



National Association of Charter School Authorizers

*Promoting quality charter schools*

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# **A Reference Guide to Special Education Law for Charter School Authorizers**

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## Foreword

**T**he National Association of Charter School Authorizers (NACSA) is a nonprofit membership association of educational agencies across the country that authorize and oversee public charter schools. Created in 2000 by a diverse group of charter school authorizers nationwide, NACSA is dedicated to supporting and strengthening the capacities of authorizers to charter successful schools.

NACSA gratefully acknowledges the assistance of numerous people who contributed their time and experience to reviewing an early draft of this publication, including Eileen Ahearn, Nancy Cappello, Mary Jo Dare, Connie Greenwald, Greg Richmond, John Rothwell, and Iris Zvi. Our special appreciation goes to Paul O’Neill and Lauren Morando Rhim for contributing innumerable observations and insights on the challenge of applying a complex set of laws to a novel public education governance structure.

We extend great thanks to Rick Landau, Kristen Tsangaris, and Len Wolfe of Dykema Gossett for taking on the challenge of creating this unique resource for charter school authorizers, and to the Walton Family Foundation for making this publication possible.

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Richard Landau's particular expertise is in the area of special education and disability law. Formerly a practicing clinical psychologist, Dr. Landau maintained a clinical practice in Boston, Massachusetts in the early 1980s, during which time he held a joint appointment at the McLean Hospital and the Harvard Medical School. Upon graduation from the Boston University School of Law, Dr. Landau began the full-time practice of law. Since that time he has participated as lead legal counsel in dozens of special education and disability rights cases.

Dr. Landau received his undergraduate degree, *magna cum laude*, Phi Beta Kappa from Brown University. He received his Ph.D. in clinical psychology, with a special emphasis in behavior modification procedures for adults and children, from the State University of New York at Stony Brook. In 2000 Dr. Landau was elected to a six-year term as Trustee of Washtenaw Community College, a charter school authorizer in Michigan.

This publication is intended to serve as an educational resource for individuals and entities involved in the authorization of charter schools. It is distributed with the understanding that neither the author, nor Dykema Gossett pllc, nor the National Association of Charter School Authorizers is engaged in providing legal advice or rendering legal or other professional services by its distribution. Anyone seeking guidance or advice regarding particular facts and circumstances should seek independent legal advice from an attorney knowledgeable about federal, state and local laws, rules and regulations.

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# Introduction

**W**hen I was asked by the National Association of Charter School Authorizers (NACSA) to author this publication, I was presented with a vexing dilemma. NACSA wanted a comprehensive resource for its members, not simply an introduction to the area of special education law. Complicating matters further, as I soon learned from the daunting number of emails received following the distribution of an initial draft, was the fact that NACSA membership's needs are as diverse as the various states in which they operated. Some of the members were themselves responsible for ensuring compliance with the special education laws for the charter schools that they authorized. These members were interested in a step-by-step guide to compliance. Others either had no such direct responsibility, or shared this responsibility with another entity, typically a public school district. Those members were less interested in the details, preferring instead concrete suggestions about contractual language that they could use when forming a charter.

These issues were compounded by the fact that no one has ever characterized special education law as simple. The educational jargon stumps many lawyers. Educators struggle with statutes and regulations that appear to have been drafted in Sanskrit and translated (poorly) into English. Added to the mix is the fact that while federal statutes and regulations govern special education law, there are subtle differences in the ways the laws are implemented in each state, as well as differences among state statutes authorizing the creation of charter schools.

My solution to these problems was to break this reference guide into two parts. In Part One I give an overview of the legal “landscape” with an eye toward helping authorizers understand what factors to consider in deciding how deeply they must inquire in ensuring special education compliance. Critical to this endeavor is determining whether or not the charter school is, or is not, a “Local Educational Agency” (LEA) as that concept is used in special education law. A charter school’s LEA status is an important factor in determining its eligibility for finan-

cial and other assistance. One word of warning is in order. You will not find the answer to this question in a chart or summary. This is a new area of the law. As of this writing there are very few reported cases dealing with any aspect of the application of special education law in the charter school context, and fewer still where a court has ruled on the critical issue of whether a charter school is, or is not, an LEA. This is generally considered a question of state rather than federal law. Authorizers will need to consult their own counsel in addressing this issue. I have done my best to point the authorizer (and perhaps their counsel) in the right directions.

In Part Two, I provide a comprehensive review of how one determines whether or not a charter school is, or is not, in compliance with **federal** special education law. The underpinnings of this analysis are the regulations implemented by the United States Department of Education concerning the two principal special education statutes: The Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). While states may differ in the particulars of **how** they expect schools to comply, compliance with these federal regulations is the bargain the states have struck in return for the (albeit meager) funds they receive from the federal government. I have also structured Part Two so as to track the process of compliance monitoring in a chronological fashion—literally from initial referral, through planning, and (if necessary) suspension or expulsion.

I wrote this guide with the patient and knowledgeable assistance of a number of people. Kristen Tsangaris provided invaluable research and technical support for the full duration of the project. William Haft, NACSA’s Associate Director, came in at the eleventh hour to provide extremely helpful comments and editorial assistance. Finally, I would like to thank the various NACSA members and other interested people who provided valuable comments throughout the editing process.

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# Part 1. Special Education and Charter Schools

## A. INTRODUCTION TO SPECIAL EDUCATION LAW

In one of the last bursts of energy that produced the raft of civil rights legislation of the 1960's and 70's, Congress turned its attention to "handicapped" children attending public schools. Congressional action culminated in 1975 with the passage of the Education for All Handicapped Children Act (EHA), which requires states to adopt goals ensuring full educational opportunity for children with disabilities as a condition for receiving federal funds.<sup>1</sup> As part of subsequent amendment by Congress, the law acquired its current title, the Individuals with Disabilities Education Act (IDEA). When Congress reauthorized IDEA in 1997, it substantially reorganized the statute and added a number of new requirements, including participation in state and district assessments and student discipline.

At its core, IDEA requires that students with identified disabilities receive a "free appropriate public education" (FAPE) in the "least restrictive environment" (LRE) appropriate for their needs.<sup>2</sup> Congress sought to achieve IDEA compliance by offering states federal funds for educating children with disabilities in exchange for states' commitment to comply with IDEA's **substantive** (*i.e.*, defining who is eligible for special education and what services are specifically required) and **procedural** (*i.e.*, defining what school administrators must do in order to document their compliance with the law) requirements. Like their traditional public school counterparts, public charter schools must comply with the statute's substantive and procedural requirements.<sup>3</sup>

Although IDEA is the most prominent federal special education statute, it is not the only federal legislation relevant to educating children with disabilities. Congress has enacted legislation broadly protecting people with disabilities that includes within its scope children with disabilities attending public schools. Section 504 of the Rehabilitation Act of 1973

(Section 504) is a civil rights statute that protects individuals against discrimination based on a disability by any recipient of federal financial assistance and by any program or activity that receives or benefits from such assistance.<sup>4</sup> The Americans with Disabilities Act (ADA) is another civil rights law that makes it illegal for any public entity to discriminate on the basis of disability.<sup>5</sup> Both of these statutes add further requirements to the special education milieu. Though not limited to public schools, both Section 504 and the ADA apply with equal force in that context. Nevertheless, the vast majority of special education claims are raised under the IDEA.

## B. SPECIAL EDUCATION LAW AS APPLICABLE TO CHARTER SCHOOLS

All public schools, including charter schools, are required to comply with federal laws that protect children with disabilities in our public school system. Through specific inclusion in IDEA, it is well-settled that charter schools are not exempt from federally mandated special education requirements. In response to an inquiry from Wisconsin, the U.S. Department of Education (ED) indicated that a state must designate some agency as the agency responsible for ensuring a charter's compliance with IDEA and that, despite the charter's autonomy, the responsible agency must be vested with the requisite authority to ensure the charter's full compliance with IDEA. If the state fails to designate a responsible entity, the Office of Special Education Programs (OSEP) indicated that it would look to the state to ensure compliance.<sup>6</sup>

Authorizers must make charter school applicants and operators aware of their obligations under IDEA, Section 504 and the ADA. Authorizers should also make charter applicants and operators aware of the importance of understanding their particular state's governance structure for ensuring compliance in charter schools. A charter school that fails to comply risks administrative burden, intrusion by state

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and federal governmental agencies, unnecessary expense, and severe financial consequences. Moreover, noncompliance by charter schools places federal funding to the entire state at risk.<sup>7</sup> Depending upon the level of knowledge on the part of applicants, authorizers may need to help applicants obtain basic knowledge of special education policies and procedures. Some authorizers have established applicant orientation programs that incorporate significant instruction regarding special education.

### C. WAIVER OR EXEMPTION FROM CERTAIN STATE SPECIAL EDUCATION REQUIREMENTS

Federal special education statutes, and in particular the IDEA regulations, set forth the minimum requirements that states must meet in order to comply with federal law. States are authorized to promulgate their own procedures for implementing the federal requirements. States are also free to impose requirements over and above those imposed by the IDEA regulations. For example, the IDEA regulations impose upon states the obligation to provide services to students with disabilities aged 3 through 21,<sup>8</sup> but Michigan law extends this obligation to students through the age of 26.<sup>9</sup> Authorizers should expect charter schools to comply with additional state special education requirements unless state law provides for waivers or exemptions.

Although charter schools are not exempt from compliance with federal special education law, they may be eligible for waivers from compliance with additional state-imposed requirements. State charter statutes often provide for charter school exemption or waiver from restrictions governing most public schools. For example, in some states, charter schools are exempt from or may request a waiver from the requirement that they hire teachers in the same way as do traditional public schools. Similarly, state law may permit a charter school to seek a waiver from state special education requirements that exceed the federal standard. Thus, while authorizers must make charter applicants and

operators familiar with federal law, it is equally important that operators be familiar with state law. In particular, charter operators must be aware of any heightened state standards and any available exceptions or waivers from those standards.

### D. CHARTER SCHOOL LEA STATUS AND SPECIAL EDUCATION OBLIGATIONS

IDEA requires compliance with its special education mandates in exchange for the federal funding it offers. The actual recipient of funds from the federal government in the first instance is the **state educational agency** (SEA). The SEA then allocates these federal funds among **local educational agencies** (LEAs) pursuant to the federally required special education funding formula [34 CFR § 300.712].

State funds are also available to support special education and they are distributed in ways that differ greatly across states. The major types of formulas used by states include the so-called “flat grant,” “pupil weight” and “percentage reimbursement” models.<sup>10</sup>

The SEA is charged with developing and implementing a regulatory scheme that ensures LEAs comply with IDEA. The LEAs are primarily responsible for implementing IDEA policies and procedures. In some states, charter school law designates the school to be its own LEA. In other states, charter schools remain part of an existing LEA or may elect either status. A charter’s status under state law as either its own LEA or its legal relationship to an existing LEA at least in part determines its financial and legal responsibility under IDEA. Moreover, a charter’s LEA status defines its eligibility for special education funding under IDEA and usually under state and local special education financing schemes as well.<sup>11</sup>

#### 1. Defining an LEA

For state law purposes, an LEA is commonly understood to be a public body charged with providing educational services to students within a defined geographical area. Typically an LEA is a local school district and/or an intermediate school district.

However, the IDEA regulations define an LEA as follows:

(a) As used in this part, the term local educational agency means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

The term includes—

- (1) An educational service agency, as defined in [34 CFR] § 300.10
- (2) Any other public institution or agency having administrative control and direction of a public elementary or secondary school, including a public charter school that is established as an LEA under State law.<sup>12</sup>

## 2. LEA status of charter schools

A charter school can be its own LEA, a school within an LEA, or an educational program within an LEA. Each state can determine its charter schools' LEA status or "linkage" for IDEA purposes.<sup>13</sup>

Based on a charter's status under state law, the IDEA regulations specifically categorize a charter school's compliance obligations as follows:

*(b) If the public charter school is an LEA, consistent with [34 CFR § 300.18], that receives funding under §§ 300.711-300.714, that charter school is responsible for ensuring that the requirements of this part are met, unless State law assigns that responsibility to some other entity.*

(c) If the public charter school is a school of an LEA that receives funding under §§ 300.711-300.714 and includes other public schools—

*(1) The LEA is responsible for ensuring that the requirements of this part are met,*

*unless State law assigns that responsibility to some other entity; and*

*(2) The LEA must meet the requirements of § 300.241.*

*(d) (1) If the public charter school is not an LEA receiving funding under §§ 300.711-300.714, or a school that is part of an LEA receiving funding under §§ 300.711-300.714, the SEA is responsible for ensuring that the requirements of this part are met.*

(2) Paragraph (d)(1) of this section does not preclude a State from assigning initial responsibility for ensuring the requirements of this part are met to another entity; however, the SEA must maintain the ultimate responsibility for ensuring compliance with this part, consistent with § 300.600.<sup>14</sup>

This regulatory scheme creates three categories of charter schools for compliance purposes:

1. If the charter school receives IDEA funds directly from the SEA, the charter school itself is responsible for complying with IDEA.
2. If the charter school is treated under state law as if it were a public school operating within a designated LEA or as an entity legally separate from the LEA but with a legislated assignment of its special education obligation to the traditional LEA, such as a local school district, that district (or other agency) is the LEA responsible for ensuring compliance.
3. If the charter school fits into neither of these categories, the SEA is responsible for ensuring compliance.<sup>15</sup>

For states in which charter schools are considered to be a school or program within an existing LEA, the responsibility for special education is determined by one or more of the following: state law, state regulation, state policy, or a charter school's contract with the LEA.

For states in which charter schools are treated as independent LEAs for special education purposes, such schools have full

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responsibility for providing FAPE to their students (unless the state assigns this responsibility to another entity). This responsibility includes identifying children with disabilities within the charter school, evaluating students suspected of having a disability, developing an individualized education program (IEP), implementing the IEP, and providing all programs and services required by the IEP. Such services may include paying for a private residential placement if the IEP team for a student enrolled in the charter school determines such a placement is necessary to provide FAPE. These substantive obligations could significantly burden a small charter school's daily operation. The financial obligations could do the same or even result in financial ruin.

Independent LEA status may create negative incentives for charter school enrollment of students with disabilities. Unlike a school district that bears responsibility for all students within its geographical district, an independent LEA charter bears responsibility only for those students enrolled in the charter<sup>16</sup> except that a charter school may be held responsible for compensatory services after a student leaves if the school is found to have been out of compliance with the IEP for that child. A traditional LEA can rely on economies of scale to provide special education services at specified sites within the district and does not have to provide those services at every individual school. Independent LEA charter schools do not have that flexibility. This situation may create incentives for some such charter schools to “counsel out” students with disabilities, and authorizers of independent LEA charter schools should be particularly attentive to this potential problem.

### 3. Charter School-LEA Linkage

Recent research into charter schools and special education characterizes charter school-LEA relationships as “linkage.” This research identifies three categories of charter school linkage: no-link, total-link and partial-link.<sup>17</sup> The categories include both formal relationships, defined by state law and policy, and informal relationships developed by individual charters and LEAs or other educational agencies.

In a no-link state, state law mandates that the charter is its own LEA and thus bears the burden of complying with IDEA. Some charters in no-link states meet this burden by contracting with a local school district or intermediate school district for special education services; but, any such relationship is voluntary. Other charters operating in no-link states provide all special education services in-house, while others pool resources with other local charters for the provision of services or contract with private providers.

In a total-link state, the charter statute or some state regulation creates a link between charter schools and an LEA for the provision of special education services. In a partial-link state, the charter is a legal entity independent of an LEA but state law mandates some type of collaboration between the charter and an LEA for ensuring compliance with federal special education law. Charters operating in total-link and partial-link states have developed numerous and varied arrangements for the provision of special education services through the LEA. Moreover, state law often is vague or simply does not speak to the linkage issue and; where this is so, schools and LEAs may have discretion regarding how to structure and meet their special education requirements.

## E. THE AUTHORIZER'S APPROVAL AND OVERSIGHT ROLE

### 1. Application and Contracting

Charter authorizers can and should facilitate charter school compliance with special education requirements. As a threshold matter, authorizers should understand the importance of a charter school's “legal identity” and the concept of “linkage” of charter schools under state law for purposes of special education compliance. That is, they should know the charter school's LEA status for special education purposes and to what degree state law provides for charter schools to establish relationships with traditional school districts, other charter schools, or other special education service providers for providing special education services.



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In addition, authorizers can support compliance by knowing what resources charter operators can develop for special education services. Charter school applicants and operators will most often need technical assistance in determining efficient and comprehensive methods of ensuring compliance with special education requirements and delivery of those services. Such guidance should begin at the time of application and can be a discrete component of the contracting process.

The application and contracting process is the authorizer's opportunity to define a charter school's special education obligations and to explore the school's program and capacity for meeting these obligations. However, whether authorizers take advantage of this opportunity varies among states

and authorizers. At a minimum, most charter statutes require applicants to assure that the school will comply with anti-discrimination laws. Some state charter school laws specifically require applicants to develop a special education plan.

## 2. Special Education Funding

Charter schools' ignorance of or failure to pursue special education funding to which they are entitled can generate obvious problems for schools and special education students. Charter schools sometimes assume that they must "get by" in the area of special education with the same per capita reimbursement that they receive for regular education students. The average estimated expenditure for a student with disabilities is at least 1.9 times the average

### ISSUES FOR AUTHORIZERS: SPECIAL EDUCATION PLAN OVERSIGHT

It is critical that each charter school operator have a special education plan and that an authorizer assess a charter school applicant's capacity to meet its special education responsibilities from the outset. A recent study reports that even where state law requires charter school applicants to address special education in their applications, the applicant's information is often insufficient for authorizers to determine whether the proposed school can meet its special education obligations.<sup>18</sup> As a result, the quality of an applicant's special education plan often depends upon the authorizer's own requirements and initiative. A charter school operator is more likely to deliver special education services if he or she has a clear understanding of the school's contractual obligations and if the performance contract specifically addresses implementation and delivery of special education services.<sup>19</sup> Therefore, authorizers should use the application and contracting process to address these issues with applicants/operators and to help them plan to meet the charter school's special education responsibilities.

Once the school is in operation, an authorizer's role should be to provide compliance oversight for special education just as it provides compliance oversight for financial viability and student performance. The oversight question should be *whether, not how, the charter school is meeting its special education obligations*. Such monitoring may consist of requiring a charter to maintain and provide data on evaluations and IEPs. Authorizers should require notice of any requests for due process hearings and any complaints filed with state or federal agencies in connection with special education issues. As with other aspects of charter school oversight, authorizers should address these requirements at the contracting stage in furtherance of their role as oversight and monitoring bodies. Unless state law imposes such obligations (i.e., prescribes that the authorizer must be an LEA or an SEA), authorizers should avoid becoming overly involved in how the school meets its special education obligations. Such involvement could conflict with the authorizer's responsibility to make objective compliance determinations. However, authorizers can and should remain well informed of special education issues arising at schools for which they have oversight responsibility.

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for a regular education student.<sup>20</sup> Therefore, those charter schools that assume they must “get by” in special education with the same resources that they devote to regular education students are shortchanging themselves. Moreover, charter schools that cope with these perceived financial disincentives by “counseling out” students with disabilities, or under-identifying students who may qualify for special education or Section 504 accommodations, risk being found in non-compliance.<sup>21</sup> Authorizers have an important responsibility to ensure that charter school applicants have accurate and clear information about federal and state special education funding available to them. Authorizers should provide charter schools full information about special education funding and services that they may receive.

### 3. Special Education Compliance

As previously discussed, the ultimate front line responsibility for meeting special education obligations under federal special education law falls to the SEA, which typically delegates the responsibility for implementation to its LEAs. In a total-link or partial-link state, when a public agency serves in a dual capacity as an LEA and as an authorizer, that agency bears primary

responsibility for meeting the obligations of the federal special education laws. In a total-link or partial-link state, if the authorizer is the SEA, the authorizer is responsible for ensuring special education obligations are met by the charter. In both instances, these obligations result from the obligations imposed on LEAs and SEAs, not the particular agency’s role as an authorizer. Authorizers who are neither LEAs nor SEAs are not legally obligated to ensure compliance.<sup>22</sup>

Recent research indicates that imposing a legal obligation to ensure compliance on a non-SEA/LEA authorizer will inhibit the authorizer’s ability to serve the charter school.<sup>23</sup> An authorizer’s primary functions are to review and approve applications, develop charter contracts, monitor charters and make renewal decisions. If an authorizer were responsible for providing special education services or ensuring the provision of such services, the authorizer’s true functions would be overshadowed and compromised. As the research indicates, intrusive authorizers distract school officials from their primary responsibility of educating students and managing the day-to-day operations of the charter school.<sup>24</sup> Such intrusion negatively affects a charter’s ability to develop its own internal accountability.<sup>25</sup>

#### ISSUES FOR AUTHORIZERS: IDEA FUNDING

The process for a charter school to receive special education funding depends upon the school’s LEA status. IDEA entitles a charter school that is identified as part of a traditional LEA to an equal share of the federal funds that the LEA provides to its other schools. A charter school operating as its own LEA applies directly to the SEA for its IDEA funds. Recent research indicates that some charter schools operating as independent LEAs have not applied for IDEA funds even though none of the charter schools surveyed reported being unaware of the availability of the funds.<sup>26</sup> Authorizers should be aware of the IDEA funding procedure for schools they oversee and should make this information available to schools.

Authorizers should help ensure special education compliance and improve special education services in charter schools by understanding federal and state special education funding mechanisms. Authorizers should require charter applicants to include a comprehensive, well-thought-out special education plan in their applications and should be prepared to discuss special education funding with charter school applicants to help them plan for funding at the application and contracting phases. Authorizers should also consider making technical assistance available to help charter school operators access the federal and state special education dollars to which they are entitled.

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## Part II. What The Law Requires

Congress enacted IDEA to protect the educational rights of students with disabilities. IDEA mandates that states develop a process by which schools will identify students suspected of having disabilities, evaluate such students, make determinations of eligibility, and develop IEPs for programs and services that will meet the unique needs of each child. IDEA also provides specific rules that schools must follow when disciplining a student with disabilities. Additionally, IDEA contains technical requirements for notice and procedures that schools must follow to protect the rights of students and parents. Compliance with these requirements also serves to protect the school from procedural challenges that could otherwise result in significant liability. The following discussion addresses each of these topics and offers special education-related suggestions for authorizers in the context of their approval, oversight and monitoring roles.

Section 504 and the ADA also provide important disabilities protections that may apply to children who are not eligible for special education services under IDEA. Although IDEA provides the most comprehensive framework and guides the following discussion, we discuss Section 504 and the ADA separately where they require procedures and protections that differ from those required by IDEA.

### A. ENROLLMENT, IDENTIFICATION AND EVALUATION OF STUDENTS WITH DISABILITIES

The threshold issue in determining a child's eligibility for special education is whether the child is "eligible" for such services under IDEA. There are three phases to this inquiry. First, schools must take affirmative steps to identify the children who are candidates for evaluation. Second, schools must evaluate such children for eligibility. Finally, if the child is deemed eligible, the school must assemble a team to develop and implement an IEP.

### 1. Eligibility and the Concepts of "Child Find" and "Zero Reject"

It is well established that a charter school may not categorically deny admission to qualified students on the basis of disability. Generally, federal law prohibits charter schools that receive federal funds from selective admissions policies. Federal regulations require that oversubscribed charter schools use a random lottery to decide which students receive a place in the school. More specifically, a policy that categorically denied a student admission to a charter school solely because of that student's need for special education or related aids or services would violate IDEA as well as Section 504 and the ADA.<sup>27</sup> IDEA extends this "zero reject" requirement by mandating that eligible students be provided with special education or related aids or services, and also by requiring LEAs to affirmatively seek out and *find* eligible students.

### 2. The Duty to Identify and Evaluate

A charter school, particularly one with independent LEA status, must take affirmative steps to identify students with disabilities and may not simply rely upon a parent to bring a child's disabilities to its attention. Section 504, for example, requires that a school evaluate a student who "needs or is believed to need special education or related services."<sup>28</sup> The IDEA enumerates specific circumstances in which an LEA will be "deemed to have knowledge that a child is a child with a disability." These circumstances include written, or sometimes oral, expression of concern from parents regarding the need for special education and related services; student behavior or performance demonstrating the need for services; parental request for an evaluation; or expression of concern by a teacher or other personnel in accordance with the school's "child find" or special education referral system.<sup>29</sup> (See Box for text of the regulations.) There are exceptions to this child find obligation if the child was previ-

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ously evaluated and found not eligible or if the LEA has previously determined that an evaluation was not necessary.<sup>30</sup>

### 3. The Evaluation Process

Once the school or LEA identifies a student who may have a disability, it must follow IDEA's evaluation procedures. First, IDEA requires a pre-evaluation determination of the data needed to evaluate the child prop-

erly. The same individuals must conduct this determination and the evaluation itself, but they may conduct the determination without a formal meeting.<sup>31</sup>

Once it is determined that a student needs to be evaluated, IDEA places certain limitations on the type of evaluation materials, assessment tools and strategies that may be used to make eligibility determinations. For example, an LEA must ensure that, among

#### ISSUES FOR AUTHORIZERS: ENROLLMENT, IDENTIFICATION AND EVALUATION

It is imperative that charter school operators recognize their affirmative duty to identify students with disabilities and understand how state law requires them to meet the needs of students they identify. During the application and contracting process, authorizers should require potential operators to demonstrate understanding of their special education obligations under state and federal law.

Depending upon a charter school's and an authorizer's LEA status, authorizers may be responsible for ensuring that charter schools evaluate students properly. If charter schools are responsible under state law for conducting evaluations, authorizers should require the school to develop a plan for conducting evaluations. Authorizers should initiate this requirement early in the application and contracting process. An appropriate evaluation process must include notice to parents of procedural safeguards and parental consent for evaluations. Authorizers should, among other things, require charter school operators to include copies of model notice and consent forms with their special education compliance plans.

#### ISSUES FOR AUTHORIZERS: KNOWLEDGE THAT A CHILD IS A CHILD WITH A DISABILITY

Federal regulations provide that a school is deemed to have knowledge that a child is a child with a disability whenever:

- (1) The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate educational agency that the child is in need of special education and related services;
- (2) The behavior or performance of the child demonstrates the need for these services, in accordance with [34 CFR] § 300.7;
- (3) The parent of the child has requested an evaluation of the child pursuant to §§ 300.530-300.536; or
- (4) The teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system.<sup>32</sup>



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other things, the tests and other evaluation materials are nondiscriminatory and unbiased, and are administered in the child's native language unless it is clearly infeasible to do so. There is a series of evaluation requirements to ensure their proper use, including that the school use varied assessment tools and strategies, that these tools and strategies include measures tailored to assess specific areas of educational need, that standardized tests are valid for the purposes used and properly administered, and that no single procedure is the sole criterion for making a disability determination.

For a comprehensive list of the requirements, authorizers should consult legal counsel and the relevant regulation, 34 CFR § 300.532, and charter operators should always consult counsel or an experienced special education technical assistance resource for assistance in understanding the detailed evaluation procedure requirements.

Once the school develops the appropriate methodology for assessment and evaluates the student, IDEA next requires the school to assemble a "group of qualified professionals and the parent" for the purpose of reviewing the eligibility data and determining whether the student is eligible for special education.<sup>33</sup> As a practical matter, the composition of this group will likely be identical to that of the IEP team.<sup>34</sup>

#### **4. Notice of Procedural Safeguards and Parental Consent**

Prior to beginning an evaluation, as well as before any reevaluation, the school must obtain parental consent.<sup>35</sup> A parent's refusal to consent does not diminish the school's obligation to conduct an evaluation.<sup>36</sup> If a parent refuses to consent, state law may require school officials to request a due process hearing to obtain consent. At various decision points, IDEA requires that parents receive notice of their procedural rights and remedies. The decision points requiring notice include initial referral for evaluation, notification of an IEP meeting, reevaluation of the child, and receipt of a request for due process.<sup>37</sup>

IDEA regulations require the notice to include a full explanation of procedural safeguards and complaint procedures relating to, among other things, the Independent Education Evaluation, prior written notice, parental consent, access to educational records, opportunity to present complaints, and procedures for various placement decisions and aspects of due process litigation. (See Box for complete list of procedures for which notice must be provided). The substance of the safeguards themselves is discussed in Part II.D., below.<sup>38</sup>

#### **5. The Classification of Students with Disabilities Under IDEA**

Under IDEA, a child with a disability means a child who meets the criteria for one or more of the following classifications:

- mental retardation;
- hearing impairments;
- speech or language impairments;
- visual impairments;
- serious emotional disturbance;
- orthopedic impairments;
- autism;
- traumatic brain injury;
- other health impairments;
- specific learning disabilities;
- deaf-blindness;
- deafness;
- multiple disabilities.<sup>39</sup>

Each of these classifications has a specific definition under the IDEA regulations. States may add to or enhance these categories, but may not exclude them. These classifications may overlap medical/psychiatric diagnostic schemes in some respects, but none is duplicative.

#### **6. Consideration of Section 504 Eligibility if IDEA Eligibility is Not Appropriate**

The IDEA eligibility categories do not encompass the entire universe of students defined as having disabilities under federal civil rights laws. The ADA and Section 504 of the Rehabilitation Act define disability more

## REGULATIONS REGARDING NOTICE OF PROCEDURAL SAFEGUARDS AND PARENTAL CONSENT

Some states have developed a procedural safeguards notice that is mandated for use in all its public schools. It is critical that charter schools understand the procedures their state has established including the requisite notification policy.

The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under [34 CFR] §§ 300.403, 300.500-300.529, and 300.560-300.577, and the State complaint procedures available under §§ 300.660-300.662 relating to:

- (1) Independent educational evaluation;
- (2) Prior written notice;
- (3) Parental consent;
- (4) Access to educational records;
- (5) Opportunity to present complaints to initiate due process hearings;
- (6) The child's placement during pendency of due process proceedings;
- (7) Procedures for students who are subject to placement in an interim alternative educational setting;
- (8) Requirements for unilateral placement by parents of children in private schools at public expense;
- (9) Mediation;
- (10) Due process hearings, including requirements for disclosure of evaluation results and recommendations;
- (11) State-level appeals (if applicable in that State);
- (12) Civil actions;
- (13) Attorneys' fees; and
- (14) The State complaint procedures under §§ 300.660- 300.662, including a description of how to file a complaint and the timelines under those procedures.<sup>40</sup>

## ISSUES FOR AUTHORIZERS: DISABILITIES CLASSIFICATION

Authorizers should consider making information available to the schools they oversee regarding federal and state-specific classification criteria. At a minimum, authorizers should be able to refer charter schools to appropriate sources for this information.

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broadly than does IDEA.<sup>41</sup> An LEA's obligation to provide FAPE under the ADA is typically the same as its obligation under Section 504.<sup>42</sup> Almost anyone who has a physical or mental impairment that substantially limits one or more major life activities (including learning), has a history of such impairment, or is regarded as having such an impairment is protected from discrimination by these statutes. This eligibility includes all students who qualify for IDEA protection but is not limited to that group. Thus, more students are eligible for Section 504 and ADA protection than are eligible under the stricter IDEA requirements. The IDEA's protection extends only to those students with disabilities who require special education services. Students with disabilities who do not need special education services (and are not, therefore, entitled to IDEA protection—for example, an asymptomatic HIV-positive student or a student with diabetes that is controlled by medication) may still have Section 504 and ADA protection.

Even if an IEP team concludes that a student is not eligible for services under IDEA, the IEP team must also consider the possibility that the student may be a “qualified” student with a disability under Section 504 and the ADA. For example, a student clinically diagnosed with attention deficit hyperactivity disorder (ADHD) may still be able to learn in a regular education curriculum but may not be able to focus on material during tests. Under these circumstances an IEP team may conclude that the student is not eligible for services under IDEA, but is entitled to certain accommodations, such as a quiet place to take exams or extended time on exams. Examples of possible accommodations that Section 504 and the ADA might require are listed in Appendix A.

Authorizers should ensure that a charter school's special education plan includes a policy for satisfying Section 504 and ADA requirements. The Section 504 regulations make it clear that compliance with IDEA's procedural requirements will satisfy the charter school's procedural obligations under Section 504 and the ADA.<sup>43</sup>

## 7. Enrollment of Students Already Eligible for Special Education

When a student who is already eligible for special education services enrolls in a charter school, the charter school is responsible for implementing an IEP to ensure that the child receives special education and related services. The charter school may have to request the student's special education records separately to determine whether the student has a current IEP. Not all states require that a student's IEP be maintained and transferred as part of the student's educational records. If an IEP is available, some states may authorize the charter school either to adopt the existing IEP or develop a new one. However, authorizers and charter operators must ensure that their approach complies with state law. For example, New York State regulations currently prohibit charter schools from replacing an existing IEP. And the U.S. Department of Education has “strongly encouraged [schools] to continue implementing the IEP developed by the former [school], if appropriate, especially if the parents believe their child was progressing appropriately under that IEP.”<sup>44</sup>

If no current IEP is available or if the parents were dissatisfied with the old IEP, the charter school must implement the old IEP to the extent possible until an IEP team can develop and implement a new IEP. The school may meet this obligation by providing interim services to which the parents agree. Ordinarily, the charter school must convene an IEP team to develop and implement a new IEP “within a short time” after the child enrolls in the charter.<sup>45</sup> Where state law permits charter schools to develop new IEPs, the regulatory guidance provided by the U.S. Department of Education suggests that the IEP team develop the new IEP “normally, within one week.”<sup>46</sup>

### B. THE INDIVIDUALIZED EDUCATIONAL PLANNING TEAM

The United States Supreme Court has described the development of an IEP for students who are eligible for services as the “centerpiece of [IDEA's] education delivery

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## REPORTED CASES: IDENTIFICATION AND EVALUATION

### Case 1

Parents of a ten-year-old student with cerebral palsy requested a due process hearing, alleging, among other things, that the charter school in which he was enrolled had failed to evaluate him properly and failed to consider evaluations ordered by his parents at their own expense. On the allegation that the charter school failed to evaluate properly, the hearing officer determined that various evaluations were conducted by both the parents' own specialists and the charter school's personnel. There was a conflict among these experts as to whether the student exhibited various learning disabilities in addition to his physical impairments. After finding that the school failed to evaluate the student properly, the hearing officer ordered the school to conduct an assistive technology evaluation, to reimburse the parents for the private evaluations, and to provide the student with an individualized reading program and one year of compensatory occupational therapy. *Seashore Learning Center Charter School*, 32 IDELR 224 (Texas 1999).

### Case 2

A student left his local school and enrolled in a charter school when his local school determined he was no longer eligible for special education services. His parent requested a due process hearing to dispute the local school's determination that he was ineligible. The due process hearing officer agreed with the school district's determination that the student was ineligible. At the time of enrollment in the charter school, the school implemented the student's local school district IEP. However, when the school learned of the hearing officer's decision, it discontinued the student's special education services. The charter school did not provide the parent with notice and did not conduct an evaluation of the student for use in making the determination prior to terminating the student's services.

Following the termination of services, the charter school conducted a psycho-educational evaluation that supported its conclusion that the student was ineligible for services. The parent complained that the evaluation was self-serving, insufficient and failed to evaluate the student's auditory deficits. The parent requested that an independent educational evaluation (IEE) be conducted and the charter school refused. The charter school then requested a due process hearing to defend its refusal.

The hearing officer determined that the charter school violated IDEA by terminating the student's IEP services without prior notice; failing to convene an IEP team prior to termination; failing to evaluate prior to termination; failing to provide an IEE when requested by the parent, or in lieu of an IEE, failing to request a timely due process hearing to defend the charter school's denial of the IEE request; and failing to evaluate or convene an IEP meeting upon the student's behavioral decline. As a remedy, the hearing officer ordered the charter school to reinstate the student's most recent IEP for a period of 25 weeks (the period the student went without an IEP) and ordered 51 days of compensatory education, or in the alternative, to provide the student with sufficient tutoring to permit him to complete his coursework for the school year successfully. *The Basis School*, 32 IDELR 187 (AZ 2000).

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system.”<sup>47</sup> The first step in this important process is to convene the team that will develop the IEP. This is the most formalistic and procedurally complicated area of special education law. *Compliance with the procedural requirements of IDEA is perhaps the best way to insulate an IEP from later challenge by a parent or a compliance monitor.* Documentation that reflects this compliance is critical to meeting the Act’s mandate that students with disabilities receive a free appropriate public education in the least restrictive environment. The SEA may make forms available for this purpose and some LEAs, particularly large ones, may have their own forms. Although a school may comply with the IDEA’s documentation requirement in a variety of ways, reliance on state-approved forms developed for this purpose is the surest way to provide proper IEP documentation.

## 1. Who Must Participate

The IDEA regulations define a core group of individuals who *must* be a part of the IEP team. Ordinarily the IEP team must include:

- the child’s parents;
- at least one regular education teacher of the child;
- at least one of the child’s special education teachers;
- a charter school or LEA representative who is qualified to provide or supervise provision of special education services and is knowledgeable about the curriculum and available resources;
- an individual who can interpret the instructional implications of evaluation results; and, as appropriate,
- the child and other experts or individuals knowledgeable about the child.<sup>48</sup>

The school’s primary concern in assembling the IEP team should be to ensure input from those most knowledgeable about the child’s needs. In addition to those team members required by law, the IEP team *should* include any other individuals with the most knowledge about a particular student’s special education needs. There is no upper limit on the number of individuals who may attend an IEP team meeting.

Moreover, if personal attendance by a knowledgeable individual is not possible, the school may obtain a written report or other documentation setting forth the individual’s input for inclusion in the IEP report.

The elaborate procedural requirements for the IEP team meeting should not obscure the IEP’s purpose. Fundamentally the IEP is a problem-solving tool whose purpose is to address a student’s educational needs. All too frequently, the procedural minutiae of the IEP team process overwhelm non-educator participants, particularly the parents of the child. Indeed, parents often find themselves literally surrounded in such meetings by a large group of professionals. It is not unusual for an IEP team meeting to take several hours and for IEPs to be several pages long. This situation, if not properly handled, can create an “us versus them” mentality, but if the professionals remind the parents—and themselves—that they are all seeking to determine an appropriate education plan for the child, then cooperation can operate around a common goal.

In some cases, parents may be looking specifically to a charter school to provide a cooperative, supportive approach to special education that did not exist in the child’s previous public school. One study suggests that some parents choose charter schools in part because of bad experiences with the special education systems in place in non-charter public schools.<sup>49</sup> One of the most significant innovations in IDEA is the emphasis placed on parental participation in the IEP process.<sup>50</sup> In order to meet their obligations, charter operators should ensure that parents can participate meaningfully in the IEP team and that parents understand that the school expects and values this participation.

For a comprehensive list of the IEP team participation requirements, authorizers should consult legal counsel or the relevant regulation, 34 CFR § 300.344, and charter school operators should always consult counsel or an experienced special education technical assistance resource for assistance in understanding the detailed evaluation procedure requirements.



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## 2. Required Considerations in IEP Development

The IEP team's long-term obligations depend on its initial eligibility determination. If the IEP team finds, at its initial meeting, that the child is not eligible for services under either IDEA or Section 504 and the parents have already received notice of their procedural safeguards, then the IEP team has discharged its obligations under federal law and need not proceed to develop an IEP. If, however, the IEP team determines that the student is eligible for special education, the team must develop the IEP. IDEA regulations require that the team must develop the IEP within 30 days of a determination that the student is eligible.<sup>51</sup> Whatever the eligibility determination, testing and attempted intervention are considered part of the decision.

After developing a child's IEP, the IEP team must review the IEP "periodically" and at least annually. The review should determine whether the IEP's goals are being achieved and whether the team should revise the IEP, based on the individual needs of the disabled child. The school must have an IEP in place for each child with a disability at the beginning of each school year.<sup>52</sup>

### 3. IEP Contents

The IEP is the "primary vehicle" for implementing IDEA and providing a student with FAPE. The IEP is a written statement for each child that is developed, reviewed, and revised as needed, and that includes:

- a statement of the child's present level of educational performance;
- a statement of measurable annual goals;
- a statement of the special education and related services and supplementary aids and services to be provided a child;
- an explanation of the extent, if any, to which the child will not participate with non-disabled children;
- the dates, frequency, location and duration of special education services for the child; and
- a statement of how the child's progress toward his or her annual goals will be measured.<sup>53</sup>

Although the IEP must include all of the information listed above, the development of accountability goals and objectives should be priorities.

Each annual goal must include short-term objectives or benchmarks. These objectives or benchmarks should enable a child's teacher(s), parents, and others involved in developing and implementing the child's IEP to gauge periodically during the year how well the child is progressing toward achievement of an annual goal. IEP teams may continue to develop short-term instructional objectives by segmenting the skills described in an annual goal into discrete components.

As an alternative, the IDEA allows IEP teams to develop timing benchmarks describing the progress the IEP team expects the child to make within specified time periods during the year. Benchmarks should include expected performance levels that allow for regular evaluation of the child's progress and that coincide with the reporting periods for informing parents of their child's progress toward achieving the annual goals. An IEP team may use either short-term objectives or benchmarks or a combination of the two depending on the nature of the annual goals and the needs of the child.<sup>54</sup> The IDEA's emphasis on achievement includes the requirement that schools and LEAs "[m]ake a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP."<sup>55</sup>

Agreement by the IEP team on annual goals and short-term instructional objectives is a critical step in the IEP process. Once the IEP team has developed them, these goals and objectives drive considerations of what programs, services and accommodations a student with disabilities requires.

### C. PROGRAMS AND SERVICES FOR THE IDEA-ELIGIBLE STUDENT

Once the evaluation process is complete, and the IEP team has been able to agree to the student's annual goals and short-term instructional objectives, the IEP team must next address the placement, as well as the programs and services in which the student will participate.

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The following sections discuss key elements of appropriate special education placement under the IDEA. The first section defines the fundamental concepts of FAPE and LRE. Subsequent sections define and discuss important related terms including “special education” and “related services.”

## 1. Core IDEA Concepts in IEP Development: FAPE and LRE

The United States Supreme Court’s 1982 decision in *Board of Education v. Rowley*<sup>56</sup> established the standard against which a court or administrative tribunal must evaluate an IEP. As discussed earlier, an IEP must provide the student with a disability a “free appropriate public education” in the “least restrictive environment.” The *Rowley* Court held that a school satisfies the FAPE requirement by providing “*personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.*” Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, “*if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.*”<sup>57</sup>

*Rowley* sets the minimum standard for determining whether an IEP meets the

IDEA’s FAPE requirement. States are free to set a higher standard, and some do,<sup>58</sup> but they may not lower the standard below that set in *Rowley*.

The principles underlying the concept of LRE are set forth in the IDEA regulations:

- (1) That 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 nondisabled; and
- (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>59</sup>

In public schools, whether traditional or charter, “restrictiveness” can be understood to mean the degree to which a child’s special education placement and services differ from the age-appropriate regular education classroom at the child’s home school. IDEA regulations require special education students to be educated with their non-disabled peers to the maximum extent appropriate. The more the placement and services limit the opportunity for a special education student to be educated with his or her non-disabled peers, the more “restrictive” it is under IDEA.

That is not to say, however, that IDEA prohibits “restrictive” placements. Indeed, any service identified for an IDEA-eligible

## ISSUES FOR AUTHORIZERS: PROGRAMS AND SERVICES

Charter school operators must be familiar with the IDEA’s substantive requirements. An operator need not be prepared to provide every conceivable special education program and service before opening his doors, but he needs some realistic notion of how to provide a program or service should the need arise. Authorizers should expect applicants and operators to demonstrate a familiarity with the IDEA’s program and service requirements, including FAPE, LRE, related services, transition services, supplementary aids and services, and staffing. Authorizers should consider requiring charter staff to attend orientation training related to these topics as part of preparing to open a new school. Authorizers should also consider providing operators with technical assistance referrals for special education matters.

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student makes the student's program slightly more restrictive than it would be if they were not identified as IDEA-eligible. And, under the proper circumstances, IDEA authorizes or may even require highly restrictive placements, such as a residential placement at a school specifically designed for students with disabilities.<sup>60</sup> The point to remember is that the more the delivery of special education services requires a student's removal from a regular education classroom, the more it is subject to scrutiny as to whether it is appropriate and meets the IDEA's "least restrictive environment" requirement.<sup>61</sup>

A charter school that is part of an LEA will need to work with its LEA to determine how to provide necessary services for a child requiring a more restrictive environment than the charter school can offer. However, if the charter school is an LEA for special education purposes, IDEA may require it to provide for whatever services a child at the school needs, including potentially costly private placements.

## 2. What is "Special Education"?

One of the linchpins of IDEA is the formal definition of "special education." This term defines part of a "menu" of services from which an IEP team can select services that are appropriate for a particular child. The IDEA regulations define "special education" as instruction specially designed to meet the unique needs of a child with a disability. Special education can mean instruction conducted in a variety of settings including in the classroom, at home, or in hospitals and institutions. It can include instruction in physical education, speech-language pathology or related services, travel training, and vocational education.<sup>62</sup>

## 3. Specially Designed Instruction

It is important for authorizers and charter operators to know that special education can include "specially designed instruction." This term includes adaptations of the content, methodology, or delivery of instruction of the curriculum to an eligible child so that he or she can meet the educa-

tional standards applicable to all children in the jurisdiction. To be considered specially designed instruction, the adaptations must be made to address the child's unique needs that result from his or her disability.<sup>63</sup>

If more than one method of instruction would meet the school's special education obligations, the LEA (or SEA) may choose the methodology it considers appropriate. In *Rowley* the Supreme Court held that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."<sup>64</sup> In other words, assuming that the goals and objectives of an IEP could be met by two different educational "methodologies," educators, not the parent or the courts, have the right to choose which methodology to use. The rationale for this conclusion was that in enacting IDEA, Congress wanted to discourage non-educators from imposing their view of preferable educational methods upon the States. Whether or not IDEA, by including "methodology" within the definition of "specially designed instruction," intended to overturn this settled principle has yet to be resolved by the courts.

## 4. What Are "Related Services"?

The concept of "related services" is the second key component of the array of educational services available to the IDEA-eligible student. The term covers a whole array of services including transportation, developmental, and corrective services.

The term related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school



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health services, social work services in schools, and parent counseling and training.<sup>65</sup>

The precise contours of the term “related services” have been a subject of considerable debate. Whatever the competing views, the Supreme Court has made it clear that the scope of related services is extremely broad, and where a service is needed in order to provide a student with access to an education, it will likely be mandated by the IDEA.<sup>66</sup>

## 5. Transition Services and Supplementary Aids and Services

The third and fourth categories of services for eligible students are “transition services” and “supplementary aids and services.” Transition services means a coordinated set of activities designed to promote a student’s movement from school to post-school activities.<sup>67</sup> The IEP team must address transition services in a student’s IEP no later than the age of 14. (See Box for text of IDEA’s transition services regulations.)

### ISSUES FOR AUTHORIZERS: DEVELOPMENT AND IMPLEMENTATION OF IEPs AND 504 PLANS

An authorizer’s primary responsibility regarding special education compliance should be to ensure that charter school applicants and operators are prepared to meet their special education obligations. To this end, authorizers should require applicants and operators to demonstrate an understanding of roles and responsibilities for development and implementation of the IEP. These roles and responsibilities may vary depending upon the LEA status of charter schools and authorizers under state law.

In **no-link states**, the charter school has the obligation to develop and implement the IEP. As such, applicants and operators should be able to provide the authorizer with a plan for convening IEP teams and developing IEPs. Authorizers should require applicants and operators to know whether the charter school will coordinate such services in-house or contract out for them. In either case, applicants and operators should have a well-thought-out and realistic plan for meeting their substantial obligations.

In **total-link** and **partial-link** states the responsibility for development may fall outside the charter school. If, however, the student’s placement remains within the charter school, the school is most likely responsible for implementation of the IEP. Applicants and operators should know who is responsible for the development and review of the IEP. If the charter school is obligated to develop the IEP, as in a no-link state, the applicant or operator should demonstrate a solid understanding of what is required and how the requirements will be met.

Regardless of the degree of linkage, authorizers should consider requiring charter school staff to have IEP development and implementation training. Authorizers should request copies of model IEP forms, procedural notices, handbooks and the like. Authorizers should also consider providing referrals for technical assistance to charter school operators on IEP development and implementation.

Finally, authorizers should view charter school compliance with special education obligations as a key part of their oversight of charter schools. To facilitate oversight, authorizers should consider requiring operators to provide copies of any requests for due process hearings or complaints filed against the charter school with any local, state or federal agency.

Supplementary aids and services means, aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children.<sup>68</sup> As a practical matter there may be considerable overlap between the concepts of “supplementary aids and services” as that term is used in IDEA, and the concept of “educational accommodations” under Section 504.

## 6. Transportation

If the IEP team includes transportation in an IEP, such transportation is treated as a related service and must be provided without expense to the parent. The U.S. Department of Education has provided the following guidance for determining whether or not transportation should be included in an IEP:

In determining whether to include transportation in a child’s IEP, and whether the

### REGULATIONS REGARDING TRANSITION SERVICES

As used in this part, transition services means a coordinated set of activities for a student with a disability that:

- (1) Is designed within an outcome-oriented process, that promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (2) Is based on the individual student’s needs, taking into account the student’s preferences and interests; and
- (3) Includes:
  - (i) Instruction;
  - (ii) Related services;
  - (iii) Community experiences;
  - (iv) The development of employment and other post-school adult living objectives; and
  - (v) If appropriate, acquisition of daily living skills and functional vocational evaluation.<sup>69</sup>

Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if required to assist a student with a disability to benefit from special education.

- (1) For each student with a disability beginning at age 14 (or younger, if determined appropriate by the IEP team), and updated annually, a statement of the transition service needs of the student under the applicable components of the student’s IEP that focuses on the student’s courses of study (such as participation in advanced-placement courses or a vocational education program); and
- (2) For each student beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.<sup>70</sup>

child needs to receive transportation as a related service, it would be appropriate to have at the IEP meeting a person with expertise in that area. In making this determination, the IEP team must consider how the child's disability affects the child's need for transportation, including determining whether the child's disability prevents the child from using the same transportation provided to nondisabled children, or from getting to school in the same manner as nondisabled children.<sup>71</sup>

If transportation as a related service is not required, the student should receive the same transportation services as nondisabled students. However, if transportation is required, cost of the transportation provides no legal basis for waiving the requirement or otherwise seeking to avoid providing it.

## 7. Staffing Requirements

IDEA requires that where the regulations refer to "qualified personnel," this means "personnel who have met SEA-approved or SEA-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services."<sup>72</sup> For example, if an IEP includes "counseling services," such services must be delivered "by qualified social workers, psychologists, guidance counselors, or other qualified personnel."<sup>73</sup> If an IEP requires counseling services for a charter school student, then the school must ensure that it has a qualified social worker on staff or that it contracts with one to provide the services. Charter schools have this obligation for any IDEA services requiring qualified personnel.

## 8. Financial Constraints on the Provision of Special Education and Related Services

The obligation to provide necessary services under IDEA can be expensive, and charter schools and their authorizers should be aware that the IDEA does not place any express limits on the potential expense. The United States Supreme Court has interpreted the IDEA's statutory silence to mean that financial constraints should play no more than a minor role in the development of an IEP and in determining appropriate related services.

In *Cedar Rapids Community Schools v. Garret* the Court considered what related services a school district must provide to a ventilator-dependent paralyzed, wheelchair-confined student.<sup>74</sup> The student's parents requested that the student be provided with "continuous one-on-one nursing services" during the school day, since the student could not remain in school without such care. The school district argued that a court should weigh the financial burden of such services in deciding whether or not the services were a district obligation. The Supreme Court rejected this argument. The Court ruled that IDEA required the school to provide continuous one-on-one nursing services to the student.<sup>75</sup> The Court reasoned that IDEA's emphasis on assuring a disabled student "meaningful access to the public schools" outweighed the district's arguments of undue burden.<sup>76</sup> The Court did not suggest that financial considerations were irrelevant, but that they cannot justify refusing to provide an otherwise needed service.

### ISSUES FOR AUTHORIZERS: TRANSPORTATION

Appropriate transportation for children with disabilities is an issue often overlooked by charter schools. Authorizers should be sure during the application and contracting phase that charter schools plan to address transportation as part of any special education plan.

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## REPORTED CASES: IDENTIFICATION AND EVALUATION

### Case 1

The U.S. Department of Education, Office of Civil Rights (OCR) determined that a charter school violated Section 504 and the ADA when it failed to implement a student's Section 504 Plan.<sup>77</sup> The student's prior school had evaluated the student, determined him eligible for Section 504 accommodations, and developed a 504 plan that addressed the student's academic and behavior problems. The charter school was aware of the student's eligibility and the 504 plan; however, upon the student's enrollment, the charter school did not implement the plan.

The charter school claimed that the parents requested that the plan not be implemented. The parents denied making such a request and OCR found there was no evidence to support the assertion that the parents had made such a request.

Throughout the student's first semester at the school, the student experienced behavioral and academic difficulties. In January of that school year, the parents and charter school officials met to develop a new 504 plan. The new plan addressed the student's academic difficulties, but failed to include a behavior intervention plan to address the student's behavior problems. To remedy the violations, OCR required the local school district to develop and submit for review Section 504 policies and procedures, to train all staff on the approved policies and procedures, and to provide parents with copies of the same. *Greenville County School District*, OCR Complaint No. 04-00-1232, 34 IDELR 188 (OCR 2000).

### Case 2

Parents of a ten-year-old student with cerebral palsy requested a due process hearing, alleging, among other things, that the charter school in which he was enrolled failed to provide appropriate services, failed to implement his IEP, failed to remove architectural barriers and acted in bad faith. The charter school denied the failures and asserted that any delay was the result of a lack of available resources including competent personnel.

On the issue of the school's failure to provide appropriate services, the hearing officer ordered the charter school to provide the student with an individualized reading program and one year of compensatory occupational therapy. On the allegation that the charter school failed to implement the student's IEP, the hearing officer determined that the building contained numerous architectural barriers making it inaccessible to the student. Such barriers included doors that opened outwards, ramps that were too steep and round door handles that were difficult for the student to open. The bathroom facilities required the student to get out of his wheelchair and crawl on the floor to reach the toilet. Moreover, the student had no access to recreational areas.

The hearing officer determined that the architectural barriers prohibited the implementation of the student's IEP, thereby denying the student FAPE. The hearing officer ordered the charter school to remove immediately all architectural barriers consistent with a professional assessment of the facility's accessibility for students with orthopedic disabilities and to implement the student's IEP immediately. Finally, the hearing officer determined that the charter school made a "deliberate effort" to deny the student FAPE by failing to make the required improvements, encouraging the parents to accept financial responsibility for improvements and services, and actively trying to block the provision of special education services. *Seashore Learning Center Charter School*, 32 IDELR 224 (Tex. 1999).

## D. PROCEDURAL RIGHTS AND REMEDIES: ENFORCEMENT OF IDEA

Congress has always used a carrot and stick approach to IDEA compliance. The carrot is federal funding that IDEA provides schools and school districts for special education services. The sticks are twofold. One is procedural safeguards that help parents to pursue their children's IDEA rights. The other is SEA and U.S. Department of Education monitoring and investigative oversight. Following

are key procedural elements of the IDEA, many of them requiring action on the school's part to comply.

### 1. Independent Educational Evaluation

The Independent Educational Evaluation (IEE) is one mechanism a parent may use under IDEA to access evaluation expertise comparable to that available to the LEA. Parents may use an IEE to obtain a "second opinion" if the parent disagrees with an

## ISSUES FOR AUTHORIZERS: PROCEDURAL RIGHTS AND REMEDIES

Authorizers should expect applicants and operators to understand the procedural requirements imposed by IDEA and Section 504 and the substantial financial burdens that may result for a failure to meet either procedural or substantive obligations.

Authorizers should require charter school operators to provide copies of model forms, notices and handbooks and should expect charter school staff to be trained in IDEA's procedural requirements. The IDEA's procedural and notice safeguards were originally designed to protect a parent's rights; however, adherence to the procedures and notice requirements can provide important protections for schools as well. A charter school should give parents written notice of the procedures and safeguards.

Authorizers should also monitor formal special education disputes in schools they oversee. **At a minimum, they should require that charter school operators provide them with copies of requests for due process hearings or mediation; complaints filed with local, state or federal agencies; notices of removal; and civil complaints.**

## REGULATIONS REGARDING INDEPENDENT EDUCATIONAL EVALUATION

- (1) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either:
  - (i) Initiate a hearing under [34 CFR] § 300.507 to show that its evaluation is appropriate; or
  - (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria.
- (2) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
- (3) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.<sup>78</sup>



evaluation obtained by the public agency. If a parent requests an independent educational evaluation, the LEA must either initiate a hearing to show that its evaluation is appropriate or provide the IEE at public expense. (See Box for text of relevant IEE regulations.)

The regulations also require that the LEA maintain “information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations.”<sup>79</sup> The criteria used to determine whether an independent evaluator is “qualified” must be the same as those used by the LEA for its own staff.<sup>80</sup>

## 2. Prior Written Notice

The IDEA regulations mandate that the parents of a child with a disability receive *written* notice at numerous decision points in the IDEA process. The parents must receive written notice a reasonable time before the school or LEA proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.<sup>81</sup> The parents must also receive written notice whenever the school or school district

refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.<sup>82</sup>

The school or LEA must provide notice in “understandable” language and must make it available to the parents in their native language or mode of communication.<sup>83</sup>

The content of the written notice is also prescribed by the regulations and requires an explanation of the decision with the basis and rationale for the decision. (See Boxes for text of “Content of Notice” regulations and related Issues for Authorizers.)

## 3. Parental Consent

IDEA imposes additional requirements with regard to the form of parental consent used whenever consent is required under the regulations. Parental consent means that the parent has been fully informed of all relevant information for the activity; that the parent understands and agrees *in writing* to the carrying out of the activity including a description of the activity and a list of any records that will be released; and that the parent understands that consent is voluntary and may be revoked at any time.

### REGULATIONS REGARDING CONTENT OF NOTICE

#### THE NOTICE REQUIRED UNDER PARAGRAPH (A) OF THIS SECTION MUST INCLUDE—

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of any other options that the agency considered and the reasons why those options were rejected;
- (4) A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;
- (5) A description of any other factors that are relevant to the agency’s proposal or refusal;
- (6) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
- (7) Sources for parents to contact to obtain assistance in understanding the provisions of this part.<sup>84</sup>

If a parent revokes consent, the revocation is prospective only and does not negate consent for a previous action that had the parent's consent when it occurred.<sup>85</sup>

As discussed above, parental consent is required upon initial evaluation, reevaluation, and whenever the school or LEA initially provides special education services to the student.

#### 4. Access to Educational Records

The IDEA regulations require that parents have access to their students' "educational records" with regard to "the identification, evaluation, and educational placement of the child" and "the provision of FAPE to the child."<sup>86</sup> The handling of student records is the subject of another federal statute, the Family Educational Rights and Privacy Act (FERPA).<sup>87</sup> FERPA ensures that students' records are private and confidential.

#### 5. Opportunity to Present Complaints to Initiate Due Process Hearings

If parents disagree with their child's IEP, they are entitled to request a "due process hearing." They may request such a hearing whenever the LEA proposes to, or refuses to, "initiate or change the identification, evaluation, or educational placement of the child

or the provision of FAPE to the child."<sup>88</sup> The regulations require the parent to provide the following information in requesting a due process hearing:

- (i) The name of the child;
- (ii) The address of the residence of the child;
- (iii) The name of the school the child is attending;
- (iv) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
- (v) A proposed resolution of the problem to the extent known and available to the parents at the time.<sup>89</sup>

The SEA is required to develop a model form that the parent can use for the purpose of giving this notice.<sup>90</sup>

A due process hearing is, in essence, a "mini-trial" conducted in front of a hearing officer. The parties—usually the parents and the school—are commonly represented by counsel or parent advocates, and, through their counsel/advocate, present witnesses, enter exhibits into evidence, and cross-examine the opposing side's witnesses. Typically there are opening and

### ISSUES FOR AUTHORIZERS: NOTICE OF PROCEDURAL SAFEGUARDS

Authorizers can provide important guidance to charter school operators regarding compliance with IDEA's notice requirements. We first addressed a parent's right to be informed of IDEA's procedural safeguards in Part II.A.4., above. It cannot be stressed enough that these safeguards are as important for protecting the school's decisions as for protecting a parent's rights. A charter school can avail itself of the safeguards only if the parent has received written notice describing them. In practice many LEAs simply copy the procedural safeguards section of the IDEA regulations (34 CFR §§ 300.500-300.517) and give a copy to the parents whenever IDEA requires them to do so.<sup>91</sup> Some SEAs and LEAs have model "Parent Handbooks" and related materials that summarize local, state and federal procedural safeguards.

In order to avoid misunderstandings and confusion later in the process, **it is imperative that charter schools and their LEAs give early written notice of IDEA safeguards and document the fact that such notice was given.** Authorizers should be aware of any notification materials that the SEA and the relevant LEAs make available. They should ensure that charter school operators are aware of the IDEA notice requirements and of available notification materials they can use to facilitate compliance.

closing statements by the counsel/advocate as well as a briefing on the issues. Following the conclusion of the hearing, the hearing officer issues a written decision as to eligibility for special services and, if the officer finds the child eligible, the appropriate placement. The LEA typically pays all costs associated with the due process hearing, including the cost of the hearing officer and written transcripts.<sup>92</sup>

## 6. Stay Put

One of IDEA's most significant procedural safeguards is commonly referred to as the "stay put" rule. Stated simply, the rule requires that in the event of a disagreement over the placement or services for a child, the LEA is required to provide services pursuant to the last uncontested IEP.<sup>93</sup> If the dispute involves a child's "initial admission to public school," the regulations require that the student "must be placed in the public school until the completion of all the proceedings."<sup>94</sup>

The "stay put" provision is a particularly powerful tool for a parent who wishes to challenge a change of placement. In effect, by invoking stay put the parent can keep the child in his/her current educational place-

ment until the dispute is resolved. Because litigation of such disputes can take years, stay put gives parents a practical veto over IDEA placement changes. A parent can enforce her child's stay put rights through a court injunction.

## 7. Requirements for Unilateral Placement by Parents of Children in Private Schools at Public Expense

The IDEA provision for unilateral placement of a child in a private school at public expense is, following the stay put rule, the next most potent IDEA enforcement tool for parents. The rule provides that where a parent and an LEA disagree about whether or not an IEP provides a student with a FAPE, the parent may unilaterally place the child in a private school. If the parent's challenge is successful, the LEA must reimburse the parents for the tuition and expenses associated with the private placement.<sup>95</sup> Placement in a residential school for students with disabilities can cost \$5,000 per month or more and due process hearings can take years to resolve. Thus, an LEA can face significant liability for tuition reimbursement if it does not prevail at the due process hearing.

### ISSUES FOR AUTHORIZERS: "STAY PUT" REQUIREMENTS

The stay put rule could have a dramatic effect on disputes regarding a disabled child's continued placement at a charter school that is an LEA for purposes of special education. For such charter schools the "stay put" rule might require that even in the event staff recommended the child's enrollment in another school, the child would nevertheless have the right to continued placement at the charter school and to receive the services specified in his/her last uncontested IEP pending resolution of the placement dispute. Because resolution of placement disputes can take so long, a child might effectively be able to maintain his/her charter school placement for an extended period of time notwithstanding the charter school's recommendation for another placement.

If the charter school is part of a larger school district or LEA, the stay put rule might not have the same effect. In that case the regulation might permit the child to be placed in any public school within the school district pending resolution of the dispute, provided the services in the last uncontested IEP were provided at the new placement.

Whether or not the charter school is its own LEA, the application of the stay put rule is far from clear in this context. Authorizers should be aware both of the *possibilities* for how the rule *might* apply to charter schools and of the *legal uncertainty* regarding how it *actually will* apply.



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IDEA regulations place some limits on the tuition reimbursement requirement by imposing certain duties upon the parents. To be effective, the parent must receive written notice of these duties prior to removing the student from the public school.<sup>96</sup>

## 8. Mediation

Recognizing the cumbersome and contentious nature of due process hearings, Congress, in enacting the 1997 IDEA amendments, sought to encourage the use of mediation to resolve disputes regarding special education. Mediation is a voluntary process whereby the parents and the LEA try to work out a mutually agreeable settlement of their dispute. The mediator must be impartial and trained in effective mediation techniques. The LEA typically bears the expense associated with mediation just as it does for the due process hearing.<sup>97</sup>

## 9. Requirements for Disclosure of Evaluation Results and Recommendations

At least five business days prior to the date of the first due process hearing, the parties must disclose “all evaluations completed by that date and recommendations based on the offering party’s evaluations that the party intends to use at the hearing.”<sup>98</sup> Failure to make the required disclosures can result in the exclusion of documents from evidence at the hearing itself.<sup>99</sup>

## 10. State-level Appeals

Under IDEA the states are free to adopt either a “one-tier” or “two-tier” due process hearing system. Under a “one-tier” system an impartial hearing officer (IHO) makes the final decision regarding the hearing, subject only to an appeal in a court of law. Under a “two-tier” system the dispute is first heard by a Local Hearing Officer (LHO), and appeals are heard in the first instance by a State Level Review Officer (SLRO).<sup>100</sup> Under either system a party may proceed to court only after “exhausting” the available local or state level proceedings.

Under a one-tier system, the IHO must issue a decision within 45 days after the request for a hearing.<sup>101</sup> Under a two-tier system, the SLRO must issue a decision within 30 days of the SEA’s receipt of the request for review.<sup>102</sup> In either case the hearing or review officer must be impartial.<sup>103</sup> Either party may request extensions to these deadlines.<sup>104</sup>

## 11. Civil Actions

Upon completion of all state-level administrative proceedings, an aggrieved party has the right to bring a civil action in state or federal court.<sup>105</sup> The court in which the case is filed typically will not hold a trial on the issues raised in the course of administrative hearings, but rather conducts what is referred to as a “modified de novo” review. The scope of this review is described in the IDEA regulations as follows:

In any action brought under paragraph (a) of this section, the court:

- (1) Shall receive the records of the administrative proceedings;
- (2) Shall hear additional evidence at the request of a party; and
- (3) Basing its decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.<sup>106</sup>

If a claim is filed in federal court, the trial court’s decision can be appealed to one of the eleven “circuits” comprising the United States Courts of Appeal. In extraordinary cases the United States Supreme Court may agree to hear appeals from any of the circuit courts of appeal.

## 12. Administrative and Judicial Remedies

The following administrative and judicial remedies are available to parents under the IDEA not only when a school’s placement substantively fails to provide a student with FAPE, but also when a school’s procedural failures are so egregious as to result in the denial of FAPE.

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*(a) Injunctive and Declaratory Relief*

When parents or school officials file a complaint with the LEA or SEA or request a due process hearing, the parties are generally seeking a determination of the student's rights and the school's responsibilities under IDEA. If the parent prevails, the relief most often granted by a state complaint review officer, hearing officer or court is declaratory or injunctive relief that requires the school to comply with the mandates of IDEA. For example, a hearing officer may order the school to change a child's placement or provide additional services. Declaratory and injunctive relief are the most common remedies when a student's current placement does not provide FAPE.

*(b) Compensatory Education*

When a school has failed to provide FAPE for a period of time, a state complaint review officer, hearing officer, or court may order compensatory education.<sup>107</sup> An award of compensatory education may permit the student to continue to receive educational services beyond the statutory age limit, require the school to provide an extended school year (ESY), or require the school to provide the student with tutoring. However, once a student graduates from high school with a "regular high school diploma," compensatory education is no longer an available remedy.<sup>108</sup>

*(c) Reimbursement*

Reimbursement is an additional remedy available in the context of either an administrative hearing or a judicial proceeding.<sup>109</sup> A parent may seek reimbursement from a school for the parent's unilateral removal of the student from the school and placement in a private school. To be entitled to such reimbursement, the court or hearing officer must rule that the school's placement failed to provide the student with FAPE in a timely manner. In such cases, the parent's placement is not required to meet state educational standards nor the requirements of FAPE, but merely must provide the student with some educational benefit.<sup>110</sup>

If a student, prior to removal, was receiving special education and related services from

the school, the parents must notify the school that they intend to remove the student and seek reimbursement. If a school has failed to identify a student with disabilities, such notice prior to removal is not required. If the parent chooses a residential placement and such placement is necessary for special education purposes, the school must reimburse the parent for room and board as well as tuition.

*(d) Monetary Damages*

Courts have split on the issue of whether monetary damages are available to parents for a school district's violation of IDEA. Some courts have held that compensatory damages are available.<sup>111</sup> Others have held that injunctive and declaratory relief, compensatory education, and reimbursement, as discussed above, are the exclusive remedies available under IDEA.<sup>112</sup>

### 13. Attorneys' Fees

As is the case with most civil rights statutes, parents who prevail at a due process hearing and who prevail in any subsequent IDEA appeal have the right to recover their reasonable attorneys' fees and costs.<sup>113</sup> The reverse is not true—an LEA that prevails is not entitled to recover attorneys' fees from a parent.

### 14. State Complaint Procedures

Another method of ensuring IDEA compliance is for parents to file an administrative complaint and request an investigation by a state administrative agency. Each SEA is required to implement procedures for such complaints.<sup>114</sup> The procedures must allow the imposition of certain remedies, including:

- (1) How to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child; and
- (2) Appropriate future provision of services for all children with disabilities.<sup>115</sup>

The regulations specify that the complaint process should be completed within 60 days after a complaint is filed.<sup>116</sup>

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## 15. Federal Complaint Procedures

The U. S. Department of Education may itself investigate complaints. Complaints regarding state compliance with IDEA are directed to the Office for Special Education Programs, while complaints regarding Section 504 compliance are directed to the Office for Civil Rights. Each of these entities has broad enforcement powers, with the ultimate sanction being to withhold federal funding.

## 16. Exhaustion of Administrative Remedies and Section 504 Policies

IDEA specifically provides that parents retain all rights they have under Section 504, the ADA, and other federal laws protecting the rights of children with disabilities. Prior to seeking enforcement of these rights in a court of law, however, the parent is required to have “exhausted” his or her administrative remedies by pursuing the complaint through a due process

### REPORTED CASES: IDENTIFICATION AND EVALUATION

#### Case 1

OCR determined that a charter school discriminated against a student on the basis of his disability and violated Section 504 and the ADA when it failed to provide his parents with the required notice of procedural safeguards, failed to provide the required notice of nondiscrimination, failed to have a designated Section 504 coordinator, failed to provide supplementary aids and services, and failed to offer a continuum of special education services. To resolve the dispute, the school agreed to reimburse the parents for childcare, remedial tutoring, and therapy expenses incurred as a result of the school’s violations. The school also agreed to reenroll the child if the parents so requested. OCR further required the charter school to submit for OCR’s review and approval policies regarding the length of school days, physical restraints, ADD/ADHD services, Section 504 plans, notice to parents under Section 504, pre-referral procedures, enrollment of students with disabilities, discipline of students with disabilities, continuum of services, supplementary aids and services, and a notice of nondiscrimination. *Boston (MA) Renaissance Charter School*, OCR Complaint No. 01-97-1096, 26 IDELR 889 (OCR 1997).

#### Case 2

A charter school requested a due process hearing to justify its denial of a student’s request for an IEE. The parents requested an IEE following termination of the student’s IEP services by the charter school. The hearing officer determined that the school violated IDEA by terminating the student’s IEP services without prior notice; for failing to convene an IEP team prior to termination; failing to evaluate prior to termination; failing to provide an IEE when requested by the parent, or in lieu of an IEE, failing to timely request a due process hearing to defend the charter school’s denial of the IEE request; failing to evaluate or convene an IEP upon the student’s behavioral decline; and for impermissibly suspending the student in excess of ten days without regard to the statutory protections afforded students with disabilities. In order to remedy these violations, the hearing officer ordered the school to reinstate the student’s most recent IEP for a period of 25 weeks (the period the student went without an IEP); and ordered 51 days of compensatory education (the number of days the student was suspended), or otherwise, to provide the student with sufficient tutoring to permit him to complete his coursework successfully for the school year. *The Basis School*, 32 IDELR 187 (AZ 2000).

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hearing and any mandated state level review.<sup>117</sup> A charter school that is an LEA should consider a formal policy authorizing the use of IDEA procedures to resolve issues involving Section 504-eligible students.

## E. DISCIPLINE OF THE STUDENT WITH DISABILITIES

One significant revision in the 1997 IDEA amendments addressed student discipline. These amendments represented Congress's effort to resolve tension between respect for schools' authority to maintain discipline and order, and concern that special education students are disproportionately subject to disciplinary measures. The Supreme Court's decision in *Honig*, establishing the "stay put" rule, had exacerbated this tension. School districts, concerned about violence in the schools, and seeking to implement an atmosphere of "zero tolerance" in order to address their concerns, resented federal regulation of discipline issues, which they considered quintessentially local concerns. Parents, cognizant of the increased costs borne by districts in order to educate students with disabilities, were fearful that schools would divest themselves of financially burdensome and behaviorally troublesome students by expelling them at a disproportionate rate. Congress responded with an extremely complex set of rules governing the suspension and expulsion process.

### 1. Discipline and the "Stay Put" Rule: What Constitutes a Change in Placement

The threshold inquiry in determining whether safeguards are triggered in the context of suspension or expulsion of a special education student is whether the disciplinary action sought represents a "change in placement" sufficient to trigger the stay put requirement. Because a suspension or expulsion from a public school setting can be deemed a "change in placement," the 1997 IDEA amendments require that until the dispute is resolved, the student must remain in his then current placement until the dispute can be adjudicated. Given the inordinate length of time that due process hearings can take, this right, enforced strictly, could effectively preclude suspension or expulsion in the case of IDEA-eligible students.

The IDEA regulations provide the following guidelines to assist schools in making a change of placement determination:

For purposes of removals of a child with a disability from the child's current educational placement under [34 CFR] §§ 300.520-300.529, a change of placement occurs if:

- (a) The removal is for more than 10 consecutive school days; or

## ISSUES FOR AUTHORIZERS: DISCIPLINE OF STUDENTS WITH DISABILITIES

Authorizers should expect applicants and operators to be familiar with IDEA's disciplinary procedures. They should encourage applicants and operators to be aware of circumstances in which school officials are deemed to have knowledge of a child's disability and for which students not yet evaluated must receive disciplinary protections.

Authorizers should consider requiring data collection and reporting of expulsions, suspensions, and patterns of short-term suspensions. Authorizers may require charter school staff to attend training on IDEA's discipline procedures and should consider providing charter school operators with referrals to technical assistance providers.



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- (b) The child is subjected to a series of removals that constitute a pattern because they amount to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.<sup>118</sup>

If the school determines that the removal contemplated is a “change in placement,” then the school must convene an IEP team for the specific purpose of determining whether or not the behavior for which the student is being disciplined is, or is not, a “**manifestation**” of his disability. This type of proceeding is called a “manifestation determination review.”

## 2. The Manifestation Determination Review

A manifestation determination review is a particular type of IEP team meeting. The possible outcomes from such a review include a decision to suspend or expel the student, a decision to modify the IEP in order to address the behavior problems that precipitated the disciplinary action, or a decision to leave the program unchanged and continue implementing the IEP as written without resorting to suspension or expulsion. In the case of offenses involving weapons or drugs, the use of an “interim alternative educational setting” is also authorized.

### (a) Timelines

If a school contemplates that a change of placement may be used for disciplinary purposes, it must notify the student’s parents immediately and give them notice of their procedural rights.<sup>119</sup> The school must then conduct a manifestation determination review “immediately,” but “in no case later than ten school days.”<sup>120</sup> The same personnel required for an IEP team must conduct the review.<sup>121</sup>

### (b) Conduct of the Manifestation Determination Review

The IEP team and other qualified personnel should not conclude lightly that a child’s

behavior was *not* a manifestation of the child’s disability. They may do so only if they first consider the behavior subject to disciplinary action in light of all relevant information including evaluation and diagnostic results, observations of the child, and the child’s IEP. They must then determine that the child’s IEP and placement were appropriate in relation to the behavior subject to disciplinary action and that the special education services, supplementary aids and services, and behavior intervention strategies provided were consistent with the child’s IEP and placement. Finally, they must determine that the child’s disability did not impair his or her ability either to understand the impact and consequences of the behavior or to control the behavior in question. The manifestation determination review team must conclude that the behavior was a manifestation of the child’s disability unless all of the standards to the contrary were met.<sup>122</sup>

If the behavior is determined to be a manifestation of the student’s disability, the school should terminate disciplinary procedures and return the student to the placement set forth in his or her IEP. If, however, the IEP team “identifies deficiencies in the child’s IEP or placement or in their implementation, it must take immediate steps to remedy those deficiencies.”<sup>123</sup>

If the IEP team determines that the behavior for which the student is being disciplined was not a manifestation of his or her disability, the disciplinary process may proceed and the school may impose long-term suspension or expulsion.<sup>124</sup> This is not, however, “expulsion” in the sense most educators would understand this concept. During the period that the child is suspended or expelled, the LEA must continue to “provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child’s IEP.”<sup>125</sup>

### (c) The Functional Behavioral Assessment (FBA) and Behavior Intervention Plan (BIP)

The IDEA regulations are not entirely reactive when it comes to discipline. The IDEA

now requires the use of positive behavioral supports prior to the imposition of discipline. Specifically, IDEA requires that within 10 days of a child's recommendation for suspension or expulsion, the LEA conduct a functional behavioral assessment (FBA). Within this same time period, the LEA must also convene an IEP meeting to develop an assessment plan.<sup>126</sup> As soon as practicable after completing the assessments, the LEA must "convene an IEP meeting to develop appropriate behavioral interventions to address that behavior and shall implement those interventions."<sup>127</sup> The outcome of the meeting will be a behavior intervention plan (BIP) for the student.

#### *(d) Student's Status Pending an Appeal of the Results of the Manifestation Determination Review*

As for any IDEA placement decision, the parents are entitled to dispute the results of the manifestation determination review and request due process if they disagree with its conclusions. IDEA requires that the student's status pending this appeal is his "stay put" placement—the placement specified in the last uncontested IEP.<sup>128</sup> An LEA may request an expedited appeal if school personnel can demonstrate that "it is dangerous for the child to be in the current placement."<sup>129</sup>

### 3. Special Considerations Where Drugs and Weapons Are Involved

Cases involving weapons or drugs trigger special disciplinary provisions. Specifically, these provisions come into play if the child carries a weapon<sup>130</sup> to school or to a school function under the jurisdiction of an SEA or LEA or knowingly possesses or uses illegal drugs<sup>131</sup> or sells or solicits the sale of a controlled substance<sup>132</sup> while at school or a school function under the jurisdiction of an SEA or LEA. Under these limited circumstances school personnel may remove the student from the current educational placement specified in the IEP and place the student in an "Interim Alternative Educational Setting" for not more than 45 days, even if the school or LEA determines that the child's behavior is a manifestation

of his or her disability.<sup>133</sup> The parent has the right to an expedited appeal, but the stay put rule does not apply.<sup>134</sup>

The Interim Alternative Educational Setting must:

1. Be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and
2. Include services and modifications to address the behavior described in [34 CFR] § 300.520(a)(2) or § 300.521, that are designed to prevent the behavior from recurring.<sup>135</sup>

In circumstances other than those involving weapons or drugs, school personnel may also request that a hearing officer order placement of the student in an Interim Alternative Educational Setting, but IDEA requires that school personnel first prove "by substantial evidence," in an expedited due process hearing, that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others."<sup>136</sup>

### 4. Discipline for Students Not Yet Identified as Having a Disability

An earlier section of this publication describes the circumstances in which an LEA may be deemed to have reason to believe that a student has a disability, and is thus responsible for evaluating the child for special education eligibility.<sup>137</sup> If these circumstances apply and school personnel propose to take disciplinary action that could result in a long-term suspension or expulsion, the school or LEA must conduct an immediate evaluation, and the student may assert the protections available to an eligible student until the eligibility issue is resolved.<sup>138</sup> Otherwise a student not previously identified as IDEA-eligible is subject to the same disciplinary procedures as non-disabled students, including removal from

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school without educational services. This is true even if the parent requests an evaluation after the disciplinary infraction.<sup>139</sup> In those circumstances, the evaluation must take place concurrently with the removal. If the evaluation determines that the student is IDEA-eligible, the LEA must provide special education and related services, and the student becomes entitled to the same manifestation determination review procedures that would have applied had he or she been eligible at the time of the infraction.<sup>140</sup>

## 5. Suspension and Expulsion under Section 504

The U.S. Department of Education, Office of Civil Rights has long maintained that Section 504 requires manifestation determinations in the context of suspension or expulsion of a student eligible for Section 504.<sup>141</sup> The Section 504 regulations do not set forth the elaborate procedural guidelines for discipline set forth in the IDEA regulations, but compliance with IDEA's procedures will satisfy Section 504's requirements.<sup>142</sup>

### REPORTED CASE: DISCIPLINE OF STUDENTS WITH DISABILITIES

A charter school terminated special education services after a hearing officer agreed with the local school district (the student's former placement) that the student was ineligible for special education services. Following the termination of services, the student had numerous disciplinary referrals and was suspended for a number of days, although not in excess of ten cumulative days. The dispute continued into the next school year and by the end of October the student had received ten disciplinary referrals, culminating in a 40-day suspension. A number of the referrals were related to IEP services that the student had previously received. For example, the student's IEP required that the student be permitted to complete long written assignments on a laptop. The student was repeatedly disciplined for refusing to complete assignments and quizzes that required him to write more than one sentence.

These referrals contributed to the student's 40-day suspension. As a condition of his return to school following the suspension, the charter school required the student and his parents to sign a behavior contract that included a requirement that the "student must complete all assignments, without any preferential treatment or requests for preferential treatment." Before signing the contract, the parent edited the contract to indicate that the student would "try to complete all assignments." Upon returning with the contract in hand, the student was disciplined for signing the contract with an "X." The hearing officer noted that the "X" marked the place for signature and next to the "X" is the student's "indecipherable signature." Despite the fact that the contract appeared to be signed, the charter school suspended the student pending receipt of a signed contract without any changes or additions. The parents and the student submitted a newly signed, unedited contract with a letter asserting the student's rights as a child with a disability.

The dispute went to a due process hearing. The hearing officer determined, among other things, that the charter school violated IDEA by failing to evaluate or convene an IEP upon the student's behavioral decline and by suspending the student in excess of ten days without regard to the statutory protections afforded students with disabilities. In order to remedy these and other violations, the hearing officer ordered the charter school to reinstate the student's most recent IEP for a period of 25 weeks (the period the student had gone without an IEP) and ordered 51 days of compensatory education (the number of days the student had been suspended), or otherwise to provide the student with sufficient tutoring to permit him to complete his course work for the school year successfully. *The Basis School*, 32 IDELR 187 (AZ 2000).





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# Endnotes

- 1 Public Law 94-142.
- 2 20 U.S.C. § 1400 et seq.
- 3 34 CFR § 300.312(a). (“Children with disabilities who attend public charter schools and their parents retain all rights under this part.” )
- 4 29 U.S.C. § 794. Virtually every public school in the country receives some federal assistance through Title I and other sources of federal funding.
- 5 For purposes of the ADA, public entities include all public schools.
- 6 *Letter from U.S. Dept. of Ed. to Wisconsin Dept. of Public Instr. Superintendent John T. Benson* (October 8, 1998), reissued to all Chief State School Officers as an issue of general interest or applicability (October 7, 1999).
- 7 *Id.*
- 8 34 CFR § 300.121(a).
- 9 M.C.L. § 380.1711 (2002).
- 10 Parrish, T.B. (2001, June). *Special Education in an Era of School Reform: Special Education Finance*. Washington, DC: Federal Resource Center.
- 11 State and local funding schemes vary from state to state and authorizers should be familiar with the funding structures in their state.
- 12 34 CFR § 300.18.
- 13 See discussion of linkage, Part I.D.3., below.
- 14 34 CFR § 300.312.
- 15 *OSEP Memorandum 00-1 to Chief State School Officers* (October 7, 1999). None of these variations affects the SEA’s ultimate responsibility for IDEA compliance in all cases.
- 16 *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 28 IDELR 173 (8th Cir. 1998).
- 17 Ahearn, E.M., Lange, C.M., McLaughlin, M.J. & Rhim, L. M. (2001). *Project SEARCH: Final Report*. Alexandria, VA: National Association of State Directors of Special Education.
- 18 *Id.*
- 19 *Id.*
- 20 *Chambers, J.G., Parrish, T., & Harr, J.H* (2002, March). *What Are We Spending on Special Education Services in the United States, 1999 2000: Advance Report #1*. Washington, DC: American Institutes for Research.
- 21 Litigation by parents under IDEA or Section 504 is yet another risk. There has been little reported litigation in this area at present, but the prospect for an increase in such litigation becomes higher as the charter school movement continues to grow.
- 22 See generally *Letter from U.S. Dept. of Ed. to Wisconsin Dept. of Public Instr. Superintendent John T. Benson* (October 8, 1998), reissued to all Chief State School Officer as an issue of general interest or applicability (October 7, 1999).
- 23 Hill, P., Lake, R., Celio, M.B., Campbell, C., Herdman, P, Bulkley, K. (2001). *A Study of Charter School Accountability*. Washington, DC: U.S. Department of Education, Office of Research and Improvement.
- 24 *Id.*
- 25 *Id.*
- 26 *Chambers, supra* n. 23.
- 27 This does not mean that students with disabilities are exempt from meeting any minimum eligibility criterion for admission—rather the student must be given the opportunity to meet any appropriate minimum eligibility criterion for admission, consistent with the mission of the charter school and civil rights requirements. See *Office of Civil Rights (2000). Applying Federal Civil Rights Laws to Public Charter Schools*. Washington, DC: U.S. Department of Education.
- 28 34 CFR § 104.35(a).
- 29 34 CFR § 300.527(b).
- 30 34 CFR § 300.527(c).
- 31 34 CFR § 300.533.
- 32 34 CFR § 300.527(b).
- 33 34 CFR § 300.534(a)(1).
- 34 IDEA has additional procedural requirements for the evaluation of students with learning disabilities. 34 CFR §§ 300.540-300.543.
- 35 34 CFR § 300.505.
- 36 34 CFR § 300.505(d).
- 37 34 CFR § 300.504(a).
- 38 34 CFR § 300.505.

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- 39 34 CFR § 300.7.
- 40 34 CFR § 300.504(b).
- 41 *Applying Federal Civil Rights Laws to Public Charter Schools*, at 17.
- 42 *Letter to Rahall*, 211 IDELR 575 (OCR 1994).
- 43 34 CFR § 104.36.
- 44 34 CFR Part 300 Appendix A - Notice of Interpretation, Response to Question 17.
- 45 *Id.*
- 46 *Id.*
- 47 *Honig v. Doe*, 108 S.Ct. 592, 597-98 (1988).
- 48 34 CFR § 300.344(a).
- 49 Fiore, T.A., Harwell, L.M., Blackorby, J., & Finnigan, K.S. (2000). *Charter Schools and Students with Disabilities: A National Study*. Washington, DC: U.S. Department of Education, Office of Educational Research and Improvement.
- 50 34 CFR §§ 300.345, 300.501.
- 51 34 CFR § 300.343(b)(2).
- 52 34 CFR § 300.343.
- 53 34 CFR § 300.347.
- 54 34 CFR Part 300 Appendix A - Notice of Interpretation, Response to Question 1.
- 55 34 CFR § 300.350.
- 56 458 U.S. 176 (1982)
- 57 458 U.S. at 203- 204 (emphasis added).
- 58 Some states, for example Michigan and Missouri, describe the level of benefit that the IEP must bestow in terms of allowing the student to attain his/her maximum potential.
- 59 34 CFR § 300.550(b).
- 60 34 CFR § 300.302.
- 61 As an extreme example, an IEP that specified that physical restraint be used with a child who was self-injurious, could nonetheless be in compliance with IDEA and the LRE requirement if the failure to restrain the student would interfere with his/her ability to be educated. Obviously in such an extreme situation the use of such restrictive procedures would have to be recommended by competent professionals, approved by the IEP team and implemented in compliance with state and federal laws.
- 62 34 CFR § 300.26(a).
- 63 34 CFR § 300.26(b)(3).
- 64 458 U.S. at 207.
- 65 34 CFR § 300.24(a).
- 66 *Irving Independent Sch.I Dist. v. Tatro*, 468 U.S. 883 (1984). In *Tatro*, the Supreme Court decided that IDEA required the school, rather than the family, to provide an eight year old girl with spina bifida with regular “clean intermittent catheterization” services so that she could attend regular classes.
- 67 34 CFR § 300.347.
- 68 34 CFR § 300.28.
- 69 34 CFR § 300.29.
- 70 34 CFR § 300.347(b).
- 71 34 CFR Part 300 Appendix A - Notice of Interpretation, Response to Question 33.
- 72 34 CFR § 300.23.
- 73 34 CFR § 300.24(b)(2).
- 74 *Cedar Rapids v.Garret*, 526 U.S. 66, 69 (1999).
- 75 *Garret*, 526U.S.at 75.
- 76 *Garret*, 526U.S.at 79.
- 77 As discussed earlier, OCR does not have enforcement authority for IDEA. Therefore, the OCR investigation did not address whether the school had violated IDEA requirements.
- 78 34 CFR § 300.502(b).
- 79 34 CFR § 300.502(a)(2).
- 80 34 CFR § 300.502(e)(1).
- 81 34 CFR § 300.503(a)(1).
- 82 *Id.*
- 83 34 CFR § 300.503(c).
- 84 34 CFR § 300.503(b).
- 85 34 CFR § 300.500(b)(1).
- 86 34 CFR § 300.501(a)(1).
- 87 20 U.S.C. 1232(g)-(i). The FERPA regulations can be found at 34 CFR § Part 99.
- 88 34 CFR § 300.507(a)(1).
- 89 34 CFR § 300.507(c)(2).
- 90 34 CFR § 300.507(c)(3).
- 91 See earlier discussion in this publication in conjunction with evaluation.
- 92 34 CFR § 300.507(b).
- 93 34 CFR § 300.514.
- 94 34 CFR § 300.514(b)
- 95 The U.S. Supreme Court established this rule in *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). The parent is entitled to such
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- reimbursement whether or not the private school meets “the State standards that apply to education provided by the SEA and LEAs.” 34 CFR § 300.403(c).
- 96 34 CFR § 300.403(e).
- 97 34 CFR § 300.506.
- 98 34 CFR § 300.509(b)(1).
- 99 34 CFR § 300.509(b)(2).
- 100 34 CFR § 300.510(b).
- 101 34 CFR § 300.511(a).
- 102 34 CFR § 300.511(b).
- 103 34 CFR § 300.508.
- 104 34 CFR § 300.511(c).
- 105 For procedural reasons that go beyond the scope of this publication, the vast majority of these cases are heard in federal court.
- 106 34 CFR § 300.512(b).
- 107 *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); 34 CFR § 300.660.
- 108 34 CFR § 300.122.
- 109 34 CFR § 300.403.
- 110 510 U.S. at 12.
- 111 See, e.g., *M.H. v. Bristol Bd. of Educ.*, 169 F. Supp. 2d 21, 28 (D. Conn. 2001); *Butler v. S. Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 420 (N.D.N.Y. 2000); *R.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 418 (S.D.N.Y. 2000); *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 114 (D.D.C. 2000); *Cappillino v. Hyde Park Cent. Sch. Dist.*, 40 F. Supp. 2d 513, 515-16 (S.D.N.Y. 1999); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 252 (3d Cir. 1999); *Emma C. v. Eastin*, 985 F. Supp. 940, 945 (N.D. Cal. 1997); *W.B. v. Matula*, 67 F.3d 484, 493-94 (3d Cir. 1995); *Walker v. District of Columbia*, 969 F. Supp. 794, 797 (D.D.C. 1997).
- 112 See, e.g., *Sellers v School Bd. of Manassas*, 141 F.3d 524 (4th Cir. 1998); *Heiderman v. Rother*, 84 F.3d 1021 (8th Cir. 1996); *Charlie F. v. Board of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 991 (7th Cir. 1996); *Crocker v. Tennessee Secondary Sch. Athletic Ass’n*, 980 F.2d 382, 386 87 (6th Cir. 1992); *Johnson v. Clarke*, 165 Mich. App. 366, 418 N.W.2d 466 (1987); *Manecke v. School Bd. of Pinellas County*, 762 F.2d 912, 915 n.2 (11th Cir. 1985); *Anderson v. Thompson*, 658 F.2d 1205, 1213-14 (7th Cir. 1981); *Christopher N. v. McDaniel*, 569 F. Supp. 291 (N.D. Ga. 1983).
- 113 34 CFR § 300.513.
- 114 34 CFR §§ 300.660-300.662.
- 115 34 CFR § 300.660(b).
- 116 34 CFR § 300.661.
- 117 34 CFR § 300.512(d).
- 118 34 CFR § 300.519.
- 119 34 CFR § 300.523(a)(1).
- 120 34 CFR § 300.523(a)(2).
- 121 34 CFR § 300.523(b).
- 122 34 CFR § 300.523(c)(d).
- 123 34 CFR § 300.523(f).
- 124 34 CFR § 300.524.
- 125 34 CFR § 300.121(d)(2)(i).
- 126 34 CFR § 300.520(b)(1)(i).
- 127 34 CFR § 300.520(b)(2).
- 128 34 CFR § 300.526.
- 129 34 CFR § 300.526(c)(1).
- 130 “Weapon” has the meaning given the term “dangerous weapon” under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code. 34 CFR § 300.520(d)(3).
- 131 “Illegal drug” means a controlled substance, but does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law. 34 CFR § 300.520(d)(2).
- 132 “Controlled substance” means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)). 34 CFR § 300.520(d)(1).
- 133 34 CFR § 300.520(a)(2).
- 134 34 CFR § 300.526(c).
- 135 34 CFR § 300.522(b).
- 136 34 CFR § 300.521.
- 137 See, Part II, Section A, 2.
- 138 34 CFR § 300.527(a).
- 139 34 CFR § 300.527(d)(1).
- 140 34 CFR § 300.527(d)(2)(iii).
- 141 Letter to Zirkel, 22 IDELR 667 (OCR 1995).
- 142 34 CFR § 104.36.



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# APPENDIX A

## Example Accommodations Under Section 504

### Allergies

#### *Examples of Accommodations:*

- Remove and/or prohibit allergens from the classroom.
- Inform necessary personnel, including nurse, teachers, administration, nutritionist, coaches, etc.
- Provide access and assistance with necessary medications.
- Train appropriate personnel in warning signs, dispensing of medication, and emergency techniques.
- Remove or limit pets/animals in the classroom

### Asthma

#### *Examples of Accommodations:*

- Inform necessary personnel, including nurse, teachers, administration, nutritionist, coaches, etc.
- Train appropriate personnel in warning signs, dispensing of medication, and emergency techniques.
- Adapt physical education and recess to accommodate student's needs, etc.
- Provide access and assistance with necessary medications.
- Provide rest periods
- Provide indoor space for before and after school activities

### Attention Deficit Disorder (ADD) and Attention Deficit Hyperactive Disorder (ADHD)

#### *Examples of Accommodations:*

- Inform necessary personnel, including nurse, teachers, administration, coaches, etc.
- Seat the student away from distractions and in close proximity to the teacher
- State classroom rules, post in an obvious location and enforce consistently
- Use simple, concise instructions with concrete steps
- Do not limit access to physical activity (physical education, recess) to complete assignments or as punishment.
- Understand the need excessive movement.

- Adjust assignments to match attention span, etc.
- Supervise during transitions, disruptions, field trips
- Introduce to organizational strategies and monitor their use.
- Maintain close contact with parents.
- Provide training for staff
- Establish a nonverbal cue between teacher and student for behavior monitoring
- Schedule subjects requiring greater concentration early in the day

### Cancer

#### *Examples of Accommodations:*

- Adjust attendance policies
- Consider shortening schedule.
- Provide tutoring/teaching during periods of hospitalization or home care.
- Limit requirements on participation in physical activities as requested.
- Inform necessary personnel, including nurse, teachers, administration, nutritionist, coaches, etc.
- Train appropriate personnel in dispensing of medication.
- Educate peers.
- Provide assistive technology.
- Provide dietary accommodations.
- Provide access to a private rest area.
- Develop a private, permissive and non-intrusive pass system to excuse student from classroom.
- Provide individual school counseling
- Notify parents of communicable diseases in school
- Maintain close contact and open communication with parents.

### Cerebral Palsy

#### *Examples of Accommodations:*

- Evaluate for and provide assistive technology.
- Ensure accessibility through the use of ramps and elevators
- Allow for extra time between classes



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- Assist with carrying books, lunch trays, etc.
  - Adapt physical education curriculum
  - Provide trained assistance with daily needs.

### **Cystic Fibrosis**

#### *Examples of Accommodations:*

- Inform necessary personnel, including nurse, teachers, administration, etc.
- Train appropriate personnel in dispensing of medication and emergency techniques.
- Develop a health care plan.
- Shorten the school day
- Adapt physical education activities

### **Hearing Impairment**

#### *Examples of Accommodations:*

- Provide written direction/instructions in addition to oral presentation.
- Provide sign language interpreter or position student to permit lip reading.
- Evaluate and provide for assistive technology.
- Provide appropriate seating.
- Educate peers.

### **Diabetes**

#### *Examples of Accommodations:*

- Inform necessary personnel, including nurse, teachers, administration, nutritionist, coaches, etc.
- Train appropriate personnel in warning signs, dispensing of medication, and emergency techniques.
- Provide access and assistance with necessary testing equipment and medications.
- Develop health care plan.
- Adapt physical education activities.
- Supervise closely when student is not feeling well.

### **Drug and/or Alcohol Abuse**

#### *Examples of Accommodations:*

- Maintain contact with parents.
- Provide for counseling/social work services.
- Monitor progression through school.
- Communicate with outside treatment providers.
- Communicate with law enforcement and other governmental entities.
- Evaluate need for education to be provided at a private or public treatment facilities.

### **Eating Disorders**

#### *Examples of Accommodations:*

- Communicate with parents and outside treatment providers.
- Provide dietary accommodations.
- Adapt physical education program.
- Educate peers
- Provide counseling services.

### **Epilepsy**

#### *Examples of Accommodations:*

- Document and communicate to parent any suspected seizure activity.
- Inform necessary personnel, including nurse, teachers, administration, coaches, etc.
- Train appropriate personnel in warning signs, dispensing of medication, and emergency techniques.
- Adapt physical education and recess to accommodate student's needs, etc.
- Provide access and assistance with necessary medications.

### **Physically Impairment**

#### *Examples of Accommodations:*

- Provide physical therapy.
- Communicate and coordinate with outside treatment providers.
- Adapt physical education to permit participation.
- Ensure accessibility to all facilities.
- Provide extra time to get to class
- Provide extra set of materials for home use.

### **Tourette's Syndrome**

#### *Examples of Accommodations:*

- Inform necessary personnel, including nurse, teachers, administration, nutritionist, coaches, etc.
- Educate other students about associated outbursts/gestures/tics
- Monitor administration/side effects of medication
- Supervise during transition, disruptions, field trips.



