such a fundamental alteration in the nature of a program stating:

> "Moreover, an interpretation of the regulations that required the extensive modifications necessary to include Respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals they would do more than clarify the meaning of Section 504, instead they would constitute an unauthorized extension of the obligations imposed by that statute. . . .
>
> "Neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. . . ."[481]

The Court acknowledged that the difference between illegal discrimination and affirmative action will not always be clear, particularly in light of the rapid technological advances which are taking place. The Court concluded that whether a particular refusal to accommodate the needs of a disabled person constitutes discrimination will have to be determined on a case by case basis. However, major modifications to the program are not required:

> "In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination . . . Section 504 imposes no requirement upon an education institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[482]

Following the United States Supreme Court's decision in Davis, several lower courts have examined the extent to which Section 504 imposes affirmative obligations to provide a free appropriate public education and Section 504's interaction with the IDEA.[483]

---

[481] Id. at 2367-2371.
[482] Id. at 2370-2371.
[483] Phipps v. New Hanover County Board of Education, 551 F.Supp. 732, 8 Ed.Law Rep. 15 (E.D.N.C. 1982); Colin K. by John K. v. Schmidt, 715 F.2d 1, 9, 13 Ed.Law Rep. 221 (1st Cir. 1983); Smith v. Cumberland School Committee, 703 F.2d 4, 10 Ed.Law Rep. 43 (1st Cir. 1983); Stewart v. Salem School District, 65 Or.App. 188, 670 P.2d 1048, 14 Ed.Law Rep. 204 (1983); Timms v. Metropolitan School District, 722 F.2d 1310, 1317-19, 15 Ed.Law Rep. 102 (7th Cir. 1983).

In Timms v. Metropolitan School District,[484] for example, the Court of Appeals held that an action brought under Section 504 as well as the Education of the Handicapped Act (now IDEA) must be dismissed for failure to exhaust the administrative remedies under the Act.

The court noted that regulations under Section 504 require public schools to provide disabled children with a free appropriate public education and that, therefore, Section 504 and the IDEA have considerable overlap. The Court of Appeals stated:

> "We agree with the Eighth Circuit, however, that the Rehabilitation Act is broader than the EAHCA (now IDEA) in the range of federally funded activities that reach us but narrower in the kind of actions it regulates. . . . As Monahan [v. State of Nebraska, 687 F.2d 1164 [6 Ed.Law Rep. 520] (1982)] notes . . . Section 504 is prohibitory, forbidding exclusion from federally-funded programs on the basis of the handicap, rather than mandatory, creating affirmative obligations. See, Southeastern Community College v. Davis . . . The EAHCA, by contrast, because of its focus on appropriate education, imposes affirmative duties regarding the content of the programs that must be provided to the handicapped. Because Section 504 forbids exclusion from programs rather than prescribing the program's content, it reaches grosser kinds of misconduct than the EAHCA."[485]

A number of lower court decisions have held that Section 504 did not require school districts to provide residential placements for disabled students. In Colin K. v. Schmidt,[486] for example, the First Circuit Court of Appeals questioned the 504 regulations which require school districts to provide handicapped students with residential placements. In Turillo v. Tyson,[487] the district court held that Section 504 was not a mandate for affirmative action. The court noted, "While Section 504 might require a school system to modify its school to accommodate handicapped children, it never compels the school system to finance a private educational placement."[488]

The district court in William S. v. Gill,[489] held that Section 504 does not obligate a school district to finance a private placement under any circumstances. The district court noted:

> "In the wake of Davis, all courts save one have concluded Section 504 does not obligate a school system to finance a private placement under any circumstances (though conceding EAHCA may impose such an obligation) . . . Because a residential placement represents a new service not available to nonhandicapped students (as distinguished from a modification of an existing service available to nonhandicapped students, which was at issue in Davis), it follows a

[484] 722 F.2d 1310 (7th Cir. 1983).
[485] Id. at 1317-18.
[486] 715 F.2d 1 (1st Cir. 1983).
[487] 535 F.Supp. 577, 3 Ed.Law Rep. 639 (D.R.I. 1982).
[488] Id. at 588.
[489] 572 F.Supp. 509, 14 Ed.Law Rep. 279 (N.D.Ill. 1983).

> fortiori from Davis that defendants have no financial responsibility under Section 504 for such a program."[490]

In Darlene L. v. Illinois State Board of Education,[491] the district court held that Section 504 does not require a school district to provide disabled students with psychiatric services. The district court noted Section 504 "certainly cannot impose any greater educational requirements on states than does the IDEA."

In Smith v. Robinson,[492] the United States Supreme Court concluded that Congress intended the Education of the Handicapped Act (EHA) to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education. The Court noted that the EHA was a comprehensive statutory scheme established by Congress to protect the rights of disabled children to a free appropriate public education. The Supreme Court noted that Section 504 and the EHA are different substantive statutes and while the EHA guarantees a right to a free appropriate public education, Section 504 prohibits discrimination on the basis of handicap in a variety of programs and activities receiving federal financial assistance.

The Court explained the difference by stating:

> ". . . [A]lthough both statues begin with an equal protection premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA . . .
>
> "In Southeastern Community College v. Davis, . . . the Court emphasized that Section 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons. . . .
>
> "In the EHA, on the other hand, Congress specified that affirmative obligations imposed on states to ensure that equal access to a public education is not an empty guarantee, but offers some benefit to a handicapped child . . .
>
> "There is no suggestion that Section 504 adds anything to petitioners' substantive rights to a free appropriate public education. The only elements added by Section 504 are the possibility of circumventing EHA administrative procedure and going straight to court with a Section 504 claim, the possibility of a damages award in

[490] Id. at 517.
[491] 568 F.Supp. 1340, 13 Ed.Law Rep. 282 (N.D. Ill. 1983).
[492] 468 U.S. 992 (104 S.Ct. 3457, 3468), 82 L.Ed.2d 746 (1984).

> cases where no such award is available under the EHA, and attorneys' fees."[493]

The Court thus concluded that while the premise of the two statutory schemes are similar, Section 504 does not impose any additional affirmative obligation or set a higher legal standard than does the EHA in the provision of a free appropriate public education to disabled students. The Court also went on to conclude that the procedural remedies available under Section 504 such as attorneys' fees and damages were not available in actions alleging a failure to provide a free appropriate public education.[494]

In response to the decision in Smith v. Robinson, Congress amended the Education of the Handicapped Act (now IDEA) mainly to provide prevailing plaintiffs with attorneys' fees in IDEA civil actions.[495]

There is nothing in the legislative history of the 1986 amendments or the amendments themselves to indicate that Congress intended to enlarge the substantive rights of disabled children under Section 504 of the Rehabilitation Act. Rather, it appears that Congress intended to enlarge the procedural rights of parents to bring an action under Section 504 which Congress believed were limited by the United States Supreme Court in Smith v. Robinson (although administrative remedies under IDEA must be exhausted), to allow an award of attorneys' fees and to allow awards of damages under Section 504 which may not be available under the IDEA.[496]

Similarly, there is nothing in the legislative history of the ADA that indicates a Congressional intent to broaden the substantive rights of disabled children to a free appropriate public education. Had Congress intended the ADA to guarantee a disabled child's right to a free appropriate public education, it would have enacted specific language in the ADA guaranteeing that right. Congress' silence on the issue in light of the United States Supreme Court's decision in Smith v. Robinson, indicates that Congress intended the IDEA to be the main vehicle for enforcing the right to a free appropriate education and intended that Section 504 and the ADA would reach grosser forms of discrimination against the disabled.

The right to a free appropriate public education is set forth only in the IDEA. It is not addressed by Section 504 or the ADA. Case law interpreting the IDEA has developed the Rowley standard for determining whether a free appropriate public education has been provided. Establishing a single legal standard under the IDEA allows for a clearer understanding of the substantive requirements of the law and makes it easier for school districts to understand their obligations to provide special education students with a free appropriate public education.

PROPOSITION 63 MENTAL HEALTH FUNDS

On November 2, 2004, the voters of California passed Proposition 63. Proposition 63 imposed a one percent income tax surcharge on California taxpayers' taxable personal income above

[493] Id. at 3472-74.
[494] Id. at 3473-74.
[495] See, 1986 U.S. Code Congressional & Administrative News, at 1798-1811.
[496] See, Smith v. Robinson, 468 U.S. 992, 1020-23 (104 S.Ct. 3457, 3473-74), 82 L.Ed.2d 746, 18 Ed.Law Rep. 148 (1984).

$1 million for the purpose of providing dedicated funding for the expansion of mental health services and programs.

Our office has been asked whether Proposition 63 funds may be used to fund special education programs. Proposition 63 funds may not be used to fund special education programs including services for emotionally disturbed special education students which have been delegated by state law to county mental health departments,[497] but Proposition 63 funds may be used to offer to "severely mentally ill" children (which under the definition of "severely mentally ill" will include many emotionally disturbed special education students) services which may decrease the number of children who need special education services such as counseling, psychological services, and residential placement.

A. Purpose and Intent of the MHSA

Proposition 63, also known as the Mental Health Services Act (MHSA), amended various provisions of the Welfare and Institutions Code and Revenue and Taxation Code. In Section 2 of the Mental Health Services Act, it is noted that untreated mental illness is the leading cause of disability and suicide and imposes high costs on state and local governments. "Children left untreated often become unable to learn or participate in a normal school environment."[498] The initiative further states that the purpose and intent of the MHSA is as follows:

1. To define serious mental illness among children, adults, and seniors;

2. To reduce long term adverse impact on individuals, families and state and local budgets resulting from untreated serious mental illness;

3. To expand the kinds of successful, innovative service programs for children, adults, and seniors most severely affected by or at risk of serious mental illness;

4. To provide state and local funds to adequately meet the needs of all children and adults who can be identified and enrolled in programs. State funds will be available to provide services that are not already covered by federally sponsored programs or by individuals' or families' insurance programs;

5. To ensure that all funds are expended in the most cost effective manner and services are provided in accordance

[497] Government Code sections 7570 et seq. Also referred to as AB 3632/AB 2756. Governor Schwarzenegger is proposing in his 2005-2006 state budget to suspend the state mandate under Sections 7570 et seq. that county mental health departments provide these IDEA related services. The Legislative Analyst's Office is recommending that the responsibility for these IDEA related services be permanently transferred to school districts. To implement the LAO's recommendation, Government Code sections 7570 et seq. would have to be repealed.

[498] See, Historical and Statutory Notes, Welfare and Institutions Code section 5840, Section 2(c).

> with recommended best practices subject to local and state oversight to ensure accountability to taxpayers and to the public.[499]

The initiative adds Welfare and Institutions Code section 5840, which requires the State Department of Mental Health to establish a program designed to prevent mental illnesses from becoming severe and disabling. The program is required to include the following components:

> 1. Outreach to families, employers, primary care health care providers, and others to recognize the early signs of potentially severe and disabling mental illnesses;
>
> 2. Access and linkage to medically necessary care provided by county mental health programs for children with severe mental illness, as defined in Welfare and Institutions Code section 5600.3, and for adults and seniors with severe mental illness, as defined in Section 5600.3, as early in the onset of these conditions as practicable;
>
> 3. Reduction in the stigma associated with being diagnosed with a mental illness or seeking mental health services;
>
> 4. Reduction in discrimination against people with mental illness.[500]

The program is required to include mental health services effective in preventing mental illnesses from becoming severe and is required to include components that have been successful in reducing the duration of untreated severe mental illness and in assisting people in quickly regaining productive lives. The program is required to emphasize strategies to reduce suicide, incarceration, school failure or dropout, unemployment, prolonged suffering, homelessness, and removal of children from their homes.[501]

B. Definition of Seriously Emotionally Disturbed (SED) Children

As indicated above, the MHSA defines "children with severe mental illness" by referencing Welfare and Institutions Code section 5600.3. Welfare and Institutions Code section 5600.3(a) defines "seriously emotionally disturbed children or adolescents" as minors under the age of eighteen years of age who have a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, other than a primary substance abuse disorder or developmental disorder, which results in behavior inappropriate to the child's age according to expected developmental norms. "Seriously emotionally disturbed children or

[499] Historical and Statutory Notes, Welfare and Institutions Code section 5840, Section 3.
[500] Welfare and Institutions Code section 5840(b).
[501] Welfare and Institutions Code section 5840(d).

adolescents" must meet one or more of the following criteria:

1. As a result of the mental disorder, the child has substantial impairment in at least two of the following areas:

   a. Self-care;

   b. School functioning;

   c. Family relationships; or

   d. Ability to function in the community

2. The child is at risk of removal from the home or has already been removed from the home, or the mental disorder and impairments have been present for more than six months or are likely to continue for more than one year without treatment.

3. The child displays one of the following:

   a. Psychotic features;

   b. Risk of suicide; or

   c. Risk of violence due to a mental disorder

4. The child meets special education eligibility requirements under Government Code sections 7570 et seq., (AB 3632/2756) (i.e., seriously emotionally disturbed).[502]

The MHSA establishes programs to assure services will be provided to severely mentally ill children who meet the definition of seriously emotionally disturbed children or adolescents defined immediately above under Welfare and Institutions Code section 5600.3(a).[503] As can be seen by the specific elements of the definition of seriously emotionally disturbed children or adolescents under Welfare and Institutions Code section 5600.3, the children who will qualify for services under the MHSA will be many of the same children who qualify or will qualify for special education services as severely emotionally disturbed (SED) under the IDEA definition.

C. Services to SED and Severely Mentally Ill Children

The MHSA states that, subject to the availability of funds, county mental health programs shall offer services to severely mentally ill children for whom services under any other public or

[502] Welfare and Institutions Code section 5600.3(a). Section 5600.3(b) contains similar definitions for adults and older adults.
[503] Welfare and Institutions Code sections 5878.1-5878.3.

private insurance or other mental health or entitlement program is inadequate or unavailable. Other entitlement programs include, but are not limited to, mental health services available pursuant to Medi-Cal, child welfare, and special education programs. The funding is required to cover only those portions of care that cannot be paid for with public or private insurance, other mental health funds, or other entitlement programs. Funding is required to be at sufficient levels to ensure that counties can provide each child served all of the necessary services set forth in the child's applicable treatment plan, including services where appropriate or necessary to prevent an out of home placement.[504]

The MHSA also funds programs for adults and seniors with severe mental illnesses. Funding is required to be provided at sufficient levels to ensure that counties can provide each adult and senior with the medically necessary mental health services, medication, and supportive services set forth in their treatment plan. The funding is only required to cover the portions of those costs of services that cannot be paid for with other funds, including other mental health funds, public and private insurance, and other local, state and federal funds.[505]

D. Education and Training Programs

The MHSA establishes a program with dedicated funding to remedy the shortage of qualified individuals to provide services to address severe mental illnesses. State and local agencies are required to develop a five year education and training development plan. The State Department of Mental Health is required to develop an expansion plan for postsecondary education to meet the needs of identified mental health occupational shortages as well as an expansion plan for the forgiveness of loans and scholarships programs offered in return for a commitment to employment in California's public mental health system. The plan is also required to make loan forgiveness programs available to current employees of the mental health system who want to obtain college degrees.[506]

E. Oversight and Accountability

The MHSA creates the Mental Health Services Oversight and Accountability Commission to oversee the administration of MHSA funds and to ensure accountability. Each county mental health program is required to prepare and submit a three year plan, updated annually, which includes a program for prevention and early intervention, and a program for services to children as well as a program for services to adults and seniors.[507]

F. County Mental Health Plan

Each county mental health program is required to prepare and submit a three year plan that must be updated annually and approved by the State Department of Mental Health after review and comment by the Mental Health Services Oversight and Accountability Commission. The plan and update must include all of the following:

[504] Welfare and Institutions Code sections 5878.3.
[505] Welfare and Institutions Code sections 5813.5.
[506] Welfare and Institutions Code sections 5820, 5821, and 5822.
[507] Welfare and Institutions Code section 5845 et seq.

1. A program for prevention and early intervention;

2. A program for services to children that includes an interagency system of care for children with serious emotional and behavioral disturbances that provides a comprehensive, coordinated system of care, to include a wrap-around program or provide substantial evidence that it is not feasible to establish a wrap-around program in that county;[508]

3. A program for services to adults and seniors;

4. A program for innovations;

5. A program for technological needs in capitol facilities needed to provide services;

6. Identification of shortages in personnel to provide services and the additional assistance needed from the education and training program;

7. Establishment and maintenance of a prudent reserve to ensure that the county program will continue to be able to serve children, adults, and seniors.[509]

Each plan and update is required to be developed with local stakeholders including adults and seniors with severe mental illness, families of children, adults and seniors with severe mental illness, providers of services, law enforcement agencies, education, social services agencies and other important interests. A draft plan and update is required to be prepared and circulated for review and comment for at least thirty days to representatives of stakeholder interests and any interested party who has requested a copy of such plans.[510]

The Mental Health Board established pursuant to Section 5604 is required to conduct a public hearing on the draft plan and annual updates at the close of the thirty day comment period. Each adopted plan and update is required to include any substantive written recommendations for revisions. The adopted plan or update is required to summarize and analyze the recommended revisions. The Mental Health Board is required to review the adopted plan or update and make recommendations to the county mental health department for revisions.[511]

---

[508] See, Welfare and Institutions Code section 5850 et seq., 18250 et seq. A "wrap-around" program is defined as a community-based intervention that emphasizes the strengths of the child and family and includes the delivery of coordinated, highly individualized unconditional services to address needs, and achieves positive outcomes in their lives. See, Welfare and Institutions Code section 18251(d).

[509] Welfare and Institutions Code section 5847.

[510] Welfare and Institutions Code section 5848(a).

[511] Welfare and Institutions Code section 5848(b).

The State Department of Mental Health is required to establish requirements for the content of the plans. The plans are required to include reports on the achievement of performance outcomes for services funded by the Mental Health Services Fund.[512] Mental health services provided under the MHSA are required to be included in the review of program performance by the California Mental Health Planning Council and in the local mental health board's review and comment on the performance outcome data.[513]

The members of the Mental Health Services Oversight and Accountability Commission are members of the California Mental Health Planning Council. They serve in an ex oficio capacity when the Council is performing its statutory duties.[514]

G. The Mental Health Services Fund

The MHSA creates the Mental Health Services Fund in the State Treasury.[515] The initiative states that nothing in the establishment of the Mental Health Services Fund, nor any other provision of the MHSA establishing the programs funded with the Mental Health Services Fund shall be construed to modify the obligation of healthcare service plans and disability insurance policies to provide coverage for mental health services.[516]

The MHSA states:

> "The funding established pursuant to this act shall be utilized to expand mental health services. These funds shall not be used to supplant existing state or county funds utilized to provide mental health services. The state shall continue to provide financial support for mental health programs with not less than the same entitlements, amounts of allocations from the general fund and formula distribution of dedicated funds, as provided in the last fiscal year, which ended prior to the effective date of this act [e.g. 2003-2004]. The state shall not make any change to the structure of financing mental health services, which increases a county's share of costs or financial risk for mental health services, unless the state includes adequate funding to fully compensate for such increased costs or financial risk. These funds shall only be used to pay for the programs authorized in Section 5892. These funds may not be used to pay for any other program. These funds may not be loaned to the State General Fund, or any other fund of the state, or a county general fund, or any other county fund for any purpose other than those authorized by Section 5892."[517] [Emphasis added]

[512] Welfare and Institutions Code section 5848(c).
[513] Welfare and Institutions Code section 5848(d).
[514] Welfare and Institutions Code section 5771.1.
[515] Welfare and Institutions Code section 5890.
[516] Welfare and Institutions Code section 5890.
[517] Welfare and Institutions Code section 5891.

Section 5892 establishes an allocation formula for the Mental Health Services Fund in 2005-2006, and each year thereafter. Twenty percent of the funds are to be used for prevention and early intervention programs distributed to counties in accordance with a formula developed in consultation with the California Mental Health Directors Association. Ten percent of the funds are to be placed in a trust fund to be expended for education and training programs, ten percent for capital facilities and technological needs, five percent for innovative programs and the balance of funds are required to be distributed to county mental health programs for services to persons with severe mental illnesses, for the children's system of care and for the adult and older adult system of care.[518]

H. Legislative Analyst's Office Analysis

The provisions of the MHSA (Proposition 63) became effective on January 1, 2005. The provisions of the MHSA may be amended by a two-thirds vote of the Legislature so long as such amendments are consistent with and further the intent of the MHSA. The Legislature may, by majority vote, add provisions to clarify procedures and terms, including the procedures for the collection of a tax surcharge.[519]

The analysis by the Legislative Analyst that was provided to voters prior to the November 2, 2004, election indicated that the tax surcharge imposed by the MHSA (Proposition 63) would generate new state revenues estimated as follows:

1. 2004-2005: $275 million;

2. 2005-2006: $750 million;

3. 2006-2007: $800 million

The Legislative Analyst also stated that Proposition 63 contains provisions that prohibit the state from reducing financial support for mental health programs below the 2003-2004 level. The Legislative Analyst also indicated that there would be partially offsetting savings resulting from the expansion of county mental health services by reducing the number of severely mentally ill individuals incarcerated, needing medical care, social services, and homeless shelters. The Legislative Analyst indicated that the extent of the potential savings was unknown but, "…could amount to as much as the low hundreds of millions of dollars annually on a statewide basis."

I. The Impact of the Passage of Proposition 63

The passage of Proposition 63 and the resulting enactment of the MHSA could have a profound impact upon the provision of special education services (particularly psychological services, counseling, and residential placement) to emotionally disturbed special education students. Depending on how the county mental health plan is developed, the impact could be dramatic. If the

[518] Welfare and Institutions Code section 5892.
[519] Historical and Statutory Notes, Welfare and Institutions Code section 5840, sections 16 and 18.

county plan provides for intensive mental health treatment of severely mentally ill children which prevents them from dropping out of school or entering special education programs, the need for the provision of psychological services, counseling, and residential placement (related services under the IDEA and the state special education law) could be diminished.

The extent of that impact would depend on the development of the county mental health plan, the elements contained in the county mental health plan, and the early identification of children with mental illness. If the county mental health department decides to include in its plan effective early identification of mentally ill children and school districts participate in this endeavor, the number of children who eventually qualify for special education as emotionally disturbed children may be decreased.

As discussed above, Proposition 63 or MHSA funds may not be used to fund special education programs but MHSA funds are required to be used to treat children with severe mental illness. In many cases, these are the same children as children served under the IDEA and their treatment will decrease their need for special education services.

MISCELLANEOUS PROVISIONS

Section 1415(n) states that a parent of a child with a disability may elect to receive notices under the IDEA by electronic mail, if the agency makes such option available.

Section 1415(o) states that nothing in Section 1415 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

HIGHLY QUALIFIED SPECIAL EDUCATION TEACHERS

The 2004 amendments to the IDEA add a definition of "highly qualified" to the Individuals with Disabilities Education Act (IDEA).[520]

The 2004 amendments to the IDEA allow special education teachers to become highly qualified in the same manner as general education teachers except that they must also have obtained full state certification as a special education teacher (including alternative routes to certification) or must also have passed the State special education teacher licensing examination and hold a license to teach in the State as a special education teacher. To be highly qualified, a special education teacher must also hold a bachelor's degree and not have their license or certification waived on an emergency, temporary or provisional basis.[521]

In addition, the amendments to the IDEA create two new options for special education teachers to become highly qualified if they meet the specified requirements. One option applies to a special education teacher who teaches core academic subjects exclusively to children who are

[520] 20 U.S.C. § 1401 (a)(10).
[521] 20 U.S.C. § 1401 (a)(10)(A) and (B).

assessed against alternative achievement standards established under the No Child Left Behind Act (NCLB).[522] The term "highly qualified" for these teachers means the teacher, whether new or not new to the profession, may:

1. Meet the applicable requirements of the No Child Left Behind Act[523] for any elementary, middle or secondary school teacher who is new or not new to the profession (e.g. by demonstrating competence in all academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation or HOUSSE); or

2. Meet the requirements of subparagraph (B) or (C) of Section 9101(23) of the No Child Left Behind Act[524] as applied to an elementary school teacher, or, in the case of instruction above the elementary level, has subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.

With respect to a special education teacher who teaches two or more core academic subjects[525] exclusively to children with disabilities, a second option to be highly qualified allows the teacher:

1. To meet the applicable requirements of the No Child Left Behind Act for any elementary, middle or secondary school teacher who is new or not new to the profession[526] or,

2. In the case of a teacher who is not new to the profession, demonstrates competence in all of the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle or secondary school teacher who is not new to the profession under the No Child Left Behind

[522] 20 U.S.C. § 6311(b)(1).
[523] 20 U.S.C. § 7801.
[524] 20 U.S.C. § 7801(23). Section 9101(23)(B) of the NCLB states that an elementary school teacher who is new to the profession must hold at least a bachelor's degree and pass a rigorous state test of subject knowledge and teaching skills in reading, writing, mathematics and other areas of basic elementary school curriculum. A middle or secondary school teacher who is new to the profession must hold at least a bachelor's degree and pass a rigorous state test of academic subjects the teacher teaches or successful completion of an undergraduate academic major (or its equivalent), a graduate degree, or advanced certification or credentialing in the subjects the teacher teaches. In California, new to the profession is defined as someone who receives their credential on or after July 1, 2002. Section 9101(23)(C) of the NCLB states that a teacher who is not new to the profession (received their California credential prior to July 1, 2002) may meet the standards for a teacher new to the profession or demonstrate competence in all academic subjects in which the teacher teaches based on a high objective uniform state standard of evaluation (HOUSSE).
[525] Core academic subjects are defined in the IDEA as amended, as having the same meaning as in the No Child Left Behind Act, 20 U.S.C. § 7801(11). The NCLB, 20 U.S.C. § 7801(11), defines core academic subject as, . . . "English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography."
[526] 20 U.S.C. § 7801(23).

Act[527] which may include a single, high objective uniform State standard of evaluation (HOUSSE) covering multiple subjects; or

3. In the case of a special education teacher who is new to the profession, who teaches multiple subjects and who is highly qualified in mathematics, language arts, or science, (e.g., by passing a rigorous state test), the teacher may demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle or secondary school teacher under the No Child Left Behind Act[528] which may include a single, high objective uniform state standard of evaluation (HOUSSE) covering multiple subjects, not later than two years after the date of employment.

In essence, for the special education teacher who teaches two or more core academic subjects and is new to the profession, after becoming highly qualified in mathematics, language arts, or science (i.e., by passing a rigorous state test in reading, writing, mathematics or other areas of the basic school curriculum or in mathematics, language arts or science rather than each subject the teacher teaches at the middle school or high school level or holding an advanced undergraduate degree, academic major or course equivalent or advanced certification in each subject taught) may utilize the HOUSSE procedures to become highly qualified in other core academic subjects.

It is somewhat unclear what the requirements are for special education teachers who do not exclusively teach students who are assessed against alternate standard or teach two or more academic subjects exclusively to children with disabilities.

Most likely, teachers who do not fit into one of these two categories must meet the same "highly qualified" requirement as general education teachers.

The "highly qualified" requirements for general education teachers are set forth in the NCLB and its implementing regulations.[529]

When the term "highly qualified" is used with respect to any public elementary school or secondary school teacher, it means the following:

1. The teacher has obtained full state certification as a teacher (including certification obtained through alternative routes to certification) or passed the State Teacher Licensing Examination, and holds a license to teach in such state, except that when used with respect to any teacher teaching in a

[527] 20 U.S.C. § 7801(23)(C)(ii) authorizes an elementary, middle or secondary school teacher who is not new to the profession (certificated before July 1, 2002, under proposed California regulations) to demonstrate competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation (HOUSSE).
[528] 20 U.S.C. § 7801(23)(C)(ii) (the HOUSSE requirements).
[529] 20 U.S.C. § 7801; see, also, 34 C.F.R. § 200.56.

public charter school, the term means that the teacher meets the requirements set forth in the state's public charter school law, and

2. The teacher has not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.

Section 200.56 adds additional requirements for teachers participating in an alternative route to certification program. Section 200.56 requires that alternative route to certification programs require the teacher to meet the following requirements:

1. A high quality professional development program that is sustained, intensive, and classroom focused, in order to have a positive and lasting impact on classroom instruction before and while teaching;

2. A program of intensive supervision that consists of structured guidance and regular, ongoing support for teachers or a teacher mentoring program;

3. Allows the teacher to function as a teacher in the classroom, only for a specified period of time not to exceed three years; and

4. Demonstrates satisfactory progress toward full certification as prescribed by the state, and the state ensures that through its certification and licensure process, the teacher will have passed a state teacher licensing examination and hold a license to teach in the state.

With respect to elementary school teachers who are new to the profession, the term "highly qualified" means that the teacher holds at least a bachelor's degree and has demonstrated, by passing a rigorous state test, subject knowledge and teaching skills in reading, writing, mathematics and other areas of the basic elementary school curriculum.[530] With respect to a middle or secondary school teacher who is new to the profession, the term "highly qualified" means that the teacher holds at least a bachelor's degree and has demonstrated a high level of competency in each of the academic subjects in which the teacher teaches by:

1. Passing a rigorous state academic subject test in <u>each</u> of the academic subjects in which the teacher teaches, or

2. Successful completion, in each of the academic subjects in which the teacher teaches, of an academic major, a graduate

[530] 20 U.S.C. § 7801(23)(B)(i).

degree, course work equivalent to an undergraduate academic major, or advanced certification or credentialing.[531]

The term "highly qualified" when used with respect to an elementary, middle or secondary school teacher who is not new to the profession means that the teacher holds at least a bachelor's degree, meets the requirements for teachers new to the profession and has passed a rigorous State test or demonstrates competence in all academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation.[532]

A high objective uniform State standard of evaluation (HOUSSE)[533] is defined in the NCLB and the IDEA (as amended by H.R. 1350) as the standard:

1. That is set by the state for both grade appropriate academic subject matter knowledge and special education teaching skills;

2. That is aligned with challenging state academic content and student academic achievement standards, and developed in consultation with special education teachers, core content specialists, teachers, principals, and school administrators;

3. That provides objective coherent information about the teacher's attainment of core content knowledge in the academic subjects in which a teacher teaches;

4. That is applied uniformly to all special education teachers who teach in the same academic subject and the same grade level throughout the state;

5. That takes into consideration, but is not based primarily on, the time the teacher has been teaching in the academic subject;

6. That is made available to the public on request; and

7. That may involve multiple objective measures of teacher competency.[534]

[531] 20 U.S.C. § 7801(23)(B)(ii).
[532] 20 U.S.C. § 7801(23)(C).
[533] 20 U.S.C. § 7801(23)(C)(ii).
[534] In summary, to be a highly qualified special education teacher must be fully state certified (no waivers), hold at least a bachelor's degree, pass a rigorous state test or for middle or secondary teachers complete an undergraduate academic major (or equivalent coursework), graduate degree or advanced certification in the subject the teacher teaches or if eligible, complete the HOUSSE process (i.e., teachers who teach core academic subjects exclusively to children who are assessed against alternate standards or teachers who are not new to the profession and teach two or more core academic subjects exclusively to children with disabilities.)

The legislation specifically states that a parent or student may not file a legal action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.[535]

The federal regulations clarify the definition of a highly qualified special education teacher.[536] The regulations state that any special education teacher teaching in a charter school must meet the certification or licensing requirements, if any, set forth in the state's public charter school law.

States may develop a separate HOUSSE process for special education teachers so long as any adaptations would not establish a lower standard to the content knowledge requirements for special education teachers and meets all the requirements for a regular education teacher. The state may develop a HOUSSE evaluation that covers multiple subjects.[537]

The highly qualified special education teacher requirements do not apply to private school teachers hired or contracted by local educational agencies to provide services to parentally placed private school children with disabilities.[538] In addition, private elementary school teachers are not required to meet the highly qualified special education teacher requirements.[539]

The regulations state that a judicial action on behalf of a class of students may not be filed alleging the failure of a state educational agency or a local educational agency employee to be highly qualified.[540]

LICENSING REQUIREMENTS FOR OTHER PROFESSIONALS

Section 612(a)(14)[541] requires the state educational agency to establish and maintain qualifications to ensure that personnel necessary to implement the IDEA are appropriately and adequately prepared and trained, including the content knowledge and skills to serve children with disabilities. These qualifications include qualifications for related services, personnel and paraprofessional that are consistent with any state approved or state recognized certification, licensing, registration or other comparable requirements that apply to the professional discipline in which those personnel are providing special education and related services.

The certification or licensure requirements cannot be waived on an emergency, temporary or provisional basis and must allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with state law, regulation or written policy, in meeting the requirements of the IDEA, to be used in assisting in the provision of special education and related services to children with disabilities. The State is required to ensure compliance with these requirements and adopt a policy that the State will take measurable steps to recruit, hire, train and retain highly

[535] 20 U.S.C. § 1401(10)(E).
[536] 34 C.F.R. § 300.18.
[537] 34 C.F.R. § 300.18(e).
[538] 34 C.F.R. § 300.18(h); 34 C.F.R. § 300.138.
[539] 34 C.F.R. § 300.138.
[540] 34 C.F.R. § 300.156(e).
[541] 20 U.S.C. § 1412(a)(14).

qualified personnel to provide special education and related services under the IDEA to children with disabilities.

A parent or student may not file an action or lawsuit on behalf of an individual student alleging the failure of a particular state educational agency or local educational agency staff person to be highly qualified. However, a parent may file a compliance complaint about staff qualifications with the state educational agency.

APPENDIX I
DEFINITION OF
HIGHLY QUALIFIED
SPECIAL EDUCATION TEACHERS

I. HIGHLY QUALIFIED – IN GENERAL

A. For any special education teacher, the term "highly qualified" has the meaning given the term in the No Child Left Behind Act[542] except that such term also includes the requirements described in Section II of this outline and includes the option for teachers to meet the requirements of the No Child Left Behind Act[543] by meeting the requirements of Sections III or IV of this outline.[544]

II. ALL SPECIAL EDUCATION TEACHERS

A. Full State Certification as a Special Education Teacher or Passage of a State Special Education Teacher Licensing Examination and Possession of a License to Teach in the State as a Special Education Teacher.

B. No Waiver of License or Certification on an Emergency, Temporary or Provision Basis

C. Possession of at Least a Bachelor's Degree[545]

III. SPECIAL EDUCATION TEACHERS TEACHING CORE ACADEMIC SUBJECTS EXCLUSIVELY TO CHILDREN WHO ARE ASSESSED AGAINST ALTERNATE STANDARDS

A. Meet NCLB Standards For Any Elementary, Middle or Secondary School Teacher Who Is New or Not New to the Profession; or

B. Meet the NCLB General Education Requirements For an Elementary School Teacher or In the Case of Instruction Above the Elementary Level, Subject Matter Knowledge Appropriate to the Level of Instruction Provided as Determined by the State Needed to Effectively Teach to Those Standards.[546]

IV. SPECIAL EDUCATION TEACHERS TEACHING TWO OR MORE CORE ACADEMIC SUBJECTS EXCLUSIVELY TO CHILDREN WITH DISABILITIES

A. Must Meet NCLB Requirements For any General Education Elementary, Middle or Secondary Teacher Who is New or Not New to the Profession, or

---

[542] 20 U.S.C. § 7801(23).
[543] 20 U.S.C. § 7801(23).
[544] 20 U.S.C. § 1401(a)(10)(A).
[545] 20 U.S.C. § 1401(a)(10)(B).
[546] 20 U.S.C. § 1401(a)(10)(C).

B. If Not New to the Profession, Demonstrate Competence in all of the Core Academic Subjects in which the Teacher Teaches in the Same Manner as a General Education Teacher Including a HOUSSE Evaluation Covering Multiple Subjects, or

C. If New to the Profession, a Special Education Teacher Who Teaches Multiple Subjects and Who is Highly Qualified in Mathematics, Language Arts or Science, May Demonstrate Competence in Other Core Academic Subjects in Which the Teacher Teaches in the Same Manner as a General Education Teacher Including a HOUSSE Evaluation Covering Multiple Subjects, Not Later than Two Years After the Date of Employment.[547]

V. CATEGORIES OF SPECIAL EDUCATION TEACHERS WHO MAY UTILIZE THE HOUSSE PROCEDURES

A. Special Education Teachers Who Teach Core Academic Subjects Exclusively to Children Who Are Assessed Against Alternative Achievement Standards

B. Special Education Teachers Who Teach Two or More Core Academic Subjects Exclusively to Children with Disabilities Who are Not New to the Profession

C. Special Education Teachers Who Teach Two or More Core Academic Subjects Exclusively to Children With Disabilities Who are New to the Profession as to Other Core Academic Subjects If They Are Highly Qualified in Mathematics, Language Arts or Science.[548]

[547] 20 U.S.C. § 1401(a)(10)(D). The elementary level teacher must be "highly qualified" in Mathematics, Language Arts or Science by passing a rigorous state test of teaching skills in reading, mathematics, and other areas of the basic elementary school curriculum. The middle or secondary school teacher must be "highly qualified" in Mathematics, Language Arts or Science by passing a rigorous state test in one of these subjects, successful completion of an undergraduate academic major (or course equivalent), a graduate degree, or advanced certification in Mathematics, Language Arts or Science.

[548] Ibid.

APPENDIX II
KEY TIMELINES UNDER THE IDEA

Education Code section 56043, as amended, sets forth timelines affecting special education programs. Section 56043(c) modifies the timeline for holding an IEP team meeting following an initial assessment from 50 days to 60 days from the date of receiving parental consent for assessment. Section 56043(e) states that post-secondary goals and transition services shall be considered at IEP meetings for special education students who are 16 years of age or younger, if appropriate.

Section 56043(f) states that an IEP required as a result of an assessment of pupils shall be developed within a total time not to exceed 60 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days, from the date of the receipt of the parent or guardian's written consent for assessment, unless the parent or guardian agrees, in writing, to an extension.

Section 56043(g) states that beginning not later than the first IEP to be in effect when the pupil is 16 years of age and updated annually thereafter, the IEP shall include appropriate, measurable post-secondary goals and transition services needed to assist the pupil in reaching those goals. Beginning not later than one year before the pupil reaches the age of 18 years, the IEP shall contain a statement that the pupil has been informed of the pupil's rights under the IDEA that will transfer to the pupil upon reaching the age of 18. Beginning at the age of 16 or younger, and annually thereafter, a statement of needed transition services shall be included in the pupil's IEP.

Section 56043(j) states that the LEA shall maintain procedures to ensure that the IEP team reviews the pupil's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the pupil are being achieved, and revises the IEP, as appropriate.

Section 56043(k) states that a reassessment of a pupil shall occur not more frequently than once a year, unless the parent and the LEA agree otherwise in writing, and shall occur at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary.

Section 56043(m) states that if an individual with exceptional needs transfers from district to district within the State from another SELPA, the LEA shall provide the student with a free appropriate public education, including services comparable to those described in the previously approved IEP, in consultation with the parents, for a period not to exceed 30 days, by which time the LEA shall adopt the previously approved IEP or develop, adopt and implement a new IEP that is consistent with federal and state law. If the child transfers within the SELPA, the new district shall continue, without delay, to provide services comparable to those described in the existing IEP unless the parent and the local educational agency agree to develop, adopt and implement a new IEP that is consistent with state and federal law. If the child transfers from an educational agency located outside California to a district within California within the same academic year, the LEA shall provide the pupil with a free appropriate public education, including services comparable to those described in the previously approved IEP, in consultation with the parents, until the local educational

agency conducts an assessment. In order to facilitate the transition of an individual with exceptional needs, the new school in which the pupil enrolled shall take reasonable steps to promptly obtain the pupil's records. Upon receipt of a request from an educational agency where an individual with exceptional needs has enrolled, a former educational agency shall send the pupil's special education records, or a copy thereof, to the new educational agency within five working days.

Section 56043(p) requires the California Department of Education to investigate compliance complaints within 60 calendar days after a complaint is filed. Section 56043(z) states that a complaint filed with the California Department of Education shall allege a violation of the IDEA or state law that occurred not more than one year prior to the date that the complaint is received by the CDE.

Section 56344 states that an IEP required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days, from the date of receipt of the parent's written consent for assessment, unless the parent agrees, in writing, to an extension. However, an IEP required as a result of an assessment shall be developed within 30 days after the commencement of the subsequent regular school year as determined by each district's school calendar for each pupil for whom a referral has been made 20 days or less prior to the end of the regular school year. In the case of pupil school vacations, the 60 day time shall recommence on the days that pupil's school days reconvene. A meeting to develop an initial IEP for the pupil shall be conducted within 30 days of a determination that the pupil needs special education and related services.

Section 56500.2(b) states that a compliance complaint shall be filed within one year of the date of the alleged violation.[549]

Section 56502 requires the State Superintendent of Public Instruction to develop a model form to assist parents and guardians in filing a request for due process. Section 56502(d) states that the due process hearing request notice shall be deemed to be sufficient unless the party receiving the notice notifies the due process hearing officer and the other party, in writing, that the receiving party believes the due process hearing request notice has not met the notice requirement. The notification must be filed within 15 days of receiving the due process hearing request notice. Within five days of receipt of the notification, the hearing officer must make a determination on the face of the notice whether the notification meets the requirements of federal law and must immediately notify the parents, in writing, of the determination.

Section 56505 maintains a three year statute of limitations for the filing of due process complaints until October 9, 2006. During this one year interim period, the three year statute of limitations will apply if the parents agree to participate in the mediation process. If the parent refuses to participate in the mediation process, then the two year statute of limitations applies. Effective October 9, 2006, all due process complaints will be subject to a two year statute of limitations.

[549] There appears to be a conflict between federal law, 20 U.S.C. § 1415(b)(6), which refers to a two year statute of limitations, and federal regulations, 34 C.F.R. § 300.662, which refers to a one year statute of limitations.

APPENDIX III
KEY TIMELINES UNDER THE IDEA

ASSESSMENT, REVIEW OR EVALUATION	TIMELINE	COMMENTS
Production of Records	5 Days[550]	
Initial Evaluations	60 Days[551]	The Initial Evaluation to determine the educational needs of a child and whether a child is a child with a disability, must be completed within 60 days of receiving parental consent for the evaluation.
Other Evaluations	60 Days	An IEP required as a result of an assessment or evaluation shall be developed within total time not to exceed 60 days (not counting days between the pupil's regular school sessions or school vacation in excess of five days) from the date of receipt of the parent's written consent for assessment unless the parent agrees in writing to an extension.[552]
Assessment Plan	15 days[553]	Within 15 days of the referral for assessment (not counting days between the pupil's regular school sessions or school vacation in excess of five days) the parent must be given a proposed assessment plan.
Parental Response to Assessment Plan	15 days[554]	The parent has at least 15 days to make a decision as to whether to consent to the assessment plan.
Development of an IEP	60 days[555]	An IEP required as a result of an assessment must be developed within a total time not to exceed 60 days.
IEP Meeting	30 days[556]	A meeting to review an IEP requested by the parent must be held within 30 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school

[550] Education Code section 56504.
[551] Education Code section 56344; 20 U.S.C. §1414(a)(1).
[552] When a referral for assessment has been made 20 days or less prior to the end of the regular school year, an IEP shall be developed within 30 days after the commencement of the subsequent regular school. In cases of school vacations, the 60 day timeline shall be commenced on the date that the pupil's school reconvenes. See, Education Code section 56344.
[553] Education Code section 56321.
[554] Education Code section 56321.
[555] Education Code section 56344. The 60 day timeline does not include days between the pupil's regular school sessions, terms or days of school vacation in excess of five days.
[556] Education Code section 56043(1).

		vacations in excess of five school days, from the date of the parent's written request.
Annual Review of IEP	Each Year[557]	Generally, a child with a disability must be reevaluated at least once every three years unless the parent and LEA agree it is unnecessary.
Triennial Review of IEP	Every Three Years[558]	
Transition Services	First IEP in Effect at Age 16[559]	
Due Process Hearing	2 year Statute of Limitations[560]	
Discipline – Initial Suspension	10 Days[561]	
Discipline – Interim Alternative Educational Setting	45 school days	School personnel may remove a student to an interim alternative educational setting whether the behavior is determined to be a manifestation of the child's disability in cases involving weapons, illegal drugs or serious bodily injury.[562]
Discipline – Expedited Hearing	Within 20 school days	When a parent or LEA requests a hearing regarding the interim alternative educational setting or a manifestation determination, the child shall remain in the interim educational setting pending a decision of the hearing officer, or until the expiration of the 45 school day time period, whichever occurs first, unless the parent and the LEA agree otherwise. In such cases, the state or local educational agency shall arrange for an expedited hearing which shall occur within 20 school days of the date the hearing is requested and a decision shall be made within 10 school days after the hearing.
Mental Health Referral	5 days[563]	Within 5 days of receipt of a referral, the

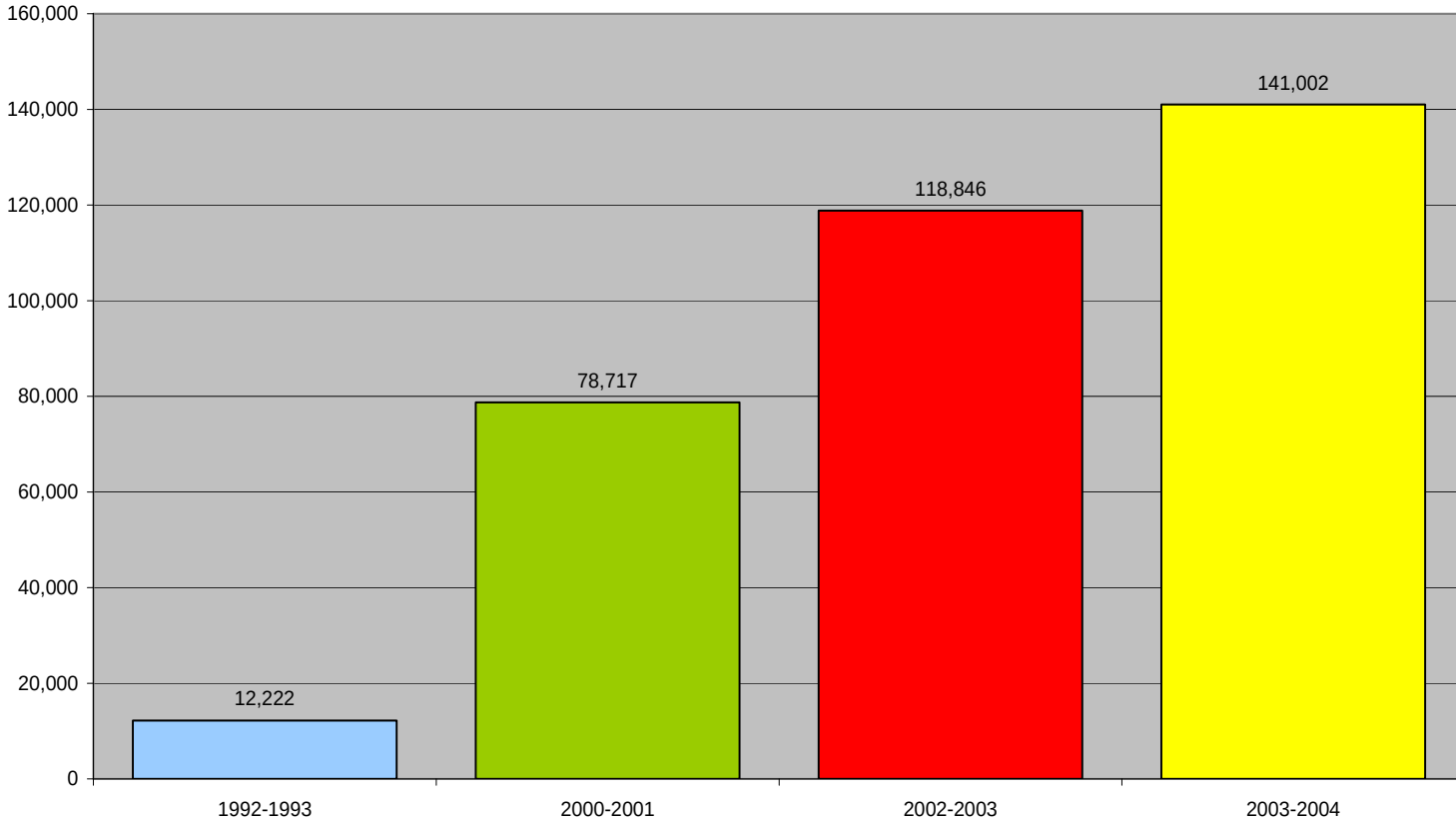
[557] 20 U.S.C. § 1414(d)(4); Education Code section 56043(d).
[558] 20 U.S.C. § 1414(a)(2); Education Code section 56043(k).
[559] 20 U.S.C. § 1414(d)(1)(A). Education Code section 54043(e).
[560] Education Code section 56505.
[561] The United States Supreme Court in Honig v. Doe, 108 S.Ct. 592 (1988), left unanswered whether the limit of 10 school days applied to a single incident or to the entire school year. The 1999 regulations state that a change of placement occurs if the child is removed for more than 10 consecutive days or the child is subjected to a series of removals that constitute a pattern of exclusion.
[562] Serious bodily injury is defined as bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty. See, 18 U.S.C. §1365(h)(3).
[563] 2 C.A.C. §60045(a).

		community mental health service (MH) shall review the recommendation for a mental health assessment and determine if such an assessment is necessary.
	15 days[564]	Within 15 days of receiving the referral, MH shall develop a mental health assessment plan if a mental health assessment is determined to be necessary.
	50 days[565]	MH must complete the mental health assessment within 50 days (this may change to 60 days to conform to 2004 IDEA changes) of receiving parental consent and the LEA must schedule an IEP meeting to discuss the MH assessment and recommendation within the 50 days timeline.

[564] 2 C.A.C. §60045(b).
[565] 2 C.A.C. §60045(d).

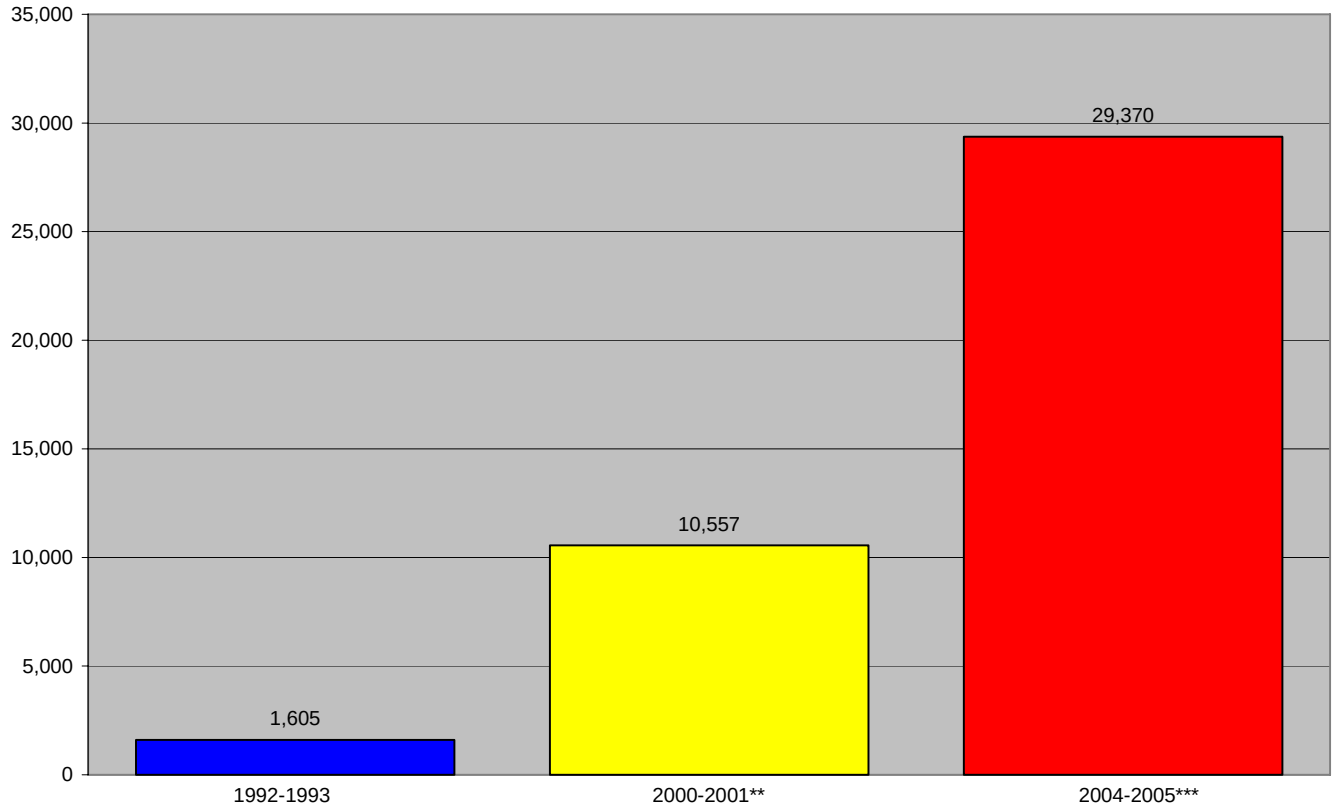
APPENDIX IV

INCREASE IN THE NUMBER OF CHILDREN WITH AUTISM IN US PUBLIC SCHOOLS*



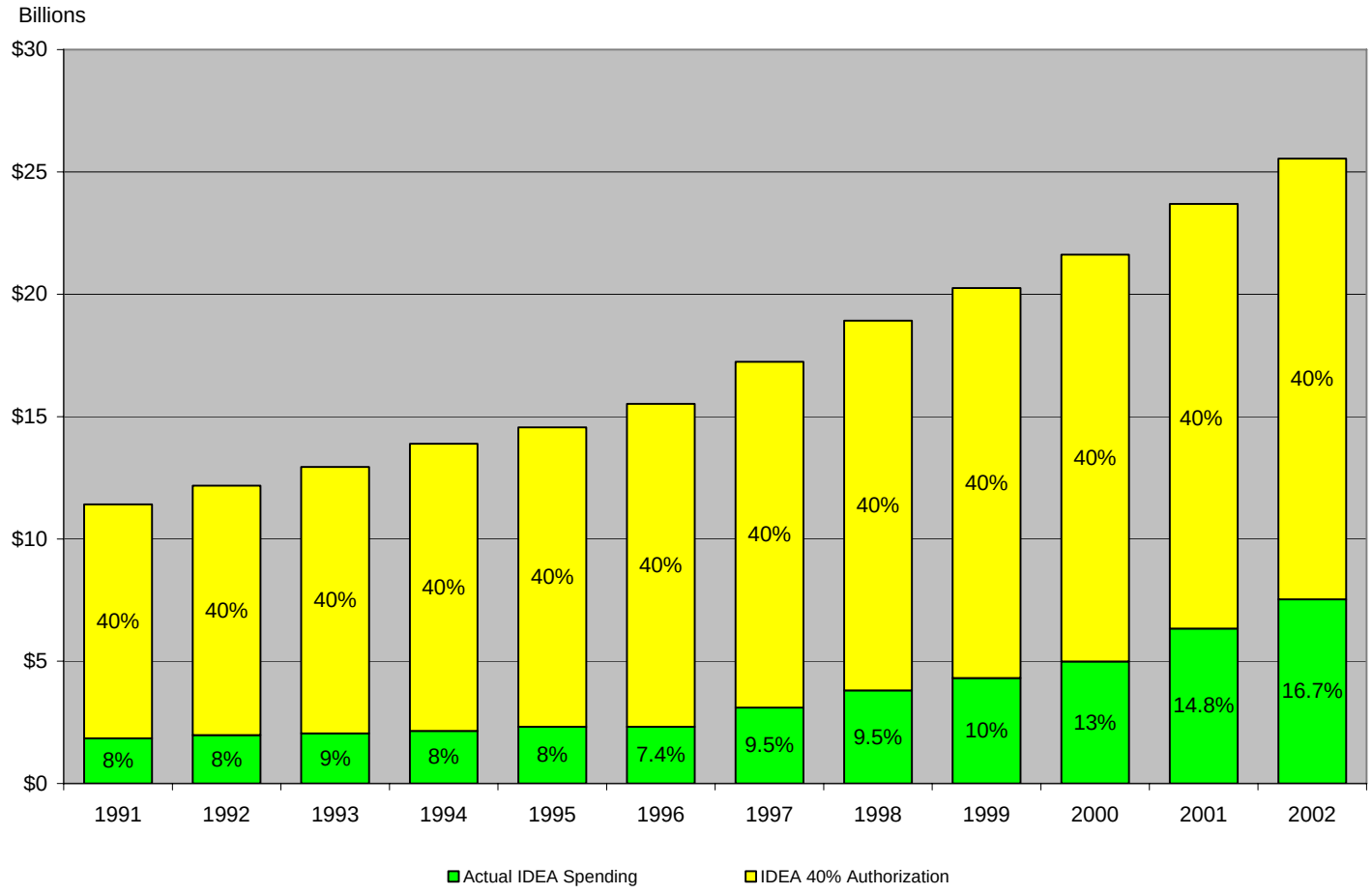
* Source, U.S. Department of Education.
** In the U.S., the number of children identified with autism rose from 12,222 in the 1992-1993 school year to 78,717 in the 2000-2001 school year, an increase of 644%.
*** The number of children with autism in the U.S. increased from 118,846 in 2002-2003 to 141,002 in the 2003-2004 school year. Source, New York Times, October 1 2004.

INCREASE IN THE NUMBER OF CHILDREN WITH AUTISM IN CALIFORNIA PUBLIC SCHOOLS*



* Source, U.S. Department of Education.
** In California, the number of children identified with autism rose from 1,605 in the 1992-1993 school year to 10,557 in the 2000-2001 school year, an increase of 668%.
*** Source, California Department of Education, Special Education Division.

CONGRESS' BROKEN PROMISE
1991-2002
Promised 40% Authorization v. Actual Expenditures



APPENDIX V

SUMMARY OF KEY PROVISIONS IN THE 2006 IDEA REGULATIONS

34 C.F.R. § 300.8(b) DEVELOPMENTAL DELAY	The definition of children aged 3 through 9 experiencing developmental delays has been changed to clarify that the use of the term "developmental delay" is subject to the conditions described in Section 300.111(b).
34 C.F.R. § 300.8(c)(9)(i) OTHER HEALTH IMPAIRMENT	The definition of other health impairment has been changed to add "Tourette Syndrome" to the list of chronic or acute health problems.
34 C.F.R. § 300.18 HIGHLY QUALIFIED SPECIAL EDUCATION TEACHERS	The definition of highly qualified special education teacher has been modified to clarify that any special education teacher teaching in a charter school must meet the certification or licensing requirements, if any, set forth in the state's public charter school law.
34 C.F.R. § 300.18(e) HIGHLY QUALIFIED SPECIAL EDUCATION TEACHERS	Authorizes states to develop a separate HOUSSE process for special education teachers so long as any adaptations would not establish a lower standard to the content knowledge requirements for special education teachers and meets all the requirements for a regular education teacher. The state may develop a HOUSSE evaluation that covers multiple subjects.
34 C.F.R. § 300.18(h) HIGHLY QUALIFIED SPECIAL EDUCATION TEACHERS	The highly qualified special education teacher requirements do not apply to private school teachers hired or contracted by LEAs to provide services to parentally placed private school children with disabilities.
34 C.F.R. § 300.30 PARENT OR GUARDIAN	The definition of parent has been revised to substitute "biological" for "natural" and the definition of "guardian" has been modified to state that the person must be authorized to act as the child's parent or authorized to make educational decisions for the child.
34 C.F.R. § 300.34(b) RELATED SERVICES	The definition of related services does not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g. mapping), maintenance of that device, or the replacement of that device.
34 C.F.R. § 300.34(b)(2) MEDICAL DEVICES	The public agency is required to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school and to routinely check the external component of the surgically implanted device to make sure it is functioning properly.

34 C.F.R. § 300.34(c) INTERPRETING SERVICES	The definition of interpreting services has been changed to clarify that the term includes transcription services such as communication access, real-time translation (CART, C-PRINT, and TypeWell) for children who are deaf or hard of hearing and special interpreting services for children who are deaf-blind.
34 C.F.R. § 300.34(c)(7) ORIENTATION AND MOBILITY SERVICES	The definition of orientation and mobility services has been changed to remove the term "travel training instruction."
34 C.F.R. § 300.34(c)(13) SCHOOL HEALTH SERVICES	The definition of school nurse services has been expanded and renamed school health services and school nurse services. The expanded definition clarifies that "school nurse services" are provided by a qualified school nurse, and "school health services" may be provided by a qualified school nurse or other qualified person.
34 C.F.R. § 300.35 SCIENTIFICALLY BASED RESEARCH	A definition of scientifically based research has been added that incorporates the definition of that term from the No Child Left Behind Act.[566]
34 C.F.R. § 300.39 SPECIAL EDUCATION	The definition of special education has been revised to remove the definition of vocational and technical education.
34 C.F.R. § 300.42 SUPPLEMENTARY AIDES AND SERVICES	The definition of supplementary aids and services has been modified to specify that aids, services, and other supports are also provided to enable children with disabilities to participate in extracurricular and non-academic settings.
34 C.F.R. § 300.101(c) FREE APPROPRIATE PUBLIC EDUCATION	The definition of a free appropriate public education (FAPE) has been revised to clarify that a free appropriate public education must be available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course, and is advancing from grade to grade.
34 C.F.R. § 300.107(a)(3) HIGH SCHOOL DIPLOMA	This section clarifies that a regular high school diploma does not include an alternative degree that is not fully aligned with the state's academic standards, such as a certificate or a general education development credential (GED).

[566] The No Child Left Behind Act, 20 U.S.C. §7801(37), defines scientifically based research as, ". . .(A) research that involves the application of rigorous, systematic and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs; and (B) includes research that (i) employs systematic, empirical methods that draw on observation or experiment; (ii) involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn; (iii) relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators; (iv) is evaluated using experimental or quasi-experimental designs in which individuals, entities, programs or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls; (v) ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings; and (vi) has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review."

34 C.F.R. § 300.107(a) SUPPLEMENTARY AIDS AND SERVICES	This section has been revised to specify the steps each public agency must take, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide non-academic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.
34 C.F.R. § 300.108(a) PHYSICAL EDUCATION	This section has been revised to specify that physical education must be made available to all children with disabilities receiving a free appropriate public education, unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades.
34 C.F.R. § 300.113 MEDICAL DEVICES	This section requires local educational agencies to routinely check hearing aids and external components of surgically implanted medical devices to ensure that hearing aids are functioning properly and that external components of surgically implanted medical devices are functioning properly but local educational agencies are not responsible for the post-surgical maintenance, programming, or replacement of a medical device that has been surgically implanted.
34 C.F.R. § 300.116 LEAST RESTRICTIVE ENVIRONMENT	The phrase "unless the parent agrees otherwise" has been removed from this section with respect to the least restrictive environment.
34 C.F.R. § 300.117 SUPPLEMENTARY AIDS AND SERVICES	This section has been modified to ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to participate with non-disabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child.
34 C.F.R. § 300.138 PRIVATE SCHOOL TEACHERS	This section has been revised to clarify that private elementary school teachers are not required to meet the highly qualified special education teacher requirements in Section 300.18.
34 C.F.R. § 300.140 CHILD FIND	This section has been modified to clarify that the due process complaint procedures and compliance complaint procedures apply to the child find requirements.
34 C.F.R. § 300.148(b) DUE PROCESS PROCEDURES	This section has been added to clarify the disagreements between a parent and a public agency regarding the availability of a program appropriate for a child with a disability, and the question of financial reimbursement, are subject to the due process procedures.

34 C.F.R. § 300.152(a)(3) STATE COMPLAINT PROCEDURES	This section has been revised to clarify that each state education agency's complaint procedures must provide the public agency with an opportunity to respond to a complaint including, at a minimum, an opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation.
34 C.F.R. § 300.152(b)(1) STATE COMPLAINT PROCEDURES	This section has been revised to clarify that it would be permissible to extend the sixty (60) day timeline for filing a state complaint if the parent and the public agency agree to engage in mediation or to engage in other alternative means of dispute resolution.
34 C.F.R. § 300.152(c) STATE COMPLAINT PROCEDURES	This section has been revised to clarify that if a written complaint is received that is also the subject of a due process hearing, the state must set aside any part of the compliance complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the compliance complaint that is not part of the due process hearing must be resolved using the time limit and procedures described in the state complaint procedures.
34 C.F.R. § 300.154(b) PARENTAL CONSENT	This section has been revised to clarify that the public agency must obtain parental consent each time access to the parent's public benefits or insurance is sought and notify parents that refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.
34 C.F.R. § 300.156(e) HIGHLY QUALIFIED EMPLOYEES	This section has been revised to clarify that a judicial action on behalf of a class of students may not be filed alleging the failure of a state education agency or local educational agency employee to be highly qualified.
34 C.F.R. § 300.172 INSTRUCTIONAL MATERIALS	This section has been revised to make clear that states must adopt the National Instructional Materials Accessibility Standard published as Appendix C to the regulations.
34 C.F.R. § 300.177 11th AMENDMENT IMMUNITY	This section makes clear that a state that accepts funds under the IDEA waives its immunity under the 11th Amendment of the U.S. Constitution from suit in federal court for violation of Part B of the IDEA.
34 C.F.R. § 300.300(a) INFORMED CONSENT	This section has been changed to provide that the public agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability must make reasonable efforts to obtain informed consent from the parent of the child before conducting the evaluation.

34 C.F.R. § 300.300(a)(3) INITIAL EVALUATION	This section has been changed to clarify that the public agency does not violate its obligations if it declines to pursue the evaluation where the parent has failed to provide consent for the initial evaluation.
34 C.F.R. § 300.300(b) INFORMED CONSENT	This section has been modified to require a public agency to make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services.
34 C.F.R. § 300.300(c)(1) RE-EVALUATION	This section has been modified to clarify that if a parent refuses to consent to a reevaluation, the public agency may, but is not required to, pursue the reevaluations by using the consent override procedures in Section 300.300(a)(3), and the public agency does not violate its obligations if it declines to pursue the evaluation or reevaluation.
34 C.F.R. § 300.300(d)(4) PRIVATE SCHOOL STUDENTS	This section has been added to provide that if a parent of a child who is home schooled or placed in a private school by the parent at the parent's expense, does not provide consent for initial evaluation or a reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures and is not required to consider the child eligible for services under the requirements relating to parentally placed private school children with disabilities.
34 C.F.R. § 300.300(d)(5) INFORMED CONSENT	This section has been added to clarify that in order for a public agency to meet the reasonable efforts requirement to obtain informed parental consent for an initial evaluation, initial services, or a reevaluation, a public agency must document its attempt to obtain parental consent using the procedures in Section 300.322(d).
34 C.F.R. § 300.307 RESPONSE TO INTERVENTION (RTI)	This section has been revised to clarify that the criteria adopted by the state for identifying children with specific learning disabilities must permit the use of a process based on the child's response to scientific, research based intervention.
34 C.F.R. § 300.308 SPECIFIC LEARNING DISABILITY	This section has been changed to require the eligibility group for children suspected of having specific learning disabilities to include the child's parents and a team of qualified professionals, which must include the child's regular teacher or a regular classroom teacher qualified to teach a child of his or her age, and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech language pathologist or remedial reading teacher.

34 C.F.R. § 300.309(a) SPECIFIC LEARNING DISABILITY	This section has been changed to clarify that the group of professionals may determine that a child has a specific learning disability if the child does not achieve adequately for the child's age or meet state approved grade level standards in one or more of eight areas when provided with learning experiences and instruction appropriate for the child's age or state approved grade level standards.
34 C.F.R. § 300.309(b) SPECIFIC LEARNING DISABILITY	This section has been changed to clarify that in order to ensure that underachievement in a child suspected having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation, data that demonstrate that prior to, or as part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel.
34 C.F.R. § 300.309(c) SPECIFIC LEARNING DISABILITY	This section has been changed to provide that the public agency must promptly request parental consent to evaluate a child suspected of having a specific learning disability who has not made adequate progress after an appropriate period of time when provided appropriate instruction, and whenever a child is referred for an evaluation.
34 C.F.R. § 300.310 OBSERVATION OF STUDENT	This section has been revised to remove the phrase "trained in observation", and to specify that the public agency ensure that the child is observed in the child's learning environment.
34 C.F.R. § 300.311(a)(5) SPECIFIC LEARNING DISABILITY	This section has been modified and expanded to state that specific documentation for the eligibility determination of specific learning disability must show that the child is not achieving adequately for the child's age or is not meeting state approved grade level standards and the child is not making sufficient progress to meet age or state approved grade level standards.
34 C.F.R. § 300.311(a)(6) SPECIFIC LEARNING DISABILITY	This section has been modified to require a statement of the specific learning disability eligibility determination of the group concerning the effects of visual, hearing or motor disability, mental retardation, emotional disturbance, cultural factors, environmental or economic disadvantage or limited English proficiency on the child's achievement level.
34 C.F.R. § 300.311(a)(7) RESPONSE TO INTERVENTION (RTI)	This section has been added to provide that if a child has participated in a process that assesses the child's response to scientific research based intervention, the documentation must include the instructional strategies used and the student centered data collected and documentation that the child's parents were notified about the state's policies regarding the amount and nature of student performance data that will be collected and the general education services that will be

	provided, strategies for increasing the child's rate of learning and the parent's right to request an evaluation.
34 C.F.R. § 300.322 DOCUMENTATION OF PARENT CONTACTS	This section has been revised to specify examples of the records a public agency must keep of its attempts to involve the parents in IEP meetings and to take whatever action is necessary to ensure that the parent understands the proceedings of the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. Examples of documentation include: detailed records of phone calls made or attempted and the results of those calls, copies of correspondence sent to parents and responses received and detailed records of home visits.
34 C.F.R. § 300.323(d) IEP RESPONSIBILITIES	This section has been revised to require public agencies to ensure that each regular teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of a child's IEP, is informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications and supports that must be provided for the child in accordance with the child's IEP.
34 C.F.R. § 300.323(e) TRANSFER STUDENTS	This section clarifies the requirements regarding IEPs for children who transfer between public agencies.
34 C.F.R. § 300.324(a)(4) IEP	This Section has been modified to require that if changes are made to a child's IEP without an IEP meeting, the child's IEP team must be informed of the changes.
34 C.F.R. § 300.324(b) IEP	This section has been modified to clarify that in conducting a review of the child's IEP, the child's IEP team must consider the same factors it considered when developing the child's IEP.
34 C.F.R. § 300.502(b)(5) INDEPENDENT EVALUATION	This section has been added to make clear that a parent is entitled to only <u>one</u> independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.
34 C.F.R. § 300.502(c) INDEPENDENT EVALUATION	This section has been changed to clarify that if a parent obtains an independent evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the pubic agency must consider the evaluation, if it meets agency criteria, in any decision made with respect to the provision of the free appropriate public education of the child.

34 C.F.R. § 300.504 PROCEDURAL SAFEGUARDS	This section has been revised to add that a copy of the procedural safeguards must be given upon receipt of the first due process complaint or compliance complaint or if discipline procedures are implemented.
34 C.F.R. § 300.506(b) MEDIATION	This section deleted the words "confidentiality pledge" in the context of mediation and clarified that discussions that occur in mediation may not be used in court proceedings.
34 C.F.R. § 300.509 DUE PROCESS MODEL FORMS	This section has been revised to clarify that each state education agency must develop model forms but may not require the use of the forms for filing for due process hearings.
34 C.F.R. § 300.510(b)(1) DUE PROCESS HEARING	This section has been changed to state that a due process hearing may occur (in lieu of must occur) by the end of the resolution period if the parties have not resolved the dispute that formed the basis for the due process complaint.
34 C.F.R. § 300.510(b)(3) RESOLUTION MEETING	This section has been added to provide that, except where the parties have jointly agreed to waive the resolution process or to use mediation, the failure of a parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.
34 C.F.R. § 300.510(b)(4) DUE PROCESS HEARING	This section has been added to provide that if a local educational agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made, and documented using the procedures in Section 300.322(d), the LEA may, at the conclusion of the thirty (30) day resolution period, request that a hearing officer dismiss the parent's due process complaint.
34 C.F.R. § 300.510(b)(5) DUE PROCESS HEARING	This section has been added to provide that if the LEA fails to hold the resolution meeting within fifteen (15) days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timelines.
34 C.F.R. § 300.510(c) RESOLUTION MEETING	This section has been added to specify the following exceptions to the thirty (30) day resolution period: 1. Both parties agree in writing to waive the resolution meeting; 2. After either the mediation or resolution meeting starts, but before the end of the thirty (30) day period, the parties agree in writing that no agreement is possible; or 3. If both parties agree in writing to continue the mediation at the end of the thirty (30) day resolution period, but later, the parents or public agency withdraws from the mediation process.

34 C.F.R. § 300.510(d)(2) SETTLEMENT AGREEMENT	This section has been expanded to allow enforcement of a written settlement agreement in any state court of competent jurisdiction or through any other state mechanism that permits the parties to seek enforcement of resolution agreements.
34 C.F.R. § 300.516(b) JUDICIAL REVIEW	This section has been clarified to state that the ninety (90) day timeline for filing a civil action begins on the date of the decision of the hearing officer or the decision of the state review official.
34 C.F.R. § 300.518 PART C SERVICES – INFANT SERVICES	This section has been revised to provide that if a complaint involves an application for initial services under Part B from a child who is transitioning from Part C of the Act and is no longer eligible for Part C services because the child has reached three years of age, the public agency is not required to provide the Part C services that the child has been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under Section 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parties and the public agency.
34 C.F.R. § 300.520(b) AGE OF MAJORITY	This section has been revised to more clearly state that a state must establish procedures for appointing the parent of the child with a disability, or if the parent is not available, another appropriate individual, to represent the educational interests throughout the child's eligibility under Part B of the Act if, under state law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.
34 C.F.R. § 300.530(d)(4) DISCIPLINE OF STUDENT	This section has been revised to remove the reference to school personnel, in consultation with at least one of the child's teachers, determining the location in which the services will be provided (it now refers only to the provision of services) with respect to the removal of a child with a disability from the child's current placement for ten (10) school days in the same school year.
34 C.F.R. § 300.530(d)(5) DISCIPLINE OF STUDENT	This section has been revised to remove the reference to the IEP team determining the location in which services will be provided and now refers only to the provision of services.
34 C.F.R. § 300.530(e)(3) DISCIPLINE OF STUDENT	This section has been added to provide that if the LEA, the parent, and the members of the child's IEP team determine that the child's behavior was the direct result of the LEA's failure to implement the child's IEP, the LEA must take immediate steps to remedy those deficiencies.

34 C.F.R. § 300.530(h) DISCIPLINE OF STUDENT	This section has been changed to specify that on the date on which a decision is made to make a removal that constitutes a change in the placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents with the procedural safeguards notice.
34 C.F.R. § 300.532(a) DISCIPLINE OF STUDENT	This section has been modified to clarify that the hearing disputing the discipline of a child is requested by filing a due process complaint.
34 C.F.R. § 300.532(c)(3) DISCIPLINE OF STUDENT	This section has been modified to provide that unless the parents and an LEA agree in writing to waive a resolution meeting, or agree to use the mediation process, the resolution meeting must occur within seven (7) days of receiving notice of the due process complaint and the hearing may proceed within fifteen (15) days of receipt of the due process complaint unless the matter has been resolved to the satisfaction of both parties when an expedited due process hearing is requested.
34 C.F.R. § 300.536(a)(2) DISCIPLINE OF STUDENT	This section has been revised to remove the requirement that a child's behavior must have been a manifestation of the child's disability before determining that a series of removals constitutes change in placement.
34 C.F.R. § 300.536(b) DISCIPLINE OF STUDENT	This section has been added to clarify that the public agency makes the determination, on a case by case basis, whether a pattern of removals constitutes a change in placement and that the determination is subject to review through the due process and judicial process.
34 C.F.R. § 300.537 ENFORCEMENT OF WRITTEN AGREEMENT	This section has been added to clarify that judicial enforcement of a written agreement reached as a result of a mediation or resolution meeting does not prevent the state education agency from using other mechanisms to seek enforcement of that agreement, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a state court of competent jurisdiction or in a district court of the United States.
34 C.F.R. § 300.622(a) DISCLOSURE OF INFORMATION	This section has been changed to provide that parental consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies, unless the information is contained in educational records, and the disclosure is authorized without parental consent under FERPA regulations.

34 C.F.R. § 300.622(b)(1) DISCLOSURE OF INFORMATION	This section has been added to clarify that parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of Part B of the IDEA or the IDEA regulations.
34 C.F.R. § 300.622(b)(2) DISCLOSURE OF INFORMATION	This section has been added to provide that parental consent must be obtained before personally identifiable information is released to officials of participating agencies that provide or pay for transition services.
34 C.F.R. § 300.622(b)(3) DISCLOSURE OF INFORMATION	This section has been added to require that, with respect to parentally placed private school children with disabilities, parental consent must be obtained before any personally identifiable information is released between officials in the LEA where the private school is located and the LEA of the parent's residence.