SPECIAL EDUCATION ADVOCACY
WHAT EVERY SNT PROFESSIONAL NEEDS TO KNOW

2013 Special Needs Trusts-The National Conference

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I. Why Knowledge of Special Education Advocacy is Important

Creating a special needs trust (SNT) as part of the estate plan for an individual with a disability can enhance that person's quality of life. Special or supplemental needs trusts provide funds to pay for expenses that can help take care of a person with a disability—while not cutting off access to government benefits.[1] However, many SNT attorneys do not understand the role of public school districts in the process.

Many trusts provide for beneficiaries between 3 and 21. A public school district represents an essential partner in providing for the needs of a child or young adult with a disability. School Districts have an affirmative obligation to provide services and individualized planning for the beneficiaries. Appropriate planning will necessarily improve a beneficiary's outcomes and capacity for independent living. The law also requires transition services for postsecondary options.

In today's competitive legal environment, attorneys in small firms must customize their practice to serve unique client needs and become trusted advisors and cultivate personal relationships which encompass related client needs.[2] When a client confides their needs and concerns about their most vulnerable loved ones in connection with an SNT or guardianship, it is essential that the lawyer ensure that the client is aware of the public school obligations, particularly if the child is not making appropriate progress.

Thus, attorneys must understand the mandates of the Individuals with Disability Education Improvement Act (IDEA) and Section 504 of the Rehabilitation Act of 1973. The attorney

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1 *See* Bernard A. Krooks, "Estate Planning & Taxation: Individuals with Special Needs," *Trusts and Estates*, July 2011, at p. 30.

2 *See* Susskind, Richard, *Tomorrow's Lawyers, An Introduction to Your Future* (Oxford University Press 2013), p. 66-67 Clearly, as trusted counselors, lawyers must empathize with their clients and continuously think of unique ways to serve their interests. "[Clients] appreciate those law firms which have clearly devoted their own time to thinking specifically about them and their business and [their needs]."

or trustee administering the SNT may consider advocating with the public school district for additional services, as required by law.

Practice Tip: Identifying a child with a disability is not always obvious or simple, even for parents. Many children with disabilities have very high IQs and cognitive ability but may have emotional or other disabilities. Some of these disabilities go unidentified for years. Some only develop during adolescence. If a child has a disability that impacts educational performance, he or she may qualify for services under the IDEA. An impairment that impacts a major life activity may qualify a child for services under Section 504. Thus, it is important to ask clients broad questions, such as if their children or grandchildren have had difficulties in school or are missing school.

A. **Lack of Knowledge on Special Education Advocacy Can be Costly.** If attorneys do not know the basics about special education services and advocacy, they may miss out on opportunities to serve clients, protect client estates and help their beneficiaries. Without this knowledge, an attorney will not have the essential tools to fully address the multitude of needs that can arise from caring for a child with a disability.

    1. *Expenses Can Drain Trust.* Medical and educational expenses for a child with a disability can run from $50,000 to $200,000 a year or more. Obviously, these expenses can drain even a generous trust, and parents must ensure that their children with special needs receive appropriate training on independent living and postsecondary options, to the extent possible.

    2. *School District has Obligation to Provide Appropriate Education and Transition Services*. Up to age 21 or graduation with a high school diploma, whichever occurs first, the child's public school district has a responsibility to provide these appropriate education and transition services.

II. History of Exclusion of Children with Disabilities from Public Schools

The law has evolved to protect students with disabilities and it is important to understand the history of exclusion. Zealous advocacy still remains important as many stigmas and misunderstandings prevail to isolate students with disabilities, particularly for students with hidden disabilities or mental illness (classified as having an emotional disturbance).

A. For most of our history, public school districts in the United States excluded children with disabilities. Programs for children with disabilities evolved slowly. In the nineteenth century and earlier, children with disabilities were essentially excluded from public schools. In 1893, a Massachusetts court ruled that student behavior resulting from "imbecility" was grounds for expulsion, which barred many intellectually disabled students from school. *Watson* v. *City of Cambridge,* 32 N.E. 864 (1893). A later decision in Wisconsin ruled that a public school

district could exclude a student from school because his disability had "a depressing and nauseating effect on the teachers and school children." *See State ex. rel. Beattie* v. *Board of Education,* 172 N.W. 153 (1919). A significant turning point occurred in 1971 when a federal court ruled that students with intellectual disabilities were entitled to a free appropriate public education. *Pennsylvania Association for Retarded Children v. Commonwealth,* 334 F. Supp. 1257 (E. D. Pa. 1971). In 1972, *Mills* v. *Board of Ed. of District of Columbia* expanded the PARC decision to include all children with disabilities. 343 F. Supp. 279 (E.D. Pa. 1972).

B. The seminal *Brown v. Board of Education* 347 U.S. 483 (1954), desegregation decision set a precedent for the extension of educational access for all children, including children with disabilities. Gradually, the rights of children evolved, largely through legislation and extensive litigation, so that currently, every public school district in our country has the affirmative obligation to provide a free appropriate public education to every child with a disability until the student graduates or turns 21.

C. Outline of Laws Protecting Children with Disabilities in School

The Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §§1400-1482(2004), 34 C.F.R.§ Part 300 (2006).

Section 504 of the Rehabilitation Act of 1973, 29 USC §794, 34 C.F.R.§ Part 104, represents the first federal civil rights law to protect individuals with disabilities from any program or activity receiving federal assistance.

Americans with Disabilities Act. Title II of the Americans with Disabilities Act, 42 USC 12101-12213. Prohibits discrimination based on disability.

The Civil Rights Act of 1964 and Section 1983, protect students on the basis of race, gender, disability and ethnic origin.

III. IDEA

The IDEA represents the most powerful statute for students with disabilities and the heart of special education advocacy. The law, as last enacted in 2004, states that every public school district in our country has the affirmative obligation to provide a free appropriate public education (FAPE) to every child with a disability until the student graduates or turns 21. 20 U.S.C. Section 1412(a)(1)(A); *Board. of Ed. of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 179 (1982). The law gives parents detailed and specific rights under the IDEA.

Congress expressed the need for this law by noting that, *inter alia*, there were more than eight million children with disabilities in the country then, that the educational needs of the children were not being met, that more than one half of the students with

disabilities did not receive appropriate services and one million are excluded entirely from school.

In 1990, Congress amended the statute and changed the title to the Individuals with Disabilities Education Act. Predecessor laws of the IDEA include the Education for all Handicapped Children Act (EAHCA), 20 U.S.C. 1400(b), enacted in 1975.

A. FAPE.

The focus of the IDEA remains the requirement that public schools provide a free and appropriate public education. A 1982 Supreme Court decision, coupled with the statute itself, still provides the structural framework for this critical aspect. *See Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

1. A school district provides a FAPE when it offers "special education and related services tailored to meet the unique needs of a particular child, [which are] 'reasonably calculated to enable the child to receive educational benefits.'" *Walczak v. Florida. Union Free Sch. Dist*., 142 F.3d 119, 122 (2d Cir.1998) (*quoting Rowley*, 458 U.S. at 207)

2. FAPE is broadly defined in the 2006 IDEA Part B regulations as special education and related services that:

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

   (b) Meet the standards of the state, including the requirements of this part;

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

   (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R.§ §300.320 through 34 C.F.R.§ §300.324 *See* 34 C.F.R.§ §300.17.

3. Courts and administrative judges generally measure educational benefit in the form of passing grades and advancement from grade to grade. *Walczak v. Florida. Union Free Sch. Dist*., 142 F.3d 119, 122 (2d Cir.1998) (*quoting Rowley*, 458 U.S. at 207). The contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each eligible student. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

4. FAPE must be available to all children residing in a state between the ages of 3 and 21, including children with disabilities who have been suspended or expelled from school, as provided for in 34 C.F.R.§ §300.530 (d). 34 C.F.R.§ §300.101 (a).

5. Children with disabilities cannot be removed from school for more than 10 days without a manifestation determination review, to determine if their behavior is related to their disability and if the IEP is implemented properly. 34 C.F.R.§ §300.530.

6. **The *Rowley* Decision and Standard.**

   School districts have no obligation to maximize a student's potential. In *Rowley,* the United States Supreme Court evaluated whether a student with deafness who was educated in a regular classroom required a qualified sign-language interpreter in all or her academic classes, in lieu of assistance proposed in other parts of her IEP. The parents filed for an impartial hearing to seek the interpreter. The school district concluded that the student did not need the interpreter, as she was achieving good grades. The United States District Court and the Court of Appeals for the Second Circuit both found, after reversing administrative review, that the IDEA required the school district to maximize the student's potential, commensurate with the opportunities of children without disabilities.

   The United States Supreme Court granted certiorari and reversed the decision. The Court held that the IDEA sets a basic floor of opportunity but does not require school districts to maximize a child's potential. Thus, the Court found that because the student was achieving good grades, advancing from grade to grade and receiving personalized services and related services, she did not require the additional service of a sign language interpreter.

7. In *Rowley*, the Supreme Court established the following two-part test that courts should use to decide appropriateness:

   1. Has the state complied with the procedures set forth in the IDEA?

   2. Is the IEP substantively appropriate, meaning that it is reasonably calculated to enable the child to receive educational benefits?

8. Is Rowley still relevant?

Federal Courts have refined *Rowley* to require a school district to offer services that provide a "meaningful educational benefit." From a case law perspective, this remains a vague term. Courts do look beyond evidence of passing grades and regular advancement from grade to grade to assess the school district's program for the student. While courts will examine objective data, such as progress in standardized test scores, *Rowley* does not deem this determinative.

Few courts have questioned *Rowley's* basic premise or updated the standard to comply with the mandates of the Individuals with Disabilities Education Improvement Act of 2004 or the No Child Left Behind Act (NCLB). Both of those laws require scientifically-based research strategies in instruction and explicit evidence of progress in the general education curriculum for students with disabilities. *Rowley* made sense in 1982, based on the statute it was interpreting, the Educational for All Handicapped Children Act of 1975, in an era when children with disabilities were systematically denied access to education and generally excluded from standardized assessments. The decision does have gaps. For example, in the decision, Justice Rehnquist did not examine specific student achievement or test scores and thus the progress he examined was, by its nature, subjective.

Courts have applied the *Rowley* standard universally to all cases, although the *Rowley* case involved the specific issue of whether a student with deafness, with above-average intelligence, who was doing well in a classroom, required the additional service of a sign language interpreter. The Court in *Rowley* expressly limited its ruling:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case, we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classroom of a public school system, we confine our analysis to that situation.

Rowley, 458 U.S. at 202.

Given the changing landscape, it is foreseeable that the Supreme Court may reassess *Rowley* in the next five to ten years. In the thirty years since the *Rowley* decision, the educational landscape, the accountability and the expectations on the methodology that school districts utilize has drastically changed. NCLB requires data driven decisions and requires school districts to demonstrate progress for all subgroups of students, including students with disabilities, measured by a precise formula for "adequate yearly progress." Most IDEA cases moreover, do not deal with parent claims that a school district must maximize potential, but rather with programs that have failed students, but which courts deem appropriate because the school district set forth an IEP that was

"good enough." Parents know that passing grades are necessarily subjective, but grade inflation can be very difficult to prove.

In addition, *Rowley* discourages courts from carefully reviewing and questioning educational methodology and substituting their judgment. For example, in *Grim v. Rhinebeck Central Sch. Dist.*, 346 F.3d 377 (2d Cir. 2003), the Court of Appeals reversed a district court determination that the challenged IEPs were substantively inadequate because, among other reasons, they did not provide sufficient services to address the student's decline in test scores from the preceding year. The Second Circuit relied on *Rowley* and reversed, because the Impartial Hearing Officers and State Review Officer had held that the IEPs were appropriate. The Second Circuit held that adopting expert opinion on dyslexia was inappropriate for a court reviewing administrative determinations under the IDEA.

In conformance with the IDEA, looking forward, parents should expect and school districts should deliver:

- Scientifically-based instructional and positive behavioral support strategies;
- Training and professional development for staff targeted for a student's disability;
- Supporting the use of assistive technology devices and services to maximize accessibility for students;
- Precise measurement and objective evidence of student progress and outcomes;
- Goals and objectives that are individualized, measurable and based on knowledge of a student's abilities and scientifically-based, rather than vague and cookie- cutter;
- An examination of whether passing grades reflect students' ability, as measured by careful attention to standardized test scores and student work product;
- Transition services designed to help students lead productive and independent adult lives, to the maximum extent possible.

When parents expect this level of progress and document, in a careful record, the school district's failures to reach this degree of specific support and program development should lead to a determination that the school district has failed to provide a FAPE to the student.

Indeed, the *Rowley* "reasonably calculated" standard does not serve school districts well either, particularly with the new standards and accountability for teachers and principals, including special education teachers. The adoption of a lackadaisical "C" standard actually encourages a lack of vigilance and attention to the details, training and IDEA. Given the extensive resources that school boards devote to providing special education services and to the instructional staff employed, high expectations and precise measurement of progress, will better serve students and ensure that school districts are effectively using their vast resources to identify student needs and to educate students.

B. **Child Find Obligations.**

1. **Basics.** The IDEA created a series of obligations on the states and school districts with the "Child Find" obligation being a critical element of the law. Under the IDEA, federal funding is contingent on states and school districts demonstrating that they have a plan in place to identify children with disabilities. That plan must identify and evaluate "[a]ll children with disabilities residing in the State, including children who are homeless or wards of the state and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services." 20 U.S.C. § 1412(a)(3)(A).

   The plan must also develop and implement a practical method to determine which children are currently receiving needed special education and related services. *Id.* The Child Find duty extends to all children suspected of having a disability. 34 C.F.R. § 300.111(c)(1). Practicality and common sense has placed the Child Find obligation on school districts, whether or not parents refer the child. The duty is triggered when the school district has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability. *New Paltz Central Sch. Dist. v. St. Pierre,* 307 F. Supp. 2d 394, 400 (N.D.N.Y. 2004). When a child is identified as potentially requiring special education services, the district has a duty to complete the evaluation process and failure to complete the process constitutes a denial of a FAPE. 20 U.S.C. § 1414(b)(2)(A)(i); *see N.G. v. District of Columbia,* 556 F. Supp. 2d 11, 16 (D. D.C. 2008). The school district must evaluate the student within a reasonable time after notice or suspicion of a disability. See 30 C.F.R. § 300.301(c)(1); *El Paso Indep. Sch. Dist. v. Richard R.,* 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008).

2. **Conduct Evaluation.** To conduct the evaluation, the school district "shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is disabled under the Act. *See* 20 U.S.C. § 1414(b)(2)(A)(i).

3. **Evaluate for signs of any disability under IDEA.** School districts must evaluate for signs of an emotional disability or other health impairment, not just for learning disabilities (*See infra*, p. 9 for a list of disabilities covered under the IDEA:

   Example: In *Weixel v. the Board of Education of the City of New York***,** 287 F.3d 138 (2d Cir. 2002), the Second Circuit held that a parent had shown a violation of the IDEA when a school district did not refer a child for special education services, who was chronically absent due to health issues. The child was in honors classes but could not attend school due to her Chronic Fatigue Syndrome. The Court held that "[t]he scope of IDEA's coverage is not limited to students with "learning disabilities, but instead applies broadly

to students who need special education and related services because of, *inter alia,* other health impairments. 20 U.S.C. § 1401(3)(A)."

The Court further noted that, "[b]y regulation, 'other health impairment' is defined as having limited strength, vitality or alertness . . . that results in limited alertness with respect to the educational environment, that -- (i) [i]s due to chronic or acute health problems . . .; and (ii) [a]dversely affects a child's educational performance. 34 C.F.R. § 300.7(c)(9)." "Special education is defined to include 'instruction conducted . . . in the home . . .' 20 U.S.C. § 1401(25)(A)." As a result of her inability to attend classes, she required "special education" in the form of home instruction. The Court found that the student met the definition of a "disabled child" within the meaning of the IDEA.

4. **Tuition Reimbursement can be a Remedy**. A failure to evaluate a student suspected of having a disability may lead to tuition reimbursement awards (*See infra*, p. 26, for further discussion of tuition reimbursement).

Example: A Connecticut school district failed to evaluate a 16-year-old student after her placement in a psychiatric hospital. Concluding that the district violated its child find obligation, the District Court ordered the district to reimburse the parents for the student's therapeutic placements. While the student's hospitalization did not in itself qualify her as a child with an emotional disturbance, the court noted that the district was applying the wrong standard in arguing that it lacked notice of the hospitalization. The court stated that the standard for triggering the child find duty is suspicion of a disability rather than factual knowledge of a qualifying disability. The court pointed out that the parent completed a health assessment form just one week before the student's hospitalization, when she enrolled the student in her local high school. The form stated that the student had been diagnosed with depression the previous year and was taking an antidepressant. Those statements, combined with the student's subsequent hospitalization, should have raised a suspicion that the student suffered from an emotional disturbance over a long period of time. The federal court recognized that the parents placed the student in an out-of-state therapeutic facility shortly after her hospitalization, but found that the placement did not relieve the district of its duty to make FAPE available to all resident children with disabilities. Determining that the student was eligible for IDEA services, as established by private evaluations, the court held that the parents were entitled to reimbursement for the private placements. *See, e.g., Regional Sch. Dist. No. 9 Bd. of Educ., v. Mr. and Mrs. M., as Parents and Next Friends of M.M*, 3:07-CV-01484 (WWE) (D.C. Conn. Aug. 7, 2009).

C. **IDEA Classification Categories.**

1. The law protects every child who requires special education and related services and has a disability in one of IDEA's classifications that affects educational performance.

2. The classification, categories, set forth at 34 C.F.R.§ §300.8, include:

Autism. According to the Center for Disease control, approximately 1 in 88 students have autism. This is a disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

Deaf-blindness means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

Deafness means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification that adversely affects a child's educational performance.

Emotional disturbance (or disability), in most jurisdictions, the most heavily litigated eligibility category, means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; and/or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems. Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

Hearing impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

Intellectual Disability (formerly Mental retardation) means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

Multiple disabilities means concomitant impairments (such as mental retardation-blindness or mental retardation-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness.

Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) adversely affects a child's educational performance.

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness. 20 U.S.C. §§ 1401(3); 1401(30)).

D. Eligibility for Services

In order to be eligible for special education services, a disability must impact educational performance and the student must require special education services. Notably, most recent complex eligibility cases deal with disputed classification over students with possible emotional disabilities. In some cases, the determination can take or has taken years of litigation to resolve.

Recent examples of eligibility:

In *G.J.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455 (E.D. Pa. 2011), a federal court concluded that a child's behavioral problems impeded his learning and held that the school district erred in finding the child ineligible for IDEA services. The court acknowledged that the child had a very high IQ and performed above grade level academically. However, the court pointed out that IDEA eligibility does not turn on academic ability alone. To the contrary, the court observed, the Third Circuit has held that a child's progress must be measured in light of his potential.

The court examined the full evaluation process. The District Court noted that the psychologist's evaluation focused on the child's superior academic performance, such as his "substantial progress in reading." At the same time, her evaluation did not discuss the results of two private ADHD diagnoses, parent and teacher rating scales, and input from the kindergarten teacher. The evaluation report also failed to include the psychologist's own classroom observations of the student. The court explained that the psychologist's statements to the parents, particularly her statement that she "didn't do IEPs for students who have good skills," underscored the flaws in the evaluation process. Determining that the flawed evaluation resulted in a denial of FAPE, the court upheld an award of compensatory education.

In *Hansen v. Republic R-III Sch. Dist*., 632 F.3d 1024 (8th Cir. 2011), the Eighth Circuit found that a student had an emotional disturbance and an OHI and affirmed a District Court's determination that the student was eligible for IDEA services. The Court of Appeals pointed out that the school district chose not to present any evidence on its case on the student's relationships after the parent presented his case to the hearing panel. Instead, the school district asked the panel to grant a judgment in its favor based on the parent's allegedly inadequate evidence — a request the panel granted.

The Eighth Circuit conducted a review of the proceeding before the hearing panel. The Court held that the student, who had bipolar disorder, was a child who met the criteria for an emotional disability. Not only did the student have multiple disciplinary referrals over the previous four years for threatening

students and teachers, fighting with other students, and disrespecting teachers and peers, he struggled to pass his classes and failed a standardized test required to advance to seventh grade. In addition, the Eighth Circuit observed that the student exhibited hyperactive, impulsive, and inattentive behavior as a result of his ADHD, and that those behaviors interfered with learning. "Although [the school district] correctly states that a diagnosis of ADHD alone does not entitle [the student] to special education services, it fails to cite any evidence in the record supporting the conclusion that ADHD does not adversely affect [the student's] educational performance," the court wrote. The Eighth Circuit thus affirmed the District Court's decision that the student was eligible for IDEA services under the categories of emotional disturbance and OHI.

Examples of Ineligibility:

An Eastern District decision provides a contrasting assessment and reflects the fact-specific elements of these cases. In *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F. Supp. 2d 516 (E.D.N.Y. 2011), a district court found that a child's anger, anxiety, and poor academic performance was not the result of an emotional disturbance that his district failed to address. The court upheld an SRO's determination that the student was ineligible for IDEA services.

The district court examined a variety of factors. The court acknowledged that the student received failing grades during the relevant time period, despite performing at grade level in previous school years. The judge also noted that the student's poor grades coincided with his daily marijuana use, as well as his abuse of alcohol and prescription drugs. The fact that the student's academic performance and interpersonal relationships improved dramatically after he overcame his substance abuse problems indicated that his drug and alcohol use were the source of his earlier difficulties. Moreover, the court observed, an assessment by an independent psychologist characterized the student's depressive behavior as being in the average range. "Indeed, one of [the student's] science teachers at [his preparatory boarding school] stated that he 'always appears to be in a good mood,'" the court wrote. The court noted that all of the instances in which the student appeared angry or anxious, became aggressive, or struggled academically occurred while he was abusing drugs and alcohol. Concluding that the student's substance abuse was the cause of his academic and behavioral problems, and not the result of them, the court held that the student did not have an emotional disturbance as defined by the IDEA.

In *W.G. v. New York City Dept. of Educ.*, 801 F. Supp. 2d 142 (S.D.N.Y. 2011), a district court held that a student did not have an emotional disturbance as defined by the IDEA. The court determined that the student's poor grades and strained relationships with certain teachers were the result of social maladjustment and substance abuse.

The court rejected the parents' claim that the student's behaviors, which included truancy, defiance, and refusing to learn, were the result of his depression. The parents had also presented other evidence. Every mental health professional who evaluated or worked with the student noted that he had oppositional defiant disorder and narcissistic personality traits, and that he simply refused to attend

school. In addition, the student had a history of drug and alcohol abuse. Although the student's evaluators acknowledged that he'd had depression in the past, the court pointed out that the episode was minor and short-lived. Evidence that the student had positive relationships with teachers he liked and performed well in their classes further undercut the parents' claim that the student was unable to maintain interpersonal relationships because of an emotional condition. "Social maladjustment, without any independent emotional disturbance, is at the root of the problems that led to the [out-of-state therapeutic placement] for which [the parents] seek reimbursement," the court stated. Finding insufficient evidence of an emotional disturbance, the District Court upheld an SRO's determination that the student was ineligible for IDEA services.

In *Maus v. Wappingers Cent. Sch. Dist*., 688 F. Supp. 2d 282 (S.D.N.Y. 2010), the U.S. District Court, Southern District of New York held that the student did not need special education to receive an educational benefit. The court recognized that neither the Part B regulations nor New York law define the term "adverse effect on educational performance." However, recent decisions from the Second Circuit indicate that "educational performance" refers solely to academics. *See C.B. v. Department of Educ. of the City of New York*, 52 IDELR 121 (2d Cir. 2009, unpublished); *Mr. and Mrs. N.C. v. Bedford Cent. Sch. Dist.,* 51 IDELR 149 (2d Cir. 2008, unpublished). The court noted that the student in this case consistently earned above-average grades in all of her classes. She performed at an eighth-grade level in reading and written expression, and at a 12th-grade level in math. Thus, while the student's disabilities might impede her social and emotional functioning, they did not impede her ability to obtain an educational benefit.

E. **Least Restrictive Environment.** The IDEA requires that students with disabilities should be educated with peers without disabilities to the maximum extent appropriate, in the least restrictive environment.

1. Standard: Courts have developed a two-part test for the least restrictive environment:

a) whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily for a child.

b) If it cannot, whether the school has mainstreamed the child to the maximum extent appropriate. *See, e.g., Daniel R.R. v. State Board of Education,* 874 F.2d 1036 (5th Cir. 1989).

Example: In *Oberti v, Board of Education*, 995 F.2d 1204 (3d Cir. 1993), the United States Court of Appeals for the Third Circuit, ruled that a school district did not meet its burden to show that a student could not be educated satisfactorily in a regular classroom with supplementary aids and services. Although the student had severe behaviors of toileting accidents, temper

tantrums, hiding under furniture, hitting other children and spitting on children, the Court noted that the student "Would not have had such severe behavior problems had he been provided with adequate supplementary aids and services in the class.

F. **Placement**

Placement encompasses more than a school location. Rather, it represents a combination of facilities, class size, personnel, location, or equipment necessary to provide instructional services to an individual with a disability. The IEP team must make the placement determination for a student.

Parent preference is not the sole or predominant factor in a placement decision. *Letter to Burton*, 17 IDELR 1182 (OSERS 1991). However, it is an appropriate consideration and the IDEA encourages parent participation in placement determinations.

A school district, in determining a child's placement, must ensure that the child's placement:

-- Is determined at least annually

-- Is based on the child's IEP; and

-- Is as close as possible to the child's home.

The placement team must consider the least restrictive environment for the student, as set forth above. 34 C.F.R.§ 300.114 (a) . A school district must not remove a child with a disability from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R.§ 300.116.

G. **Related Services**

1. Definition. Related services mean such services as 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 include:

- speech-language pathology and audiology services,
- interpreting 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.

Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

34 C.F.R. § 300.34,

2. Health services are related services, unless must be provided by physician.

In *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999), the United States Supreme Court, relying on a previous Supreme Court decision, *Irving Independent School District v. Tatro*, 468 U. S. 883 (1984), continued to support the "bright line" rule and held that school districts must provide medical services as a related service. School districts, however, do not have to provide medical services which a physician must provide. The Supreme Court held that the IDEA, 34 C.F.R. § 300.34, required the provision of certain supportive services for a ventilator-dependent child, despite arguments from the school district concerning the costs of the services.

H. Transition Services

Transition planning represents a process in which the parents and school develop a coordinated set of services to assist the student to successfully move from school to postsecondary activities and adult life.

1. An IEP must also contain transition services and goals, described below, which are absolutely essential for helping children with disabilities attain independent living.

2. The IDEA requires that, beginning no later than the first IEP to be in effect when the child turns 16, or younger if set by state law or determined appropriate by the IEP team, the IEP must contain transitional goals and services that will facilitate movement from school to post-school activities. 34 C.F.R. §300.320 (b).

3. Specifically, the IEP must contain:

- Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills;

- The transition services (including courses of study) needed to assist the child in reaching those goals.

4. Transition services are quite comprehensive. The law defines them as a coordinated set of activities for a child with a disability that is:

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

(2) based on the individual child's needs, taking into account the child's strengths, preferences and interests; and includes:

- Instruction;
- Related services;
- Community experiences;
- The development of employment and other post-school adult living objectives;
- If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

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

6. A school district must, for example, include transition goals for the school to work program and progress reports for the student's participation in the programs. The district must provide an appropriate or detailed formal report of the student's school to work experiences. There must be specific transition goals on the IEP to measure a student's progress in a school to work program.

   Thus, all students with disabilities require a comprehensive coordinated set of transition activities that include specific vocational experiences in addition to academic programs, including expanded community experience, acquisition of daily living skills related to employment and communication skills. *See* 34 C.F.R.§ § 300.43

   Example: In *Pace v. Bogalusa City School Bd*., 325 F.3d 609 (5th Cir., 2003), *Rehearing en Banc Granted, Opinion Vacated by Pace v. Bogalusa City School Bd.,* 339 F.3d 348 (5th Cir. 1983), the Court found that a transition plan adequate that included: statement of desired adult outcomes, school action steps, and family action steps for various areas of need such as postsecondary education, employment, living arrangements, homemaking, financial/income, advocacy/legal, community resources, recreation and leisure, transportation, and relationships.

Example: An Illinois state agency found that the transition services offered by an Illinois district to a student with an ED were insufficient to address the student's goal of attending college. The transition plan failed to adequately address behavior management, self-monitoring and self-advocacy skills, or strategies for strengthening the student's functional, developmental and academic skills through ameliorating recognized deficits in areas of attention, social/emotional fragility and executive functioning problems. *Deer Creek-Mackinaw Community Unit Sch. Dist. 701*, 54 IDELR 138 (SEA IL 2010).

I. Power of Attorney

1. Why is it Necessary? The IDEA provides that states may allow the transfer of rights at the age of majority. Specifically, a state may mandate that once a child reaches the age of majority all the rights that were once accorded to the parent under the IDEA are transferred to the child. 20 USC 1415 (m)(1); *Neville v. Dennis*, Appeal No. 07-2202-CM-DJW (D. Kan. 2007) (holding that a parent loses standing to bring a due process complaint once the student reaches the age of majority); *See Brooks v. District of Columbia*, 841 F. Supp. 2d 253 (D.D.C. 2012)

2. An education power of attorney is intended for use in educational institutions by an “agent” or “attorney-in-fact” chosen by a legally competent young adult with disabilities that create challenges or even roadblocks for the young adult in handling the myriad tasks involved in the education setting. Prior to the age of legal majority (age 18 in most states), the parents as “natural guardians” of the child have the authority to handle bureaucratic tasks and advocacy for the child.

3. Thus, a child with a disability who has reached the age of majority may request a due process hearing in his or her own name. *Shook v. Gaston County Bd. of Educ.*, 882 F.2d 119(4th Cir. 1989).

4. Thus, the power of attorney represents an important tool for parents of young adults with disabilities. With the education power of attorney tool, the agent is authorized to handle tasks in the education setting that are **not** essential to the young adult’s learning process in course work and other learning activities. This enables the young adult to focus on his or her course work and other learning activities, potentially lowering stresses that can interfere with the pursuit of learning that **will** be essential in maximizing the young adult’s future success.

5. What it Covers. An education power of attorney will clarify that parents have the right:

- To make decisions for the student concerning his or her education.
- To provide opportunities for the student to engage in any recreational activities having an educational purpose.
- To investigate and arrange for opportunities for the student to engage in educational activities that provide occupational training.
- To enroll the student in any educational programs.

Unlike the health care and financial durable powers of attorney, in most states there is no statutory form or express statutory authority for an education power of attorney. There are some exceptions. For example, Illinois creates express statutory authority for a "Delegation of Rights to Make Educational Decisions." 105 ILCS §14-610(c)(2). Nevertheless, in most states, an education power of attorney must rely on the common law of agency for effectiveness. The Restatement (Second) of Agency describes delegable acts as follows:

> A person privileged, or subject to a duty, to perform an act or accomplish a result can properly appoint an agent to perform the act or accomplish the result, unless public policy or the agreement with another requires personal performance; if personal performance is required, the doing of the act by another on his behalf does not constitute performance by him.
>
> (Restatement (Second) of Agency § 17 (1957))

A school district is likely to accept and even facilitate an educational power of attorney, with a list of a list of particularized powers, including education powers. Contact the school district's attorney for review of the proposed document, but also consider soliciting recommendations for additions to the listed powers.

IV. Applying the IDEA Process: How it Works

A. Evaluations.

> If a child is referred for special education, the law requires the District to evaluate the child with specific evaluations within 60 days after receiving consent.34 C.F.R. § 300.301(c) The IDEA defines "evaluation" to mean the "…procedures used… to determine whether a child has a disability and the nature and extent of the child's need for special education and related services."[3]

1. An evaluation under the IDEA services two purposes: identifying students who need specialized instruction and related services because of an IDEA-eligible disability; and helping IEP teams to identify the special education and related services the student requires. 71 Fed. Reg. 46548 (2006).

2. Each school district "must conduct a full and individual initial evaluation" before providing special education and related services to a child with a disability. 34 C.F.R. §300.301 (a). A district also must ensure the reevaluation of a child with a disability if it determines that the child's educational or related services needs warrant a reevaluation, or if the child's parent or teacher requests a reevaluation (subject to certain time limitations). 34 C.F.R.§300.03.

3. The IDEA distinguishes between initial, or preplacement, evaluations (34 C.F.R.§ §300.301) and reevaluations of students who already are receiving special education and related services under the IDEA (34 C.F.R.§ §300.303). The former refers to the first evaluation, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career.

4. If parents disagree with a school district evaluation, they may request an independent educational evaluation at public expense. 34 C.F.R. § 300.502. The school district is entitled to set reasonable criteria for the evaluation, such as requiring that the evaluators be qualified and that the expenditure be in accordance with market rates.

3 Those procedures must conform to the requirements set forth in §§ 34 CFR 300.304 through 34 CFR 300.311. 34 CFR 300.15.

5. Evaluations can provide important information on a child that will be invaluable for an SNT attorney and trustee:

- cognitive ability, including IQ and achievement levels;
- emotional state or level of any anxiety;
- social functioning;
- physical limitations;
- level of services needed;
- adaptive living skills and other levels of functioning.

B. The IEP Meeting

1. After a child is referred for special education services and evaluated, an "IEP team" meets to determine the eligibility of the student or to review the program. This team also meets when a child is reevaluated to determine whether services may be changed or discontinued. States utilize different terminology. In New York, the team is termed the Committee on Special Education. In states such as Connecticut and Illinois, it is called the Pupil Personnel Team. In some states, it is simply termed the IEP team.

2. Who is on the team, as set forth in 34 C.F.R. §300.321:

a. the parent or guardian (parent of the student)
b. not less than 1 regular education teacher (if the child is participating in the regular education environment.
c. Not less than 1 special education teacher or where appropriate not less than 1 special education provider of such child (i.e., speech therapist, occupational therapist, physical therapist etc.)
d. A representative of the school district who:
    - is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
    - Is knowledgeable about the general education curriculum and
    - Is knowledgeable about the availability of resources of the local educational agency.

e. an individual who can interpret the assessments and evaluations.

f. at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child;

g. whenever appropriate - the child (depending on age and maturity). For transition planning the school district must invite the student.

A parent must consent, in writing to the excusal of a required member. Some states require additional members.

Practice tip: If an attorney will be attending with the parent, the district must be informed prior to the meeting. If the parent is bringing anyone else with them, a non-attorney advocate or their own expert, it is always good practice to let the school district know at least 24 hours before the meeting. Most school districts will require at least 24 hours' notice if an attorney will attend and may adjourn the meeting if a parent brings an attorney without such notice.

C. The IEP. Once a child is evaluated, a team of special education professionals must meet to decide if the child meets the criteria to receive special education services. If so, the IEP team must develop an individualized education program (IEP).

1. An IEP represents the "centerpiece" of the IDEA and is a written statement outlining a plan for providing a FAPE. *Honig v. Doe*, 484 U.S. 305 (1988).

The IEP contains valuable information for special needs planning. It must include the present levels of academic achievement and functional performance and will detail academic, physical, management and social emotional needs. The IEP should contain services and a goal for every special education need identified. Pursuant to 34 C.F.R.§ §300.320, it must contain:

(1) A statement of the child's present levels of academic achievement and functional performance, including—how the child's disability affects the child's involvement and progress in the general education curriculum (that is, the same curriculum as for children without disabilities); or

(2) A statement of measurable annual goals, including academic and functional goals designed to: meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability;

(3) A description of how the child's progress toward meeting the annual goals will be measured;

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided. The services and modifications must enable the child: a) to advance appropriately toward attaining the annual goals; b) to be involved in and make progress in the general education

curriculum, including participation in extracurricular and other nonacademic activities; and c) to be educated and participate with other children with disabilities and with children without disabilities in the activities.

(5) An explanation of the extent, if any, to which the child will not participate with children without disabilities in the regular class;

(6) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on state and district assessments, if appropriate (Students with severe disabilities will take assessments based on alternate achievement standards);

(7) The projected date for the beginning of the services and the anticipated frequency, location, and duration of each of those services and modifications.

In deciding on a student's placement, the District must consider the continuum of services available, from general education with related services to a residential placement. Home or hospital instruction must also be available if needed.

D. Placement Options

Federal courts have held that there is no requirement in the IDEA that the IEP name a specific school location. Thus, an IEP was not procedurally deficient for that reason. *See T.Y., K.Y., on behalf of T.Y. v. New York City Department of Education*, Region 4, No. 08-3527-cv. (2d Cir. 2009). However, in this case, the court emphasized that it was not holding that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements. It simply held that an IEP's failure to identify a specific school location will not constitute a per se procedural violation of the IDEA. *See White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir.2003). *But see A.K. ex rel J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir.2007). The parents noted, however, that notwithstanding the holding, the evidence reflected that T.Y.'s parents did participate in school selection and that the NYCDOE worked cooperatively with the parents after they voiced their objections. The NYCDOE offered the parents one school, which they rejected. The NYCDOE offered the parents another school, which they also rejected without an on-site visit. The parents then enrolled their child into the Rebecca School without allowing the NYCDOE an opportunity to offer yet another school. The court found that the parents' actions suggested that they sought a "veto" over school choice, rather than "input"-a power the IDEA clearly does not grant them. *See White*, 343 F.3d at 380.

E. Implementation of IEP

In order to provide a FAPE, a school district must ensure that the IEP is implemented. The IEP essentially represents a “contract” with the school district that it must deliver upon. The school district must ensure that the student is placed in a class with the correct student-teacher ratio, that the student receives all special education and related services on the IEP, that any behavior intervention plan and that any program modifications, and supports are in place.

When an IEP's services are to be implemented at an outside placement, the recommended placement must not be wholly incapable of providing the services the IEP requires. *J.S. and A.G., obo J.G v. Scarsdale Union Free School District,* 826 F. Supp. 2d 635 (S.D.N.Y. 2011); *see also TY. v. New York City Dep’t of Educ.,* 584 F.3d 412 (2d Cir. 2009); *Mr.* X v. *New York State Ed. Dep't,* 975 F. Supp. 546- 559 (S.D.N.Y.l997). In *Scarsdale,* the Court held that a school district failed to provide a FAPE to a student because the record did not demonstrate the proposed placement's appropriateness. Also, in *Scarsdale,* the school district proposed making an out-of-district placement for the student. In support of the proposed placement, the district merely produced an e-mail from the proposed program's director stating that the student would be an appropriate candidate and a district statement that the program would be appropriate. *Scarsdale,* 2011 WL 5925309 at *30. Another district witness, who knew the student better, however, stated that the program would not be appropriate for the student. *Id.* Moreover, the district did not offer any evidence concerning either class size or the amount of therapy available to the student, and failed to offer a witness from the proposed program or any evidence that explained the school's offerings. *Id.* The court reviewed the minimal evidence presented and affirmed the IHO's and SRO's determination that there was insufficient evidence to determine whether or not the placement of the student in the program "was reasonably calculated to enable her to achieve educational benefits." *Id.* (emphasis added).

V. The Practice - Advocacy, Mediation, Litigation

A. Advocacy.

As a first step, an advocate or attorney can work with the school district to analyze the case and explain the parent’s position. Advocates or attorneys may write letters to the school district and attend the IEP meeting. A non-attorney advocate can explain the process to parents and essentially hold the client’s hand and advocate for eligibility or an appropriate placement or services.

B. Mediation.

Each school district must ensure that procedures are established and implemented to allow parties to resolve disputes involving any matter, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process. 34 C.F.R.§ § 300.506

The procedures must ensure that the mediation process—

(i) Is voluntary on the part of the parties;

(ii) Is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights

(iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

A school district may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State; and who would explain the benefits of, and encourage the use of, the mediation process to the parents.

If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

Practice Note: In some states and localities, notwithstanding the IDEA mandate, school district attorneys are not willing to participate in mediation. As noted, mediation must be voluntary. In litigious, high stakes cases, such as tuition reimbursement, school districts are fearful that an untrained mediator will award parents relief and bind the school district in future litigation.

C. Due Process

1. Filing. If parents disagree with a school district decision, they have the right to file for due process.

Under 20 USC §1415 (b)(7)(A) of the IDEA, the party initiating due process must file a "due process complaint notice". This written notice must be provided to the other party, with a copy forwarded to the state. It must include:

- The name of the child, the address of the child's residence (or available contact information in the case of a homeless child), and the name of the school the child attends. 34 C.F.R.§ 300.508 (b)(1) through 34 C.F.R.§ 300.508 (b)(3).

- In the case of a homeless child or youth, available contact information for the child and the name of the school the child attends. 34 C.F.R.§ 300.508 (b)(4).

- A description of the nature of the problem of the child relating to such proposed initiation or change (concerning the identification, evaluation or educational placement of the child or the provision of FAPE), including facts relating to such problem. 34 C.F.R.§ 300.508 (b)(5).

- A proposed resolution of the problem to the extent known and available to the party at the time. 34 C.F.R.§ 300.508 (b)(6).

The response to a Complaint must be sent within 10 days of receiving it. Such response must "specifically" address issues raised in the complaint. 20 U.S.C. § 1415 (c)(2)(B)(ii); 34 C.F.R.§ 300.508 (f).

2. Once the due process complaint is filed, a school district must conduct a due process hearing before an impartial hearing officer, appointed through the state. The hearing is an administrative proceeding, can take one day or some last for many months.

3. Parents have the right to seek various remedies in an impartial hearing. They may seek compensatory or made up services. The Hearing Office has broad equitable powers and may grant or deny the parent relief. Parents generally cannot seek money damages under the IDEA[4] although they can seek

4 *See Nieves-Marquez v. Commonwealth of Puerto Rico*, 40 IDELR 90 (1st Cir. 2003); *Polera v. Board of Educ. of the Newburgh Enlarged City Sch. Dist.*, 36 IDELR 231 (2d Cir. 2002); *Chambers v. School Dist. of Philadelphia Bd. of Educ.*, 53 IDELR 139 (3d Cir. 2009); *Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. 1998); *Hall v. Knott County Bd. of Educ.*, 18 IDELR 192 (6th Cir. 1991); *Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68*, 24 IDELR 1039 (7th Cir. 1996); *Heidemann v. Rother*, 24 IDELR 167 (8th Cir. 1996); *Witte v. Clark County Sch. Dist.*, 31 IDELR 128 (9th Cir. 1999); *Ortega v. Bibb County Sch. Dist.*, 42 IDELR 200 (11th Cir. 2005). The 5th U.S. Circuit Court of Appeals affirmed an award of "nominal damages" in *Salley v. St. Tammany Parish Sch. Bd.*, 22 IDELR 878 (5th Cir. 1995).

reimbursement for services they provided to their child. Section 1983 money damages are also generally not available.[5]

When a parent files for a hearing, the child receives pendency, which means that the last agreed-upon IEP must remain in place.

Pendency is a valuable tool in litigation because it can preserve a favorable placement. For example, if a student is placed in an expensive, state-approved private school, and a school district attempts to change this placement, the parents can claim pendency and the student will remain there until a final, unappealed decision takes place. The appeal process can take years.

4. **Settlement of Due Process**. Due process hearings can cost parents and districts from $10,000 up to hundreds of thousands of dollars. The IDEA specifically favors resolution of complaints and a school district must hold a resolution session within 15 days of receipt of the due process complaint. 34 C.F.R.§ §300.510.

   A resolution session is a meeting with the parents and the relevant member or members of the IEP team, as determined by the school district and the parent, who have specific knowledge of the facts identified in the complaint. The attorney of the school district must not attend unless the parent is accompanied by an attorney. In this meeting, the parents of the student discuss their complaint and the facts that form the basis of the complaint, and the school district has the opportunity to resolve the complaint.

   The school district must take steps to ensure that one or both of the parents of the student with a disability are present at the resolution meeting, including notifying parents of the meeting early enough to ensure that they will have the opportunity to attend and scheduling the resolution meeting at a mutually agreed on time and place.

5 Federal Circuit Courts are split as to whether parents can use Section 1983 to recover monetary damages for an IDEA violation. The majority have held that IDEA violations cannot be remedied under Section 1983. See *A.W. v. Jersey City Pub. Schs.*, 47 IDELR 282 (3d Cir. 2007); *Sellers v. School Bd. of Manassas*, 27 IDELR 1060 (4th Cir. 1998); *Blanchard v. Morton Sch. Dist.*, 48 IDELR 207 (9th Cir. 2007); *Padilla v. School Dist. No. 1*, 33 IDELR 217 (10th Cir. 2000). However, when cases are particularly egregious and the violations transcend the IDEA, at least two Circuit Courts have allowed Section 1983 claims premised on IDEA violations. *See Weixel v. Board of Educ. of the City of New York*, 36 IDELR 152 (2d Cir. 2002); *Marie O. v. Edgar*, 27 IDELR 40 (7th Cir. 1997). Although the U.S. Supreme Court has not addressed the issue directly, it has identified the IDEA as an example of a statute that is not enforceable under Section 1983. See *City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113 (2005).

Both parties may agree in writing to waive the Resolution Session. The parent must attend if the school district does not waive the session. If the school district does not hold the Resolution Session, the hearing must proceed.

D. **Burden of Proof.**

In a due process hearing, pursuant to *Shaffer v. Weast*, 546 U.S. 49 (2005), the moving party has the burden of proof and persuasion under the IDEA. The Court noted that because the IDEA is silent on the allocation of the burden of persuasion, the Court relied on the "default rule" that the party bringing the legal challenge bears such burden. Because parents initiate most due process hearings, the default standard sets the burden on the parent to show violations of the law. Having the burden on the parent makes the litigation more difficult and onerous. The *Shaffer* Court held that:

> *The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is [the student], as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ.*

Practice Tip: Each state may set its own burden of proof. Accordingly, you should check state law, as it is essential to understand the burden of proof before filing for a due process hearing. For example, in New York, school districts have the burden of proof for their case in an impartial hearing, so that the school district has the affirmative burden of proof and persuasion that it offered and provided the student a FAPE. This benefits parents tremendously and levels the playing field to some degree for New York parents who are litigating with their school district, particularly in light of the favorable *Rowley* standard for school districts on FAPE. The hearing thus begins in New York with the presumption that the school district violated the child's rights and the school district must provide that it offered a FAPE. However, in New York, in tuition reimbursement cases, the parents have the burden to show that the private school is appropriate. New York Education Law §4402.

E. **Tuition reimbursement.** Much litigation involving special education involves tuition reimbursement claims, under the *Burlington-Carter* standard, as more fully set forth below. Courts have held that parents have the right to unilaterally place their child in a private school and seek tuition reimbursement. Parents have the burden to show that the private school is appropriate and individually tailored to the student's needs.

A parent is entitled to reimbursement if a court concludes that:

1. The district's placement was inappropriate; and

2. The parent's private school placement was appropriate.[6]

3. Equitable considerations must support the claim. Parents must have cooperated with the IEP process, consented to evaluations and provided notice of removal of the student.[7]

The central and primary question in a tuition reimbursement claim centers on whether the district offered the student a FAPE. If the student's IEP is procedurally and substantively appropriate, the parents are not entitled to reimbursement. *A.C. v. Board of Educ. of the Chappaqua Cent. Sch. Dist.*, 51 IDELR 147 (2d Cir. 2009). Furthermore, a delay in providing a substantively appropriate IEP does not necessarily qualify a student for tuition reimbursement. *C. W. v. Rose Tree Media Sch. Dist.*, 55 IDELR 123 (3d Cir. 2010, *unpublished*).

A parent's right to recover private school expenses based on a procedural denial of FAPE will depend on the nature of the violation. If the procedural violation impedes the parent's participation in the IEP process or prevents the student from receiving a FAPE, the court may order the district to fund the student's private services. *E.g.*, *Deal v. Hamilton County Dep't of Educ.,* 49 IDELR 123 (6th Cir. 2008, *unpublished*). However, courts are unlikely to award tuition reimbursement for harmless procedural violations. *G.N. v. Board of Educ. of the Twp. of Livingston*, 52 IDELR 2 (3d Cir. 2009, *unpublished*).

In *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985)**,** the United States Supreme Court held that IDEA's grant of equitable authority empowered a court to order a school district to reimburse the parents for private school tuition and costs, if the school district denied a student a free appropriate public education and the parents unilaterally placed the student in an appropriate private school.

The United States Supreme Court, in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), extended the Burlington decision to non-approved private schools. In *Florence*, a student was classified as learning disabled and the school district developed an IEP. The IEP provided that the student would

6 Courts will find a private placement appropriate if the placement provides individually tailored services and, essential for the child to receive an educational benefit and is primarily orientated toward enabling the child to obtain an educational benefit. *Richardson Indep. Sch. Dist. v. Michael Z*, 52 IDELR 277 (5th Cir. 2009). *See also Shaw v. Weast*, 53 IDELR 313 (4th Cir. 2010).

7 *Florence County Sch. Dist. Four v. Carter,* 20 IDELR 532 (U.S. 1993). *See Burlington Sch. Comm. v. Massachusetts Dept. of Educ*., 556 IDELR 389 (U.S. 1985).

stay in regular classes except for three periods of individualized instruction per week. The parents were dissatisfied and requested a hearing. Due to their dissatisfaction, the parents placed the student in Trident Academy, a private school specializing in educating children with disabilities. The court noted that when they place their child, parents have no way of knowing whether the school meets state standards.

The *Florence* Court noted that:

> Public educational authorities who want to avoid reimbursing parents for the private education of a [child with a disability] can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who confirm to it need not worry about reimbursement claims.

Practice Tip: Before unilaterally removing their child from the public school district to a private school and seeking tuition reimbursement, parents must provide written notice to the public school district of their reasons for disagreement with the program, the removal and their intent to seek reimbursement. Parents must send this notice 10 business days before the removal.

F. Appeal

After a due process hearing and a decision, parents or the district may appeal, first, in some states, to a state administrative panel, then, in all states, to federal or state court.

G. Attorney Fees.

IDEA's fee-shifting provision provides that a court may award attorney fees to parents who are "prevailing parties". 34 C.F.R.§ 300.517 (a)(1)(i). The fees must be reasonable. The IDEA states that the attorney's fee must be "based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." In addition, courts cannot use a bonus or multiplier when calculating a reasonable fee award under the IDEA. 34 C.F.R.§ 300.517 (c)(1).

A court may order a parent's attorney to pay attorney's fees to a state or local educational agency that prevails in an IDEA action only if it determines that the action was frivolous, unreasonable, or without foundation. The court may also award fees against the attorney if the parent continued to litigate after the action became frivolous, unreasonable, or without foundation. 34 C.F.R.§ 300.517 (a)(1)(ii).

Parents can qualify as prevailing parties if they obtain relief through a settlement, even if the settlement does not include attorney fees, so long as the settlement has some form of judicial imprimatur or sanction, such as an IHO "so ordering" the settlement. In *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (U.S. 2001), the U.S. Supreme Court held that prevailing party status requires a judicially sanctioned change in the parties' legal relationship, such as a judgment on the merits or a court-ordered consent decree. *See Doe v. Boston Pub. Sch.*, 40 IDELR 176 (1st Cir. 2004); *A.R. v. New York City Dep't of Educ.*, 43 IDELR 108 (2d Cir. 2005), *motion denied*, 110 LRP 46500 , 546 U.S. 806 (2005); See *V.G. v. Auburn Enlarged Cent. Sch. Dist.*, 53 IDELR 140 (2d Cir. 2009, *unpublished*) (ruling that a hearing officer's addition of the words "so ordered" to a consent decree made the parent a prevailing party).

Most Courts allow parties to recover attorney's fees, based on their degree of success. Thus, even if parents do not prevail on all of their claims, they can still recover. However, their fee recovery is reduced to account for their incomplete success. *See Mr. and Mrs. B. v. East Granby Bd. of Educ.*,46 IDELR 212 (2d Cir. 2006, *unpublished*);

A Court may reject a request for an award of attorney's fees if a parent is not justified in rejecting a proposed settlement offer. Pursuant to 34 C.F.R.§ 300.517 (c)(2)(i).A court will not award attorney's fees accrued *following* a properly proposed settlement to a parent when:

1. The offer is made at any time more than 10 days before the proceeding begins;

2. The offer is not accepted within 10 days; and

3. The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Practice Tip: Depending on the state and jurisdiction, many school districts will settle IDEA attorney fee claims with attorney fees, after a party prevails in an impartial hearing. In large urban areas, such as New York City, due to the amount of litigation, the Department of Education has set up settlement units to handle such agreements. Some districts or localities choose not to settle claims and parents must seek relief in federal court.

VI. Section 504

A. Section 504 of the Rehabilitation Act of 1973 29 U.S.C. Section 794(a), 34 C.F.R. Part 104, represents the first civil rights law for individuals with disabilities and provides that :

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

The statute provides coverage for a larger population, but does not provide the affirmative remedies and services of the IDEA. Note that Section 504 also protects school age children and can serve children with disabilities with an accommodation plan if they do not qualify for special education services. For example, a child with diabetes may simply require accommodations of needing to leave class early to test blood sugar, rather than full special education services.

B. To prove a violation of the Rehabilitation Act, a plaintiff must show that:

(1) he is an individual with a disability; (2) he is otherwise qualified to participate in a particular program; (3) he was denied that participation based upon his disability; and (4) the program receives federal funds.

C. After a child graduates with a regular education diploma or turns 21, Section 504 and the ADA still protect him from discrimination, but do not require a FAPE or services to the extent the IDEA does. This is why special education advocacy up to age 21 is so important.

VII. The Americans with Disabilities Act

Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, prohibits discrimination based on disability. The ADA, enacted in 1990, declares that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S. § 12132. The Title II regulations under the ADA published one year later required all district facilities designed, constructed, or altered on or after Jan. 26, 1992 to conform to the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG). *OCR Senior Staff Memorandum*, 19 IDELR 694 (OCR 1992). Current building standards have further evolved.

The ADA has applicability in the workplace for adults, but is a statute requiring general access and is not generally used in special education advocacy against school districts, as the IDEA is a much more powerful statute and generally subsumes ADA remedies.

The ADA requires program accessibility. If a facility was constructed or altered before June 3, 1977, it is an existing facility under Section 504. A district does not need to make sure that each part of the facility is accessible to and usable by individuals with disabilities. Rather, the district must operate programs or activities in the facility so that they are readily accessible to individuals with disabilities when viewed in their entirety. 34 C.F.R. § 104.22 (a). Districts may comply with this "program accessibility" standard by redesigning equipment, reassigning classes or services to accessible buildings, assigning an aide to an individual with a disability, altering existing facilities, constructing new facilities that conform to federal accessibility standards, or using "any other methods" that will make programs and activities accessible to individuals with disabilities. 34 C.F.R. § 104.22 (b).

Congress has passed legislation addressing judicial interpretation of the ADA. President George W. Bush signed the ADA Amendments Act into law on Sept. 25, 2008, and it took effect on Jan. 1, 2009. Through these amendments, Congress rejected a number of U.S. Supreme Court decisions that Congress viewed as improperly narrowing ADA coverage. [8] Congress was concerned that these decisions excluded individuals who were meant to fall within the protections of the Act. Among other changes, the amendments expanded the ADA's non-exhaustive list of major life activities, and bars districts from considering the ameliorative effects of most mitigating measures in determining whether a disability is substantially limiting. The Amendment also provides that an impairment that is episodic or in remission is a disability if, when active, it is substantially limiting. Those changes mean that more students may qualify as students with disabilities, and that students who may not have had a qualifying disability prior to Jan. 1, 2009, may now qualify.

The Office for Civil Rights (OCR) imposes the same procedural requirements on districts with respect to FAPE under the ADA as govern educational decisions under Section 504. *See Madera (CA) Unified Sch. Dist.*, 22 IDELR 510 (OCR 1995). OCR has interpreted the ADA as incorporating all Section 504 protections that may afford students with disabilities more extensive rights. *See Newburyport (MA) Pub. Schs.*, 21 IDELR 813 (OCR 1994). Title II of the ADA essentially extended the anti-discrimination prohibitions embodied under Section 504 to all state and local governmental entities, including public school systems. As a result, OCR applies the standards established under Section 504 to meet the requirements of the ADA except where the ADA has specifically adopted a different standard from Section 504. In addition, Title II of the ADA allows OCR to utilize its administrative case processing procedures in making determinations of whether appropriate educational services have been provided by a public elementary or secondary educational entity.

8 *See Sutton v. United Air Lines, Inc*., 527 U.S. 471 (U.S. 1999), and its companion cases, *Murphy v. United Parcel Service, Inc*., 527 U.S. 516 (U.S. 1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (U.S. 1999).

Litigation Under Section 504 and the ADA

Due process rights exist under Section 504, but the remedies are not as strong. To prevail in litigation under Section 504 or the ADA, a plaintiff must prove more than an IDEA violation and must show bad faith, intentional discrimination or gross misjudgment. *See Pape v. Board of Education of Wappingers Central School District,* 07 Civ. 8828 (ER) (S.D.N.Y. 7/30/13); *C.L. v. Scarsdale Union Free Sch. Dist.,* 10 Civ. 4315 (CS), 2012 WL 983371 (S.D.N.Y. Mar. 22, 2012) (in dismissing a Section 504 claim on summary judgment, the court noted that "[t]he fact that [the District] made an inappropriate decision regarding an IEP for [the student] does not itself mean that [the District] acted in bad faith or with gross misjudgment," *citing S.W by J.W. v. Warren,* 528 F. Supp. 2d 282, 289 (S.D.N.Y. 2007) ("[S]omething more than a mere violation of the IDEA is necessary in order to show a violation of Section 504.")).

In *Pape*, a student was denied postsecondary transition services after the New York ED's vocational education office determined that he exceeded its income requirements. Finding no evidence that the district was deliberately indifferent to the student's needs, the District Court granted the district's motion for judgment and determined that the student could not prove a Section 504 or Title II violation by his former school district. The court first rejected the student's claim that the district failed to comply with an October 2004 due process decision that required it to provide transition services. Noting that the IHO only ordered the district to "thoughtfully consider" the student's need for postsecondary transition services, the court determined the school district complied with the order. "Six months after the 2004 IHO Order, the [school] district convened [an IEP meeting], arranged for transitional services through [the vocational education office], and recommended psychiatric and vocational evaluations," the court said. The court acknowledged that the vocational education office found the student ineligible for postsecondary transition services based on his parents' income, but pointed out that the student never informed the district about the lack of services. Absent evidence of intentional discrimination, the student could not prevail on his Section 504 and Title II discrimination claims. The court also granted judgment for the district on the student's Section 504 and Title II retaliation claims, noting that the student did not show that the district's six-month delay in convening the required IEP meeting was retaliatory.

Practice Tip: Section 504 and the ADA do allow students with documented disabilities to qualify for accommodations on standardized assessments, such as the ACT or SAT, according to the discretion of the ACT and College Board, respectively. Also, for college students with disabilities, under Section 504, colleges do offer accommodations to all students with learning disabilities who request them if supported by adequate documentation. Standard modifications can include the following:

1. Extended time (time and a half or double time) for exams.

2. Notetaking services.

3. Recorded audio versions of textbooks.

4. Permission to retake exams.

See Zukle v. Regents of the Univ. of Calif.,14 NDLR 188 (9th Cir. 1999).

VIII. Civil Rights Laws: Bullying of Student with a Disability

More and more cases may involve claims for bullying and harassment of students with disabilities with higher damage awards. Notably, federal courts in New York have held that bullying can result in a denial of a student's civil rights and in a denial of FAPE.

A. Second Circuit Awards Bullied African-American Student 1 Million Dollars

In a recent decision, *Zeno v. Pines Plains Central School District,* 702 F.3d 655 (2012), the United States Court of Appeals for the Second affirmed a $1 million dollar jury award to a student who faced bullying and harassment based on race for over three and a half years, in violation of Title VI of the Civil Rights Act of 1964 ("Title VI") Reflecting a culture that has recognized the grave harm of student bullying, the Second Circuit panel of three judges condemned school district inaction and found sufficient evidence in the record to support the jury's finding that the District's responses to student harassment "amount[ed] to deliberate indifference to discrimination

In this case, an African-American young man who classified as a student with disability, moved to the Pines Plains School District in January of 2005 and began as a freshman. Harassment and bullying began almost immediately and never relented. Students continued to call him racial epithets in the hallways "all the time," and he reported these comments to the principal. He encountered continued racial harassment on the bus to his off-campus program. The student's parent repeatedly informed school officials of the continuing and escalating harassment, each year. In the student's freshman year, the parent wrote a letter to the Superintendent and school board notifying them of the harassment. The District never offered a meeting. At the student's CSE meeting in June 2006, the parent said the student experienced school as a "battleground" and that the constant threats, epithets, and racial slurs created an atmosphere that sent a hate message. The parent initiated 30-50 communications on the bullying and harassment to the school district.

District inaction. In response to these actions, the school district suspended certain students for approximately five days each, in response to various incidents and took other action. The District contended that, as a matter of law, it was not deliberately indifferent to student harassment. Specifically, it argued that (1) it reasonably responded to each reported incident, (2) it was under no obligation to implement the reforms requested by the student's lawyer, and (3) it never knew that its responses were inadequate or ineffective.

Court analysis. The court noted that, in some circumstances, prompt disciplinary action against a student's identifiable harassers may show that a school district was not deliberately indifferent—if it is effective. However, the Second Circuit identified five circumstances which should have informed the District's continued response to student harassment of the student was ineffective: The District knew that disciplining the student's harassers, through suspensions or otherwise, did not deter others from engaging the student in serious and offensive racial conduct. The harassment directed at the student grew increasingly severe. The disciplinary action had little effect, if any, on the taunting and other hallway harassment. The District knew

that the harassment predominantly targeted his race and color. As early as November 2005, the Dutchess County HRC and N.A.A.C.P. offered the District both a free shadow, to accompany the student during the school day, and a free racial sensitivity training series, which the District declined.

The Second Circuit upheld the jury finding that the school district was deliberately indifferent to actionable harassment. First, the panel upheld the finding that, based on the record below, the harassment the student suffered was "severe, pervasive, and objectively offensive." The court further upheld the jury findings that the District's delay in taking additional action here was unreasonable and that the District's additional remedial actions were little more than half-hearted measures. The Panel noted that "responses that are not reasonably calculated to end harassment are inadequate." Finally, the panel upheld the award of $1 million dollars. The court rejected the school district's argument that the damages were "garden variety," in line with employment discrimination cases. The panel noted that the student was a teenager being subjected—at a vulnerable point in his life—to three-and-a-half years of racist, demeaning, threatening, and violent conduct. Furthermore, the conduct occurred at his school, in the presence of friends, classmates, other students, and teachers. The panel upheld the jury finding that the harassment would have a profound and long-term impact on the student's life and his ability to earn a living. For school district staff, the ruling sends a clear message that staff must respond to student bullying in an effective way that actually targets and makes at least a reasonably calculated effort to stop the bullying and harassment.

IX. **Advising Parents and Grandparents**

A. At the client meeting, it is essential for you to be able to spot issues and know where to send the parents for more information. Thus, if you learn that one of your clients has a child with a disability under age 21 who appears to be struggling with school, advise clients of the basic right of a student to a FAPE and transition services. Attorneys should remind parents that they may request in writing, under FERPA, access to all school records and documents. Also remind clients to ensure that the school has an appropriate transition plan and services.

B. Attorneys must perform due diligence. Attorneys who take the time to understand these issues will be providing a value-added service to their clients, which will enhance their relationships with those clients and lead to better representation and service in the future.