Special Education Law: The School Board Perspective

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Print this page

I. THE REHABILITATION ACT OF 1973 AND THE AMERICANS WITH DISABILITIES ACT OF 1993

A. Definition of "Individual with Disabilities" under the Rehabilitation Act, 29 U.S.C. §706(8)(B).

1. "handicapped person" 34 C.F.R. §104.3(j)(1)

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

2. "physical or mental impairment" 34 C.F.R. §104.3(j)(2)(i)

". . . (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

3. "record of such an impairment" 34 C.F.R. §104.3(j)(2)(iii)

". . . has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."

4. "regarded as having an impairment" 34 C.F.R. §104.3(j)(2)(iv)

". . . (A) has a physical or mental impairment that does not substantially limit major life activities but that is

treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined . . . but is treated by a recipient as having such an impairment."

5. Amendments to Section 504 as contained in the ADA.

a. Any student with disabilities currently engaged in the illegal use of drugs or in the use of alcohol who is subjected to disciplinary action as a result of that use shall be treated as a non-disabled student. No hearing rights are applicable in these situations. 29 U.S.C. §706(8)(C)(iv).

B. ADA Definition of Disability -- 42 U.S.C. §12131(2)

"The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

C. §504 Evaluation Procedures

1. An evaluation is required prior to an initial placement and prior to any change in placement. 34 C.F.R. §104.35.

2. Prior notice of evaluation procedures must be given to the parents in a language they can understand. Ogden City (UT) Sch. Dist, 21 IDELR 387 (OCR 1994).

3. No timelines are specified for conducting an initial evaluation or reevaluation but

a. evaluations must be conducted "in a timely manner" or in a "reasonable period of time," which is decided on a case by case basis. Letter to Saperstone, 21 IDELR 1127 (OSEP 1994).

b. Unreasonable delays deny a free appropriate public education (FAPE) and violate 34 C.F.R. §§104.33(a), (b) and 104.35(a).

c. Assessments need to be sensitive to a student's language deficiencies. West Las Vegas (NM), 20 IDELR 1409 (OCR 1993).

4. The evaluations must be sufficient to define the disability adequately and its effect on the student's education. 34 C.F.R. §104.35.

a. Trained personnel must administer and interpret the tests. Taunton (MA) Sch. Dist., 16 EHLR 128 (OCR 1989).

b. Parents may choose their own, independent evaluator as long as he/she qualifies under the district criteria.

(1) A district cannot require a parent/student to provide a medical statement at their expense. Letter to Veir, 20 IDELR 864 (OCR 1993).

D. §504 Placement Procedures

1. Students with disabilities are entitled to FAPE. 34 C.F.R. §104.33(a).

2. The child's placement may be in regular education classes or in special education classes. 34 C.F.R. §104.33(b).

a. In order to avoid violating §504/ADA, a school system must be able to justify utilizing special education over regular education classes. Fairbanks (AK) North Star Borough Sch. Dist., 21 IDELR 856 (OCR 1994).

b. Students should be integrated to the maximum extent appropriate with their peers. 34 C.F.R. §104.34(a).

3. A written §504 plan which complies with IDEA will satisfy §504 requirements. 34 C.F.R. §104.33(b)(2).

E. §504 Procedural Safeguards

1. Notice of the existence of education programs for disabled must be given. 34 C.F.R. §104.32.

2. Notice of rights must be provided, including the rights of the parents to receive notice, to review records and to have access to a hearing process to resolve disputes. 34 C.F.R. §104.36.

3. Using the IDEA hearing procedure will satisfy §504 hearing requirements. 34 C.F.R. §104.36.

4. Be sure that the school division has a Section 504 procedure and a hearing procedure.

F. ADA Requirements

1. ADA has a complaint process separate from §504. 28 C.F.R. §§35.170-78.

2. The ADA must be construed to afford, at a minimum, the rights available under §504. 28 C.F.R. §35.103.

3. Failure to assign an ADA coordinator to oversee efforts to comply with the ADA violates 28 C.F.R. §35.107. Fort Worth (TX) Indep. Sch. Dist., 19 IDELR 856 (OCR 1993).

G. Attention Deficit Hyperactivity Disorder ("ADHD") or ("ADD")

1. Duty to Evaluate: Because ADD or ADHD may affect a student's academic performance and may be a disability, a school has an affirmative duty to ensure FAPE by assessing/evaluating the condition and the student's placement. Romulus (MI) Community Sch., 18 IDELR 81 (OCR 1991).

2. Suggestion: Even if there exists an outside diagnosis, the district should conduct a separate evaluation for ADHD for purposes of special education services.

3. Administering medication is considered a related service under §504 and a school should ensure that ADHD students receive their medicine in order to avoid violating 34 C.F.R. §104.33. San Ramon Valley (CA) Unified Sch. Dist., 18 IDELR 465 (OCR 1991).

H. Diabetic Children

1. OCR has focused on complaints involving diabetic children recently.

2. Issues that need to be addressed are blood-sugar testing, administration of insulin and glucagon and training of staff. See Va. Code §8.01-225A9.

3. There is statutory immunity from ordinary negligence for administration of glucagon and insulin by a school board employee in some circumstances. Va. Code §8.01-225A9.

II. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 20 U.S.C. §§1400, ET SEQ. ("IDEA"); 34 C.F.R. Part 300; VA. CODE §§22.1-213, ET SEQ.

A. Note: The State Regulations were revised effective January 1, 2001. The cites in this article are to the regulations current as of April 14, 2000.

B. "The term 'children with disabilities' means children --

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services." 20 U.S.C. §1401(3)(A) (hereinafter cited by section number); 34 C.F.R. §300.7.

C. The Term Includes Children Ages 2 to 21
(Va. Code §§22.1-213.)

D. Evaluation and Eligibility Procedures
(§1412(a)(3)(A); §1412(a)(6)(B); 34 C.F.R. §300.530-536; State Regulations Governing Special Education Programs for Children with Disabilities ("State Regs.") Part I, Definitions.)

1. Children with disabilities must be sought out by school divisions for identification. §1412(a)(3)(A); 34 C.F.R. §300.125.

2. All school divisions must establish procedures to screen children within its jurisdiction for possible identification. State Regs. §3.2.C.

3. A child study committee must meet within 10 administrative working days of a referral for possible special education services. State Regs. §3.2.C(3) & (4).

4. The child study committee decides whether to refer children for a special education evaluation. State Regs. §3.2.D.

5. The evaluation process begins with written notice to and consent by the parents for the evaluation. Notice of rights is given at this stage. §1414(a)(1)(C); State Regs. §3.2.E; 34 C.F.R. §§300.530-543.

6. Evaluations must be completed and eligibility held within sixty-five administrative working days. State Regs. §3.2.E.6. This timeline is unchanged by the 1999 Federal Regulations.

7. Assessments must be made by trained evaluators. Tests must not be racially or culturally discriminatory, must be validated, and must be administered in the child's native language or mode of communication. §1414(b)(2) and (3). State Regs. §3.2.E.2.a; 34 C.F.R. §300.532.

8. Parents may obtain an independent educational evaluation. 34 C.F.R. §300.502. Parents are entitled to reimbursement for only one independent evaluation. Lawyer v. Chesterfield County Sch. Bd., Civil Action No. 3:92CV760, 20 IDELR 172 (E.D. Va. 1993).

9. Eligibility determinations are made by a team of qualified individuals and the parent of the child. §1414(b)(4)(A); 34 C.F.R. §300.534 (a)(1).

10. The parent must be given a copy of the evaluation report and the documentation of the eligibility determination. §1414(b)(4)(B); 34 C.F.R. §300.534(a)(2).

11. The eligibility committee must produce a written report and give written notice of the decision to the parents. State Regs. §3.2.F.4; 34 C.F.R. §300.534(a)(2).

12. The determination of eligibility cannot be based predominantly on a problem arising from a lack of instruction in reading or math or limited English proficiency. §1414(b)(5); 34 C.F.R. §300.534(b).

13. An evaluation must be conducted before determining that a child with a disability is no longer eligible. 20 U.S.C. §1414(c)(5); 34 C.F.R. §500.534(c).

14. Parents must participate in the decision regarding which evaluations will be performed because this decision is made by the IEP team. §1414(c)(1).

15. Additional evaluations are not required to determine continued eligibility if notice of this fact is given to the parents, reasons are supplied, the parents are advised of their right to require an evaluation and the parents do not desire an evaluation. §1414(c)(4); 34 C.F.R. §533(d).

E. Free Appropriate Public Education ("FAPE")
(20 U.S.C. §1401(18); 34 C.F.R. §300.13, 300.300?.313; State Regs. Part I, Definitions; see also Va. Code §22.1-213.)

1. Definition - special education and related services which:

a. Are provided at no cost and under public supervision;

b. Meet state standards;

c. Are based on an individualized education program ("IEP");

d. Include preschool, elementary, secondary and vocational education;

2. An appropriate education does not require maximization of services. Board of Education v. Rowley, 458 U.S. 176 (1982).

F. The Individualized Education Plan
(20 U.S.C. §1401(11); 34 C.F.R. §300.346-.347)

1. An IEP is appropriate if:

a. It is developed through the IDEA's procedures; and

b. The designated services are designed to confer educational benefit. Board of Education v. Rowley, supra.

2. The IEP must include the following items (20 U.S.C. §1414(d)(1)(A); 34 C.F.R. §300.346-.347).

a. Present level of educational performance, including

(1) the affect of the child's disability on the child's involvement and progress in the general curriculum; or

(2) for preschool children, how the disability affects the child's participation in appropriate activities.

b. Statement of measurable annual goals, including benchmarks or short-term objectives related to:

(1) meeting the child's needs that result from the disability so that the child can be involved in and progress in the general curriculum; and

(2) meeting the other education needs that result from the disability;

c. Statement of the special education and related services and supplementary aids and services to be provided to the child and a statement of program modifications so that the child:

(1) will advance toward attaining the annual goals;

(2) be involved in and progress in the general curriculum and participate in extracurricular and other nonacademic activities; and

(3) be educated and participate with other children with disabilities and nondisabled children;

d. Statement of the extent, if any, to which the child will not participate with nondisabled children in the regular class or activities;

e. A statement of modifications needed for statewide or district-wide testing or, if the student will not participate, a statement of why the assessment is not appropriate and how the child will be assessed;

f. A statement of the beginning date for services and modifications, anticipated frequency, location and duration (Note: location does not necessarily mean school site; it means type of program such as general education);

g. At age 14 and annually thereafter, a statement of the transition service needs and at age 16, or younger if needed, according to the IEP team, a statement of transition services and agency linkages;

h. At least one year before the child reaches the state age of majority, a statement that the child has been informed of the transfer of rights, if any, that will transfer at the age of majority; and

i. A statement of:

(1) how the progress toward the annual goals will be measured; and

(2) how often progress reports will be provided to the parents, but no less frequently than are provided to parents of nondisabled children

(a) the progress reports must include:

i) the child's

progress toward annual goals and ii) the extent to w

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to achieve the goals by year-end. §1414(d)(1)(A);

C.F.R. §3000.347(a)(7).

3. The IEP Team will consist of :

a. The parents,

b. At least one regular education teacher, if the child participates in regular education,

(1) the regular education teacher will, to the extent appropriate, participate in the IEP development including the determination of appropriate positive behavioral interventions and strategies, supplementary aids and services, program modifications and support for school personnel (§1414(d)(3)(C)); 34 C.F.R. §§300.344,

c. At least one special education teacher or at least one special education provider,

d. A representative of the Local Education Agency ("LEA") who is:

(1) qualified to provide or supervise the provision of specially designed instruction,

(2) is knowledgeable about the general curriculum, and

(3) is knowledgeable about the availability of resources;

e. An individual who can interpret the instructional implications of evaluation results, although this member may be one of the other IEP team members other than the parent;

f. Other individuals with knowledge or expertise regarding the child as deemed appropriate by the parent or LEA; and

g. Whenever appropriate, the child. §1414(d)(1)(B); 34 C.F.R. §300.344.

4. The LEA must have in effect at the beginning of each school year an IEP for each child with a disability in its jurisdiction. §1414(d)(2); 34 C.F.R. §300.342.

5. The IEP team must consider:

a. The strengths of the child and the concerns of the parents for enhancing the education of the child. §1414(d)(3)(A)(I); 34 C.F.R. §300.346(a)(1)(i);

b. The results of the initial evaluation or most recent evaluation. (§1414(d)(3)(A)(ii); 34 C.F.R. §300.346(a)(1)(ii);

c. Additional considerations:

(1) for children with behavioral concerns which impede learning for the child or others, interventions, strategies and supports to address the behaviors;

(2) for children who are blind or visually impaired, instruction in Braille, unless the IEP team determines after an evaluation that Braille is not appropriate;

(3) the communication needs of the child and for the deaf or hard of hearing, consideration of the language and communication needs, opportunities for direct communication in the child's language and communication mode, academic level and full range of needs; and

(4) whether the child requires assistive technology devices and services. §1414(d)(3)(B); 34 C.F.R. §300.346(a)(2).

6. IEP Review and Revision (§1414(d)(4); 34 C.F.R. §300.346):

a. The IEP must be reviewed periodically but not less frequently than annually to determine whether the annual goals are being achieved and

b. The IEP must be revised to address:

(1) Any lack of expected progress toward the annual goals and in the general curriculum,

(2) The results of any reevaluation;

(3) Information provided by the parents;

(4) The child's anticipated needs; or

(5) Other matters. §1414(d)(4)(A);

c. The regular education teacher must participate in the review and revision of the IEP. §1414(d)(4)(B); 34 C.F.R. §300.346(d).

7. If a participating agency does not provide identified transition services, the IEP team must meet and develop alternative strategies to meet the transition objectives. §1414(d)(5); 34 C.F.R. §300.348.

8. If the required IEP components are set forth in one area of the IEP, there is no need to include the information under another component. §1414(e); 34 C.F.R. §300.346(e).

9. The LEA shall take steps to ensure that one or both parents are present or afforded the opportunity to attend the IEP meeting. §1414(f); 34 C.F.R. §300.345. This requirement includes:

a. Notifying parents of the meeting, its purpose and scheduled participants;

b. Scheduling at a mutually convenient time;

c. Considering telephonic meetings, if necessary;

d. Documenting efforts by LEA to include parents in the IEP process; and

e. The meeting may take place without the parents if there is documented refusal by the parents to be involved.

10. The IEP must be developed within 30 days of the eligibility determination. State Regs. §3.3.B.2.a(2).

11. The LEA is not responsible for insuring that IEP goals and objectives are met; however, the benefit received by a handicapped child from implementation of the IEP must not be trivial. Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988).

12. It is important that the LEA document both success in attaining IEP goals and the benefit obtained from the educational program.

G. Children with Disabilities in Adult Prisons

1. There is no requirement for children with disabilities in adult prisons to participate in statewide or district-wide assessments;

2. There is no requirement for transition planning if eligibility will end because of their age before they will be released from prison; and

3. If a child is convicted as an adult and is in an adult prison, the IEP team may modify the IEP or placement without regard to general education considerations and the least restrictive environment provision if the State can demonstrate a bona fide security or compelling phenological interest that cannot otherwise be accommodated. §1414(d)(6).

H. Related Services
(§1401(22); 34 C.F.R. §300.24; State Regs. Part I, Definitions)

1. A student is entitled to receive related services if:

a. The child is identified as disabled under the Act;

b. The related service is necessary for the child to benefit from a special education program; and

c. The service is not a medical one. Irving Independent School District v. Tatro, 468 U.S. 883 (1984).

2. Examples of related services -- counseling, speech, recreation, transportation, etc. The Reauthorized IDEA includes "orientation and mobility services" as related services. §1401(22); 34 C.F.R. §300.22.

3. Extensive nursing services are required under the IDEA. Cedar Rapids Community School District v. Garret F., __ U.S. __ (1999).

I. Placement Alternatives and the Least Restrictive Environment
(§1412(a)(5); 34 C.F.R. §300.550-556; State Regs. §3.3.A.2).

1. Range of services: Resource; self-contained; special school for handicapped only; residential facility; homebound; education in the hospital.

2. Custodial care is not an educational service which the school division must provide. Matthews by Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984); Burke County School Board v. Denton, 895 F.2d 973 (4th Cir. 1990).

3. A residential placement is required when no less restrictive alternative will produce benefit. Matthews by Matthews v. Davis, supra.

4. The LEA has the responsibility for selecting the placement site, not the parents. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987).

5. While the neighborhood school is the preferred school for attendance, it is not always the required location for the delivery of services. Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir), cert. denied, 502 U.S. 859 (1991); Pinkerton v. Moye, 509 F. Supp. 107 (W.D. Va. 1981).

6. In order for a student with disabilities to participate in the general education class, he or she must be able to benefit from the instruction in that class. Loudoun County School Board v. Hartmann, 118 F.3d 996 (4th Cir. 1997), cert. denied, 118 S. Ct. 688 (1998).

7. Additional rules now apply for children placed by their parents in private schools when a free appropriate public education is available in the public school.

> a. The LEA must expend a proportionate amount of federal funds, consistent with the numbers of these children, to provide special education and related services to children with disabilities placed by their parents in a private school. §1412(a)(10)(A)(I); 34 C.F.R. §300.453.
>
> b. There is no individual entitlement to services by these privately enrolled children so long as total funds expended on some of the private school children equals the proportionate share of total federal funds; 34 C.F.R. §§300.454(a).
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> c. Services may be provided on the site of the private school, even if a parochial

school, so long as there is no conflict with law. §1412(a)(10)(A)(II); 34 C.F.R. §300.456.

J. Tuition Reimbursement under the Act (Va. Code §22.1-216)

1. Tuition assistance is provided when the LEA cannot meet the child's educational needs in a public program. Burlington School Committee v. Dept. of Education, 471 U.S. 359 (1985); see also 34 C.F.R. §300.349; State Regs. §3.3.B.8.

2. Tuition assistance may be ordered for a program which is not state?approved. Florence County School District Four v. Carter, 510 U.S. 7, 114 S. Ct. 361 (1993).

3. In certain situations, parents may make the placement themselves and seek reimbursement from the LEA. Burlington School Committee v. Department of Education, supra.

a. Test for tuition reimbursement:

(1) The LEA's IEP must be found to be inappropriate; and

(2) The placement made by the parents must be shown to be appropriate. Id.

b. Rules have been established in cases where the students are placed by their parents in private schools and for whom tuition reimbursement is subsequently sought from the school district.

(1) The first rule regarding these placements does not reflect a change. There is no obligation for the school district to pay for parental placements in private schools if the school district has made a free appropriate public education available to the child with disabilities. §1412(a)(10)(C); 34 C.F.R. §300.403.

(2) The school district will be liable for the private school tuition only if a hearing officer or the court finds that the school district had failed to offer a free appropriate public education. §1412(a)(10)(C)(ii); Hall v. Vance County Board of Education, supra; Board of Education of Cabell County v. Dienalt, 843 F.2d 813 (4th Cir. 1988).

c. Tuition reimbursement for private school placements made by the parents will be reduced or denied in total if:

(1) At the most recent IEP meeting or at least 10 business days before the child was removed from the public schools, the parent did not inform the IEP team or school district, as appropriate, of:

(a) the rejection of the school district's placement,

(b) their concerns with the IEP, and

(c) their intent to place the child in private school at public expense. §1412(a)(10)(C)(iii); 34 C.F.R. §300.403(d).

d. This limitation will not apply if:

(1) the parents are illiterate,

(2) physical or emotional harm would occur to the student,

(3) the school prevented the parent from providing notice or

(4) the school failed to advise the parents that they had to give written notice. §1412(a)(10)(C)(iv).

e. Tuition may also be reduced or denied if, prior to the removal to private schools, the school district informed the parents through notice requirements of the intent to evaluate the child and the child was not made available for an evaluation. §1412(a)(10)(C)(iii)(II); 34 C.F.R. §300.403(d),

f. Upon a judicial finding that the parents have acted unreasonably. §1412(a)(10)(C)(iii)(III).

g. The parents' violation of the status quo provision of §1415(j) does not automatically result in a waiver of their reimbursement rights. Burlington School Committee v. Department of Education, supra; Florence County School District v. Carter, supra.

h. Children placed by the School District in Private Schools

(1) Students who are placed privately by the school district must be provided a free appropriate public education at no cost to the parents. §1412(a)(10)(B)(I); 34 C.F.R. §300.400-402.

III. EXTENDED SCHOOL YEAR SERVICES UNDER THE IDEA

A. Extended Year Services ("ESY") Must Be Provided to Qualified Students with Disabilities. 34 C.F.R. §300.309.

1. Under the IDEA, a school division may not limit special education services to 180 school days. Such a limitation is contrary to a determination of the necessary components for a free appropriate public education. An inflexible 180 day limitation is at odds with considering the unique needs of the child. Battle, et al. v. Commonwealth of Pennsylvania, et al., 629 F.2d 269 (3rd Cir. 1980).

2. The failure of Congress to address extended school year services in the IDEA does not, by implication, authorize the provision of a traditional nine-month program. Georgia Association of Retarded Citizens, et al. v. McDaniel, et al., 740 F.2d 902 (11th Cir. 1984).

B. Eligibility for an Extended Year Services Is Based On the Individual Student's Needs. 34 C.F.R. §300.309.

1. The determination of whether a handicapped student requires summer school services in order to receive a free appropriate public education is made by the IEP Committee. 1978-87 EHA Rulings, EHLR 211:481 (Aug. 12, 1987); Lawyer v. Chesterfield County School Board, supra; 34 C.F.R. §300.309(a)(2).

2. Not all students require ESY. Bales v. Clarke, 523 F. Supp. 1366 (E.D. Va. 1981).

3. The need for summer school services is made each year in an IEP meeting. There is no automatic renewal or denial. Schwartz v. County of Nassau. 489 N.Y.S. 2d 274 (App. Div. N.Y. 1985).

4. The length of time that ESY services are provided must be determined on a case-by-case basis. A school division cannot allow the length of ESY services to be dictated by the schedule of a private service provider. Hamilton County Schools (TN), 18 IDELR 338 (Oct. 18, 1991).

5. Empirical proof of regression is not necessary before finding that ESY services are needed. Need for ESY services can be shown by empirical data as well as expert opinion based on professional assessment. Cordrey v. Eukert, 917 F.2d 1460 (6th Cir. 1990).

6. Factors to consider in determining whether ESY services should be offered are: (a) degree of regression,

(b) recovery time, (c) ability of parents to supplement in the summer, (d) the child's rate of progress, (e) the child's behavior and physical problems, (f) avail-ability of alternate resources, (g) peer relationships, (h) continuous educational needs, (I) vocational needs, and (j) whether the requested services are extraordinary given the child's handicap. Johnson v. Independent School District No. 4 of Bixby, Tulsa County, Oklahoma, 921 F.2d 1022 (10th Cir. 1990). See also Richfield Joint School District No. 1 (WI), 18 IDELR 168, 171 (September 9, 1991).

C. Extended Day Programs Might Be Required During the Regular School Year.

1. If regular education students are allowed to participate in an after-school Latch Key program, handicapped students must be given an equal opportunity to participate. Board of Education of the City of New York (NY), 16 EHLR 373 (Dec. 6, 1989).

2. An in-home behavior management program may be required under IDEA but is not required when a student is receiving a free appropriate public education without the home component. Burke County Board of Education v. Denton, supra.

D. Least Restrictive Environment (Sometimes Erroneously Referred to as Inclusion).

1. There is no mention in special education law of the terms inclusion or full inclusion. Courts also have not adopted the term in their decisions dealing with mainstreaming. Even the U.S. Department of Education notes that the term "inclusion" is not found in special education law and is not a defined term. OSEP Memorandum 95-9, 21 IDELR 1152 (1994).

2. Each state must establish procedures to assure that, "To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . ." 20 U.S.C. §1412(a)(5)(A).

3. The requirement to educate children with disabilities with children who do not have disabilities to the

maximum extent appropriate is restated in the Federal Regulations. 34 C.F.R. §300.550.

4. Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of the children with disabilities. 34 C.F.R. §300.551(a).

5. Placement decisions should be made at least annually, be based on an IEP and be as close as possible to the child's home. 34 C.F.R. §300.552.

6. In selecting the least restrictive environment, consideration should be given to any potential harmful effect on the child or on the quality of services that he or she needs. Id.

7. Consideration should also be given to any potential harmful effect on the education of other students. 34 C.F.R. §300.552(d).

8. § §504 Regulations

a. Students with disabilities are to be educated with non-handicapped students "to the maximum extent appropriate." 34 C.F.R. §104.34(a).

b. Consideration should also be given to the proximity to the child's home. Id.

E. Least Restrictive Environment Cases.

1. Hartmann v. Loudoun County Board of Education, 118 F.3d 996 (4th Cir. 1997), cert. denied, 118 U.S. 688 (1998). The Fourth Circuit held that an eleven year old autistic student was not appropriate for placement in a regular education class because (1) he would simply be monitoring the classes and would require a different curriculum; (2) he would not benefit from instruction in that class; and (3) his disruptive behaviors would negatively affect the education of the regular education students. The district court had found the credentials of the properly certified teachers who worked with the student to be lacking with regard to training in working with autistic students. The Fourth Circuit found, however, that "[n]ot all school systems will have the resources to hire top-notch consultants, nor will every school have the good fortune to have personnel who were involved in a major state program related to the needs of every disabled child. We note that in Virginia, there is no certification for autism. . . . [The teachers]

were clearly qualified to work with Mark as special educators. . . . To demand more than this from regular education personnel would essentially require them to become special education teachers trained in the full panoply of disabilities that their students might have. Virginia law does not require this, nor does the IDEA. . . ." The decision of the district court was reversed. The Supreme Court of the United States refused to review this case.

2. Daniel R.R. v. State Board of Education, et al., 874 F.2d 1036, 1048 (5th Cir. 1989). In determining whether a student is in the least restrictive environment, consideration should be given to (1) whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily for a given child; and (2) if not, whether the school has mainstreamed the child to the maximum extent appropriate. "[T]he Act does not require regular education instructors to devote all or most of their time to one handicapped child or to modify the regular education program beyond recognition." The factors which the court will consider in addressing this test are (1) whether consideration has been given to accommodating the child in the regular class; (2) whether the child will receive any educational benefit from regular education; and (3) what effect the child's presence has on regular education students.

3. Greer v. Rome City School District, 950 F.2d 688, 696 (11th Cir. 1991). The court adopted the Daniel R.R. test. During the development of the IEP, ". . . school officials should consider the full range of supplemental aids and services that may be provided in conjunction with regular classroom education, and they should share these considerations with the child's parents at the IEP meeting. It is not sufficient that school officials determine what they believe to be the appropriate placement for a handicapped child and then attempt to justify this placement only after the pro-posed IEP is challenged by the child's parents." The Greer court added as a consideration the cost of the supplemental aids and services. Id. at 697. (NOTE: This opinion was withdrawn when jurisdiction was questioned (956 F.2d 1025) and later reinstated (967 F.2d 78).

4. Oberti v. Bd. of Education of the Borough of Clementon School Dist., 995 F.2d 1204 (3rd Cir. 1993). Downs syndrome child was removed from the regular classroom and placed in a segregated special education class. The court adopted the Daniel R.R. test in reviewing the case rather than the Roncker test adopted

by the district court. (NOTE: The school district did not raise cost as an issue and the court did not consider cost.) The court held that Raphael was entitled to placement in a regular class because the school district did not prove by a preponderance of the evidence that he could not be satisfactorily educated in a regular classroom with supplementary aids and services. Although Raphael had been disruptive in the past, there was nothing in the record to suggest that, at the point in time the court was considering the case, he would be a behavior problem in regular classes.

5. Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993). Student who might make more educational progress in a residential placement is not entitled to that placement if it is established that the student could make educational progress in a day program. The day program allowed Daniel to live at home with the support of the parents, to have the opportunity to be educated with nondisabled peers and to interact with the members of his community.

6. Teague Independent School Dist. v. Todd L., 999 F.2d 127 (5th Cir. 1993). Seventeen-year-old boy who had disorders of affect, behavior, learning and speech did not require hospitalization for educational reasons. The school district had proposed an IEP which called for one-on-one instruction during a reduced school day of two hours. Todd had received "significant benefit" from his public school placement, and whether he benefited at the private placement was questionable. The court held that Todd did not require removal from his home community and from any contact with nondisabled peers, and that Todd "could not only cope, but thrive, in a less restrictive setting."

7. Sacramento City Unified School District v. Rachel H., 14 F.3d 1398 (9th Cir. 1994). Eleven year old student with IQ of 44 was appropriate for placement in a second grade class. Court adopted a combination of the Roncker and Daniel R.R. tests.

8. Hall v. Shawnee Mission School Dist. (U.S.D. No. 512), 856 F. Supp. 1521 (D. Kan. 1994). Student who had pervasive developmental disorder and attention deficit hyperactivity disorder had been placed in a private residential facility by his parents. His academic skills were above grade level in all areas. The court held that a residential placement was not required to remedy problems the student was having at home. Counseling and support for the parents may be a part of related services.

9. Clyde K. and Sheila K., Guardians for Ryan K. v. Puyallup School Dist., 35 F.3d 1396 (9th Cir. 1994). The court held that the burden of proof in mainstreaming cases is not on the school district, but rather it is on the party bringing the lawsuit. In determining the least restrictive environment, the court said it must consider (1) the academic benefits of the placement in a mainstream setting, with any supplementary aids and services that may be appropriate; (2) the nonacademic benefits of a mainstream placement, such as language and behavior models; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost to educate the student in the mainstream environment. The conclusion of the court was that a student who directed sexually explicit remarks to female students and whose behavior interfered with the ability of other students to learn was not appropriate for placement at a regular junior high school and required a placement in a separate self-contained program.

10. Urban v. Jefferson County School District R-1, 870 F. Supp. 1558 (D. Colo. 1994), aff'd, 89 F.3d 720 (10th Cir. 1996). Nineteen-year-old trainable mentally disabled student who functioned as a two to three year old was not appropriate for placement in his neighborhood school. Mainstreaming is not required in every case. It should be considered, however, whether a child would benefit from non-academic experiences in a regular education environment even though functioning at a much lower level than the other students in the class.

F. Agency Rulings.

1. Required modifications to the regular program must be stated in the IEP. Letter to Anonymous, 20 IDELR 541 (OSEP 1993).

2. It is not necessary that a student fail in a regular classroom before a more restrictive environment is attempted. The IEP dictates the placement based on the child's unique needs. Letter to Anonymous, 20 IDELR 1168 (OSEP 1993).

3. The neighborhood school should be the first placement option considered. Letter to Johns, 21 IDELR 571 (OSERS 1994).

4. Students must be placed based on least restrictive environment considerations as dictated by the IEP. The amount of participation in regular education is an IEP

decision. If supplementary aids and services are required, they must be described in IEP. OSEP Memorandum 95-9, supra.

IV. PROCEDURAL SAFEGUARDS (§1415):

A. The LEA must establish and maintain a system of guaranteed procedural safeguards for children with disabilities and their parents regarding the provision of a free appropriate public education. §1415(a).

B. Procedures must be established for:

1. Examination of records relating to the child,§1415(b)(1); 34 C.F.R. §300.501(a);

2. Participation in meetings relating to identification , evaluation, educational placement and the provision of a free appropriate public education, §1415(b)(1); 34 C.F.R. §300.501(b);

3. Provision of an independent educational evaluation of the child, §1415(b)(1); 34 C.F.R. §300.502;

4. Surrogate parent procedures to protect the rights of the child, §1415(b)(2); 34 C.F.R. §300.515;

5. Written prior notice to the parents whenever the LEA:

a. Proposes to initiate or change; or

b. Refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education §1415(b)(3); 34 C.F.R. §300.503;

6. Provision of prior notice in the native language of the parents, unless clearly not feasible, §1415(b)(4);

7. An opportunity for mediation, §1415(b)(5);

8. An opportunity to present complaints with respect to matters relating to identification, evaluation or educational placement or the provision of a free appropriate public education, §1415(b)(6);

9. Notice from the parent or attorney with regard to any complaint filed which includes:

a. The name, address of residence and school the child is attending;

b. A description of the nature of the problem and facts relating to the problem; and

c. A proposed resolution of the problem to the extent known and available to the parents, §1415(b)(7); and

10. Development of a model form by the state which will assist the parent in giving the information required for the filing of complaints. §1415(b)(8).

C. Content of prior written notice:

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

2. An explanation of why the agency is taking the action;

3. A description of other options considered and rejected;

4. A description of information considered in making the determination;

5. A description of other relevant factors;

6. A statement that the parents have procedural safeguards available to them and how to obtain a copy, unless the LEA was required to provide a copy with the notice; and

7. Sources for the parent to obtain assistance in understanding the procedural safeguards. §1415(c); 34 C.F.R. §300.503(b).

D. The notice of procedural safeguards must be given at a minimum on these occasions:

1. At initial referral for an evaluation;

2. With notice of an IEP meeting;

3. With any reevaluation; and

4. When a complaint is registered. §1415(d)(1); 34 C.F.R. §300.504(a).

E. The notice of procedural safeguards must include a full explanation of the procedural safeguards, written in the native language of the parents unless clearly not feasible, and written in a clearly understandable manner and which gives notice of the following rights:

1. Independent educational evaluation;

2. Prior written notice;

3. Parental consent;

4. Access to educational records;

5. Opportunity to present complaints;

6. The child's placement during the pendency of due process proceedings;

7. Procedures for students placed in an interim alternative educational setting;

8. Requirements related to placement by parents in private schools;

9. Mediation;

10. Due process hearings, including requirements for disclosure of evaluations and recommendations;

11. State appeals;

12. Civil actions; and

13. Attorneys' fees. §1415(d)(2); 34 C.F.R. §300.504(b).

F. Mediation

1. The state must establish procedures to resolve disputes through the mediation process. §1415(e)(1); 34 C.F.R. §300.506(a).

2. The mediation procedures must ensure:

a. Mediation is voluntary on the part of the parties;

b. Mediation will not delay due process hearings or other rights; and

c. A qualified, impartial and trained mediator is used. §1415(e)(2)(A); 34 C.F.R. §300.506(b).

3. The LEA or state may establish voluntary procedures requiring parents to attend a meeting which explains the benefits of mediation when the parents have rejected mediation. §1415(e)(2)(B); 34 C.F.R. §300.506(d).

4. The state must bear the cost of the mediation process. §1415(e)(2)(D); 34 C.F.R. §300.506(b)(3).

5. Any agreements reached as a result of mediation must be reduced to writing. §1415(e)(2)(F); 34 C.F.R. §300.506(b)(5).

6. Discussions held during the mediation process are confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and a confidentiality pledge signed by the parties may be required. §1415(e)(2)(G); 34 C.F.R. §300.506(b)(6).

V. DUE PROCESS HEARINGS

A. Local Due Process Hearings.

1. Due process hearings can be initiated over disputes concerning identification, evaluations, the need for independent evaluations, educational placement, or the provision of a free appropriate public education. Va. Code §22.1-214; State Regs. §3.4.A.2; §1415(b)(2); 34 C.F.R. §300.507(a)(1).

2. The hearing must be requested within two years for disputes arising on or after July 1, 1995, and within one year for disputes arising prior to that date. Manning by Manning v. Fairfax County School Board, Civil Action No. 95-1181-A, 23 IDELR 639 (E.D. Va. Dec. 15, 1995); Schimmel v. Spillane, supra; Richards v. Fairfax County School Board, 7 F.3d 225 (4th Cir. 1993); School Board v. Nicely, 12 Va. App. 1051 (1991).

3. The hearing is conducted by an impartial hearing officer. 34 C.F.R. §300.508. In Virginia, the hearing officer is appointed by the Supreme Court of Virginia. State Regs. §3.4.A.6.

4. The parties have the right to have counsel at the hearing, to present evidence, to cross-examine witnesses and to compel the attendance of witnesses. 34 C.F.R. §300.509; State Regs. §3.4.A.9; Va. Code §22.1-214.1.

5. Discovery:

a. Five business days in advance of a due process hearing, each party must disclose to all other parties all evaluations and recommendations based on the evaluations which they intend to use at the hearing. 34 C.F.R. §300.509(a)(3) & (b).

b. The hearing officer may bar the evaluation and recommendations if a party fails to disclosed them timely. §1415(f)(2); 34 C.F.R. §300.509(b)(2).

c. Any party to a hearing has the right to prohibit any evidence at the hearing that has not been disclosed at least five business days before the hearing. Documents may be subpoenaed. 34 C.F.R. §300.509(a)(3); State Regs. §3.4.A.9.a(3); Va. Code §22.1-214.1.

6. A verbatim written record, or, at the option of the parents, an electronic record must be made of the hearing. 34 C.F.R. §300.509(a)(4); State Regs. §3.4.A.8.

7. The decision must be issued in writing within 45 calendar days of the request for the hearing. State Regs. §3.4.A.10.

8. Expedited hearings are provided for discipline cases. 34 C.F.R. §300.525(a)(2).

B. State Review Hearings.

1. An appeal must be noted within 30 administrative days. State Regs §3.4.A.10(i).

2. The record is reviewed and additional evidence is taken, if necessary. State Regs §3.4.A.11; 34 C.F.R. §300.510; Springer v. Fairfax County Schools, 134 F.3d 659 (4th Cir. 1998); Lewis v. School Board of Loudoun County, 808 F. Supp. 523 (E.D. Va. 1992).

3. The state review proceeding must be concluded within 30 days. State Regs. §3.4.A.13.b.

C. Judicial Proceedings.

1. It appears that an appeal to court now must be filed within two years for decisions issued on or after July 1, 1995. Va. Code §8.01-248. Previously it was one year.

2. Appeals may be made to state or federal court. Va. Code §22.1-214D; §1415(i)(2)(A).

3. The court will receive the administrative record, take "additional evidence" at the request of a party and make its decision based on a preponderance of the evidence. §1415(i)(2)(B).

4. The term "additional evidence" means supplemental evidence. Witnesses may not repeat or embellish their prior testimony, and testimony that was or could have been presented to the administrative hearing is not considered "additional evidence" and is properly excluded. Springer v. Fairfax County Schools, supra.

5. The decisions of the hearing officers are entitled to due deference and the findings of fact are to be considered as prima facie correct. Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991).

6. The burden of proof is on the appealing party. Barnett v. Fairfax County School Board, supra.

7. Issue: What is the stay-put placement during litigation? 34 C.F.R. §300.514(c).

VI. DISCIPLINE OF STUDENTS WITH DISABILITIES

A. Authority of School Personnel (§1415(k)(1)); 34 C.F.R. §300.519-529.

1. School personnel may order a change in placement of a child with a disability without parental permission under the following circumstances:

a. Placement for not more than ten school days in an interim alternative educational setting, another setting or suspension to the same extent these alternatives would be applied to nondisabled students; or

b. Placement in an appropriate interim educational setting for not more than forty-five calendar days and for not more than the same amount of time as a nondisabled student would be disciplined if:

(1) the student carries or possesses a weapon at school or at a school function; or

(2) the student knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function; 34 C.F.R. §300.520.

2. The interim alternative educational setting for the 45-day placement is determined by the IEP team. §1415(k)(3)(A); 34 C.F.R. §300.520(a)(2).

3. Definitions

a. The term "controlled substance" means a drug or other substance set forth in schedules I, II, III, IV, or V in Section 202(c) of the Controlled Substances Act. 20 U.S.C. §1415(k)(10)(A); 34 C.F.R. §300.520(d)(1). See also Section 21 U.S.C. §812(c).

b. "Illegal drug" means a controlled substance, but does not include:

(1) substances that are legally possessed or used under the supervision of a licensed health care professional; or

(2) legally possessed or used under the Controlled Substances Act or any other authority in federal law. 20 U.S.C. §1415(K)(10)(B).

c. "Weapon" means "a weapon, device, instrument, material or substance,

animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length. See 18 U.S.C. §930(g)(2); 34 C.F.R. §300.520(d)(3).

4. The IDEA requires school personnel, in situations where the discipline is a change in placement, to hold an IEP meeting either prior to the disciplinary action or no later than 10 business days after the action is taken in order to:

a. Develop a behavioral assessment plan for intervention regarding the behavior that resulted in the suspension, if this behavioral intervention plan had not been developed before the misconduct, or

b. Review the behavioral intervention plan and modify it if necessary in order to address the behavior, if a plan was already in place. §1415(k)(1)(B); 34 C.F.R. §300.520(b).

B. Authority of Hearing Officer (§1415(k)(2)); 34 C.F.R. §300.521.

1. A 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 forty-five calendar days if he or she considers:

a. whether there is substantial evidence to demonstrate that keeping the student in the current placement will be substantially likely to result in injury to the child or to others;

b. Whether the current placement is appropriate;

c. Whether the public agency has made reasonable efforts to minimize the risk of harm in the current placement through the use of supplementary aids and services; and

d. Whether the interim placement will enable the child to continue to participate in the general curriculum, although in

another setting, to receive the services and modifications set forth in the student's IEP and to meet the IEP goals. §1415(k)(2).

C. When a placement is made in an alternative setting by the LEA due to weapons or drugs or by a hearing officer due to the substantial likelihood of risk of injury, the IEP team or hearing officer, as appropriate, must also consider:

1. Whether the interim placement will enable the child to continue in the general curriculum, although in a different setting and to continue to receive services and modifications as set out in the current IEP so the child will meet the IEP goals; and

2. Whether the interim placement will include services and modifications designed to address the behaviors so that they do not recur. 20 U.S.C. §1415(k)(3)(B); 34 C.F.R. §300.522.

D. Expedited hearing and change in placement

1. A school district may seek an expedited hearing to change a student's current placement during the pendency of due process proceedings if the LEA maintains that it is dangerous to keep the student in the current placement pending the hearing. In making this determination, the hearing officer must consider the factors set forth in sections B and C above. §1415(k)(7)(C); 34 C.F.R. §300.526(c).

E. "Substantial evidence" means beyond a preponderance of the evidence. §1415(k)(10)(C).

F. Manifestation Determination Review

1. When disciplinary action is proposed for behaviors involving drugs, weapons or for a change in placement, there are a number of actions required to be taken by the school district.

a. Give notice of the decision and of procedural safeguards to the parents not later than the date on which the decision is made to take disciplinary action (§1415(k)(4)(A)(i)) and

b. Conduct a review of the relationship between the misconduct giving rise to the discipline and the disability immediately, if

possible, but not later than 10 school days after the decision is made to take action. §1415(k)(4)(A)(ii); 34 C.F.R. §300.523.

2. The manifestation team shall be composed of the IEP team and other qualified personnel. §1415(k)(4)(B); 34 C.F.R. §300.523(b).

3. The IEP team is to make its manifestation review by considering the following information:

a. All information relevant to the specific behavior including evaluation and diagnostic results including those supplied by the parents, observations of the student, and the student's IEP and placement. §1415(k)(4)(C); 34 C.F.R. §300.523(c).

4. The IEP team must then determine whether:

a. In relationship to the behavior subject to disciplinary action, the student's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the IEP;

b. The disability impaired the ability of the student to understand the impact and consequences of the behavior giving rise to the disciplinary action; and

c. The disability impaired the ability of the child to control the behavior subject to disciplinary action. §1415(k)(4)(C)(ii); 34 C.F.R. §300.523(c)(2).

5. If the IEP team determines that the behavior of the student was not a manifestation of the student's disability, the student may be subject to the same disciplinary procedures applicable to children without disabilities except that the student must be provided educational services. §1415(k)(5)(A).

G. The person in the school district who makes the final decision about whether to discipline the student with disabilities must be provided with the special education and disciplinary records of the student. §1415(k)(5)(B); 34 C.F.R. §300.524(b).

H. Appeals by parents of manifestation determination

1. The parent can request a due process hearing when he or she disagrees with the manifestation determination. 34 C.F.R. §300.525.

2. An expedited hearing must be provided if requested by a parent. §1415(k)(6).

3. In reviewing the manifestation decision, the hearing officer must look at the required manifestation criteria and consider the criteria for determining the appropriate interim alternative educational setting. §1415(k)(6)(B).

I. Placement during appeals

1. The child remains in the current educational setting during due process hearings to contest the manifestation determination unless the LEA has acted under the drug and weapons exceptions, or the LEA has obtained a ruling from a hearing officer lifting stay-put due to likelihood of injury or the parent and the LEA agree otherwise. In cases involving drugs, weapons or a change in placement due to a substantial likelihood of injury, the child must return to the current placement prior to the interim alternative education setting at the end of forty-five calendar days unless the parents and the LEA agree otherwise. §1415(k)(7); 34 C.F.R. §300.526.

2. An expedited hearing may be requested when it would be dangerous for the student to remain in the current placement. The hearing officer may order an interim alternative education placement if he or she considers the factors governing alternative education placement. §1415(k)(7)(C).

J. Children not Yet Determined to be Disabled

1. A child who has not been found eligible may be protected under these procedures if the LEA had knowledge that the child had a disability prior to the misconduct. §1415(k)(8)(A); 34 C.F.R. §300.527.

2. Knowledge of a disability for those not formally identified will arise if:

a. The parent has expressed concern in writing (unless the parent is illiterate or cannot write due to a disability) that the

child is in need of special education and related services;

b. The behavior of the child demonstrates that the student qualifies as disabled and needs special education and related services;

c. The parent has requested an evaluation of the child; or

d. The teacher or other LEA personnel have expressed concern about the behavior or performance of the child to the director of special education or to other LEA personnel in accordance with child find procedures. §1415(k)(8)(B); 34 C.F.R. §300.527(b)(4).

3. If there is no knowledge of disability attributable to the LEA:

a. The LEA can subject the child to the same disciplinary measures as are used for nondisabled children. §1415(k)(8)(C)(I); 34 C.F.R. §300.527(d).

b. If a request is made for an evaluation while the child is being disciplined, an expedited evaluation must be conducted.

(1) If the child is found to have a disability, special education and related services must be provided.

(2) No special education and related services are required during the evaluation. §1415(k)(8)(C)(ii); 34 C.F.R. §300.527(d)(2).

K. Children with disabilities, who commit crimes or require other judicial intervention, may be reported to law enforcement officials and judicial authorities. §1415(k)(9); 34 C.F.R. §300.529.

VII. ATTORNEYS' FEES

A. Statutory Provisions Governing Attorneys' Fees under IDEA.

1. "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party." §1415(I)(3)(B); see also 34 C.F.R. §300.513.

2. No provision is made in the law for an award of attorneys' fees to prevailing school districts. See, Board of Education of Northfield Township High School District 225 v. Roy H. and Lynn H., individually and as parents of Elizabeth H., Civil Action No. 93-C-3252, 21 IDELR 1173 (E.D.N.D. Ill. January 12, 1995). ("Because the statute pointedly authorizes attorneys fees only for the parents of the disabled child without providing a reciprocal right for the state educational agency, we deem [the school district's] request for attorneys fees based on IDEA to be inappropriate." Id. at 1174).

B. Prohibition of Attorney's Fees and Related Costs for Certain Services

1. Attorneys' fees are not allowed for attendance at IEP meetings unless the meeting is convened as a result of an administrative proceeding or judicial action, or, at the state's discretion, at mediation conducted prior to filing a complaint. §1415(I)(3)(D)(ii); 34 C.F.R. §300.513(c)(2).

2. Attorneys' fees may be reduced if the attorney representing the parent did not give notice to the LEA of the information required in the due process complaint. §1415(I)(3)(F)(iv); 34 C.F.R. §300.513(c)(4)(iv).

C. Attorneys' Fees Cases

1. Pullen v. Botetourt County School Board, 26 IDELR 535 (W.D. Va. 1997) -- Plaintiff lost his attempt to have the school's educational placement declared inappropriate. However, the hearing officer ordered the School Board to reimburse Plaintiff for previous counseling and to pay for future psychiatric care. The School Board refused to reimburse Plaintiff for his attorney's fees, arguing that Plaintiff was not the prevailing party despite the fact that the hearing officer had ordered counseling, etc. The Court disagreed with the School Board, holding that the hearing officer had "'altered the legal relationship between the parties' by modifying the School Board's behavior in a way that directly benefited [Plaintiff.]" Therefore, Plaintiff was the prevailing party. However, the inquiry did not end there, as the Court has the discretion to identify specific hours billed by the attorney that should be eliminated, or the

Court may "simply reduce the award to account for limited successes." The Court did not consider work performed on Plaintiff's first Complaint that was dismissed. Also, Plaintiff did not succeed to the degree necessary to warrant an award of full attorney's fees. Finding it impracticable to separate the time and effort by Plaintiff's counsel in securing additional psychiatric counseling from the time spent on other issues raised at the due process hearing, the Court awarded one-third of Plaintiff's fees.

2. Gochenour v. Southampton County Public Schools, 25 IDELR 1193 (E.D. Va. 1997) -- Plaintiffs were not "prevailing parties" and therefore attorneys' fees were denied. Plaintiffs had been dissatisfied with the IEP, obtained private evaluations, and presented their own expansive IEP proposal to the School Board. The School Board then revised its own IEP which borrowed some elements from the Plaintiffs'. The revised IEP was deemed appropriate and the Plaintiffs' inappropriate. Plaintiffs' theory that they had prevailed because their efforts served as a catalyst to effectuate the desired change had been previously rejected by the Fourth Circuit in S-1 & S-2 v. State Bd. of Educ. of North Carolina, 21 F.3d 49, 51 (4th Cir.)(en banc), cert. denied, 115 S. Ct. 205 (1994). Plaintiffs had no enforceable judgment, consent decree, or settlement, and therefore were not the prevailing party. Further, the facts were similar to those found in Combs v. School Bd. of Rockingham County, 15 F.3d 357 (4th Cir. 1994), where the Court held that the School Board's actions were unilateral and were not the result of the administrative proceedings. Quoting Combs, the Court held that allowing the Plaintiffs to recover fees would discourage schools from taking "any action whatsoever, particularly any favorable change in a child's IEP, . . . for fear that any action on its part would give rise to a claim by the plaintiff that he prevailed and that attorneys' fees are in order."

3. Soroko v. Gosling, 26 IDELR 1135 (4th Cir. 1997) (unpublished) -- Plaintiffs claimed they were the prevailing parties because they obtained, at the administrative level, (1) weekly reports detailing the special education services rendered to Anna during the past week; (2) the imposition of the ten-day limit before they must be notified if special education services will be suspended in the future pursuant to Honig; and (3) an input as into what, how, and where compensatory services will be provided if there is a suspension of services in the future. The Court denied attorneys' fees. First, with respect to the weekly reports, the Plaintiffs' efforts did not contribute to the resolution of a problem

that could have been achieved without resort to administrative or legal process. Plaintiffs did not give adequate notice and the opportunity to provide weekly reports before they sought administrative action. Second, regarding the ten-day limitation, the reviewing officer made only a "favorable judicial statement of law in the course of litigation," which is insufficient to render Plaintiffs the prevailing party. Third, the Plaintiffs had waived the claim regarding compensatory services because they had not raised it in the district court, and the reviewing officer did not explicitly give the Plaintiffs input as to what, how, and where services would be provided.