THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: THE BASICS

IDEA SPECIAL EDUCATION MEDIATOR TRAINING
NEW YORK STATE EDUCATION DEPARTMENT

VIRTUAL PROGRAM

TUESDAY, SEPTEMBER 8, 2020 – WEDNESDAY, SEPTEMBER 9, 2020
WEDNESDAY, SEPTEMBER 23, 2020 – THURSDAY, SEPTEMBER 24, 2020 (REPEAT)

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I. INTRODUCTION

A. This presentation will not be a slow "walk-through-the-rules" discussion. Rather, its purpose is to provide an overview of the Individuals with Disabilities Education Act (IDEA) scheme, a "feel" for how it works (and does not work), and insight regarding particular areas where significant substantive issues may arise for special education mediators.

B. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988) *citing Free v. Bland*, 369 U.S. 663, 666 (1962). The IDEA and its implementing regulations, therefore, prevail whenever State law/district policy conflicts with the IDEA and its implementing regulations or where the State law/district policy (including collective bargaining agreements) is an obstacle to the accomplishment/execution of the remedial purposes/objectives of the IDEA. *See Vogel v. School Board of Montrose R-14*, 491 F. Supp. 989, 552 IDELR 202 (W.D. Mo. 1980); *Parks v. Illinois Dept. of Mental Health*, 441 N.E.2d 1209, 554 IDELR 197 (App. Ct. Ill. 1982).

C. Nonetheless, in the absence of a direct conflict with the IDEA, deference is given to State law and to policy interpretations issued by OSEP. *See, e.g., Mrs. S. v. Vashon Island Sch. Dist.*, 337, F.3d

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1115 (9th Cir. 2003) *citing Honig v. Doe*, 484 U.S. 305 (1988) ("We defer to and adopt the position of the OSEP in the *Letter to Campbell* because the OSEP is the agency responsible for monitoring and administering the IDEA and because the *Letter to Campbell* comports with the purposes of the IDEA."); *J.G. v. Douglas County Sch. Dist.*, 552 F.3d 786 (9th Cir. 2008) (affirming that deference to State regulations should be given but cautioning that "allow[ing] a state to use its regulations as a safe harbor in the absence of a congressional directive or regulation … would flout Congress's intent that judicial review of IDEA claims be child-specific").

II. CHILD FIND

A. Each state education agency (SEA) and its local districts must have in effect policies and procedures to ensure that all children with disabilities residing in the state/district – including those in private schools or who are homeless – who need special education and related services are identified, located, and evaluated. How this is to be accomplished is not specified. Typically, it is through public service announcements, brochures, school newsletters, etc., as well as district staff having reasonable cause to suspect that a student has an eligible "disability," even if s/he is advancing from grade to grade (since, for example, an academically successful student might still have emotional impairments adversely affecting the student's education). Parents, too, may refer the student. *See* 34 C.F.R. § 300.111; 8 NYCRR § 200.2(a)(7).

III. ELIGIBILITY

A. Age Range. Under Part B of the IDEA, a free and appropriate public education (FAPE) must be available to all children residing in the State between the ages of 3 and 21. 34 C.F.R. § 300.101(a). However, the obligation to make FAPE available to all children with disabilities does not apply to children aged 3, 4, 5, 18, 19, 20, or 21 in a state to the extent that its application to those children would be inconsistent with state law or practice. 34 C.F.R. § 300.102(a)(1).

In New York, children with disabilities between the ages of 3 and 5, as well as 18 through 21, are entitled to FAPE. Moreover, a student who turns 21 during the school year, can continue to go to school until the end of that school year. N.Y. EDUC. LAW Art. 89 § 4402(5)(b). However, if the student turns 21 during the summer, s/he must, if otherwise eligible, be allowed to continue in the summer program until the 31st day of August or until the termination of the summer program, whichever occurs first. N.Y.

EDUC. LAW Art. 89 § 4402(5)(a).

B. "Child with a disability" means a child: (1) evaluated in accordance with IDEA regulations pursuant to 34 C.F.R. §§ 300.304 – 300.311; (2) as having characteristics of one of the 13 enumerated disability conditions; and (3) who, by reason thereof, needs special education and related services. *See* 34 C.F.R. § 300.8(a). *See also* 8 NYCRR § 200.1(zz) (New York uses the term "student with a disability" rather than "child with a disability").

New York State extends eligibility to students who only require related services. Pursuant to IDEA, special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with disability, including related services, if the service is considered special education rather than a related service under State standards. New York State defines special education as specially designed instruction which includes special services or programs. Special services or programs is defined to include related services. N.Y. EDUC. LAW Art. 89 §§ 4401(1) and (2)(k).

1. The disability condition must adversely affect educational performance. *See*, *generally*, 34 C.F.R. § 300.8(c).[1] The IDEA, however, does not define the term educational performance. Some states define educational performance to include just academic areas such as reading and math. *See*, *e.g.*, *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 33 IDELR 34 (2d Cir. 2000) (limited to academic performance); *N.C. v. Bedford Central Sch. Dist.*, 300 F. App'x 11, 51 IDELR 149 (2d Cir. 2008) (unpublished); *C.B. v. Dep't of Educ.*, 322 F. App'x 20, 52 IDELR 121 (2d Cir. 2009) (unpublished); *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 53 IDELR 327 (E.D.N.Y. 2010). Others broadly define it to include nonacademic areas such as daily life activities, mobility, and social skills. *See*, *e.g.*, *D.A. v. Meridian Joint Sch. Dist. No. 2*, 618 F. App'x 891, 65 IDELR 253 (9th Cir. 2015) (unpublished); *Q.W. v. Bd. of Educ. of Fayette County*, 630 F. App'x 580, 66 IDELR 212 (6th Cir. 2015) (unpublished); *Mary P. v. Illinois State Bd. of Educ.*, 919 F. Supp. 1173 (N.D. Ill. 1996).

Courts, however, are unlikely to hold that the term educational performance is broad enough to include any

[1] Although the definition of specific learning disability does not include the term, "adversely affects a child's educational performance," the requirement that the disability condition must adversely affect the child's educational performance is implied.

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difficulties a student might experience outside of the school environment that s/he does not exhibit in the school environment. *See, e.g., Q.W. v. Bd. of Educ. of Fayette County*, 630 F. App'x 580, 66 IDELR 212 (6th Cir. 2015) (unpublished).

2. The 13 enumerated disability conditions are: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectually disabled (formerly referred to as mental retardation), multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment.[2] 34 C.F.R. § 300.8.

3. States may establish standards for eligibility for special education and related services and are not required to use the precise definition listed in the 13 enumerated disability conditions. However, such standards cannot narrow the definitions in the IDEA. *Letter to State Directors of Special Education*, 70 IDELR 23 (OSEP 2017).

4. School districts must consider the student's need for special education under related disability classifications, and not just the disability condition the parent requested that the school district evaluate the student under. *E.M. v. Pajaro Valley Unified Sch. Dist.*, 758 F.3d 1162 (9th Cir. 2014). *See also Heather S. v. Wisconsin*, 125 F.3d 1045, 26 IDELR 870 (7th Cir. 1997) (noting "whether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education."); 20 U.S.C. § 1412(a)(3)(B) ("Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter."). *Cf. Cronkite v. Long Beach Unified Sch. Dist.*, 176 F.3d 482, 30 IDELR 510 (9th Cir. 1999) (unpublished) (finding that the student's IEP was not inadequate because it failed to use the term dyslexia to describe the student's disability).

[2] States are not required to adopt the identical disability condition label. For example, New York uses "learning disability" instead of "specific learning disability." *See* 8 NYCRR § 200.1(zz)(6).

C. Limits. The mere fact that a student is severely disabled and not able to benefit from education is irrelevant under the IDEA. Congress intended to provide public education for every eligible child with a disability, unconditionally and without exception, regardless of severity of disability. *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 441 IDELR 393 (1st Cir. 1989) (finding that a student with severe disabilities that would only benefit from stimulation and physical therapy is entitled to an appropriate education because the language in the IDEA in its entirety makes clear that a "zero reject" policy is what Congress intended with the IDEA).

D. Strong academic performance is not determinative of the student's eligibility for special education. *Mr. and Mrs. Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 68 IDELR 61 (1st Cir. 2016).

E. Students with disabilities are not excluded merely because they happen to be in the home, in hospitals and institutions, and in other settings like prisons. *See* 34 C.F.R. §§ 300.39(a)(i) and 300.115(b)(1). Moreover, a school district cannot exclude a student from school for health reasons unless it can show unusual risk that cannot be reasonably controlled by routine precautions. *See District 27 v. Bd. of Ed*, 502 N.Y.S.2d 325, 557 IDELR 241 (Sup. Ct. NY 1986). Also, misconduct, whether related to the disability or not, cannot serve as a basis to deny the student services. A FAPE must be available to all children, including children who have been suspended or expelled from school. 34 C.F.R. § 300.101(a).

F. The obligation to make FAPE available to all children with disabilities does not apply to those children who have graduated from high school with a regular high school diploma (34 C.F.R. § 300.102(a)(3)(i)); who have aged out (*see* 34 C.F.R. § 300.101(a)); who have left the LEA's jurisdiction (*see* 34 C.F.R. § 300.111(a)(1)), or who no longer need a program of special education.

IV. APPROPRIATE EDUCATION

A. FAPE is defined as special education and related services that: (1) are provided at public expense; (2) meet the standards of the State; (3) include preschool, elementary school, or secondary school (but not post-secondary school); and (4) are provided in conformity with an Individualized Education Program (IEP) that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324. *See* 34 C.F.R. § 300.17.

B. The United States Supreme Court attempted to define the term "appropriate" in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 553 IDELR

656 (1982). Finding that Congress intended the IDEA to provide "equal educational opportunity," the Court rejected arguments that appropriate under the IDEA meant some maximization of potential or commensurate opportunity.[3] Rather, the IDEA requirements of a FAPE is satisfied when the State provides personalized instruction with sufficient support services to permit the student with a disability to benefit educationally from the instruction. Noting it was not attempting to establish any one test for determining the adequacy of educational benefits the IDEA required, it stated that an IEP: 1) had to be formulated in accordance with the procedural requirements of the IDEA; and 2) must be "reasonably calculated" to enable the child to obtain educational benefit.

Recently, in a unanimous decision, the Court clarified *Rowley's* FAPE standard. The Court rejected the Tenth Circuit's interpretation that an IEP is appropriate if it allows "merely … more than *de minimis*" progress. The Court ruled that the student's program must be "appropriately ambitious" in light of his/her unique circumstances. *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 69 IDELR 174 (2017). School districts must be able to offer a "cogent and responsive" explanation for their decisions that shows the IEP is reasonably calculated to enable the student to make progress appropriate in light of his/her circumstances. *Id.*

C. The primary responsibility for addressing questions of methodology under the IDEA is left to the State and local officials in cooperation with the parents. Accordingly, courts should not impose their views of preferable educational methods upon States. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982).

Note: Since *Rowley*, courts have treated IDEA due process hearing officers as State officials even though they typically are not educators.

D. Certain standards of what may constitute an appropriate education (e.g., personnel, class age-range, class size, etc.) are clearly left to the individual States to decide. For example, the IDEA requires the SEA to establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of the IDEA are

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[3] States may establish higher programming standards, (*see*, *e.g.*, *David D. v. Dartmouth Sch. Committee*, 775 F.2d 411, 557 IDELR 141 (1st Cir. 1985)), but few States actually do. Michigan has adopted a "develop the maximum potential" standard. However, the Sixth Circuit has said that these words may be more of an earnest request than a mandate. *Soraruf v. Pinckney Comm. Sch.*, 208 F.3d 215, 32 IDELR 4 (6th Cir. 2000).

appropriately and adequately prepared and trained. 34 C.F.R. § 300.156(a).[4] These "qualifications" would be a part of the "State standards" which must be met under the definition of FAPE.

V. AT NO COST

A. The IDEA requires that a FAPE be "without charge" and that special education be "at no cost" to the parents. 34 C.F.R. §§ 300.17(a), 300.39(a)(1); 8 NYCRR § 200.1(ww). "At no cost" is defined to mean without charge, but not precluding incidental fees that are normally charged to non-disabled students or their parents as part of the regular education program. 34 C.F.R. § 300.39(b)(1). Parents may volunteer or acquiesce to provide transportation, serve as an aide, etc., but such cannot be made a condition by a school district for a child to receive a program or service.

Accordingly, cost is not to be a factor in discussions with few exceptions, including if there are two or more appropriate options, the cheaper one can be utilized, and "center" programs can be used for low-incidence populations.

B. In funding programs, the IDEA specifically allows interagency agreements. 34 C.F.R. § 300.103(a). Further, it is expressly provided that an insurer or similar third party (e.g., health, Medicaid) is not relieved from an otherwise valid obligation to provide or pay for services provided to a student with a disability. 34 C.F.R. § 300.103(b).

C. If an insurer or other third party is to be utilized, the "at no cost" to the parent requirement means, for example, that the filing of a health insurance claim cannot pose a realistic threat of the student suffering a financial loss (e.g., decrease in available lifetime coverage, increase in premiums, discontinuation of policy, or payment of deductible). Notice of Interpretation, 45 Fed. Reg. 86,390 (Dec. 30, 1980). The school district, however, may access the parents' health insurance benefits to pay for related services required for FAPE only if the parents provide informed consent. 34 C.F.R. § 300.154(e).

VI. REFERRAL/EVALUATION

A. In New York, a student suspected of having a disability must be referred in writing to the chairperson of the district's committee on

[4] The IDEA regulations were recently amended to eliminate the requirement that special education teachers be highly qualified. *See* 34 C.F.R. § 300.156(c) (2017).

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special education (CSE) or to the building administrator of the school which the student attends or is eligible to attend for an individual evaluation and determination of eligibility for special education programs and services. 8 NYCRR § 200.4(a).

B. Generally, under IDEA, a student suspected of having a disability can be referred for an initial evaluation and determination of eligibility for special education programs and services either by the school district (through a teacher or other school personnel involved in the student's education), by a parent or guardian, by an employee of the State educational agency, or by a community service agency. *See* 34 C.F.R. § 300.301(b). However, New York provides more specificity as to who can directly refer a student for an initial evaluation and who can request that a referral be made for an initial evaluation.

In New York, a direct referral for an initial evaluation may be made by: a student's parents; a designee of the school district in which the student resides, or the public school district the student legally attends or is eligible to attend; the commissioner or designee of a public agency with responsibility for the education of the student; and/or a designee of an education program affiliated with a child care institute with CSE responsibility. 8 NYCRR 200.4(a)(1). A *request* for referral that the school district or agency refer the student for an initial evaluation may be made by: a professional staff member of the school district in which the student resides, or the public or private school the student legally attends or is eligible to attend; a licensed physician; a judicial officer; a professional staff member of a public agency with responsibility for welfare, health or education of children; or a student who is 18 years of age or older, or an emancipated minor, who is eligible to attend the public schools of the district. The request for referral must be in writing. 8 NYCRR § 200.4(a)(2).

C. Neither the IDEA nor its implementing regulations prescribe a specific timeframe from referral for evaluation to parental consent. *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). Generally, an LEA must seek parental consent within a reasonable time after the referral for evaluation, if the LEA agrees that an initial evaluation is needed. *Id.* States, however, may adopt a specific timeline. In New York, upon receipt of a request for a referral that meets the requirements of 8 NYCRR § 200.4(a)(2)(iii), the school district must, within 10 school days, either request parent consent to initiate the evaluation or provide the parent with a copy of the request for referral and inform the parents of their right to refer the student for an initial evaluation and offer the parents the opportunity to meet to discuss the request

for referral. 8 NYCRR § 200.4(a)(2)(iv).

D. An evaluation means procedures used in accordance with 34 C.F.R. §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 C.F.R. § 300.15; *see also* 8 NYCRR § 200.1(aa). An evaluation, therefore, is a process that includes the administration of specific tests, instruments, tools, strategies, and other materials.[5]

E. An initial evaluation of a child is the first complete assessment of a child to determine if the child has a disability under the IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated, a decision has been rendered that a child is eligible for services under the IDEA, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46640 (August 14, 2006).

F. In conducting the evaluation, the LEA must use a variety of tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, to determine whether the child is eligible and, if so, the content of the child's IEP. 34 C.F.R. § 300.304(b)(1); 8 NYCRR § 200.4(b)(1). New York has specific requirements for an initial evaluation. *See* 8 NYCRR §§ 200.4(b)(1)(i) through (v).

G. The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category. 34 C.F.R. § 300.304(c)(6); 8 NYCRR § 200.4(b)(6)(ix); *see also Timothy O. v. Paso Robles Unified Sch. Dist.*, 882 F.3d 1105, 67 IDELR 227 (9th Cir. 2016) (finding that the LEA's evaluation was not sufficiently comprehensive because it failed to assess the student to determine if he had autism because of the subjective views and informal observation of its school psychologist). The LEA cannot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 C.F.R. § 300.304(b)(2); 8 NYCRR § 200.4(b)(6)(v).

H. Under the IDEA, an initial evaluation must be conducted within 60 calendar days of *receiving parental consent* for the evaluation

[5] The distinction between an evaluation and an assessment is an important one that has significance in the IDEA scheme.

unless the State establishes a different timeframe. 34 C.F.R. § 300.301(c). New York has not established a different timeframe but does allow the student's parents and the CSE to extend the timeline by mutual agreement under limited circumstances. *See* 8 NYCRR § 200.4(b)(1).

I. The evaluation process includes the review of existing evaluation data as part of an initial evaluation (if appropriate[6]) or any reevaluation to identify what additional data is needed, if any, to determine eligibility (or continued eligibility) and the educational needs of the child. 34 C.F.R. § 300.305(a); 8 NYCRR § 200.4(b)(5).

The review is to be made by a group that includes the CSE and other qualified professionals, as appropriate. *Id.* "Other qualified professionals" include other professionals who may not be a part of the child's CSE in the group that determines if additional data are needed to make an eligibility determination and determine the child's educational needs. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46644 (August 14, 2006).

The review of existing evaluation data does not have to take place in a meeting. 34 C.F.R. § 300.305(b). Should the CSE and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the LEA must notify the child's parent(s) of its determination and the reasons for the determination. 34 C.F.R. § 300.305(d); 8 NYCRR § 200.4(b)(5)(iv).

The parent(s) must also be advised of the right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs. 34 C.F.R. § 300.305(d)(1)(ii); 8 NYCRR § 200.4(b)(5)(iv). The LEA, however, is not required to conduct an assessment unless requested to do so by the parent(s). 34 C.F.R. § 300.305(d)(2); 8 NYCRR § 200.4(b)(5)(iv). There is no requirement that a reason for the reevaluation be given by the parent(s) and the reevaluation cannot be conditioned on the parent(s) providing a reason for requesting a reevaluation. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46640 (August 14, 2006).

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[6] In limited circumstances an LEA can conduct an initial evaluation only through review of existing data on the child. In most instances, review of existing data on the child generally would be insufficient for a team to determine whether a child qualifies as a child with a disability and the nature and extent of the child's educational needs. *Letter to Copenhaver*, 108 LRP 16368 (OSEP 2007).

Should the CSE and other qualified professionals, as appropriate, determine that no additional data are needed, and a request for an assessment has not been made by the parent(s), then the review of the existing data may constitute the reevaluation. *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007). Conversely, should additional data are needed, the LEA must administer such assessments and other evaluation measures as may be needed. 34 C.F.R. § 300.305(c); 8 NYCRR § 200.4(b)(5)(iii).

J. An LEA proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must first provide prior written notice to the parent(s). 34 C.F.R. § 300.300(a); 8 NYCRR 200.5(a)(1). The notice must be written in language understandable to the general public and provided in the native language of the parent(s) or other mode of communication, unless it is clearly not feasible to do so. 34 C.F.R. §§ 300.503(c)(1)(i) and (ii); 8 NYCRR § 200.5(a)(4).

K. The written notice must also describe the action proposed or refused by the LEA (34 C.F.R. § 300.503(b)(1)); explain why the LEA has proposed or refused to take the action (34 C.F.R. § 300.503(b)(2)); describe other options that the IEP team considered and the reasons why those options were rejected (34 C.F.R. § 300.503(b)(6)); describe each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused action (34 C.F.R. § 300.503(b)(3)); explain how the procedural safeguards can be obtained (34 C.F.R. § 300.503(b)(4); 34 C.F.R. § 300.504(a)(1)); and list resources available to the parent(s) to assist the parent(s) with understanding the written notice (34 C.F.R. § 300.503(b)(5)). (*See also* 8 NYCRR § 200.5(a)(3)). New York has a required form for LEAs to use to provide prior written notice to parents.

L. The IDEA and New York law also require parental consent for an initial evaluation. 34 C.F.R. § 300.300(a); 8 NYCRR § 200.5(b)(1)(i). Consent means that the parent(s) has been fully informed of all information relevant to the activity for which consent is sought, in the parent's(s') native language, or other mode of communication (34 C.F.R. § 300.9(a)); the parent(s) understand(s) and agree(s) in writing to carry out the activity for which consent is sought, and the consent describes the activity (34 C.F.R. § 300.9(b)); and the parent(s) understand(s) that consent is voluntary and may be revoked at any time (34 C.F.R. §

300.9(c)(1)).[7] *See also* 8 NYCRR § 200.1(l).

M. A parent may revoke consent at any time, but said revocation is prospective only. 34 C.F.R. §§ 300.9(c)(1), 300.9(c)(2); 8 NYCRR § 200.1(l)(3). Upon revocation of consent for special education and related services, the LEA must provide the parent with prior written notice before ceasing the provision of special education and related services. 8 NYCRR § 200.5(b)(5). A parent, however, maintains the right to subsequently request an evaluation to determine if the child is a child with a disability and any later requests that his or her child receive special education and related services must be treated as a request for an initial evaluation rather than a reevaluation. *Letter to Cox*, 54 IDELR 60 (OSEP 2009).

N. Parental consent is not required before reviewing existing data or administering a test or other evaluation that is administered to all children, unless consent is required of parents of all children. 34 C.F.R. § 300.300(d).

O. Unless State law says otherwise, an LEA may use mediation and the due process hearing procedures to pursue an initial evaluation of a child when the parent refuses to consent or fails to respond to a request for consent.[8] 34 C.F.R. § 300.300(a)(3). The use of mediation and the due process hearing procedures to pursue an initial evaluation when the parent refuses to consent or fails to respond to a request for consent is available in New York. 8 NYCRR § 200.5(b)(3). The LEA, however, is not required to pursue an initial evaluation of a child suspected of having a disability if the parent does not provide consent for the initial evaluation. The LEA is in the best position to determine whether, in a particular case, an initial evaluation should be pursued. 8 NYCRR § 200.5(b)(3); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46632 (August 14, 2006); *Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-2 (OSERS 2011). The override procedures are not available for children who are home-schooled or placed by their parents in private school. 34 C.F.R. § 300.300(d)(4)(i).

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[7] Should consent be revoked, it does not negate an action that has occurred after the consent was given and before the consent was revoked. 34 C.F.R. § 300.9(c)(2).

[8] Informal methods may be attempted before the LEA opts for mediation and the due process hearing procedures. Such measures include parent conferences. *Letter to Williams*, 18 IDELR 534 (OSEP 1991).

P. A reevaluation of a child with a disability must occur when conditions warrant[9] or if the parent or teacher requests a reevaluation. 34 C.F.R. § 300.303(a); 8 NYCRR § 200.4(b)(4). The reevaluation must occur at least once every three years, unless the parent and the LEA agree that a reevaluation is unnecessary.[10] 34 C.F.R. § 300.303(b)(2); 8 NYCRR § 200.4(b)(4). Additionally, the reevaluation is limited to one per year, unless the parent and the LEA agree otherwise.[11] 34 C.F.R. § 300.303(b)(1); 8 NYCRR § 200.4(b)(4).

Q. The LEA must obtain informed parental consent prior to conducting any reevaluation of a child with a disability. 34 C.F.R. § 300.300(c)(1)(i); 8 NYCRR § 200.5(b)(1)(i). However, the LEA may proceed with the reevaluation without informed parental consent if the LEA has taken reasonable measures to obtain consent and the *parent has not responded*.[12] 34 C.F.R. § 300.300(c)(2); 8 NYCRR § 200.5(b)(1)(i)(b); *see also Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-3 (OSERS 2011). The LEA, however, must document its attempts to obtain parent consent using the procedures in § 300.322(d).[13] If the *parent has refused* to consent, the LEA may, but is not required

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[9] A substantial change in the student's academic performance or disabling condition may warrant a reevaluation of the student.

[10] The IDEA does not require that the LEA document agreements with parents that a reevaluation is unnecessary. *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007). An agreement between the parent and the LEA is not the same as parental consent in § 300.9. Rather, an agreement refers to an understanding between a parent and the LEA and does not need to meet the requirements for parental consent in § 300.9. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46641 (August 14, 2006).

[11] When the parent requests a reevaluation more than once per year but the LEA is not in agreement, the LEA must provide the parent with prior written notice of its refusal to conduct the reevaluation. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46640 (August 14, 2006).

[12] Should the LEA opt not to use the consent override provision, the LEA does not need to continue to provide FAPE if it has determined based on existing data that the student is no longer eligible for special education and related services. The LEA, however, must provide the parent with written prior notice of its proposal to discontinue the provision of FAPE. *Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-2 (OSERS 2011).

[13] These procedures include detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parent and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits. 34 C.F.R. § 300.322(d).

to, pursue the reevaluation by using the consent override procedures.[14] 34 C.F.R. § 300.300(c)(1)(ii); 8 NYCRR 200.5(b)(3).

R. Under the IDEA, a team of qualified professional, which must also include the parent, must determine eligibility. 34 C.F.R. § 300.306(a)(1). In New York, the CSE (or the committee on preschool special education (CPSE)) and other qualified individuals are tasked with determining eligibility. 8 NYCRR § 200.4(c)(1). A copy of the evaluation report and eligibility determination must be given to the parent upon completion of administration of tests and other evaluation materials.[15] 34 CFR § 300.306.

S. An independent educational evaluation (IEE) is a procedural safeguard available under the IDEA that provides the parents with the opportunity to obtain their own private evaluation of their child. *See*, *generally*, 34 C.F.R. § 300.502. When the parents disagree with an evaluation obtained by the LEA, the parents have the right to an IEE at public expense.[16] 34 C.F.R. § 300.502(b)(1); 8 NYCRR 200.5(g)(1). The parents need not provide prior notification of their disagreement or even the areas of their disagreement, although the district can ask. 34 C.F.R. § 300.502(b)(4).

T. Because the parent has a right to an IEE at public expense, upon request, the LEA must, without unnecessary delay, either: 1) file a

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[14] Should the LEA elect not to pursue the reevaluation by using the consent override procedures, the LEA is not required to continue to provide a free and appropriate public education to child if a review of the existing data indicates that the child is no longer eligible. The LEA, however, must provide the parent with prior written notice of its proposal to discontinue special education and related services. *Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question D-4 (OSERS 2011).

[15] The failure to provide the parent with copies of the various assessments encompassing an evaluation may rise to a denial of a FAPE. *See*, *e.g.*, *Amanda J. v. Clark County Sch. Dist.*, 260 F.3d 1106, 35 IDELR 65 (9th Cir. 2001) (finding that the failure to give the parents copies of the assessments indicating the possibility of autism and the need for further psychiatric assessment violated the procedural requirements of the IDEA); *M.M. v. Lafayette Bd. of Educ.*, 767 F.3d 842, 64 IDELR 31 (9th Cir. 2014) (finding that the failure of the LEA to provide the parents with complete RTI data was a procedural violation that denied the student a FAPE because the parents were unable to meaningfully participate in the IEP process).

[16] An LEA must either grant the parents' request to fund an IEE or request a due process hearing when the parents request an IEE because the parents feel the LEA did not assess all of the student's educational needs. The LEA cannot simply "cure" the parents' concern by simply completing its own assessment. *Letter to Carroll*, 68 IDELR 279 (OSEP 2016).

due process complaint to request a hearing to show that its evaluation is appropriate (34 C.F.R. § 300.502(b)(2)(i)); or, 2) ensure that an IEE is provided at public expense,[17] unless the LEA demonstrates in a hearing that the evaluation obtained by the parent did not meet the LEA's criteria (34 C.F.R. § 300.502(b)(2)(ii)). *See also* 8 NYCRR § 200.5(g)(iv).

U. If the LEA files a due process complaint notice to request a hearing and the final decision is that the LEA's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. 34 C.F.R. § 300.502(b)(3); 8 NYCRR § 200.5(g)(v).

V. An IEE at public expense, or an IEE obtained at private expense, must be considered by the LEA in any decision made with respect to the provision of FAPE to the child, provided the IEE meets agency criteria. 34 C.F.R. § 300.502(c)(1); 8 NYCRR § 200.5(g)(vi). However, although the LEA must consider the evaluation, there is no corresponding obligation to accept the IEE or its recommendations. *S.S. v. Bd. of Educ., Town of Ridgefield*, 10 F.3d 87, 20 IDELR 889 (2d Cir. 1993).

VII. INDIVIDUALIZED EDUCATION PROGRAMS (IEP)

A. An IEP must be in place before special education or related services are provided. *See* 34 CFR § 300.323. The requirements regarding its development and content are many, *see*, *generally*, 34 C.F.R. §§ 300.320 through 300.328, and are important since the IEP is the keystone of the child's program and the IDEA itself.[18]

B. Under the IDEA, the IEP team must include: the parents of the child; at least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);[19]

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[17] The LEA may not impose conditions or timelines related to obtaining an IEE at public expense. 34 C.F.R. § 300.502(e)(2). Any delays in timely completion of an IEE caused by the private evaluator or parents are not the responsibility of the LEA. *See*, *e.g.*, *Magnum v. Renton Sch. Dist. No. 403*, 63 IDELR 277 (9th Cir. 2014) (unpublished).

[18] One of the best documents on the interpretation of the IDEA requirements concerning IEPs is an OSEP "Notice of Interpretation" at Federal Register, Vol. 64, No. 48 (March 12, 1999), at pp. 12469-12480, referred to as "Appendix A" to the regulations, which sets forth 40 questions and answers. *See also* Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (OSEP 2011).

[19] In an unpublished decision, the Ninth Circuit upheld the LEA's use of an assistant principal who was not the student's teacher but who taught a general education Spanish class and "may be" responsible for implementing portions of

at least one special education teacher of the child, or where appropriate, or at least one special education provider of the child; a district representative qualified to supervise/provide special education who is knowledgeable about the general education curriculum and the district's available resources; and, an individual who can interpret the instructional implications of evaluation results (who may be an existing, required member of the team other than the parent).

The IEP team may also include, at the discretion of the parents or LEA, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate.[20] If transition services are to be considered, with the consent of the parent or the student who has reached the age of majority, a representative of any other agency providing/paying for such service must be present. The child may attend whenever appropriate. 34 C.F.R. §§ 300.321(a) and (b).

C. In New York, the CSE or the CPSE carries out the functions of the IEP team. 8 NYCRR § 200.3(a)(1). The composition of the CSE meets the IDEA requirements but also includes a school psychologist, who may also serve as the district representative or individual who can interpret the instructional implications of the evaluation results.[21] *See* 8 NYCRR §§ 200.3(a)(1)(i) – (vi). The CSE may also include a school physician and/or an additional parent member of a student with a disability residing in the school district or a neighboring school district. 8 NYCRR §§ 200.3(a)(1)(vii) – (viii). However, if the parent or a member of the school would like the school physician to attend the meeting, the parent or school official must make a written request to the CSE at least 72 hours prior to the meeting. 8 NYCRR § 200.3(a)(1)(vii). Similarly, if the parent would like the additional parent member present, the parent must make a written request to the CSE at least

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the student's IEP. *Z.R. v. Oak Park Unified Sch. Dist.*, 622 F. App'x 630, 66 IDELR 213 (9th Cir. 2015) (unpublished).

[20] Parents have the right to bring another individual, including their attorney, with them to a scheduled IEP team meeting without first providing advanced notice to the LEA. *Letter to Andel*, 67 IDELR 156 (OSEP 2016). The LEA may seek to reschedule the meeting to have its own attorney present provided the parents agree and there is no delay to the provision of a FAPE to the student. *Id.*

[21] The special education teacher or provider may also serve as the district representative. The regular education teacher, the special education teacher or provider, the school psychologist, and the district representative may also serve as the individual who can interpret the instructional implications of evaluation results. 8 NYCRR §§ 200.3(a)(1)(v) and (vi).

72 hours prior to the meeting. 8 NYCRR § 200.3(a)(1)(viii).

The membership of the CPSE includes the same members as the CSE with the exception of the school psychologist and physician.[22] *See* 8 NYCRR §§ 200.3(a)(2)(i) – (vii). However, two additional members are included: for a child in transition from early intervention programs and services, at the request of the parent, the appropriate professional designated by the agency that has been charged with the responsibility for the preschool child (8 NYCRR § 200.3(a)(2)(viii)); and a representative of the municipality of the preschool child's residence, provided that the attendance of the appointee of the municipality shall not be required for a quorum (8 NYCRR § 200.3(a)(2)(ix)).

D. In city school districts having a population in excess of 125,000 inhabitants (e.g., New York City), the school district is required to appoint subcommittees on special education to the extent necessary to ensure timely evaluation and placement of students with disabilities. All other districts may have subcommittees. 8 NYCRR § 200.3(c). The subcommittee is not required to include a school physician, an additional parent member, or school psychologist (unless a new psychological is being reviewed or a change to a program option with a more intensive staff/student ratio is being considered). *See*, *generally*, 8 NYCRR § 200.3(c)(2).

The subcommittee may perform the functions of the CSE except when a student is considered for initial placement in a special class; or a special class outside of the student's school of attendance; or a school primarily serving students with disabilities or a school outside of the student's district. 8 NYCRR § 200.3(c)(4).

E. A CSE, CPSE, or subcommittee member is not required to attend a meeting of such committee if the parent and school district agree in writing that the member's attendance is not necessary because the member's area of the curriculum or related services is not being modified or discussed at the meeting. 34 C.F.R. § 300.321(e)(1); 8 NYCRR 200.3(f)(1). A member may also be excused from attending a meeting when the meeting involves a modification to or discussion of the member's area of the curriculum or related services if the parent and the school district agree in writing to the excusal and the member submits written input into the development of the IEP prior to the meeting. 34 C.F.R. § 300.321(e)(2); 8 NYCRR § 200.3(f)(2). The request for excusal and

[22] Presumably, however, the school psychologist may be invited to sit as the individual who can interpret the instructional implications of evaluations results. The regulations contemplate this. *See* 8 NYCRR § 200.3(a)(2)(vi).

the written input must be provided to the parent not less than five days prior to the meeting date, in order to afford the parent a reasonable time to review and consider the request. 8 NYCRR § 200.3(f)(3). The parents and the district representative may agree to alternative means of meeting participation, such as videoconferences and conference calls. 34 C.F.R. § 300.328; 8 NYCRR § 200.4(d)(4)(i)(d).

F. The IEP is a written statement for each child with a disability that is developed, reviewed, and revised in a meeting that must include –

1. a statement of academic achievement and functional[23] performance, including involvement and progress in the general curriculum (or for preschoolers, participation in appropriate activities).

2. measurable annual goals, including academic and functional goals.[24]

3. a statement of the special education and related services and supplementary aids and services to be provided, and the anticipated frequency, location, and duration of those services and modifications.

4. a statement of program modifications or supports for school personnel to assist the student in advancing appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities; and to be educated with nondisabled children.

5. an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class.

6. a statement of any individual appropriate accommodations (e.g., testing accommodations) that are necessary to measure the academic achievement and functional performance of the

[23] The term "functional" is understood to mean skills or activities that are not considered academic or related to a child's academic achievement (i.e., routine activities of everyday living). *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46661 (August 14, 2006).

[24] The IEP must include short-term objectives for children with disabilities who take alternate assessments aligned to alternate achievement standards. 34 C.F.R. § 300.320(2)(ii).

child on State and district wide assessments.

7. transition goals and services.[25]

8. a description of how progress towards the IEP goals will be measured and when progress reports will be provided to the parents.

34 C.F.R. § 300.320; 8 NYCRR § 200.4(d)(2).

G. The IEP team must consider –

1. the strengths of the child.

2. the concerns of the parent.

3. the results of the initial or most recent evaluation of the child.

4. the academic, developmental, and functional needs of the child.

5. the use of positive behavioral interventions and supports, and other strategies to address any behavior that impedes the child's learning or that of others.[26]

6. language needs of a child with limited English proficiency.

7. instruction in Braille and the use of Braille for students who are blind or visually impaired, unless the IEP team determines otherwise after an evaluation of the child's skills and needs.

8. the communication needs of the child, and in the case of a child who is deaf or hard of hearing, opportunities for direct instruction in the child's language and communication

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[25] Under the IDEA, appropriate measurable postsecondary goals and transition services must be in effect when the child turns 16, or younger if determined appropriate by the IEP team. 34 C.F.R. § 300.320(b). In New York, however, the transition goals and services must be included in the IEP to be in effect when the student is age 15 (and at a younger age, if determined appropriate). 8 NYCRR § 200.4(d)(2)(ix).

[26] The regular education teacher, to the extent appropriate, must participate in decisions regarding positive behavioral intervention strategies, supplementary aides and services, program modifications and personnel support. 34 CFR § 300.324(a)(3); 8 NYCRR § 200.3(d).

mode.

9. assistive technology devices and service needs.

34 C.F.R. §§ 300.324(a)(1) and (2); *see also* 8 NYCRR §§ 200.4(d)(2) and (3).

H. Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability, or within 60 school days of the referral for review of the student with a disability, the LEA must arrange for appropriate special programs and services, except that if such recommendation is for placement in an approved in-state or out-of-state private school, the LEA must arrange for such programs and services within 30 school days of the LEA's receipt of the recommendation of the CSE. 8 NYCRR § 200.4(e)(1). There may be no delay in implementing a student's IEP, (34 C.F.R. § 300.323(c)(2); 8 NYCRR § 200.4(e)(1)(i)), and each student with a disability must have an IEP in effect at the beginning of each school year, (34 C.F.R. § 300.323(a); 8 NYCRR § 200.4(e)(1)(ii)).

I. A copy of the IEP must be provided to the parents. 34 C.F.R. § 300.322(f); 8 NYCRR § 200.4(e)(3)(iv). A copy of the IEP must also be accessible to each service provider who is responsible for its implementation and each must be 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 IEP. 34 C.F.R. § 300.323(d); 8 NYCRR §§ 200.4(e)(3)(ii) and (iii).

J. The IEP must be reviewed periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. 34 C.F.R. § 300.324(b)(1)(i); 8 NYCRR § 200.4(f). The IEP must be revised to address: 1) any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate; 2) the results of any reevaluation; 3) information about the child provided to, or by, the parents; the child's anticipated needs; or other matters. 34 C.F.R. § 300.324(b)(1)(ii); 8 NYCRR § 200.4(f)(2).

K. The IEP may be amended between annual review meetings without the need for a meeting if the parents and the school district agree not to convene a meeting for the purposes of making changes to the IEP. 34 C.F.R. § 300.324(a)(4)(i); 8 NYCRR § 200.4(g)(1). The parents must be provided with prior written notice of any changes to the IEP and receive a copy of the document that amends or modifies the IEP or, upon request, a copy of the revised IEP with

the amendments incorporated.[27] 8 NYCRR §§ 200.4(g)(1)(i) and (iii); *see also Questions and Answers on IEPs, Evaluations, and Reevaluations*, 111 LRP 63322, Question C-10 (OSERS 2011).

L. There is nothing in the IDEA that requires an IEP to include specific instructional methodologies. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46665 (August 14, 2006). There may be circumstances in which the particular teaching methodology that will be used with the student is an integral part of what is individualized about a student education. In those circumstances, the teaching methodology will need to be discussed at the IEP meeting and incorporated into the student's IEP.[28] In general, however, specific day-to-day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team. *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Pages 12552, 12595 (March 12, 1999).

M. When a student who had an IEP that was in effect in a previous LEA transfers to a new LEA in the same State within the same school year, the new LEA in consultation with the parents must provide comparable services to those provided in the previous IEP until the new LEA either adopts the child's previous IEP or develops, adopts, and implements a new IEP. 34 C.F.R. § 300.323(e); 8 NYCRR § 200.4(e)(8)(i). Comparable services are services like – or similar or

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[27] Amending an IEP without ever informing the parent or providing a copy of the revised IEP to the parent may rise to a denial of a FAPE. *See*, *e.g.*, *M.C. v. Antelope Valley Union High Sch. Dist.*, 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017), *amended*, 117 LRP 21748 (9th Cir. 2017) (rephrasing the statement that "[a]n IEP is a contract" to an IEP is "like a contract.").

[28] *J.L. v. Mercer Island Sch. Dist.*, 575 F.3rd 1025, 52 IDELR 241 (9th Cir. 2009). An LEA, however, is not required to provide the parents' preferred teaching methodology when it is established that the recommended program meets the applicable statutory standard. *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 20 IDELR 1449 (9th Cir. 1994). Courts typically defer questions of educational policy and methodology to the States. *See*, *e.g.*, *M.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 45 IDELR 1 (11th Cir. 2006) (reminding the parents that the IDEA does not permit parents to challenge an IEP "on the grounds that it is not the best or most desirable program for their child"); *Joshua A. v. Rocklin Unified Sch. Dist.*, 319 F. App'x 692, 52 IDELR 64 (9th Cir. 2009) (unpublished) (upholding an LEA's use of an eclectic approach that was not itself peer-reviewed); *Bend-Lapine Sch. Dist. v. D.W.*, 152 F.3d 923, 28 IDELR 734 (9th Cir. 1998) (stating that an LEA is not required to "cooperate" with the parents when deciding what methodology was to be used).

equivalent to – those described in the student's IEP from the previous LEA. *Letter to Finch*, 56 IDELR 174 (OSEP 2010); *Sterling A. v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2008). When the student transfers from another State within the same school year, the requirements are the same except that the new LEA must continue to provide comparable services until it conducts an evaluation (if determined to be necessary by the new LEA) and develops, adopts, and implements a new IEP, if appropriate. 34 C.F.R. § 300.323(f); 8 NYCRR § 200.4(e)(8)(ii).

VIII. RELATED SERVICES

A. "Related services" means supportive services "required to assist a child … to benefit from special education." 34 C.F.R. § 300.34(a). The regulation lists various examples of supportive services that qualify under the definition, but the list is not exhaustive. *See id.* States have the option to define special education to include related services. 34 C.F.R. § 300.39(a)(2)(i). New York defines special education to include related services. *See* N.Y. EDUC. LAW Art. 89 §§ 4401(1) and (2)(k).

B. Noteworthy are the number of related services which specifically address providing services to parents, e.g., "parent counseling and training," "psychological services" (including psychological counseling), and "social work services in schools," (including group and individual counseling with the child and family and helping parents acquire skills to support implementing the IEP and to work in partnership with schools). 34 C.F.R. §§ 300.34(c)(8), (10) and (14); 8 NYCRR §§ 200.1(kk) and (qq).

C. Related services include "medical services," which is defined to mean services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services, but it does not include medical devices that are surgically implanted or the maintenance or replacement of such devices. 34 C.F.R. §§ 300.34(c)(1) and (5); 8 NYCRR §§ 200.1(ee) and (qq)(1). Thus, a physician is not allowed to provide direct medical services to a student.

D. Related services also include school health/nurse services, which means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. 34 C.F.R. § 300.34(c)(13); 8 NYCRR § 200.1(ss). However, only those services necessary and required to be administered during the school day to

aid a child with a disability to benefit from special education must be provided. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 555 IDELR 511 (1984) *Cedar Rapids Community Sch. Dist.*, 526 U.S. 66, 29 IDELR 966 (1999). *See also Clovis Unified Sch. Dist. v. California Office of Administrative Hearings*, 903 F.2d 635, 16 IDELR 944 (9th Cir. 1990) (holding that just because a service can be provided by someone other than a physician does not make it a related service; the service must be required for educational purposes as well).

E. It is important to distinguish the difference between medically necessary occupational therapy and physical therapy to address personal needs and therapy that is necessary under the IDEA to allow the student to participate/benefit/function educationally. Moreover, there are varying approaches to delivering such services, e.g., "monitoring" or "consultative" versus "hands-on" or "direct." The appropriate method will vary depending upon the particular needs of the student and his or her goals.

IX. ASSISTIVE TECHNOLOGY DEVICES (ATD)

A. ATD means any item, piece of equipment, or product system used to increase, maintain, or improve the functional capabilities of children with disabilities. 34 C.F.R. § 300.5; 8 NYCRR § 200.1(e). Assistive technology service means any service that directly assists a child with a disability in the selection, acquisition, or use of an ATD. 34 C.F.R. § 300.6; 8 NYCRR § 200.1(e). The CSE/CPSE determines what ATDs and services are necessary to provide the student with a FAPE.[29] 34 C.F.R. § 300.24(a)(2)(v); 8 NYCRR § 200.4(d)(2)(v)(b)(6).

B. As a practical matter, school districts have typically not been asked to provide and bear the expense of eyeglasses, hearing aids, or medical equipment, such as respirators or even wheelchairs (unless needed to assist the child benefit from special education). *See Letter to Stohrer*, 213 IDELR 209 (OSEP 1989); *Letter to Seiler*, 20 IDELR 1216 (1993); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46681 (August 14, 2006). Note, however, that the IDEA expressly excludes a "medical device that is surgically implanted or the replacement of such device" from the definition of ATD. 34 C.F.R. § 300.5.

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[29] The failure to specify the assistive technology devices that a student requires may infringe on the right of the parent to participate in the IEP process. *See, e.g., M.C. v. Antelope Valley Union High Sch. Dist.*, 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017), *amended*, 117 LRP 21748 (9th Cir. 2017).

X. TRANSITION

A. Transition services means a coordinated set of activities for a child with a disability that is designed to be within a results-oriented process focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities (e.g., postsecondary education, vocational education, integrated employment, independent living, or community participation). 34 C.F.R. § 300.43(a)(1); 8 NYCRR § 200.1(fff).

B. Under the IDEA, when the student is no older than 16 (15 or younger in New York), the CSE must conduct appropriate transition assessments relating to training, education, employment, and where appropriate independent living skills.[30] 34 C.F.R. § 300.320(b)(1); 8 NYCRR § 200.4(d)(2)(ix)(b). Thereafter, the IEP must include appropriate, measurable postsecondary goals (based on the results of the assessments) and transition services (including courses of study) needed to assist the child in reaching those goals.[31] 34 C.F.R. § 300.320(b)(2); 8 NYCRR §§ 200.4(d)(2)(ix)(b) and (c).

C. Postsecondary goals are required in the IEP in the areas of training, education, and employment, but not required in area of independent living, unless appropriate.[32] It is up to the CSE to determine whether IEP goals related to the development of independent living skills are appropriate and necessary for the child to receive FAPE. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46668 (August 14, 2006). The requirement for measurable postsecondary goals relating to training, education, and employment applies whether or not the child's skill levels related to training, education, and employment are age appropriate. *Questions and Answers on IEPs, Evaluations,*

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[30] In New York, a level 1 vocational assessment is required beginning at age 12 to determine vocational skills, aptitudes and interests. 8 NYCRR § 200.4(b)(6)(viii).

[31] The lack of appropriate assessments and the failure to adequately consider the student's preferences and interests can result in loss of educational opportunities to the student denying the student a FAPE. *See, e.g., Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, 655 F. App'x 423, 68 IDELR 33 (6th Cir. 2016) (unpublished) (affirming award of 425 hours of transition related services).

[32] The periodic progress reporting requirement in 34 C.F.R. § 300.320(a)(3) for annual IEP goals also applies to secondary transition goals even though the IDEA does not explicitly include post secondary transition goals in the requirement. *Letter to Pugh*, 69 IDELR 135 (OSEP 2017).

and Reevaluations, 111 LRP 63322, Question F-1 (OSERS 2011).

D. Upon graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law, the school district must provide the child with a summary of the child's academic achievement and functional performance, which must include recommendations on how to assist the child in meeting the child's postsecondary goals. 34 C.F.R. § 300.305(e)(3); 8 NYCRR § 200.4(c)(4).

E. Though the IEP team must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services (34 C.F.R. § 300.321(b)(3)), the agency's failure to provide services requires the LEA to reconvene the IEP to identify alternative strategies to meet the transition objectives for the child set out in the IEP (34 C.F.R. § 300.324(c)(1)).

XI. EXTENDED SCHOOL YEAR (ESY)

A. If the CSE determines on an individual basis that services beyond a normal school year are necessary for the child to receive a FAPE, then ESY services must be provided.[33] 34 C.F.R. § 300.106(a)(2); *see also* 8 NYCRR § 200.6(k)(1) (describing eligibility for 12-month special services and/or programs).

B. Typically, ESY services are provided during the summer months. However, ESY services may be provided during times other than the summer, such as before and after regular school hours or during school vacations, if the CSE determines that the child requires ESY services during those time periods in order to receive FAPE. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46582 (August 14, 2006).

C. The IDEA does not provide a test to determine when ESY services are "necessary." The Comments provide that States may use "recoupment" and "likelihood of regression or retention" as their sole criteria but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations. *Id.*

[33] A policy of a uniform amount of ESY services violates the IDEA. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 19 IDELR 1 (9th Cir. 1992).

D. New York has adopted a regression criterion and sets forth standards for making ESY determinations. 8 NYCRR § 200.6(k)(1).

XII. PLACEMENTS

A. A placement decision is a determination of where the LEA will implement the student's IEP in the least restrictive environment ("LRE"). An LEA must ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 34 C.F.R. § 300.114(2)(i).

B. The term "educational placement" refers only to the general type of educational program in which the child is placed. *Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751, 552 IDELR 147, (2d Cir. 1980), *cert. denied*, 449 U.S. 1078, 110 LRP 34494 (1981).

C. The IDEA defines IEP to include, *inter alia*, "the anticipated frequency, *location*, and duration of those services." 34 C.F.R. § 300.320(a)(7) (emphasis added). The term "location," however, as used in the IDEA, refers to the type of environment that is the appropriate place for the delivery of services, and not a *particular* school or facility, classroom or teacher. *T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 53 IDELR 69 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3277 (2010).

D. The Comments to the IDEA regulations discuss the difference between placement and location. "Placement" refers to the points along the continuum of placement options available for a child with a disability, and "location" refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46588 (August 14, 2006). When an LEA has two or more equally appropriate locations that meet the child's special education and related services needs, the LEA has the flexibility to assign the child to a particular school or classroom. *Id.*; *Letter to Trigg*, 50 IDELR 48 (OSEP 2007).

E. The placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1); *see also Letter to Trigg*, 50 IDELR 48 (OSEP 2007) (stating that placement decisions must be made on an individual, case-by-case basis). The child's placement must be determined at least annually based on the child's IEP and must be

as close as possible to the child's home. 34 C.F.R. § 300.116(b).

F. The placement offer must be in writing and must meet certain procedural and substantive requirements. 34 C.F.R. § 300.503.

G. Just as with the initial evaluation of a student, prior notice and parent consent is necessary regarding an initial placement. 34 CFR § 300.300(b)(2). A school district may not go to hearing or use the mediation procedures in an attempt to override the refusal. 34 CFR § 300.300(b)(3).

H. An LEA, in the traditional exercise of its discretions, can implement minor changes to the educational program as it may determine to be necessary within the educational programs provided for its students. *Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751, 552 IDELR 147, (2d Cir. 1980), *cert. denied*, 449 U.S. 1078, 110 LRP 34494 (1981). Said adjustments do not constitute a change in the educational placement sufficient to trigger the prior written notice provisions. *See id.*

I. In order for the change to qualify as a change in educational placement, a fundamental change in, or elimination of a basic element of the education program, must be identified. *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 556 IDELR 270 (D.C. Cir. 1984). [T]he 'touchstone' is whether the modification 'is likely to affect in some significant way the child's learning experience.'" *J.R. v. Mars Area Sch. Dist.*, 318 F. App'x 113, 52 IDELR 91 (3d Cir. 2009) *citing DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 556 IDELR 260 (3d Cir. 1984). *Cf.* 8 NYCRR §§ 200.1(g) and (h).

J. A case-by-case analysis must be conducted to determine whether a change in placement materially or substantially alters a student's program. In making such a determination, the effect of the change in location on the following factors must be examined: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements. *Letter to Fisher*, 21 IDELR 992 (OSEP 1994). If this inquiry leads to the conclusion that a substantial or material change in the child's educational program has occurred, the public agency must provide prior written notice. *Id.*; *see also Letter to Chandler*, 59 IDELR 110 (OSEP 2012) (stating that there is no requirement for prior written notice when the student is simply moving from elementary school to middle

school as part of the normal progress that all students follow, unless the student's education program will not be substantially and materially similar to his/her elementary program or the student would not be attending the middle school s/he would normally attend).

K. The IDEA contemplates that a residential program is necessary to provide special education and related services to a child with a disability. *See* 34 C.F.R. § 300.104. The "test" regarding whether a residential program is "necessary" is not set forth in any law or rule, but case law is instructive.

Most courts look to "distinguish between residential placement that is a necessary predicate for learning and the provision of services that are unrelated to learning skills." *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 552 IDELR 350 (3d Cir. 1981). The analysis "must focus … on whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process." *Id. See also Ashland Sch. Dist. v. E.H.*, 587 F.3d 1175, 53 IDELR 177 (9th Cir. 2009) *citing Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 16 IDELR 944 (9th Cir. 1990) ("Accordingly, 'our analysis must focus on whether [the residential] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process."); *Taylor v. Honig*, 910 F.2d 627; 16 IDELR 1138 (9th Cir. 1990) (finding that placement in a psychiatric hospital was necessary to meet student's educational needs). While it may be possible in some situations to determine whether the medical, social or emotional problems are segregable from the learning process, the emotional, medical and educational problems may be "so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them." *North v. Dist. of Columbia Bd. of Educ.*, 471 F. Supp. 136, 551 IDELR 157 (D.D.C. 1979); *but see Forest Grove Sch. Dist. v. T.A.*, 638 F.3d 1234, 56 IDELR 185 (9th Cir. 2011) (affirming the lower court's decision denying the parents' request for tuition reimbursement for the student's residential placement because the nature of the placement was for non-educational purposes). In such case, "the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning." *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 552 IDELR 350 (3d Cir. 1981); *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585, 19 IDELR 482 (9th Cir. 1992).

If a residential program is, therefore, required due to a child's emotional problems, and the child's emotional problems prevent the child from making meaningful educational progress, the IDEA requires the State to pay for the costs of the placement. *See, e.g.*, *M.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 296 F. App'x 126, 51 IDELR 91 (2d Cir. 2008); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 25 IDELR 217 (2d Cir. 1997).

XIII. LEAST RESTRICTIVE ENVIRONMENT (LRE)

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

The IDEA requires that "to the maximum extent appropriate" children with disabilities be educated with children without disabilities and that segregation occur only when the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114. The factors to be considered in determining the LRE for a child include: the proximity of the placement to the child's home; whether the child is educated in the school that s/he would attend if nondisabled (unless the IEP requires some other arrangement); and any potential harmful effect on the child or on the quality of services that s/he needs. 34 C.F.R. §§ 300.116(b), (c), and (e); 8 NYCRR §§ 200.4(d)(4)(ii)(b) and (c).

B. LRE is not an option. It is a mandate. But, the student does not have an absolute right to be in a general education classroom or in their "home" school. The student only has the right to have such considered first and rejected for good reason.[34] The LRE for each student must be determined based upon an analysis of the above factors and that child's individualized situation. Bottom line, the LRE mandate creates tension between two IDEA requirements: (1) educating the student to the maximum extent appropriate in general education settings with supports, while also (2) meeting all of the student's unique needs, academically, socially, behaviorally, etc. *See Wilson v. Marana Unified Sch. Dist. No. 6*, 735 F.2d 1178, 556 IDELR 101 (9th Cir. 1984); *Bend-Lapine Sch. Dist. v. D.W.*, 152 F.3d 923, 28 IDELR 734 (9th Cir. 1998). *See also B.S. v. Placentia-Yorba Linda Unified Sch. Dist.*, 306 F. App'x 397, 51 IDELR 237

[34] "Mainstreaming which results in total failure, where separate teaching would produce superior results, is not appropriate and satisfactory." *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 22 IDELR 804 (9th Cir. 1995).

(9th Cir. 2009) (unpublished) (holding that the benefits of mainstreaming were minimal compared to the student's need for more intensive instruction).

C. The IDEA and its regulations do not set down a "test" to determine LRE. The Second Circuit has adopted a two-pronged approach. *See Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 51 IDELR 2 (2d Cir. 2008). It must first be determined "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child, and, if not, then whether the school has mainstreamed the child to the maximum extent appropriate." *Id.*

In determining whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services, several factors should be considered, including: "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class." *Id.* If, after considering these factors, it is determined that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, it must then be considered "whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate."[35] *Id.*

D. Participating in general education settings is not an all or nothing matter. Some of the student's needs might be met in a general education setting (with supports), while other needs might be met in special education settings.

E. The LRE principles also apply to the preschool setting,[36] transportation of a student to and from school, nonacademic and extracurricular services and activities, such as recess, meals,

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[35] OSEP has identified permissible factors that should be considered, which are similar to *Newington*, including: (1) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; (2) the nonacademic benefits to the child from interacting with nondisabled students; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class. *See* OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994).

[36] *Dear Colleague Letter*, 69 IDELR 106 (OSEP 2017).

athletics, and groups, and ESY.

XIV. EQUITABLE PARTICIPATION

A. Under the IDEA, parentally-placed private school children with disabilities may receive special education and related services. 34 C.F.R. §§ 300.132(a) and (b). Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious schools located in the school district served by the LEA. 34 C.F.R. § 300.131(a). To the extent consistent with the number and location of parentally-placed private school children with disabilities, the LEA must afford IDEA-eligible parentally placed private school students with an opportunity for equitable participation in the services funded by the IDEA that the LEA determines to make available to parentally placed private school children. *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schs.*, 111 LRP 32532 (OSERS 2011).

B. A services plan must be developed and implemented for each eligible parentally placed private school child with a disability by the LEA in which the private school is located. 34 C.F.R. § 300.132(b). Parentally-placed private school children with disabilities may receive a different amount of services than children with disabilities in public school. 34 C.F.R. § 300.138(a)(2). Moreover, no parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the student would receive if enrolled in a public school. 34 C.F.R. § 300.137(a). Accordingly, access to the due process and state complaint procedures is limited to a claim that an LEA has failed to meet the child find requirements. 34 C.F.R. § 300.140.

C. Under IDEA, the LEA where a child attends private school is responsible for ensuring equitable participation.[37] 34 C.F.R. § 300.133. If a parentally placed private school child also resides in that LEA, then the LEA would be responsible for making FAPE available to the child, unless the parent makes clear his or her intent to keep the child enrolled in the private school located in the LEA. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46593 (August 14, 2006). If a parentally placed private school child resides in a different LEA, the school

[37] For additional information on serving students with disabilities voluntarily placed in private schools, *see Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, 111LRP 32532 (OSEP 2011).

district in which the private school is located is not responsible for making FAPE available to that child, but the LEA of the child's residence would be responsible for making FAPE available to the child.

D. New York, unlike the IDEA, makes a distinction between New York State resident and non-resident students enrolled in nonpublic schools by their parents.

Under Education Law § 3602–c, New York State resident students are entitled to an individualized education services program ("IESP") developed by the school district where the nonpublic school is located and the IESP must be developed in the same manner and with the same contents as an IEP. Special education services under an IESP must be provided on an equitable basis as compared to other students with disabilities attending public or nonpublic schools located within the school district.

Further, § 3602-c provides a parent of a New York State resident student the opportunity to challenge an IESP through the same due process procedures offered to students who are enrolled in a district of residence. The complaint is filed with the district of location.

For out-of-state students with disabilities, the school district of location is obligated to provide special education services to an eligible student who legally resides in another state and is parentally placed in a nonpublic school located in New York State only to the extent that such services provide the student equitable participation in the services funded with federal IDEA funds (i.e., through a services plan).

A parent of an out-of-state student suspected of having a disability has the right to mediation or an impartial hearing for disputes regarding evaluations and an eligibility determination. Since out-of-state resident students have no individual right to services, there is no right to mediation or an impartial hearing for disputes regarding services.

XV. DISCIPLINE

A. Under the IDEA, there are different rules governing the discipline of students with disabilities, and the requirements differ depending on the number of days the student is being removed from his normal setting. *See*, *generally*, 34 C.F.R. § 300.530.

B. A student with a disability can be removed for violating a code of student conduct from his or her current placement to an

appropriate interim alternative educational setting, another setting, or suspension for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities) and for additional removals of not more than 10 consecutive school days in the same school year for separate incidents of misconduct that do not constitute a change of placement. 34 C.F.R. § 300.530(b); 8 NYCRR §§ 201.7(b) and (c). This is commonly referred to as a short-term removal.

C. For short-term removals, the LEA is not required to provide services to the student, unless services are provided to children without disabilities who are similarly removed. 34 C.F.R. § 300.530(d)(3); 8 NYCRR § 201.10(b).

D. In the disciplinary context, a change in placement occurs if –

1. the removal is for more than 10 consecutive school days; or

2. the student is subjected to a series of removals that constitute a pattern because the number of school days exceeds 10 days, the student's behavior is substantially similar to the behavior in previous incidents that resulted in the series of removals, and such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another.

34 C.F.R. § 300.536(a); 8 NYCRR § 201.2(e). The LEA (not necessarily the CSE) determines on a case-by-case basis whether a pattern of removals constitutes a change of placement, and such determination is subject to review by a hearing officer. 34 C.F.R. § 330.536(b); 8 NYCRR § 201.2(e)(2).

E. An in-school suspension would not be considered part of the days of suspension provided the student is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified in his or her IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. However, portions of a school day that a student has been suspended may be considered when determining whether there is a pattern of removals. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46715 (August 14, 2006).

F. A bus suspension would count as a day of suspension if bus transportation is listed on the student's IEP, unless the LEA provides the bus service in some other way, because that

transportation is necessary for the student to obtain access to the location where services will be delivered. *Id.*

G. A long-term removal is one of over 10 consecutive school days. Establishing whether the removal is short or long-term is important because of the additional requirements imposed on long-term removals.

H. Once a long-term removal is initiated (i.e., a decision is made to change the student's placement), the LEA, the parents, and relevant members of the CSE must convene a meeting to review all relevant information in the student's file, including the IEP, and any relevant information provided by the parents to determine if the misconduct was caused by, or had a direct and substantial relationship to, the student's disability or if the misconduct was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1); 8 NYCRR § 201.4(b). This process is known as a manifestation determination review. *See id.*

I. The manifestation determination must occur within 10 school days of the decision to change the student's placement. 34 C.F.R. § 300.530(e)(1); 8 NYCRR § 201.4(a).

J. If it is determined that the conduct is not a manifestation of the student's disability, the LEA may apply the relevant disciplinary procedures to the student in the same manner and for the same duration as the procedures would be applied to children without disabilities. 34 C.F.R. § 300.530(c). The LEA, however, must continue to provide the student with educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress towards meeting the goals set out in his or her IEP. In addition, the student must receive, as appropriate, a functional behavioral assessment (FBA), and behavioral intervention services and modifications to address the behavior violation so that it does not recur. 34 C.F.R. § 300.530(d)(1). The CSE determines what services are to be provided to the student. 34 C.F.R. § 300.530(d)(5).

K. Participation in the general education curriculum does not require the LEA to replicate every aspect of the services that the student would have received in his or her classroom. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46716 (August 14, 2006).

L. If it is determined that the misconduct is a direct result of the LEA's failure to implement the student's IEP, the LEA must take

immediate steps to remedy those deficiencies. 34 C.F.R. § 330.530(e)(3).

M. If it is determined that the conduct is a manifestation of the student's disability, a long-term removal cannot take place. The student must be returned to the placement from which s/he was removed, unless the parents and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. 34 C.F.R. § 300.530(f)(2); 8 NYCRR 201.4(d)(2)(ii). An IEP team meeting must also be convened to either (1) conduct an FBA, unless one had already been done, and implement a behavior intervention plan (BIP) for the student; or (2) review the existing BIP, if one had already been developed, and modify it, as necessary, to address the behavior. 34 C.F.R. § 300.530(f)(1); 8 NYCRR § 201.4(d)(1).

N. A student may be removed to an interim alternative educational setting (IAES) for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of his or her disability, if the student (1) carries/possesses a weapon in school or at school functions; (2) knowingly possesses or uses illegal drugs or sells/solicits the sale of a controlled substance in school or at school functions; or (3) inflicts serious bodily injury upon another person in school or at school functions. 34 C.F.R. § 300.530(g); 8 NYCRR § 201.7(e). Note that the IDEA continues to require a manifestation determination even though the outcome of the meeting does not much matter to whether the LEA removes the child to the IAES. 34 C.F.R. § 300.530(g).

O. The CSE determines the IAES for services, and the setting must enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP, as well as appropriate behavior interventions. 34 C.F.R. §§ 300.530(d)(1) and 300.531; *see also* 8 NYCRR § 201.2(k)(1). The LEA cannot limit an IEP team to offering home instruction as the sole IAES option. *Questions and Answers on Discipline Procedures*, 52 IDELR 231 (OSERS 2009).

P. The parents of a student with a disability who disagree with the placement decision or the manifestation determination resulting from a disciplinary removal may challenge said decision by requesting a hearing. 34 C.F.R. § 300.532(a); 8 NYCRR §§ 201.11(a)(3) and (4). An LEA that believes maintaining the current placement of the student is substantially likely to result in injury to the student or others, may seek to have the HO order a change in placement to an IAES. 34 C.F.R. §§ 300.532(a) and (b)(2)(ii); 8 NYCRR §§ 201.11(a)(1) and (2). The disciplinary hearing must be

expedited. 34 C.F.R. § 300.532(c)(1); 8 NYCRR § 201.11(a). The hearing must occur within 20 school days of the date the complaint requesting the hearing was filed and the hearing officer must issue a decision within 10 school days after the hearing. 34 C.F.R. § 300.532(c)(2); 8 NYCRR §§ 201.11(b)(3)(iii) and (iv).

Q. The resolution meeting must occur within seven days of the LEA and SEA receiving notice of the due process complaint and must be completed within 15 days. 34 C.F.R. § 300.532(c)(3); 8 NYCRR §§ 201.11(b)(3)(i) and (ii).

R. There are no procedures to challenge the sufficiency of the due process complaint requesting an expedited hearing. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46725 (August 14, 2006). Nor is there any requirement that the LEA file a response to the parent's complaint. *See* 34 C.F.R. § 300.532(c).

S. Students who have not been determined eligible for special education and related services and are subject to disciplinary removal may assert IDEA protections if it is shown that the LEA had knowledge that the student was a child with a disability. 34 C.F.R. § 300.534(a); 8 NYCRR 201.5(a). An LEA is deemed to have knowledge that the student is a child with a disability if before the behavior that precipitated the disciplinary action occurred, (1) the parent expressed concern in writing to supervisory/administrative personnel of the LEA or a teacher that the child needed special education, (2) the parent requested an evaluation, or (3) the teacher or other district staff express specific concerns about a pattern of behavior directly to the director of special education or the supervisory staff. 34 C.F.R. § 300.534(b); 8 NYCRR § 201.5(b). An LEA is not deemed to have knowledge if the parent did not allow the child to be evaluated, the child was evaluated and found not eligible, or the parent refused special education services. 34 C.F.R. § 300.534(c); 8 NYCRR § 201.5(c). If a request for evaluation is made after the student is subjected to disciplinary measures, the evaluation is to be expedited. But, pending results of the evaluations, the child remains in the placement determined by the LEA. 34 C.F.R. § 300.534(d)(2); 8 NYCRR § 201.6.

XVI. PARENTAL STATUS

A. "Parent" is defined to mean not only a natural or adoptive parent but also a guardian or a person acting as a parent (e.g., relative with whom child lives or one legally responsible for child's welfare), as well as a surrogate parent. 34 C.F.R. § 300.30; 8 NYCRR § 200.1(ii)(1). If no parent can be identified, after reasonable efforts

by the district, or the child is a ward of the state, the district must assign an individual to act as a surrogate for the parent and there are procedures relating to the training and selection of such persons. *See* 34 C.F.R. § 300.519.

B. If a foster parent meets certain requirements, the person can be a parent within the meaning of the IDEA. 34 C.F.R. § 300.30(a)(2); 8 NYCRR § 200.1(2).

C. In divorce situations, care should be taken to examine the order regarding custody to determine whether custody lies with just one parent or joint and whether it includes educational matters. Where there is joint custody, both parents have the right to participate in the IEP meeting and challenge it. Moreover, non-custodial parents have been held to have rights, albeit not contesting an IEP (e.g., access to records, participating in an IEP team meeting, observing the child in school, etc.). *See*, *e.g.*, *Navin v. Park Ridge Sch. Dist. No. 64*, 36 IDELR 235 (N.D. Ill. 2002), *aff'd*, 49 F. App'x 69, 104 LRP 18051 (7th Cir. 2002) (unpublished); *Smith v. Meeks*, 69 IDELR 29 (N.D. Ill. 2016).

XVII. PROCEDURAL SAFEGUARDS, GENERALLY

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

B. The safeguards notice must be given to the parent only once a year, except that a copy must also be given to the parents upon initial referral or a request for an evaluation, upon receipt of the first due process complaint or State complaint, when the decision is made to change the student's placement because of a disciplinary removal, and upon the request of the parent. 34 C.F.R. § 300.504(a); 8 NYCRR § 200.5(f)(3).

C. When a district proposes/refuses to initiate/change the identification, evaluation, placement or FAPE of a child, prior written notice (PWN) must be provided to the parent which includes: a description of the action proposed/refused; an explanation of why the LEA proposed/refused to take the action; a

description of other options considered and why said options were rejected; a description of each evaluation procedure/test/report used by the LEA as a basis for the proposed/refused action; and a description of other relevant factors to the LEA's proposal/refusal. 34 C.F.R. §§ 300.503(a) and (b); 8 NYCRR §§ 200.5(a)(1), (2), and (3)(i) – (v). The parent must also be advised of where to get a copy of procedural safeguards and of sources to contact to obtain assistance in understanding their rights. 34 C.F.R. §§ 300.503(b)(4) and (5); 8 NYCRR §§ 200.5(a)(3)(vi) and (vii).

D. A parent or LEA must be afforded the opportunity to resolve disputes arising under federal and State law and regulations through either a due process complaint (*see* 34 C.F.R. § 300.507), mediation (*see* 34 C.F.R. § 300.506), State complaint (*see* 34 C.F.R. § 300.151), or a combination thereof. *See Resolving Disputes Under IDEA* Outline for a summary review of the three dispute resolution options available to LEAs and parents.

E. If the parents are the "prevailing party" resulting from a due process complaint, they may be awarded reasonable attorneys' fees and related costs (but not expert witness fees) by a court. 34 C.F.R. § 300.517(a)(1)(i); *see also Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 45 IDELR 267 (2006). Factors considered include the reasonableness of the rate, whether either party unreasonably protracted the resolution, the time spent, and whether the parents were justified in refusing a settlement offer made 10 days or more prior to the hearing which was "more favorable" than the eventual decision. *See*, *generally*, 34 C.F.R. § 300.517(c). If at the time the hearing is requested the parents refuse to provide notice to the district of the problems causing the hearing request and proposed solutions "to the extent known and available to the parents at the time," any potential request for attorneys' fees by the parents could be reduced or denied. 34 C.F.R. § 300.517(c)(4)(iv).

F. An SEA or LEA can recover attorneys' fees from the parents' attorney who requests a hearing or starts a court action that is "frivolous, unreasonable, or without foundation" or continues to litigate after the litigation has become such. 34 C.F.R. § 300.517(a)(1)(ii). Attorneys' fees can also be recovered from either the parents' attorney or the parents if the parents' request for hearing or a subsequent court action "was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 34 C.F.R. § 300.517(a)(1)(iii).

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