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SPECIAL EDUCATION LAW

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Three generations of imbeciles are enough.

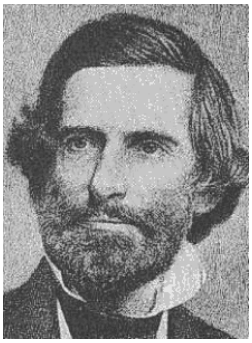
Buck v. Bell, 274 U.S. 200, 207 (1927) (Justice Oliver Wendell Holmes)
(affirming the constitutionality of mandatory sterilization laws in Virginia).

Section 1[1]

A BRIEF HISTORY OF SPECIAL EDUCATION

Before discussing the current status of special education in the United States, it is useful to review the history of educating persons with disabilities.[1]

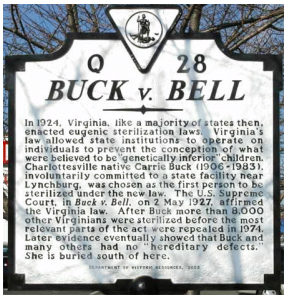
Persons with disabilities were historically excluded from traditional activities, including education, work, recreation and commerce, despite their desire and ability to participate. Prior to the mid-nineteenth century, children with disabilities were generally educated in the home, if at all. Only the wealthy could provide an education for their children with disabilities. In 1848, Dr. Samuel Gridley Howe established The Massachusetts School for Idiotic and Feeble-Minded Youth, an experimental boarding school in South Boston. This school represented an early attempt to educate youth with intellectual deficiencies. Dr. Howe emphasized the importance of community and family, and pursued the goal of preparing children with disabilities to live with their peers without disabilities in the community. In the 1850s,



[1] The information in this section is based upon a variety of sources. *See e.g.*, John Dayton, *Special Education Discipline Law*, 163 Ed. Law Rep. 1, 18 (May 23, 2002); Jennifer R. Rowe, *High School Exit Exams Meet Idea-an Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers*, Brig. & Young Univ. Educ. and Law Journal, 78 (2004); Seguin Services, Inc., www.seguin.org; and The Minnesota Governor's Council on Developmental Disabilities, www.mnddc.org.

following Dr. Howe's efforts, a number of "training schools" opened in the eastern United States for children with disabilities.

By the 1870s, however, the educational approach was displaced by a medical model which viewed the mentally impaired as incurable and sick, and the philosophy changed to sheltering the impaired from society. It was thought that children with disabilities did not belong in regular public schools. Many were institutionalized, preventing them from interacting with peers without disabilities. In the early twentieth century, the rise of eugenics[2] and mandatory sterilization laws became popular for institutionalized persons "in order to prevent our being swamped with incompetence," *Buck v. Bell*, 274 U.S. 200, 207 (1927), and by 1926, twenty-three states had enacted such laws.



Despite societal obstacles with cases like *Buck*, the late 1800s and early 1900s saw the emergence of special education. In 1896, Rhode Island opened the first special education class in the United States, and almost 34,000 students were in special education classes by 1923. Institutions began offering special classes for residents and training for school teachers, while the beneficial effects of education and community interaction started being recognized. While the early twentieth century saw improvements in the effort to educate children with disabilities, most of the special education offerings were in larger cities. The population of institutions continued to rise as families did not have the financial means to care for their children with disabilities, community services were minimal, and they believed that institutions were the only option for training and education. Furthermore, a competing social concept suggested that having a

[2] In general, eugenics is a concept that advocates improvement of the human race by controlling reproduction. *See, e.g.*, WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY p. 491 (1996).

developmental disability was hereditary and that education was of little help. Families with children with disabilities were socially stigmatized as genetically flawed or morally corrupt. As a result of worker shortages during World War II, many institutions hired conscientious objectors who publicly voiced opinions about the poor living conditions. Published reports further highlighted the conditions within institutions.

During the 1950s, advocates for children with disabilities began to vocalize objections to institutionalization, demanding that children with disabilities attend traditional public schools. The United States Supreme Court decision of *Brown v. Board of Education*, 347 U.S. 483 (1954), which held that "separate but equal" had no place in public education, provided an unexpected source of support for students with disabilities. Legal theories founded on the principles of *Brown* were the subject of countless cases being filed nationwide, claiming that children with disabilities were being improperly excluded from public schools, thereby violating their rights to equal protection and due process. *See e.g., Pa. Ass. for Retarded Children v. Pa., et. al.*, 343 F. Supp. 279 (D. Pa. 1972) (affirming the right of children with disabilities to a free public education and providing procedural safeguards); *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 878 (D. D.C. 1972) (holding that all children with disabilities are entitled to a free and adequate public education "regardless of the degree of the child's mental, physical or emotional disability or impairment").

Before these cases reached the Supreme Court, Congress intervened with legislation aimed at protecting children with disabilities. In 1961 the President's Panel

on [Developmental Disabilities][3] was created by President Kennedy, whose sister Rosemary was mentally disabled. The Panel set a goal of combating developmental disabilities and exploring possibilities of prevention and care.

In 1974, the United States District Court for the District of Minnesota held that [the due process clause of the Fourteenth Amendment to the U.S. Constitution] requires that civil commitment for reasons of developmental disability be accompanied by minimally adequate treatment designed to give each committed person a realistic opportunity to be cured or to improve his or her mental condition. *Welsch v. Likins*, 373 F. Supp. 487, 499 (D. Minn. 1974). The Court further held that due process requires treatment be provided in a manner least restrictive of a person's liberties. *Id.* at 502. The Court observed that the right to treatment or "habilitation," consisting of "individualized treatment, education, and training," can improve the lives of citizens with developmental disabilities. *Id.* at 490, 495. Testimony of experts and documentary evidence indicate that everyone, no matter the degree or severity of disability, is capable of growth and development if given adequate and suitable treatment. *Id.* at 495.

Prior to 1975 people with profound disabilities received little instruction. Persons with developmental disabilities were termed "educable" and provided with basic academic instruction and social skills training. Those who were more severely disabled were categorized as "trainable" and were provided with instruction in self-help and social skills. Between 1958 and

3 Respectful and inclusive language is an essential part of the movement for the dignity and humanity of people with developmental disabilities. Consistent with this movement, the authors have replaced historical and statutory references to the offensive term "mental retardation" with "developmental disability." The authors also recognize the Minnesota Department of Human Services' commitment to updating old and offensive language in its policies, bulletins, brochures, or other publications as well as drafting a bill for the Minnesota Legislature that will require the replacement of terms such as "insane," "mentally incompetent," "mental deficiency," and other similar inappropriate terms that appear in Minnesota statutes and rules.

1974 Congress attempted, with limited success, to advance the cause of educating children with disabilities in public schools. As of 1971, only seven states had laws mandating public education for all children with disabilities, although twenty-six other states had laws mandating some form of education for some students with disabilities.

The passage of Section 504 of the Rehabilitation Act of 1973 ("Section 504") (codified at 29 U.S.C. § 794) was a dramatic step toward protecting the rights of the disabled. Section 504 was designed to prevent discrimination against persons with disabilities in federally funded programs, including public education. Problems remained, however, as more than 4 million of the estimated 8 million children with disabilities in 1975 were either not receiving an appropriate education or not even being served at all by the public school system.

Nonetheless, with appropriate educational services, a presumption existed that children with disabilities could be prepared to lead productive, independent lives. In furtherance of this presumption and to protect students with disabilities from discrimination in public schools, Congress passed the Education for All Handicapped Children Act ("EAHCA") in 1975. The EAHCA provided significant new substantive rights and procedural protections for children with disabilities, including a federal guarantee to a free and appropriate public education ("FAPE") for children with disabilities between ages three and twenty-one. School Districts were prohibited from refusing service to students with disabilities or forcing parents to place their children in programs which they did not approve. School Districts were also required to place students with disabilities in the least restrictive environment ("LRE") possible and to develop an Individualized Education Plan ("IEP") for each student consisting of annual goals, short term

objectives, and a description of the specific services needed. After the passage of the EAHCA, institutional populations decreased as parents began bringing their children home since they could now attend school.

Despite advances with the passage of EAHCA, students with disabilities were rarely mainstreamed or included in general education classes. From 1979 to 1989, the number of students educated in separate special education classes doubled. In response, the U.S. Department of Education issued an initiative known as the Regular Education Initiative ("REI"), which supported the notion that the general education classroom should be used to educate students with disabilities and sought methods to include as many children with disabilities as possible. This concept of "inclusion" was thought to promote independence and self-sufficiency and demonstrate to others that persons with disabilities had the ability to function with persons without disabilities. Inclusion increased in the late 1980s and early 1990s.

In 1990, Congress changed the name of EAHCA to the Individuals with Disabilities Education Act ("IDEA"). While the IDEA brought only minor changes to the law, it symbolized a rejection of the patronizing attitude associated with the term "handicapped" and demonstrated a renewed interest in the education of the nation's disabled citizens. Rowe, *supra* note 1, at 84. IDEA guaranteed students with disabilities the right to FAPE based on an individual assessment of the child's needs and performance levels. Changes that came with IDEA included the addition of autism and traumatic brain injury as classifications of disabilities, and the requirement of a transition plan that would help prepare students with disabilities to move into higher education, employment and the community.

In 1997, IDEA was reauthorized with the addition of several significant amendments including greater focus on inclusion in general education classrooms and discipline of IDEA-eligible students who bring drugs or weapons to school or present a danger to themselves or others. The IDEA was once again reauthorized in December 2004 ("IDEA 2004"); performance standards were increased and schools were now required to use instruction based on research and provide more intensive special education services. Additionally, IDEA 2004 recognized that teachers must have "the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible." 20 U.S.C. § 1400(c)(5)(E) (2000 & Supp. 5 2006). In 2004, there were more than 7 million students nationwide who were eligible for and receiving special education services, including 118,000 in Minnesota.[4] Following the reauthorization of IDEA in 2004, the Minnesota Legislature followed suit by making a number of changes to state special education law in 2005.

While history has observed great strides in providing persons with disabilities with an education and integration into the community, school districts continue to face budget shortfalls and challenges in providing FAPE to children with disabilities. Many districts lack sufficiently qualified staff, and segregation continues to occur despite the IDEA's mandate of inclusion where possible. In 2001, Congress passed the No Child Left Behind Act ("NCLB"), which mandated for the first time that schools should be held accountable for the progress of students with disabilities.

[4] Dan Stewart, Minnesota School Training and Consulting Services, *Minnesota Special Education Law: Background and Step-by-Step* (2005), *available at* http://www.law.umn.edu/uploads/BZ/tT/BZtTNzQ8JFnMo_nGQTrw1g/f09sestss.pdf

In January 2007, a survey was conducted by the Minnesota Governor's Council on Developmental Disabilities ("MGCDD") regarding attitudes of Minnesotans toward persons with developmental disabilities. The survey followed a similar survey that was done in 1962, and over the last forty-five years, the perception and attitude toward persons with developmental disabilities has changed substantially. More people now believe that persons with developmental disabilities should be cared for at home, can learn to lead normal lives, should be integrated into the community, and should not be institutionalized.

In 2008, Congress passed the ADA Amendments Act ("ADAAA"), which amended the ADA and Section 504 of the Rehabilitation Act of 1973, in response to Supreme Court decisions that had too narrowly interpreted the ADA's definition of disability.[5] According to Congress, the purpose of the ADAAA was primarily "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

Over the past several years, there has been a change in terminology when it comes to defining and discussing individuals with disabilities. For example, on October 8, 2010, President Obama authorized the replacement of the offensive term "mental retardation" with the term "intellectual disability" in all federal health, education, and labor laws.[6]

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[5] *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. Dep. of Edu., Office of Civil Rights, U.S. Department of Education (Jan. 19, 2012), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html#note4.

[6] Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010).

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Section 2

AN OVERVIEW OF SPECIAL EDUCATION LAWS

Education is a foremost determinant of future success, and every child deserves equal access to education. The opportunity for a quality education should not be denied on the basis of physical, mental or cognitive disability. Beginning with the Individuals with Disabilities Education Act of 1975, and most recently through the No Child Left Behind Act of 2001, the United States government has championed the right of people with disabilities and their families to get the most out of educational opportunities.

A "child with a disability" is defined as a child "with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A) (2010). Additionally, the term "child with a disability" for a child age three through nine, may include a child "experiencing developmental delays . . . [in] physical development; cognitive development; communication development; social or emotional development; or adaptive development; and who, by reason thereof, needs special education and related services." § 1401(3)(B). However, in

Minnesota, "[a] child with a short-term or temporary physical or emotional illness or disability . . . is *not* a child with a disability. Minn. Stat. § 125A.02, subd. 2 (2011).

The IDEA 2004, the No Child Left Behind Act of 2001, Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, the Family Educational Rights and Privacy Act, and applicable Minnesota Law, including Minnesota Statutes, Chapter 125A, and Minnesota Rules, Chapter 3525, are the most prevalent and controlling laws governing special education in Minnesota. In that order, the following discussion provides a brief introduction to each of these laws.

I. INDIVIDUALS WITH DISABILITIES EDUCATION ACT

IDEA is a federal law designed to protect the rights of students with disabilities by ensuring that everyone receives a free appropriate public education regardless of his or her ability. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482. The purpose of IDEA is:

> [T]o ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; to ensure that the rights of children with disabilities and parents of such children are protected; and to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.

§ 1400(d)(1)(A-C).

Every child is entitled to a non-discriminatory evaluation to determine whether they have a disability and, if so, to determine what special education and related services the student will need. § 1414. An individualized education program ("IEP") is developed for each child determined to be in need of special education services, and services are to be provided in

accordance with it. § 1414(d). The development and implementation of an IEP is a critical component of IDEA in order to ensure an appropriate education.

Furthermore, students with disabilities are to be educated in the least restrictive environment ("LRE"). Pursuant to IDEA:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

§ 1412(a)(5)(A). IDEA emphasizes the need for children with disabilities to participate in the general curriculum and for regular education teachers to be involved in their education.

II. NO CHILD LEFT BEHIND ACT OF 2001

The No Child Left Behind Act of 2001 ("NCLB") is the major federal law related to the education of students in grades pre-kindergarten through high school.[7] The purpose of NCLB is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at minimum, proficiency on challenging state academic achievement standards and state academic assessments." 20 U.S.C. § 6301. NCLB's goal is to ensure students attain academic achievement in reading and math with annual assessments to monitor and confirm progress. Under NCLB public school students throughout the country, including those students with disabilities, must participate in annual testing in specific academic areas and grades outlined in the law. While IDEA mandates FAPE in the least restrictive environment for students with disabilities, it does not guarantee academic achievement. Thus, the inclusion of students

[7] *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1451 (2002).

with disabilities in the NCLB testing requirements helps to ensure these students achieve specific academic goals, and schools are held accountable for their achievements.

The reauthorization of the IDEA in 2004 aligned the IDEA with the goals of NCLB. These two laws now work in tandem to set high standards for all students with disabilities and ensure that every child receives a quality education. The IDEA and NCLB explicitly require that children with disabilities receive accommodations, as appropriate, and as provided pursuant to their IEPs. 20 U.S.C. § 1412(a)(16)(A); 34 C.F.R. § 300.320(a)(6); 20 U.S.C. § 6311(b)(3)(C)(ix)(II). Students with disabilities must be provided the appropriate accommodations necessary to participate in the standardized testing. Accommodations are changes in testing materials or procedures that ensure that an assessment accurately measures a student's knowledge and skills despite any disability. Providing accommodations for children with disabilities helps to level the playing field between them and children without disabilities.

The appropriate accommodations required for students with disabilities in order to fully and equally participate in testing are critical components of developing the student's IEP. 34 C.F.R. § 300.320(a)(6). If a child with a disability does in fact require accommodations, his or her IEP must address which accommodations are necessary and appropriate to accurately measure academic achievement and functional performance on state and district-wide assessments. § 300.320(a)(6)(i). Such accommodations must be determined by the student's IEP team based on his or her individual needs. § 300.320(a)(6). The accommodations should be similar to those provided to the student during classroom assessment. Ideally, accommodations should be the same or similar across classroom instruction, classroom tests, and state/district

tests.[8] There is not a limit on the number of accommodations that may be provided to a child with a disability. *See* 34 C.F.R. § 300.320(a)(6)(i). If a child does not need accommodations, under regular assessment participation, he or she will undergo assessments in the same manner as a child without a disability.

An accommodation is not to be confused with a modification. Accommodations are intended to lessen the effects of a student's disability and do not reduce learning expectations, whereas a modification occurs when learning expectations are changed, lowered, or reduced. If accommodations are not adequate, the child may require alternate assessments based on modified academic achievement standards. In April 2007, the United States Department of Education issued final regulations allowing states to develop modified academic achievement standards for students with disabilities who can make significant progress but are unable to reach grade level achievement standards even with appropriate accommodations. *See* 34 C.F.R. § 200.1(d)-(f). Under the regulations, states are required to develop clear guidelines for IEP Teams to determine which students qualify for alternate assessments based on modified academic achievement standards. § 200.1(f)(3)(i)(A). The criteria for IEP Teams include:

> (i) The student's disability has precluded the student from achieving grade-level proficiency, as demonstrated by such objective evidence as the student's performance on (A) The State's assessments described in § 200.2; or (B) Other assessments that can validly document academic achievement.
>
> (ii)(A) The student's progress to date in response to appropriate instruction, including special education and related services designed to address the student's individual needs, is such that, even if significant growth occurs, the IEP team is

[8] It is important to note that some accommodations used in classroom instructions and tests cannot be used on state/district assessments as they may alter the substance of what is being tested. Standard accommodations are those allowed for both testing and instruction without changing the skill being tested.

> reasonably certain the student will not achieve grade-level proficiency within the year covered by the student's IEP.
>
> (B) The determination of the student's progress must be based on multiple measurements, over a period of time, that are valid for the subjects being assessed.
>
> (iii) If the student's IEP includes goals for the subject assessed under § 200.2, those goals must be based on the academic content standards for the grade in which the student is enrolled.

§ 200.1(e)(2).

Finally, if accommodations and modified standards are not sufficient, students may require alternate assessments based on alternate achievement standards. If the IEP Team determines that the student must take an alternate assessment instead of a regular state or district-wide assessment, it must include in the student's IEP, statements as to why the child cannot participate in the regular assessment and why the particular alternate assessment is appropriate for the student. 34 C.F.R. § 300.320(a)(6)(ii).

III. SECTION 504 OF THE REHABILITATION ACT OF 1973 AND TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Section 504 of the Rehabilitation Act ("Section 504") and Title II of the Americans with Disabilities Act are Federal laws prohibiting discrimination against individuals with disabilities. Section 504 prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance. It applies to virtually all public school districts, public colleges and universities, and most private colleges and universities. The Americans with Disabilities Act ("ADA") was enacted in 1990 with the intent of preventing unwarranted discrimination against Americans with disabilities and contains five major parts (or titles). Title II of the ADA ("Title II") prohibits discrimination on the basis of disability by public entities,

including state and local governments. While not directly related to educating children with disabilities, Title II is still important because it ensures a child's access to school facilities, technology, etc., and supports access to future employment and inclusion in the community.

Section 504 and Title II guarantee certain rights to individuals with disabilities, including the right to full participation and access to FAPE for all children regardless of the nature or severity of their disability. In general, if a school has satisfied the IDEA, the requirements for an appropriate education under Section 504 and Title II will also be fulfilled.

Section 504 and Title II apply not only to academic settings, but also prohibit exclusion on the basis of disability from participation in extracurricular activities and non-academic services. For example, students with disabilities must have equal access to transportation, physical education, recreational athletics and activities, health services, special interest groups or clubs sponsored by the school, referrals to agencies that provide assistance to persons with disabilities and student employment. In addition, otherwise qualified students with disabilities should not be advised to make educational decisions that suggest more restrictive career objectives than would be advised for students without disabilities with similar interests and abilities.

Disability harassment is also a form of discrimination prohibited by Section 504 and Title II. Disability harassment is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying the student's participation in, or receipt of, benefits, services, or opportunities in the institution's program. "Harassing conduct may take many forms, including verbal acts and name calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful or

humiliating." *Guidance to the Field on Disability Harassment*, United States Department of Education, Office for Civil Rights and Office of Special Education and Rehabilitative Services (July 2000). Schools and school districts have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, schools must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment. *Id.*

As mentioned earlier, the ADA and Section 504 were modified in 2008 by the ADAAA, which emphasizes that the definition of "disability" in the two Acts should be interpreted broadly and that the determination of whether an individual has a disability should not require extensive analysis. As the U.S. Department of Education's Office for Civil Rights has stated, application of the ADAAA's new rules "should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district's action and obligations to ensure equal educational opportunities."[9]

IV. FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

The Family Educational Rights and Privacy Act ("FERPA") is a federal law that protects the privacy of student records.[10] It gives parents the right to review their children's education record and request that the school correct any records the parents believe are inaccurate, false, or misleading.

[9] *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. Dep. of Edu., Office of Civil Rights, U.S. Department of Education (Jan. 19, 2012), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html#note4

[10] 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

V. MINNESOTA STATUTES, CHAPTER 125A AND MINNESOTA RULES, CHAPTER 3525

In Minnesota, the IDEA is implemented through Minnesota Statute Chapter 125A and Minnesota Rules Part 3525. Chapter 125A governs special education, the early childhood intervention system, academies for the deaf and blind, and funding. It affects all agencies and educational organizations working with students with disabilities and their families.

Rule 3525 covers the Department of Education's rules for children with disabilities. Pursuant to the rules, students with disabilities who are eligible for special education services based on an appropriate individual evaluation shall have access to FAPE. Minn. R. 3525.0300 (2012).

"Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."

IDEA, 20 U.S.C. § 1400(c)(1).

Section 3

IDEA

The Individuals with Disabilities Education Act, usually referred to simply as IDEA, is the primary federal law governing special education.[11] 20 U.S.C. §§ 1400-1487. Previously known as the Education for All Handicapped Children Act ("EAHCA"), the IDEA was most recently revised and reauthorized in 2004.[12] The IDEA is the centerpiece of the various federal legislative efforts to address the educational rights of children with disabilities. The IDEA provides federal money to assist state and local agencies in educating children with disabilities. § 1411(a)(1). To qualify for federal assistance, a state must demonstrate, through a detailed plan submitted for federal approval, that it has in effect a policy that assures all children with disabilities the right to a "free appropriate public education," ("FAPE") tailored to the unique needs of the child with a disability by means of an "individualized educational program" ("IEP"). *See* § 1412. The IEP must be prepared (and reviewed at least annually) by school officials with participation by the child's parents or guardian. § 1414(d). The IDEA also requires that a participating State provide specified administrative procedures by which the child's parents or guardian may challenge any change in the evaluation and education of the child. *See*

[11] The IDEA is implemented through 34 C.F.R. §§ 300.1-.818.
[12] In 1990 Congress changed the name of EAHCA to the Individuals with Disabilities Act. 20 U.S.C. §1400. IDEA was reauthorized in 1997 and once again in 2004. *Id.*

20 U.S.C. § 1415. Any party aggrieved by the state administrative decisions is authorized to bring a civil action in either a state court or a federal district court. *Id.*

The IDEA is designed to protect students with disabilities by ensuring them access to FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living. The following is an overview of the IDEA and its key components, including evaluation, eligibility determinations, FAPE, IEPs, least restrictive environment, due process hearings and student discipline.

I. EVALUATION PROCESS FOR SPECIAL EDUCATION SERVICES

Every child with a disability has a right to an appropriate evaluation to determine his or her special education and related services needs. 20 U.S.C. § 1414(a)(1)(A). Either a parent of a child with a suspected disability or a state educational agency, other agency or local educational agency, may initiate a request for an initial evaluation to determine if the child does indeed have a disability. § 1414(a)(1)(B). With parental consent, the state educational agency, other state agency, or local educational agency is the party charged with conducting a full and individual initial evaluation of the child to make such determination. §§ 1414(a)(1)(A); 1414(a)(1)(D)(i)(I). The evaluation should be used to first determine whether the child is a child with a disability, and second, to determine the educational needs of such child. § 1414(a)(1)(C)(i).

In conducting an evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parents that may assist in determining whether the child has a disability and the content of the child's IEP. 34 C.F.R. § 300.304(b)(1). No single measure or assessment tool is to be used as the sole criterion for determining whether a child is a

child with a disability, nor for determining an appropriate educational program for the child. § 300.304(b)(2). The assessment tools and strategies used to gather relevant information about the child should be unbiased, non-discriminatory, and related to enabling the child to be involved in, and progress through, the school's general curriculum. § 300.304(b), (c)(1)(i). Assessments and other evaluation materials should be tailored to assess specific areas of educational need and not merely those designed to provide a single general intelligence quotient. § 300.304(c)(2). The child must be assessed in all areas related to his or her suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. § 300.304(c)(4). Furthermore, 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 in which the child has been classified. 34 C.F.R. § 300.304(c)(6). In sum, the assessment tools and strategies should assist in determining whether the child does indeed have a disability, what that specific disability is, and what special education and related services he or she needs. § 300.304(b).

As part of an initial evaluation, if appropriate, or reevaluation,[13] the evaluating party must review and include existing evaluation data on the child, such as: evaluations and information provided by the parents of the child; current classroom-based, local or state assessments, and classroom-based observations; and observations by teachers and related service providers. 34 C.F.R. § 300.305(a)(1). Based on this review and input from the child's parents, the evaluating party should identify what additional information, if any, is needed to determine whether the

[13] A reevaluation of a child previously determined to have a disability must be conducted "[i]f the school determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or [i]f the child's parent or teacher requests a reevaluation." 34 C.F.R. § 300.303(a).

child does have a disability, or, in the case of a reevaluation, whether the child continues to have such a disability. § 300.305(a)(2). Furthermore, the evaluation should determine the present level of performance and educational needs of the child, whether the child needs, or continues to need, special education and related services. *Id.* In the case of a reevaluation, modifications to the child's special education and related services should be made as needed. *Id.*

II. ELIGIBILITY DETERMINATIONS

Upon completion of an evaluation, the determination of whether the child is a child with a disability and his or her educational needs shall be made by a team of qualified professionals and the parent of the child. 20 U.S.C. § 1414(b)(4)(A). The parties must draw upon information from a variety of sources, "including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." 34 C.F.R. § 300.306(c)(i). All information must be documented and carefully considered. § 300.306(c)(ii). The parents of the child must also be provided with copy of the evaluation report and the documentation of determination of eligibility. 20 U.S.C. § 1414(b)(4)(B).

For a child to be eligible for special education services under the IDEA, he or she must meet one of the criteria of the qualifying disabilities and, by reason thereof, need special education and related services. 20 U.S.C. § 1401(3)(A). The IDEA regulations provide a significant amount of detail regarding specific disabilities covered. 34 C.F.R. § 300.8(c) (defining disability terms). In general, the IDEA provides that any mental, physical or emotional condition that adversely impacts a child's educational performance qualifies as a disability for purposes of determining eligibility. *See* § 300.8(a). The IDEA regulations identify three broad

categories of impairments that expressly qualify as a disability under the IDEA: (1) physical impairments; (2) mental, emotional and cognitive impairments; and (3) impairments not otherwise identified that fall within various catch-all categories. *Id*. The following three tables outline the categories of impairments and what each entails:

1. PHYSICAL IMPAIRMENTS	
Type	**Description**
Auditory	Three eligible hearing conditions are identified by the regulations: hearing impairment, deafness and deaf-blindness. 34 C.F.R. §§ 300.8(c)(2); 300.8(c)(3); 300.8(c)(5). Hearing impairment means "an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section." § 300.8(c)(5). Deafness means "a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance." § 300.8(c)(3). Finally, deaf-blindness means "concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness." § 300.8(c)(2).
Visual	Visual impairment including blindness means "an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness." § 300.8(c)(13).
Speech	Speech or language impairment means "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance." § 300.8(c)(11).

Orthopedic	The regulations recognize that orthopedic impairments are varied in their presentation and in the impact on the education of the child. *See* 34 C.F.R. § 300.8(c)(8). The regulations define such impairments as "a severe orthopedic impairment that adversely affects a child's educational performance. *Id.* The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures)." *Id.*

2. MENTAL, EMOTIONAL AND COGNITIVE IMPAIRMENTS	
Type	**Description**
Developmental Disability	Developmental Disability means "significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(6).
Specific Learning Disabilities	Specific learning disabilities are not defined by the IDEA regulations, but rather, are identified in a list of disorders that impact the educational performance of children. Specific learning disability is defined as follows: "(1) General. The learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (2) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of developmental disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage." § 300.8(c)(10).

Emotional Disturbances	The IDEA regulations set forth criteria for determining whether a child is eligible based on an emotional disturbance. Emotional disturbance means "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems." § 300.8(c)(4)(i). "Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance." § 300.8(c)(4)(ii).
Autism	Autism means "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i). "Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance." § 300.8(c)(1)(ii). "A child who manifests the characteristics of autism after age three could be diagnosed as having autism if the criteria in [defining autism above] are satisfied." § 300.8(c)(1)(iii).

Traumatic Brain Injury	IDEA regulations also cover traumatic brain injuries under certain circumstances. Traumatic brain injury means "an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psycho-social impairment, or both, that adversely affects a child's educational performance." § 300.8(c)(12). The term applies to "open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech." *Id.* The term does not apply to "brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma." *Id.*

3. OTHER IMPAIRMENTS	
Type	**Description**
Multiple Disabilities	Children with multiple concurrent disabilities are covered by the IDEA regulations. Multiple disabilities means "concomitant impairments (such as development disability-blindness or developmental disability-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments." 34 C.F.R. § 300.8(c)(7). The term does not include deaf-blindness. *Id.*
Other Health Impairments	This category is rather broad and appears to be an attempt to identify other examples of conditions that may negatively impact a child's ability to achieve educationally. Other health impairment means "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and adversely affects a child's educational performance." § 300.8(c)(9).

Every child has the right to a free appropriate public education (FAPE), and the IDEA establishes that right for all children with disabilities. 20 U.S.C. § 1400(d)(1)(A). Under the IDEA, parents cannot be required to pay for special education services needed to help their child reach his or her full potential, and what is considered "appropriate" varies between children – the appropriate education offered to a child with a disability must reflect his or her situation and unique needs. *See id.* § 1401(9); *see also* § 1401(29); § 1400(d)(1)(A).

As defined in the IDEA, the term "free appropriate public education" means special education and related services that are provided at public expense, under public supervision and direction, and without charge. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. FAPE includes an appropriate preschool, elementary school, or secondary school education and services provided in conformity with the student's individualized education program. *Id.*

In *Hendrick Hudson District Board of Education v. Rowley*, the United States Supreme Court had its first opportunity to review the meaning of FAPE in the context of the Education of the Handicapped Act ("EHA"), the predecessor to the IDEA. 458 U.S. 176, 102 S.Ct. 3034 (1982). In *Rowley*, the Court found that a deaf child, who was performing better than the average child in her class and advancing easily from grade to grade, was receiving an adequate education, and because she was receiving personalized instruction and related services calculated by school administrators to meet her educational needs, the EHA did not require provision of a sign-language interpreter. The Court stated:

> According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a

> checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Rowley, at 188-89.

Under either definition, it is evident that the IDEA and its predecessor clearly establish that special education must be provided at public expense and under public supervision, at no cost to parents. However, as noted in *Rowley*, the Court has observed that "[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded [children with disabilities]." *Id.* at 189. As such, the Supreme Court rejected the argument that the EHA required the provision of educational services that would "maximize each child's potential 'commensurate with the opportunity provided other children.'" *Id.* at 198. Additionally, the Supreme Court declined to develop "any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Rowley*, *Id.* at 202. Rather, it held that a school system satisfies the FAPE requirement by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

The Court in *Rowley* set a relatively low standard for FAPE and expressly does not require a school district to provide the "best" education or even the "most appropriate" education to a child. Rather, the *Rowley* standard (which remains the applicable standard)[14] merely requires

[14] "The proper standard to determine whether a disabled child has received a free appropriate public education is the 'educational benefit' standard set forth by the Supreme Court in *Rowley*."

the school to provide "some educational benefit" to the child: "Implicit in the congressional purpose of providing access to a free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child. *Id.* at 200 (emphasis added); *see also Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8th Cir. 2011) ("'Some educational benefit' is sufficient; a school need not 'maximize a student's potential or provide the best possible education at public expense.").

The question, then, is: What is *some educational benefit*? The federal courts have not answered this question with clarity; rather courts address this issue on a case-by-case basis, analyzing whether the proposed education plan will provide an educational benefit to the child in question. Certain school districts have argued that promotion from grade-to-grade is objective evidence that a child is receiving an educational benefit. Federal courts, including the *Rowley* court, have declined to establish this as an objective benchmark for educational benefit under the IDEA and its predecessors. *Id.* at 203 n.25. Courts consider the totality of the situation in

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J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 951 (9th Cir. 2009). Further, the Court in *Mercer Island* explained:

> Had Congress sought to change the free appropriate public education "educational benefit" standard-a standard that courts have followed vis-à-vis *Rowley* since 1982-it would have expressed a clear intent to do so. Instead, three omissions suggest that Congress intended to keep *Rowley* intact. First, Congress did not change the definition of a free appropriate public education in any material respect. If Congress desired to change the free appropriate public education standard, the most logical way to do so would have been to amend the free appropriate public education definition itself. Second, Congress did not indicate in its definition of "transition services," or elsewhere, that a disabled student could not receive a free appropriate public education absent the attainment of transition goals. Third, Congress did not express disagreement with the "educational benefit" standard or indicate that it sought to supersede *Rowley*. In fact, Congress did not even mention *Rowley*.

Id. at 950-51.

determining whether the educational plan is conferring "some educational benefit" upon the child.

IV. INDIVIDUALIZED EDUCATION PROGRAMS

The centerpiece of the IDEA is the requirement that each student eligible for special education must have an individualized education program, commonly referred to as an IEP. An IEP is a unique, detailed, written education plan for every child receiving special education services. *See* 20 U.S.C. § 1414(d)(1)(A); *see also* 34 C.F.R. § 300.320. It is primarily created by school staff with direction and input from the child's parents and, whenever appropriate, the child. 20 U.S.C. § 1414(d)(1)(B). The group of people charged with creating and developing a child's IEP is referred to as the "IEP Team." *Id.*; 34 C.F.R. § 300.23. The school district or other public agency must ensure that the IEP Team for each child with a disability includes: the parents of the child, at least one regular education teacher of the child if the child is, or has the potential to be, participating in the regular education classroom, at least one special education teacher of the child, a qualified representative of the school district, an individual who can interpret the instructional implications of evaluation results (who may or may not be one of the aforementioned persons), and other necessary and relevant individuals, and whenever appropriate, the child with a disability. 34 C.F.R. § 300.321(a). School districts are responsible for conducting and initiating meetings regarding the development and/or amendment of a child's IEP and must take steps to ensure that one or both of the child's parents are present or afforded the opportunity to participate. § 300.322(a). Parents should be members of any group that makes decisions on the educational placement of their child. § 300.327.

At the beginning of each school year, an IEP must be in effect for each student with a disability. § 300.323(a). A student's IEP must be reviewed at least annually to determine whether the annual goals set for the child are being achieved. § 300.324(b)(1)(i). The IEP must be revised, as appropriate, to address any lack of expected progress toward the set annual goals and any other matters deemed relevant. 34 C.F.R. § 300.324(b)(1)(ii). An IEP that complies with the IDEA requirements must include the following regardless of the type of plan:

1. Identify the child's present levels of academic achievement and functional performance including how the child's disability affects his or her involvement and progress in the general education curriculum;

2. Identify specific, measurable outcomes and goals to be achieved during the year;

3. Describe how progress will be measured, how parents will be informed of that progress, and how often they will be informed. (Parents of children with disabilities must receive progress reports at least as often as parents of children without disabilities.);

4. Identify specific special education and related services and resources that will be provided to the child. And identify any specific modifications, accommodations and other techniques that will be used;

5. Identify the extent, if any, that the child will be removed from the general classroom;

6. Describe any testing accommodations necessary to measure the academic achievement and functional performance of the child on state and district-wide assessments;

7. Outline when special education and related services will begin and the anticipated frequency, location and duration, location, how, duration such services will be provided to the child during the year; and

8. Include transition plans for children with disabilities beginning at or before age sixteen.[15]

[15] The term "transition services" means "a coordinated set of activities for a child with a disability that is designed to be within a results-oriented process, that is focused on improving

34 C.F.R. §§ 300.320(a)(1)-(7); § 300.320(b).

V. THE LEAST RESTRICTIVE ENVIRONMENT

Every child has the right to be educated in the least restrictive environment ("LRE"). One of the primary goals of IDEA is to bring children with disabilities into the "mainstream" (*i.e.*, regular education) settings in schools as much as possible. *Roncker v. Walter*, 700 F.2d 1058, 1060 n.2 (6th Cir. 1983) (the concept that children with disabilities should be educated along with children without disabilities is popularly known as "mainstreaming"). The IDEA is designed to accomplish this goal by requiring that within a range of possible settings, from more restrictive and less integrated, to least restrictive, the less restrictive is preferred. LRE is defined as follows:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, special schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). The LRE requirement is tied to the distribution of governmental funds for the purpose of special education services. The IDEA states as follows:

> A State funding mechanism shall not result in placements that violate the requirements of [LRE], and a State shall not use a funding mechanism by which

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the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continued and adult education, adult services, independent living, or community participation; is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation." 20 U.S. C. § 1401(34).

> the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

§ 1412(a)(5)(B)(i).

IDEA regulations provide a great deal of detail regarding procedures schools must follow to make the proper LRE determination. In determining the educational placement of a child with a disability, the placement decision must be made by the child's IEP Team annually and made in conformity with his or her IEP and the LRE provisions of the IDEA. 34 C.F.R. § 300.116(a), (b). Furthermore, a child with a disability is not to be removed from education in the general classroom solely because of a need for modifications in the general education curriculum. § 300.116(e).

There is a strong presumption within the IDEA that children with disabilities will be mainstreamed into general classrooms with children without disabilities as much as possible.[16] *See* 34 C.F.R. § 300.114. An influential early decision regarding LRE was made in the case of *Roncker v. Walter*, wherein the Sixth Circuit overturned a decision approving placement of a child with severe developmental disabilities at a specialized school and required a determination as to whether the services the child needed could be provided in a more integrated setting. 700 F.2d 1058, 1062-63 (6th Cir. 1982). In doing so, the court stated that:

> The [IDEA] does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the [IDEA]. . . . In a case where the segregated facility is considered superior, the court should determine whether the services which make

[16] The Supreme Court stated a free appropriate public education requires that children with disabilities should be educated with children without disabilities to the "maximum extent appropriate." *Rowley,* 458 U.S. at 181.

> the placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the [IDEA].

Id. at 1063. However, when selecting the LRE, a school district is obligated to consider any potential harmful effect on the child from such placement. § 300.116(d).

Furthermore, when determining the least restrictive educational setting for a student with a disability, the student's IEP Team should consider the impact the student has on the progress of students without disabilities in the general classroom, as well as the amount of teacher time the student may require. *See Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1048-49 (5th Cir. 1989). In *Daniel R.R. v. State Board of Education*, the court stated that, if after receiving supplemental teaching aids the time commitment required of a teacher to the student with a disability continues to interfere with the educational benefit of others, then removal from the classroom may be appropriate. *Id.* "Although Congress preferred education in the regular education environment, it also recognized that regular education is not a suitable setting for educating many [children with disabilities]." *Id.* at 1045 (citing *Rowley*, 458 U.S. at 181 n.4). Thus, the IDEA allows school officials to remove a child with a disability from regular education or to provide special education in an alternative setting if they cannot educate the child satisfactorily in the regular classroom. 20 U.S.C. § 1412(5)(B).

Consistent with educating a child with a disability in the LRE is the concept of "inclusion." Inclusion is the notion that all children, regardless of having a disability, should learn together with their peers. Inclusion education is the "practice of educating everyone, regardless of disability, income or cultural background in a supportive classroom environment where all students' needs are met full-time in regular classrooms alongside their peers without

disabilities, with appropriate supports and modifications, at their neighborhood schools." *Partners in Education: History, Inclusion & 21st Century Digital Literacy*, The Minnesota Governor's Council on Developmental Disabilities, Partners in Education (2010).[17] Inclusion has six components:

1. *Students go to their local school*. Students with disabilities are educated in the school they would attend if they did not have a disability. This generally means attending their neighborhood school.

2. *Never too many, never too few*. The number of students with and without disabilities mirrors the natural proportion one would find in the local community. Once this balance is skewed one way or another, a school begins to move toward a segregated system.

3. *All means all*. The school has a zero reject policy and philosophy. No student will be excluded based on the type or extent of his or her disability.

4. *Everybody together*. All students learn in classes that are appropriate for their age and grade. There are no self-contained special education classes and no continuum of special services.

5. *Good teaching*. Cooperative learning and peer instruction are the preferred teaching methods.

6. *Special education is a support, not a place*. Special education supports are integrated into the general education classes and other places.

Id.[18] Effective inclusion makes every student feel welcomed and valued. According to Jill England, Ph.D., an Inclusive Education Specialist, full inclusion of children with disabilities in the general education classroom offers dramatic proof that inclusion works. *Id.* Her research on inclusion found that:

[17] http://www.partnersinpolicymaking.com/education/glossary.html
[18] http://www.partnersinpolicymaking.com/education/history_inclusion_model.html

1. Following implementation of a full inclusion model at two Michigan high schools, graduation rates for children with disabilities soared from 50% to 95% in one school and from 70% to 97% in the other.

2. 80% of students with disabilities who learned in inclusive classrooms had higher levels of achievement than their counterparts in pull-out or "special class" models.

3. Creating an inclusive school community costs the same as a segregated system (which is no longer allowed) and usually costs less than an inclusion model that is created student by student.

Id.[19]

In relation to the concept of inclusion, the child's IEP Team is also responsible for determining which extracurricular and nonacademic activities are appropriate for the student. *See Indep. Sch. Dist. No. 12 v. Minnesota Dept. of Educ.*, 788 N.W.2d 907, 913 (Minn. 2010) *cert. denied*, 131 S. Ct. 1556, (2011). These activities are not limited by those required to educate the student, but are determined appropriate under the discretion of the IEP Team. *Id.* Therefore, the IEP Team can determine other appropriate extracurricular activities for the student in addition to the activities required by the IDEA.

VI. THE DUE PROCESS HEARING

One of the main purposes of the IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(B). Thus, a school district or other state agency must establish and maintain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE. § 1415(a). Decisions made by the school system can be challenged by parents. The due process provision of IDEA gives parents and schools several options and procedures for resolving disagreements and holding the parties accountable. *See* 20 U.S.C. § 1415; *see also* 34

[19] http://www.partnersinpolicymaking.com/education/glossary.html

C.F.R. § 300.507. The primary dispute resolution mechanism of the IDEA is the "due process hearing." Under the IDEA, the school district is required to provide an impartial hearing to resolve FAPE disputes. These hearings are known as due process hearings and may involve many different types of issues related to the special education of the child in question. Different aspects of these hearings are discussed below.

A parent or public agency may file a due process complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE being provided to the child. 34 C.F.R. § 300.507(a)(1). The due process complaint must allege a violation that occurred not more than two years before the date the complaining party knew or should have known about the alleged action that forms the basis of the complaint.[20] § 300.507(a)(2). If the parents are the party bringing a due process complaint, the school district must send a response specifically addressing each of the issues raised within ten days of receipt of said complaint. § 300.508(e). If the school district has not sent prior written notice to the parent concerning the subject matter, the response must include:

1. An explanation of why the school district proposed or refused to take the challenged action;

2. A description of the other options considered by the IEP team and an explanation of why those were rejected;

3. A description of each evaluation procedure, assessment, record or report the school district used as a basis for the action; and

4. A description of the factors relevant to the decision.

[20] The school district must inform parents of any free or low-cost legal and other relevant services available in the area if the parent requests the information; or the parent or agency files a due process complaint. 34 C.F.R. § 300.507(b).

Id. However, if the school district had previously sent written notice to the parents addressing the issues listed above, it need only send a response addressing the issues raised in the parents' complaint. *Id.* If the school district is the party filing the due process complaint, the parents must file a response specifically addressing the issues raised by the school district within ten days of receiving the complaint. 34 C.F.R. § 300.508(f).

Within fifteen days of receiving notice of a parent's due process complaint, and prior to the initiation of a due process hearing, the school district must convene a meeting with the parents and IEP Team who have specific knowledge of the facts identified in the due process complaint, to allow the parents of the child to discuss their complaint, and the facts that form the basis of it, so that the school district has the opportunity to resolve the matter. §§ 300.510(a)(1), (a)(2). This meeting, referred to as a "resolution meeting," need not be held if the parties agree in writing to waive the meeting, or if the parties agree to use the mediation process instead.[21] § 300.510(a)(3). If the school district is unable to obtain the participation of the parents in the resolution meeting after reasonable efforts have been made, or if the school district fails to hold the resolution meeting within the fifteen-day requirement, either party may seek the intervention of a hearing officer to begin the due process hearing timeline. §§ 300.510(b)(4), (b)(5).

Whenever a due process complaint is filed, the parties to the dispute must have the opportunity for an impartial due process hearing. § 300.511(a). The school district or public agency responsible for the education of the child is also responsible for conducting the hearing. 34 C.F.R. § 300.511(b). In Minnesota, the Minnesota Department of Education is generally responsible for appointing a hearing officer to initiate an administrative hearing once requested

[21] For more information regarding the mediation process see 34 C.F.R. § 300.506.

by the complaining party and upon receipt of the Special Education Complaint. The due process hearing is limited to matters raised in the complaint or an amended complaint unless the other party agrees to allow other matters to be raised during the hearing. § 300.511(d).

The following bullet points outline the general timeline of responsibilities following notice from the Minnesota Department of Education that a due process hearing has been requested.[22]

- A prehearing conference must be held within five business days from the date that he hearing officer is appointed. In Minnesota, the hearing officer is generally an administrative law judge.

- Unless the parties agree in writing to waive the requirement and proceed to mediation or due process hearing, the District must convene a resolution meeting within 15 days of its receipt of notice from the MDE or receipt of the complaining party's hearing request, whichever occurs first. At the prehearing conference, the District must notify the hearing officer of the date of the resolution meeting. The District may not include an attorney at the resolution meeting unless the complaining party is also represented by counsel. If the parties agree to waive the resolution meeting, they should forward their written waiver to the hearing officer prior to the prehearing conference. If the party requesting the hearing fails to meet in a resolution meeting and has not agreed to waive the meeting, then the hearing request will be dismissed.

- Prior to the prehearing conference, the District should provide a copy of the student's IEP and the most recent prior written notice or conciliation memo to the hearing officer and to the complaining party.

- Within 10 days of receiving the hearing request, the District must send the complaining party and hearing office a response that specifically addresses the issues raised in the complaint and hearing request.

- Within 15 days of receiving the hearing request, the District must provide written notice to the hearing officer and complaining party if the District wishes to challenge the sufficiency of the hearing request.

- Following a due process hearing, the hearing officer will generally issue his or her opinion within 45 days.

22 The source for the information is taken from notice letters received from the MDE by Districts upon request by a parent for a due process hearing.

- The complaining party or the District may appeal the hearing officer's final decision in the Minnesota Court of Appeals or in federal district court. A party must appeal to the Minnesota Court of Appeals within 60 days of receiving the hearing officer's decision or must appeal to the federal district court within 90 days of receiving the decision.

- A complaint alleging a District's failure to implement a due process hearing decision must be resolved by the MDE. Should a party believe that the hearing officer's order is not being implemented, a complaint may be filed with the MDE within 1 year of the date of the alleged failure to implement the decision.

The IDEA mandates certain rights to the parties of a due process hearing. Parties have the right to be represented by counsel. § 300.512(a)(1). They have the right to confront, cross-examine, and compel attendance of witnesses, as well as present evidence. § 300.512(a)(2). Each party must disclose all evaluations, recommendations and any other evidence at least five business days prior to the hearing. 34 C.F.R. §§ 300.512(a)(3), (b). If this deadline is not met, the evidence may be excluded unless the opposing party consents. § 300.512(a)(3). Finally, the parties have the right to obtain a written transcript of the hearing and a copy of the findings of fact and decisions. 34 C.F.R. §§ 300.512(a)(4), (a)(5). In addition to the rights afforded to both parties of the due process hearing, parents have the right to have the child in question present at the hearing and to have the hearing be open to the public. § 300.512(c).

During the pendency of any due process hearing, unless otherwise agreed to by the parties, the child involved must remain in his or her current educational placement. § 300.518(a). One of the evils that Congress sought to remedy was the unilateral exclusion of children with disabilities by schools, not courts. *Honig v. Doe*, 484 U.S. 305, 327, 108 S.Ct. 592, 606 (1988). School districts are prohibited from unilaterally placing a child with a disability in an alternative educational setting. *Id.* The "stay-put" provision of the IDEA requires that during the due process hearing and any appeals, the child will remain (or stay-put) in his or her current educational

placement. *Honig*, 484 U.S. 305; *see also* 34 C.F.R. § 300.518. However, even though the school district is prohibited from unilaterally removing a child with a disability from his or her current educational placement to an alternative interim placement, there is nothing limiting the district from seeking a court injunction. *Honig*, at 327. In the landmark case of *Honig*, the Supreme Court addressed whether the stay-put provision of the IDEA's predecessor statute EHA conclusively prohibited public school districts from unilaterally excluding students with disabilities from school for dangerous or disruptive conduct stemming from his or her disability, once legal proceedings under the IDEA had been initiated. *Id.* at 323 (1988). The Court ruled that school districts may not unilaterally excluded children with disabilities from schools; however, nothing in the IDEA's stay-put provision operated to limit the equitable powers of district courts to temporarily enjoin dangerous students from attending school in appropriate circumstances. *Id.* at 327. The Court stated:

> In short, then, we believe that school officials are entitled to seek injunctive relief under [IDEA] in appropriate cases . . . [IDEA] effectively creates a presumption in favor of the child's current education placement which school officials can overcome only by a showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others.

Id. at 328. Thus, notwithstanding the IDEA's stay-put provision, school districts may seek the relief of the court and apply for a "*Honig* injunction" to temporarily remove a dangerous student, regardless of disability, from his or her current educational placement.

VII. DISCIPLINE OF STUDENTS WITH DISABILITIES

In general, a student receiving special education and related services may be disciplined in the same manner a general education student would be. However, discipline of students with disabilities becomes an issue under the IDEA when the disciplinary incident in question requires

a "change in placement" or the conduct that gave rise to discipline is a "manifestation" of the student's disability. 20 U.S.C. § § 1415(j), (k).

Pursuant to the IDEA, a "change of placement" occurs when a child with a disability is removed from his or her current educational placement for more than ten consecutive school days or when the child is subjected to a series of removals that constitutes a pattern. 34 C.F.R. § 300.536(a); *see also Honig v. Doe*, 485 U.S. at 325 n.8 (a suspension longer than ten days would constitute a change in a student's special education placement). A series of removals can constitute a change in placement depending on the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another. § 300.536(a). The school must determine on a case-by-case basis whether a pattern of removals constitutes a change in placement. § 300.536(b)(1). A school may, however, remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate alternative educational setting or suspend the student, for less than ten school days to the extent a child without a disability would be removed or suspended. 20 U.S.C. § 1415(k)(1)(B).

If a school attempts to remove a child with a disability from his or her current placement for more than ten days, a "manifestation determination" must be conducted. § 1415(k)(1)(E)(i). A manifestation determination is to be conducted by the school, the parents of the child, and relevant members of the child's IEP Team. *Id.* The parties must review:

> [A]ll relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the [school]'s failure to implement the IEP.

Id. If the parties determine that the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct was the direct result of the school's failure to implement the child's IEP, it will be determined that the conduct *was* a manifestation of the child's disability. § 1415(k)(1)(E)(ii). If the conduct was a manifestation of the child's disability, the IEP team must conduct a functional behavior assessment and implement a behavioral intervention plan for the child.[23] 20 U.S.C. § 1415(k)(1)(F)(i). The child must then be returned to the child's original, general placement unless the parents and IEP Team decide otherwise. § 1415(k)(1)(F)(iii).

If, however, the behavior that gave rise to the violation of the school code of school conduct is determined *not* to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and duration in which the procedures would be applied to children without disabilities. 20 U.S.C. § 1415(k)(1)(C). There is, however, an exception to the above change of placement rules:

> School personnel may remove a student to an interim alternative educational setting for not more than 45 school days, without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child carries or possesses a weapon to or at school, on school premises, or to or at a school function . . . ; or knowingly possesses or uses illegal drugs, or sells or

[23] "Functional behavior assessment" is the process of determining the cause of behavior before developing an intervention. Stephen Starin, Ph.D., *Functional Behavioral Assessments: What, Why, When, Where, and Who?*, Wrightslaw, www.wrightslaw.com/info/discipl.fab.starin.htm. "Behavioral intervention plans" are developed as part of a child's IEP after collecting data on the student's behavior, and after developing a hypothesis of the likely function of that behavior, and may include: positive strategies, program or curricular modifications, and supplementary aids and supports required to address the disruptive behaviors in question. *An IEP Team's Introduction to Functional Behavioral Assessment and Behavior Intervention Plans (2nd edition)*, IDEA Partnerships: FAPE (Sept. 16, 1998), www.fape.org/idea/what_idea_is/osher/indivinterv.htm#behavior

> solicits the sale of a controlled substance, while at school, on school premises, or at a school function . . . ; or has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function . . .

§ 1415(k)(1)(G).

If a child with a disability is removed from his or her current educational placement, irrespective of whether the behavior is determined to be a manifestation of the child's disability, the child must continue to receive educational services so as to "enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his or her IEP." § 1415(k)(1)(D)(i). Additionally, the child is to receive, as appropriate, "a functional behavior assessment, behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur." § 1415(k)(1)(D)(ii).

VIII. CONCLUSION

The IDEA obligates states to set up a system through which it can ensure an efficient implementation of its laws and regulations. All states and school districts must meet the minimum requirements of the IDEA; however, some states go even further and impose additional requirements.[24] Thus, it is important for both parents and school district officials to know their state's special education laws and regulations in addition to the IDEA. Students with disabilities and their parents may usually take advantage of whichever law is more favorable, and school districts must generally comply with whichever law is more stringent.

[24] Minnesota law imposes additional requirements above and beyond those of IDEA. *See* Minn. Stat. § 125A *et seq.*; *see also* Minn. R. 3525 *et seq.*

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Section 4

DISCIPLINE OF STUDENTS WITH DISABILITIES

The Minnesota Pupil Fair Dismissal Act, and other provisions of Minnesota Statutes Chapter 121A related to discipline of students, apply to students both with and without disabilities. Minn. Stat. § 121A.41, subd. 7. Thus, schools must follow the Act when disciplining students with disabilities. However, when suspending or expelling a student receiving special education, schools must follow additional requirements that are not set forth in the Pupil Fair Dismissal Act, but are set forth in other parts of state and federal law including the IDEA.[25]

I. SUSPENSION

If the misconduct that led to the suspension is causally related to the student's disability, the student may be suspended for a maximum of ten days per incident.[26] Under Minnesota state law, a manifestation determination meeting must be held if the student is suspended for five or more consecutive days or if his or her parent requests such a meeting. Minn. Stat. § 121A.43(a). As discussed in the previous section, the federal regulations clarify that a student with a disability may be suspended for more than ten days per school year; however, schools must be certain no pattern of suspension is apparent, and FAPE must be provided when a change of

[25] *See supra* Section 3 for disciplinary requirements for students receiving special education under the IDEA.

[26] A longer suspension would constitute a change in a student's special education placement under the U.S. Supreme Court's holding in *Honig v. Doe*, 484 U.S. 305 (1988).

placement occurs. If the misconduct is not causally related to the student's disability, he or she may still only be suspended for a maximum of ten days per incident. Thus, regardless of casual connection, a student with a disability may be suspended for no more than ten days per incident.

II. EXPULSION

If the misconduct that led to the expulsion is causally related to the student's disability, the student may not be expelled. A student with a disability may not be expelled for conduct that is a manifestation of his or her disability. A functional behavior assessment, or FBA, must be conducted if not previously done so. Further, if a behavioral intervention plan, or BIP, is in place, the students IEP Team must review and modify it as necessary.[27] If the misconduct is not causally related to the student's disability, he or she may be expelled. School districts, however, must continue to provide the expelled student with FAPE. A FBA must also be conducted if appropriate.

III. COURT ORDERED INJUNCTION (*HONIG* INJUNCTION)

Regardless of whether the misconduct is a manifestation of the student's disability, a student who poses an immediate threat to the safety of others may be temporarily enjoined from attending school. An injunction to remove a student with a disability from school is very difficult to obtain. A school district must prove the student has injured students or staff members, or that there is a strong likelihood he or she will do so. Threats of violence will not usually suffice. In addition, a school district must show that it has attempted to address the student's violent behavior through other means, such as a BIP or other education accommodation.

[27] A behavioral intervention plan is a plan of positive behavioral interventions in the IEP of a child whose behaviors interfere with his or her learning or that of others.

IV. PROPOSED CHANGE OF PLACEMENT

An IEP Team may determine at the manifestation determination meeting that a student needs a more restrictive placement. A student and his or her parents must be provided prior written notice of any proposed change of placement and may challenge the proposed placement through an IDEA due process hearing. If a change of placement is challenged, the student must remain in the interim alternative setting pending the hearing officer's decision, or until the expiration of the relevant disciplinary procedures for a student without a disability. When a student's misconduct is not related to his or her disability, a change in the student's special education placement is not usually warranted.

V. WEAPONS, ILLEGAL DRUGS OR SERIOUS BODILY INJURY

A student receiving special education may be placed in a 45-day interim placement for possession of a weapon, for having drugs on school property, or inflicting serious bodily injury to another student or person while on school property. Regardless of whether the conduct was a manifestation of the student's disability, the IDEA provides that a student with a disability who brings or possesses a weapon at school, possesses, uses, or sells drugs at school, or inflicts serious bodily injury on another at school may be immediately unilaterally removed from his or her school setting to an alternative educational placement for forty-five school days. A FBA must be conducted if not already done so. Furthermore, if a BIP is in place, the IEP Team must review and modify it, if necessary. If a parent objects to the alternative placement and requests a due process hearing, the IDEA provides that the student stays in the alternative placement pending resolution of the due process hearing. Regardless of whether the conduct is a manifestation of the student's disability, a 45-day interim placement may be appropriate, and the student must receive a FBA, as appropriate.

"A level playing field."

Section 504 of the Rehabilitation Act of 1973

Section 5

SECTION 504 AND TITLE II

Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act are federal laws prohibiting discrimination against individuals with disabilities.

I. SECTION 504 OF THE REHABILITATION ACT

Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funds from the United States Department of Education. Although parents of children with disabilities are usually more familiar with the IDEA, they should also be acquainted with Section 504. Knowledge of both the IDEA and Section 504 is essential to securing an appropriate education for a child with a disability.

Section 504 is designed to protect persons from discrimination based upon their disability. It is designed to "level the playing field." Essentially, the purpose of Section 504 is to prevent intentional or unintentional discrimination against persons with disabilities, persons who are believed to have disabilities, or family members of persons with disabilities. Section 504 merely states that:

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

29 U.S.C. § 794(a).

The definition of disability under Section 504 is much broader than the definition under the IDEA. Thus, students who are not eligible for services under the IDEA may, nonetheless, be eligible for services under Section 504. A person is disabled under Section 504 if he or she: (1)

as a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 34 C.F.R. § 104.3(j); *see* 42 U.S.C. 12102(1). To fall within the protection of Section 504, a person's physical or mental impairment must have a substantial limitation, whether permanent or temporary, on one or more major life activity. Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, *learning* and working. § 104.3(j)(2)(ii). Insofar as it applies to students, the critical question is whether a student's impairment substantially limits his or her ability to learn.

The key factor in determining whether a person is considered an individual with a disability under Section 504 is whether the physical or mental impairment results in a substantial limitation of one or more major life activities and the impairment must have a material effect on one's ability to perform that major life activity. For example, an individual who has a physical or mental impairment would not be considered a person with a disability under Section 504 if the condition does not in any way substantially limit the individual. However, there is no quantifiable standard by which to apply the "substantially limits" test. Schools must consider more than the student's grades when determining whether a student's learning is substantially limited; both academic and nonacademic activities must be considered. S. James Rosenfeld, *Section 504 and IDEA: Basic Similarities and Differences*, Wrightslaw (2008).[28]

Furthermore, in some cases Section 504 protects individuals who do not have a disability but are treated as though they do because they have a history of, or have been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. For example, if you have a history of a disability but no longer have the disability, or

[28] *Available at* www.wrightslaw.com/advoc/articles/504_IDEA_Rosenfeld.html

have been incorrectly classified as having such a disability, you too are protected from discrimination under Section 504. Finally, persons who are not disabled may still be covered by Section 504 if they are treated as if they are disabled (e.g., if they are infected with the human immunodeficiency virus).

Under Section 504, school districts have a number of responsibilities toward qualified students with disabilities in its jurisdiction. First, school districts are charged with the responsibility of child find - identifying and locating all un-served children with disabilities within the district. A school must annually undertake efforts to identify and locate every qualified individual with a disability residing in the school's jurisdiction who is not receiving a public education. Second, FAPE is to be provided to each student with a disability, regardless of the nature or severity. This means providing regular or special education, and related aids and services, designed to meet the individual educational needs of students with disabilities, as adequately as the needs of students without disabilities are met. FAPE under Section 504 is broader than under the IDEA. Third, school districts must ensure that each student with a disability is educated with students without a disability to the maximum extent appropriate to the needs of that student, and afford children with a disability an equal opportunity to participate in non-academic and extracurricular services and activities. And fourth, school districts must establish nondiscriminatory evaluation and placement procedures to avoid the inappropriate education that may result from the misclassification or misplacement of students. When a condition significantly limits a major life activity, an accommodation plan similar to that of an IEP, must be developed for that individual and the services provided under such Section 504 Plan, must be determined by a team known as a Section 504 Team.

II. TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Title II of the Americans with Disabilities Act prohibits discrimination on the basis of disability by state and local governments. The Americans with Disabilities Act of 1990 builds on the foundation of Section 504. Title II does not replace or invalidate Section 504, rather it amplifies and expands its protective mandates. *See* 28 C.F.R. § 35.103. The primary difference is that while Section 504 applies only to organizations that receive federal funding, Title II applies much broader. With respect to education, however, Title II's objectives and language are very similar to Section 504, and for this reason both statutes are administered by the Office for Civil Rights and considered essentially identical. For public schools, Title II defers to Section 504; thus, if a public school district is in compliance with Section 504, it is also in compliance with Title II. In effect, virtually every violation of Section 504 is also a violation of Title II as it applies to students.

III. ADA AMENDMENTS ACT OF 2008

In 2008, Congress passed the ADA Amendments Act ("ADAAA"), which amended Title II of the ADA and Section 504 of the Rehabilitation Act of 1973, in response to Supreme Court decisions that had too narrowly interpreted the ADA's definition of disability.[29] According to Congress, the purpose of the ADAAA was primarily "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA." ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (hereinafter "ADAAA"). Therefore, while the ADAAA

[29] *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. Dep. of Edu., Office of Civil Rights, U.S. Department of Education (Jan. 19, 2012), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html#note4.

does not alter a school district's substantive obligations under the ADA or Section 504, it does significantly amend the two laws to broaden the potential class of persons with disabilities protected by the statutes.

First, the ADAAA provided some guidance as to the interpretation of the term "substantially limits" in the definition of "disability." 42 U.S.C. § 12102(4)(B). The ADAAA determined that the term "substantially limits" shall be interpreted without regard to the ameliorative effects of mitigating measures, other than ordinary eyeglasses or contact lenses. ADAAA § 2(b)(2) (*overruling Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)); 42 C.F.R. § 12102(4)(E) . Further, the ADAAA provided that an impairment need not prevent or severely or significantly restrict a major life activity to be considered substantially limiting. ADAAA § 2(b)(4) (*overruling Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S.2d 184 (2002)); 42 C.F.R. § 12102(4)(C). The ADAAA also clarified that an impairment that is episodic or in remission is a disability if, when in an active phase, it would substantially limit a major life activity. 42 C.F.R. § 12102(4)(D) .

Second, the ADAAA clarified that Section 504 and the ADA protections apply whether or not the individual actually has the impairment and also whether or not the impairment is perceived to be a substantial limitation on a major life activity.

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 C.F.R. § 12102(3)(A). However, an individual will not be "regarded as having an impairment" if the impairment is both "transitory and minor." 42 C.F.R. § 12102(3)(A).

Ultimately, the ADAAA's effect can be summed up as "shift[ing] the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district's actions and obligations to ensure equal educational opportunities."[30]

[30] *See supra* n.9.

*"The mission of public education in Minnesota, a system for lifelong learning, is to ensure individual academic achievement, an informed citizenry, and a highly productive work force. * * * The public schools of this state shall serve the needs of the students by cooperating with the students' parents and legal guardians to develop the students' intellectual capabilities and lifework skills in a safe and positive environment."*

Minnesota Statutes, section 120A.03.

Section 6

MINNESOTA LAW

The IDEA obligates states to set up a system through which it can ensure an efficient implementation of the law. All states and school districts must meet the minimum requirements of the IDEA, however, some states, including Minnesota, go even further and impose additional requirements.[31] Thus, students with disabilities and their parents may generally take advantage of whichever law is more favorable, and school districts must generally comply with whichever law is more stringent. Consequently, Minnesota educators must compare the federal IDEA to Minnesota law in order to determine where the laws are consistent, and whether the IDEA or Minnesota law provides greater rights to students and their parents.[32]

I. MINNESOTA STATUTES THAT IMPOSE A REQUIREMENT NOT REQUIRED BY THE IDEA OR ITS REGULATIONS

Minnesota Statutes, Chapter 125A, Special Education and Special Programs, invoke additional requirements and standards more stringent than those of the IDEA. Minnesota statutory requirements provide services to students with disabilities before the age at which services are federally required. Minnesota provides special education services to students with

[31] Even though the federal IDEA would generally preempt any state law where the two laws are in conflict, a state legislature may impose *additional* requirements that are not set forth in IDEA provided the state's requirements do not diminish or eliminate the rights afforded to students with disabilities and their parents under IDEA.

[32] In Minnesota, IDEA is implemented through Minnesota Statutes Chapter 125A and Minnesota Rules Part 3525.

disabilities from birth to age twenty-one, while, by comparison, IDEA mandates service be provided from only age three to twenty-one. Minn. Stat. § 125A.02 (2011). Furthermore, under Minnesota law transition services must be provided during grade nine while, by comparison, the IDEA does not require transition services to start until the age of sixteen. § 125A.08(a)(1).

Minnesota law also varies from the IDEA with regard to Alternative Dispute Resolution and due process hearings. First, the federal regulations regarding parental consent to evaluate a child make it clear that due process procedures may be used to override a parent's lack of consent for an initial evaluation; however, in Minnesota, override procedures cannot be used. 34 C.F.R. § 300.300(a)(3); Minn. Stat. § 125A.091, subd. 5. Second, Minnesota requires school districts to provide and participate in a conciliation conference if requested by the parents, and offers voluntary facilitated IEP meetings as a dispute resolution option. Minn. Stat. § 125A.091, subds. 7, 8. Neither conciliation conferences nor facilitated IEP meetings are processes required by the IDEA. Third, Minnesota requires that parents be informed of their right to these various Alternative Dispute Resolution options, including conciliation conferences, facilitated IEP Team meetings and mediation. § 125A.091, subd. 3a. Contrarily, the federal regulations simply require that parents be informed of the availability of mediation only. 34 C.F.R. § 300.504(c)(6). Fourth, under Minnesota law a parent has the right to an expedited due process hearing when there is a dispute over a manifestation determination or a proposed or actual placement in an interim alternative educational setting. Minn. Stat. § 125A.091, subd. 19. And a school district has the right to an expedited due process hearing when proposing or seeking to maintain placement in an interim alternative educational setting. *Id.* In both circumstances, a hearing officer must hold an expedited due process hearing and issue a decision within ten calendar days of the request for a hearing. *Id.* Pursuant to the federal regulations, however, an expedited hearing must be heard

within the expanded time of twenty school days from the date the complaint is filed, and the hearing officer has ten school days from the date of the hearing to make a determination. 34 C.F.R. § 300.532(c).

Furthermore, Minnesota law mandates that a district, group of districts, or special education cooperative, in cooperation with the county or counties in which the district is located, establish a Community Transition Interagency Committee ("CTIC") for youth with disabilities, beginning at grade nine or age equivalent, and their families. Minn. Stat. § 125A.22. They must also establish an Interagency Early Intervention Committee ("IEIC") for children with disabilities under age five and their families, and for children with disabilities ages three to twenty-two consistent with the requirements under sections 125A.023 and 125A.027. § 125A.30. Mandated by state statute, IEIC's are local committees with membership that includes parents of young children with disabilities under age twelve, and representatives from the local school districts, county social services, public health, school and county boards and community service agencies. *Id.* They meet at least quarterly (some monthly) to assist in developing and planning comprehensive, coordinated, multidisciplinary, interagency services for children with disabilities from birth to age five and their families. *Id.* They are funded by state grants based on annual counts of children receiving Early Childhood Special Education services.

Finally, in order to increase the involvement of parents of children with disabilities in district policy and decision making, school districts must incorporate a Special Education Advisory Council into the district's special education plan. Minn. Stat. § 125A.24. Such parent advisory councils are not required by the IDEA.

II. MINNESOTA RULES THAT IMPOSE A REQUIREMENT NOT REQUIRED BY FEDERAL LAW

In addition to more stringent statutory requirements, Minnesota imposes additional rules not required by the IDEA in Minnesota Rules Chapter 3525, Children with a Disability. First, Minnesota Rule 3525.0800, Responsibility for Ensuring Provision of Instruction and Services, states in part that "[t]he district shall not purchase special educational services for a pupil from a public or private agency when the service is available or can be made available and can be more appropriately provided as the least restrictive alternative within the district." Minn. R. 3523.0800, subp. 2 (2011). The federal rules do not place such restrictions on a school district's ability to spend money on services. Because the Minnesota rule places a restriction on the ability of a school district to procure services, a restriction not found in the federal scheme, such a rule exceeds the federal requirements.

Second, Minnesota provides explicit restrictions on teachers' caseload levels for certain students receiving special education. The rule limits the number of students assigned to a teacher. *See* Minn. R. 3525.2340. The Minnesota imposed caseload restrictions are not required by the federal rules, thus, such rules exceed the federal requirements.

Third, Minn. Rule 3525.2405, applying to directors, states:

> The school board in every district shall employ, either singly or cooperatively, a director of special education to be responsible for program development, coordination, and evaluation; in-service training; and general special education supervision and administration in the district's total special education system. Cooperative employment of a director may be through a host district, joint powers agreement, or a service cooperative. A director may not be assigned to direct instructional duties.

Minn. R. 3525.2405. Minnesota requires each local education agency or school district, to employ, singly or cooperatively, a special education director. While the federal rules do not use a specific rule or portion of the statute to require a special education director at the local level, at

least one statutory section and its corollary rule contemplate the existence of a local-level special education director. 34 C.F.R. § 300.534(b)(3) (within the context of discussing whether a district can be considered to have knowledge that a child is a child with a disability, the statute notes that knowledge will be presumed if concerns are reported directly to "the director of special education of the agency"). Though the federal rule contemplates a local-level special education director, the requirement for a district special education director is a Minnesota imposed requirement.

Fourth, Minnesota Rule 3525.2810, Development of Individualized Education Program Plan, exceeds the federal law regarding the provision of transition services. The Minnesota rule generally reflects that of the federal rule, however, the need for benchmarks or short-term objectives has been removed from the IDEA, while Minnesota still requires them. *See* Minn. R. 3525.2810. Additionally, pursuant to Minnesota law, an IEP must address the student's transition needs from secondary services to post-secondary education and training, employment, and community living, by grade nine or age fourteen, whichever comes first. Minn. R. 3525.2900, subp. 1 (A)(7). The IDEA, however, does not mandate transition planning until age sixteen.

Finally, the conciliation conference is a dispute resolution option available in Minnesota. Minnesota requires that districts provide a conciliation conference if requested by parents, and, if additionally requested by the parents, the district must participate in the conciliation conference. Minn. R. 3525.3700. This is a state-imposed requirement not demanded by the IDEA. The IDEA only mandates alternative dispute resolution is mediation. 34 C.F.R. § 300.506.

"For students with disabilities, a big factor in their successful transition from high school to post-secondary education is accurate knowledge about their civil rights."

U.S. Department of Education

Section 7

SCHOOL-TO-WORK TRANSITION

One of the primary purposes of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 34 C.F.R. § 300.1(a). Transition services are intended to prepare students with disabilities to make the transition from the world of school to the world of adulthood. The term "transition services" means:

> [A] coordinated set of activities for a child with a disability that-- (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional [[Page 23]] achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.

§ 300.43(a)(1). Transition services are offered to help students with disabilities and their families prepare and establish a vision of the future concerning where the student will live, work, and participate in the community.

Transition services are based on the student's individual unique needs taking into account the child's strengths, preferences, and interests. § 300.43(a)(2). Transition planning must be a part of the student's first IEP in effect when a student turns fourteen years old, or by the ninth grade, whichever comes first.[33] Minn. Stat. § 125A.08(a)(1). Some schools may require the

[33] While Minnesota law requires by age fourteen or grade nine, whichever comes first, IDEA does not require transition planning as part of an IEP until the student reaches age sixteen.

student and his or her IEP Team to create an individualized transition plan ("ITP") in addition to an IEP, to document the transition process, while other schools simply incorporate these plans into the already established IEP. An effective ITP section of an IEP should contain the following:[34]

Age-appropriate, measurable goals for training, education, employment and independent living skills and how progress will be measured.
A description of the services, including specific courses of study, the student needs to reach his or her goals and transition successfully from school to adulthood.
A coordinated set of activities.
Functional and academic goals and activities that promote the following outcomes: 1. Post-secondary education (such as college or university) 2. Vocational training (such as junior college or technical institute) 3. Continuing and adult education (such as formal or informal courses) 4. Employment in a setting where there are non-disabled workers (called "integrated employment" because the person with a disability is included in the work force with people without disabilities) 5. Independent living (living alone, with or without assistance) 6. Adult services and community participation (use of public and private services available in the community to people without disabilities)
Both campus-based instruction and community-based experiences.
Be developed by the student's parent(s), school faculty and staff from agencies that specialize in transition planning and who will provide post-high school services.
Take the student's preferences, interests and goals into account.

[34] *See Partners in Education: Know the Laws, Know Your Rights*, The Minnesota Governor's Council on Developmental Disabilities (last visited June 26, 2012) (citing Rud Turnbull, et al., *Exceptional Lives: Special Education in Today's Schools* 84 (Pearson Prentice Hall 1995) (updated to reflect criteria outlined in IDEA 2004)), *available at* www.partnersinpolicymaking.com/education/law_tipstools.html.

"*[T]here is an urgent and substantial need to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first 3 years of life.*"

Congressional Findings - 20 U.S.C. § 1431(a).

Section 8

INFANTS AND TODDLERS WITH DISABILITIES

There is a need to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities. 20 U.S.C. § 1431(a). Part C of the IDEA ("Part C") governs early intervention services for infants and toddlers under the age of three with disabilities. §§ 1431-1445. An infant or toddler with a disability is defined as:

> [A]n individual under 3 years of age who needs early intervention services because the individual is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in 1 or more of the areas of cognitive development, physical development, communication development, social or emotional development, and adaptive development; or has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

§ 1432(5)(A). Because it is often difficult to detect the existence and true nature of a disability in a child under the age of three, and even in some preschool children, Part C does not require that a child be classified according to particular categories of disabilities, but rather a child is frequently described simply as "developmentally delayed." Furthermore, Part C provides states with the option of serving children who are "at risk" of developing a disability. The term "at-risk infant or toddler" means "an individual under 3 years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to the individual." § 1432(1). Special education or related services are provided to an infant or toddler in hopes of lessening the severity of a future disability and, in certain situations, possibly preventing the development of a disability altogether.

I. EVALUATION AND ASSESSMENT

Under Part C, evaluations and assessments are to be provided at no cost to the parent. "Evaluation" refers to the process used by the multidisciplinary team (qualified people with training and experience in the areas of speech and language skills, physical abilities, hearing and vision, and other important areas of development) to find out whether or not a child is eligible for early intervention services. § 1432(4). As part of the evaluation, the multidisciplinary team will observe, interact, and use other tools or methods, to gather information on the child in order to learn how the child functions and whether or not the child is eligible for services under Part C. *Id.* The team will then meet with the parents to discuss these findings.

Once an infant or toddler has been evaluated and found to have a disability, he or she must receive a multidisciplinary assessment of his or her unique strengths and needs, and the services appropriate to meet such needs must be identified. 20 U.S.C. § 1436(a)(1). Furthermore, the family of the infant or toddler is to receive a family-directed assessment of the resources, priorities, and concerns of the family, and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the infant or toddler. § 1436(a)(2).

II. EARLY INTERVENTION SERVICES

The purpose of early intervention is to lessen the effects of the disability or delay. The term "early intervention services" means:

> [D]evelopmental services that are . . . designed to meet the developmental needs of an infant or toddler with a disability, as identified by the individualized family service plan team, in any 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development.

20 U.S.C. § 1432(4). Early intervention programs and services may occur in a variety of settings, with a heavy emphasis on natural environments, including the home, and community settings in which children without disabilities participate. § 1432(4)(G). Such services are proven to be most effective when started as soon as the delay or disability is identified and should be in conformity with an individualized family service plan. § 1432(4)(H).

III. INDIVIDUALIZED FAMILY SERVICE PLAN

Once an infant or toddler has been evaluated and an assessment has been made, a written individualized family service plan ("IFSP") must be developed by the multidisciplinary team and the parents. 20 U.S.C. § 1436(a)(3). An IFSP is very similar to the IEP used in special education. The IFSP is the vehicle through which effective early intervention is implemented in accordance with Part C of the IDEA. An IFSP documents and guides the early intervention process for children with disabilities and their families. It contains information about the services necessary to facilitate a child's development and enhance the family's capacity to facilitate the child's development. Through the IFSP process, family members and service providers work as a team to plan, implement, and evaluate services specific to the family's concerns, priorities, and available resources. A service coordinator then helps the family by coordinating the services outlined in the IFSP. According to § 1436(d), every IFSP must contain:

The infant or toddler's present level of cognitive, physical, communication, social or emotional, and adaptive development. These levels must be determined based on objective criteria.
The family's resources, priorities, and concerns related to enhancing their child's development.
The major outcomes for the infant or toddler and his or her family.

The criteria, procedures, and timelines for determining whether these outcomes are achieved and whether modifications of the outcomes or early intervention services are necessary.
The early intervention services to be provided to the infant or toddler and his or her family.
The frequency, intensity and method of delivering these early interventions services.
The natural environments in which they will be provided or why they will ***not*** be provided in those environments if the plan so requires.
The dates for starting the services and how long they will last.
The name and contact information for the family's service coordinator.
The infant's or toddler's transition plan for leaving early intervention services and entering preschool or another appropriate setting.[35]

[35] *See Partners in Education: Know the Laws, Know Your Rights*, The Minnesota Governor's Council on Developmental Disabilities (2007) (citing Rud Turnbull et al., *Exceptional Lives: Special Education in Today's Schools* 25 (Pearson Prentice Hall 2004), *available at* www.partnersinpolicymaking.com/education/law_tipstools.html.

"The [IDEA] directs the court to grant such relief as [it] determines is appropriate. The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be appropriate." *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 105 S.Ct. 1996 (1985).

Section 9

REMEDIES AND DAMAGES FOR SPECIAL EDUCATION VIOLATIONS

Where substantive violations exist, the IDEA affords students with disabilities and their parents a wide range of relief. Courts have the power to grant the relief that the court determines to be appropriate. 34 C.F.R. § 300.516(c)(3). To ensure that the "punishment fits the crime," the IDEA remedies provision allows for broad discretion and flexibility: "[n]othing in this part shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the ADA of 1990, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of students with disabilities." 34 C.F.R. § 300.516(e). Hearing officers and courts have enjoyed considerable discretion in awarding various types of relief. The following remedies have been awarded by administrative agencies and courts: awards of relief in the form of specific performance, injunctive and declaratory relief, reimbursement for private school tuition and privately obtained services, compensatory education, monetary damages, and attorney's fees.

I. AWARDS OF RELIEF IN THE FORM OF SPECIFIC PERFORMANCE

A common form of relief granted by due process hearing officers or courts of law for special education violations are to provide a particular type of special education service, or to take a specified course of action. For example, school districts may be required to provide additional special education and related services, come into compliance with terms of an IEP, revise an existing IEP, conduct an evaluation, or institute a particular placement. Often times

courts or hearing officers will provide only a general outline for the relief that they deem to be due and leave it up to the school districts to fill in the details.

II. Injunctive and Declaratory Relief

An injunction is an equitable remedy issued by a court of law ordering a party to take an affirmative action or prohibiting a party from taking a particular action. While some injunctions can be permanent, most injunctive actions provide only temporary relief and are designed to provide a "quick fix" pending a hearing on the merits of the claim. Permanent injunctions are rare in the special education context because permanency runs counter to the notion that special education is supposed to be fluid and change and develop along with the child's unique needs. If the interests at stake are vital, injunctions allow for one of the rare occasions where a party is allowed to seek direct relief from a court. Injunctions comprise one of the few exceptions to the doctrine of administrative exhaustion.

Injunctive relief may be utilized in a myriad of special education contexts. For example, an injunction may compel a particular placement or service, give effect to previously issued due process decisions or court orders in cases where parties are out of compliance, or be used to fulfill other requests for relief by parties to whom courts wish to give legal import.

In order to state a successful claim for injunctive relief, a party must be able to preliminarily show the following elements: that he or she is likely to prevail on the merits of the claim; that irreparable harm will result without the desired relief; and that society's interests favor the injunction. In evaluating the irreparable harm factor, courts balance the harm to the petitioner if the relief is not granted against the harm to the opposing party of the relief is granted.

Additionally, courts may couple an award of injunctive relief with that of declaratory relief. Basically, declaratory relief is simply statement of rights that other parties will recognize. Courts may issue joint awards of declaratory and injunctive relief, the effect of which provides a statement of rights with a court order to carry them out. A court may also just simply grant declaratory relief.

III. Reimbursement for Private School Tuition and Privately Obtained Services

Parents of students with disabilities have the option of placing their child in a private school or obtain private services, and then seek reimbursement for those services from the school district, on the grounds that the school district's services to their child was not adequate.[36] In determining whether parents are entitled to reimbursement for private school placement of their child, two Supreme Court cases govern. The case of *Burlington School Committee v. Department of Education* established the right to reimbursement as an appropriate remedy under the IDEA, *Florence County School District v. Carter* expanded on it, and *Forest Grove School District v. T.A.* clarified it's requirements. In *Burlington*, the Supreme Court held that parents who unilaterally change their child's placement to a private school setting are entitled to reimbursement *only* if a court concludes both that the public placement violated the IDEA and that the private placement was proper under the IDEA. 471 U.S. 359, 373-74, 105 S.Ct. 1996, 2004 (1985).[37]

[36] Parents may not seek reimbursement for private school tuition or the cost of privately obtained related services in situations where the parent(s) have unilaterally placed their child in such settings due to their own personal preferences and not out of dissatisfaction with the public program. Reimbursement is only possible in situations where public school provisions have been inadequate.

[37] Total reimbursement, however, will not be appropriate if a court fashioning discretionary equitable relief under the IDEA determines that the cost of the private education was unreasonable. *Florence County School District v. Carter*, 510 U.S. 7, 16, 114 S.Ct. 361, 366 (1993). Furthermore, parents who unilaterally change their child's placement during the

The Supreme Court's decision in *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993), added a second piece to the standard outlined in *Burlington*. In this decision, the Supreme Court concluded that private school placement selected by the parents does not need to meet all of the specific IDEA requirements applicable to educational placements made by public agencies. Specifically, while private school placements made by the school district must be at facilities that are approved by state departments of education for the provision of education to students with disabilities, private school placement made unilaterally by the parents is not required to adhere to this contingency. *Id.* at 364-66. The Supreme Court reasoned that to prevent parents from placing their child at a private school that otherwise offers an appropriate education, simply because the private school lacked the same seal of approval of the public system that failed the child in the first instance, would be inconsistent with the IDEA's goals.

More recently, the Supreme Court ruled in *Forest Grove School District v. T.A.* that reimbursement for private school tuition was appropriate even if the child with disabilities never attended the public school which failed to provide FAPE. 557 U.S. 230, 246, 129 S. Ct. 2484, 2496 (2009). To be clear, the court must first find that the potential public school placement violated the IDEA and that the private school placement was appropriate. *Id.* The court reasoned that because the 1997 Amendments to the IDEA did not categorically bar reimbursement schemes where the child never attended the violating public school, courts had discretion to grant it. *Id.* at 239-40.

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pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the court ultimately determines that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement.

IV. Compensatory Education

When a child with a disability is being denied FAPE, courts and hearing officers frequently award additional services or programming to compensate the student. Known as "compensatory education," this form of relief may be received both while the child is still in school and past the maximum age for eligibility under the IDEA. Additionally, the receipt of compensatory education may be tacked on to the regular school day, during the summer or beginning upon the student's expiration of eligibility for standard educational services. It does not necessarily only have to occur during the regular school day. The form of compensatory education received will vary depending on the when in the student's education career it is awarded. Most commonly, it will be awarded in a block of time equivalent to the length of time of the inappropriate placement or time where there was a denial of FAPE.

V. Monetary Damages

As stated previously, the IDEA's remedies provision contains a broad statement authorizing courts to grant all relief they deem appropriate. 20 U.S.C. § 1415(i)(2). The availability of monetary damages, both compensatory and punitive in nature, under the IDEA is still unsettled. The growing consensus, however, is that the IDEA does not permit an award of compensatory damages beyond reimbursement and out-of-pocket costs.[38] Generally, remedies under the IDEA are strictly limited to relief that is "equitable" in nature, such as reimbursement for out-of-pocket expenditures and compensatory education to make up for past shortcomings, and does not enter the realm of "tort-like" damages such as compensatory damages or punitive damages.

[38] The IDEA does not provide the exclusive avenue through which parents may enforce the rights of their child with a disability. IDEA violations may also be remediated through the liberal financial remedy provisions afforded under other civil rights law.

A claim for money damages generally proceeds under a theory of educational malpractice; however, there is no such claim for educational malpractice under the IDEA. Because the IEP is not an educational contract, a district cannot be held judicially accountable for an individual student's progress under an IEP. The district's responsibility is limited to ensuring that the student receives an educational program that is "reasonably calculated to provide an educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982).

V. ATTORNEY'S FEES

Reasonable attorney's fees are available to parents who prevail in actions or proceedings brought under the IDEA as a matter of course.[39] 20 U.S.C. § 1415(i)(3)(B). Fees matter to parents and quite possibly to the achievement of the IDEA's goal of free, appropriate public education for all children with disabilities. In addition to awarding fees to a prevailing party who is the parent of a child with a disability, districts may receive fees from parents' attorneys for frivolous, unreasonable, or foundationless due process hearing requests and proceedings, including court proceedings, and against parents or parents' attorneys for requests and

[39] Expert fees, however, are not reimbursable costs incurred during litigation. In the case of *Arlington v. Murphy*, 548 U.S. 291, 126 S.Ct. 2455 (2006), the United States Supreme Court decided whether the fee-shifting provision of the IDEA authorizes prevailing parents to recover fees for services rendered by experts in IDEA actions. The Court held that it does not. In *Arlington*, Paul and Theodore Murphy filed an action under the IDEA on behalf of their son, Joseph Murphy, seeking to require Arlington Central School District Board of Education to pay for their son's private school tuition for specified school years. The Murphy's prevailed in district court and the court of Appeals for the Second Circuit affirmed. As prevailing parents, the Murphys then sought reimbursement of fees paid for the services of an educational consultant who assisted them throughout the IDEA proceedings, including services as an expert. The district court granted the Murphys' request in part and the Court of Appeals for the Second Circuit affirmed. The Supreme Court granted certiorari to determine whether Congress authorized the compensation of expert fees to prevailing parents in IDEA actions. The IDEA provides that a court "may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the Act. 20 U.S.C. §1415(i)(3)(B). The Court held that this attorneys' fee-shifting provision does not authorize a court to award "expert" fees to the parents of a child with a disability who is a prevailing party under the IDEA, and thus, they are not entitled to recover fees paid to expert witnesses as part of their costs.

proceedings that are presented for an improper purpose. 20 U.S.C. § 1415(i)(3)(B)(i)(II); 34 C.F.R. § 300.517(a)(1)(ii). Districts do not receive fees, however, simply on the grounds that the parents lost the due process hearing or court proceeding. Additionally, courts may grant fees to prevailing school districts, against the parents' attorney, if the complaint or subsequent cause of action "was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 34 C.F.R. § 300.517(a)(1)(iii); 20 U.S.C. § 1415(i)(3)(B)(i)(III).[40]

[40] As to general information contained in this section, *see* Vicki M. Pitasky, Steven E. Lake & John W. Norlin, *School Law Handbook*, Chris Hiley Donohue ed., LRP Publications 2007.

"Education is the most powerful weapon which you can use to change the world."
Nelson Mandela

Section 10

CONCLUSION

How best to provide persons with disabilities the tools to live fulfilling lives has undergone tremendous change in the last 150 years. It is now generally accepted that an appropriate education is critical to future success, and every child deserves one regardless of physical, mental or cognitive disability. The success of children with disabilities requires an understanding of the complexities and demands of special education laws. The IDEA, NCLB, Section 504, Title II, FERPA, and applicable Minnesota law, champion the rights of those with disabilities and are powerful tools to craft an appropriate education and a promising future.

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