

Special Education

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Introduction

20 USC § 1400 et. seq.
64 Fed. Reg. 12406 et. seq.,
March 12, 1999
P.L. 108-446
71 Fed. Reg. 46540 et seq.,
August 14, 2006

Congress enacted P.L. 94-142, then known as the Education for All Handicapped Children Act (EHA), in 1975 in response to the widespread failure of public school systems to provide appropriate, if any, education to children with disabilities. The EHA was amended and renamed the Individuals with Disabilities Education Act (IDEA) in 1990. IDEA was reauthorized and amended in 1997, and the regulations implementing these amendments went into effect in 1999. On November 19, 2004, Congress passed P.L. 108-446, once again reauthorizing the IDEA, and making a number of changes. The President signed the bill into law on December 3, 2004. Most of the changes went into effect on July 1, 2005. On August 14, 2006, the U.S. Dept. of Education published new federal regulations covering the IDEA. These regulations go into effect on October 13, 2006.

Ch. 115, Wis. Stats. and
PI 11, Wis. Admin. Code

Essentially, IDEA provides funding to states, which in turn flows to local school districts/local education agencies (LEA), for special education programs. Every state accepts these funds. In return, all states and local school districts must comply with the requirements of IDEA.

Wis. Act. 258 (2006)

Wisconsin also has special education laws which, essentially conform to federal law, with some additional rights granted to children. Wisconsin special education law was revised to conform to IDEA 2004. Wisconsin's new law went into effect on July 1, 2006. This chapter will concentrate on federal law, with reference to Wisconsin law, when it differs or expands rights.

Basic entitlement
20 USC § 1412(1)

The basic entitlement on which IDEA is based is that children with disabilities, who qualify for services under the law, must be provided with a "free appropriate public education" (**FAPE**). (*Further discussion of the meaning of FAPE can be found on pages* .) Over 30 years of federal special education law has clearly established that in order to determine how FAPE should be provided to any given child, LEAs, in tandem with parents, must engage in a variety of procedures in order to develop a plan for delivering FAPE. Those procedures are the subject of the following section.

Procedural Steps to Provide a Free Appropriate Public Education

Eligibility

"Child with a disability"
definition
20 USC § 1402(3)
34 CFR § 300.8 (2006)

In order to qualify for special education services under IDEA, the student must be a "child with a disability" as defined by IDEA. The term "child with a disability" means a child:

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

Sec. 115.76(3), Wis. Stats.

- who by reason thereof, needs special education and related services.

It is important to note that case law has established that IDEA does not permit school districts to refuse to provide educational services to a child on the basis that the child is too severely disabled to benefit from them. (REINSERT FN. 1) Under federal law and state statutes, children ages 3 through 21 are eligible for services under IDEA.

Child Find
20 USC § 1412(a)(3);
34 CFR § 300.111(2006)

Identification and Referral

IDEA requires states and local school districts to take affirmative steps to identify and evaluate all children in the state who have disabilities and are in need of special education and related services. This concept is known as “**child find.**”

Sec. 115.77(1m), Wis. Stats

Wisconsin law requires school districts to actively search for any children in their districts who might have special education needs. Wisconsin requires school districts to conduct child find activities from birth through age 21.

Through appropriate testing or other measures, such as gathering medical, psychological and family information, Wisconsin statutes require school districts to look for children with special education needs who are within their districts by screening all of the following:

1. Children below school entry age.
2. Children entering school for the first time.
3. Children currently enrolled in public and private schools.
4. All transfer pupils.
5. School-age children who are eligible to attend school but who are not attending school.

Secs. 115.777(1) and
115.777(2), Wis. Stats.

Once a school district determines that “reasonable cause” exists to believe that a child has special education needs, it must make a referral for a special education evaluation. The local school district must also accept and process all referrals submitted to it regarding children who are residents of the school district. All referrals, including those coming from a parent, must be in writing and include the reason why the person believes that a child has special education needs.

Sec. 115.78(3), Wis. Stats.;
20 U.S.C. § 1414(a)(1)(C)

Whenever a school district receives a referral, a notice, which includes the date which the district received the referral, must be sent to the child's parent. **The newly reauthorized IDEA, requires that the evaluation process be completed within 60 days. According to state law, the 60 day period begins after the school district receives a signed consent from the parent to begin the evaluation. The school district must send the parents any necessary consents within 15 days of receiving the referral for evaluation. After the evaluation process is completed, if the child qualifies for special education supports and services, a special education placement offer made within 30 days of the school district's completion of the evaluation.**

When making a referral for a special education evaluation to a school district, parents should date their letter, and keep a copy for their records, noting when 90 days from the referral letter expires.

Evaluations

20 USC § 1414(a)(1);
34 CFR § 300.300(2006)
Sec. 115.782(1), Wis. Stats.

Before a school district embarks upon an evaluation of a child, it must obtain parental consent for the evaluation. If the consent is refused, the school district may utilize mediation or due process hearing procedures, (*discussed on pages*), to either persuade or obtain an order that consent be given. However, under the newly reauthorized IDEA, a school district cannot be penalized for failing to provide FAPE to a child, regarding whom the parent has failed to give consent to evaluate.

While the evaluation process necessarily varies depending on the disability of the child, IDEA does set forth a number of important guidelines and requirements regarding the evaluation process and who should conduct it. IDEA requires that school districts shall:

20 USC § 1414(b)(2)(A)-(C)
34 CFR § 300.304(b)(2006)

- use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent;
- not use any single procedure as the sole criterion for determining whether a child has a disability or determining an appropriate educational program for the child; and
- use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors.

Free from racial or cultural bias
20 USC § 1414(b)(3)(A)-(B)
34 CFR § 300.304(c)(2006);
Sec. 115.782(2)(a)3.c., Wis. Stats.

IDEA also requires that any tests or other evaluations used to assess the child be unbiased racially or culturally, and that they be administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so. The tests must be appropriate for the child in question and be administered by a qualified professional. Needless to say, the child must be assessed in all areas of suspected disability.

Education team
20 USC § 1414(c)(1)
34 CFR § 300.321(a)(2006);
Secs. 115.78(1m) and (2)(a),
Wis. Stats

IDEA requires that the evaluation team must consist of at least those individuals whom IDEA requires to be on the IEP team along with other qualified professionals. Accordingly, members of the evaluation team, should consist of at least the following individuals:

- the parents of the child with a disability;
- at least one regular education teacher of the child (if s/he is, or may be, participating in the regular education environment);
- at least one special education teacher, or if appropriate, at least one special education provider (e.g., a physical therapist) of such child;
- a representative of the local school district (or LEA) who is qualified to provide, or supervise the provision of special education, is knowledgeable about the general curriculum; and is knowledgeable about the availability of resources of the LEA;
- someone who can interpret the instructional implications of the evaluation results;
- anyone else with knowledge or special expertise regarding the child, at the discretion of the parent or the LEA; and
- whenever appropriate, the child with a disability.

20 USC § 1414(a)(4);
Sec. 115.782(3), Wis. Stats.

When the evaluation team has completed its work, it must make a written determination as to whether the child has a disability and needs special education services. A copy of that report and the documentation that supports the report must be provided to the parents.

Right to an independent evaluation

20 USC § 1415(b)(1)
34 CFR § 300.502(2006)

34 CFR § 300.502(b)(2006)

If the parents believe that the evaluation was not thorough, or that it was conducted improperly, they have a right to request an independent educational evaluation (IEE). It is best if the parents have a particular evaluator in mind prior to requesting an IEE. The district must take into account the findings of an independent evaluator. The school district may be required to pay for the independent evaluator if its own evaluation is found to be inadequate. If the school district refuses to pay for the independent evaluator, the parents may need to go to a due process hearing (explained on pages), to prove that the school district's evaluation was inadequate.

Periodic re-evaluation
20 USC § 1414(c)(1)-(4)
34 CFR § 300.303(b) (2006);
Sec. 115.782(4)(a)2., Wis. Stats.

Children who are determined to be eligible for special education supports and services, must be re-evaluated at least once every 3 years.

The re-evaluation is conducted in essentially the same way as the initial evaluation. Although this may also be true for an initial evaluation, it is especially important during reevaluations, that the evaluation team review

existing data on the child prior to determining, what, if any, other testing must be conducted. Also parents can request a re-evaluation at any point in time. However, school districts may refuse to re-evaluate a child if an evaluation was conducted less than one year ago.

Since the parents are part of the IEP team, they should ask school officials on the team what existing data has been reviewed prior to testing their child further.

Examples include grades, past evaluations, reports from specialists, etc.

20 USC § 1414(d)(1)(b)
34 CFR § 300.321(2006);
Sec. 115.782(4)(c), Wis. Stats.

Individualized Education Programs

As outlined above in the Evaluations section, the Individualized Education Program (**IEP**) team is essentially the same team of people who conduct the evaluation. Thus, the evaluation team can discuss educational programming at the same time it discusses evaluation results. Unlike past practice, these two processes have become merged.

The IEP is essentially the plan for meeting the specific individualized educational needs of the child. Failure to develop an IEP and follow the specific procedures for doing so, may mean that the school district has failed to provide a free appropriate public education to the child. (INSERT FN. 2) IDEA sets forth very specifically those elements that are required to be included within a child's IEP. They are as follows:

Required elements of an IEP

20 U.S.C. §§ 614(d)(1)(A)(ii) and
(d)(1)(A)(i)(I)(cc)

20 USC § 1402 (26)
34 CFR § 300.320 (2006);
Sec. 115.76(14), Wis. Stats

- a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum; or for preschool children, how the disability affects the child's participation in appropriate activities;
- a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability. **Please note that under the newly reauthorized IDEA, as of July 1, 2005, this requirement is only required for those students whose IEP teams determine that they must take alternative assessments in place of statewide or district wide assessments;**
- a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child. **Please note that under the newly reauthorized IDEA, as of July 1, 2005, related services include school nurse services designed to enable a child with a disability to receive FAPE;**
- a statement of the program modifications or supports for school personnel that will be provided for the child in order to advance appropriately toward attaining the annual goals, to be involved and

progress in the general curriculum and to participate in extracurricular and other nonacademic activities, and to be educated and participate with children both with and without disability;

“Related services” Note: The IDEA defines **“related services”** as: transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, school nursing services and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education.

- an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular education class and/or extracurricular and other nonacademic activities, such as receiving special education in a classroom which only includes other children with disabilities;
- a statement of any individual modifications in the administration of state or district wide assessments of student achievement, and if it is determined that the child will not participate in such assessments, a statement regarding why the child will not do so, and how s/he will be assessed. **The newly reauthorized IDEA requires the IEP to detail any accommodations that the IEP team determines are necessary for measuring the child’s achievement and functional performance on state and districtwide assessments. If the IEP team determines that the child will take an alternative assessment, the IEP must explain why an alternative assessment is necessary and why the particular alternative assessment to be used is appropriate;**
- the projected date for the beginning of the services set forth in the IEP, and the anticipated frequency, location, and duration of those services;

20 U.S.C. §§
1414(d)(1)(A)(i)(VI)(aa) and (bb)

Extended school year
34 CFR § 300.106 (2006)

Note: Although the Reauthorized IDEA statute does not address the issue of an **Extended School Year (ESY)** specifically, prior case law establishes that a student is entitled to ESY services whenever s/he would experience severe or substantial regression (i.e., significant loss of the benefits of the regular school year) without a summer education program.³ (INSERT FN. 3) The regulations implementing the 2004 Reauthorization Amendments discuss the concept of extended school year.

Transition services
20 U.S.C. § 614(d)(1)(A)(i)(VIII))
Sec. 115.787(2)(g)

- Beginning at age 14 (or younger if determined appropriate by the IEP team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages. Beginning at least by age 17, a statement that the child who has special education needs be informed of the fact that his/her rights under IDEA will transfer to the student upon the age of majority,

unless a guardianship is instituted; and

Measuring progress
20 USC §1414(d)(1)(A)(III);
Sec. 115.787(2), Wis. Stats.

- a statement of how the child's progress toward the annual goals in the IEP will be measured, and how the parents will be regularly informed of their child's progress toward the annual goals, and the extent to which the progress is sufficient to enable the child to achieve the goals by the end of the year. This reporting must be done at least as often as parents of nondisabled children are informed of their children's progress.

Periodic review of the IEP
20 USC § 1414(d)(4)(A)
34 CFR § 300.324(6)(b)(2006);
Sec. 115.787(4), Wis. Stats.

The child's IEP must be reviewed and revised at least annually. It must be done on a more frequent basis in order to address: a) any lack of expected progress towards the annual goals set forth in the IEP; b) the results of any re-evaluations, new information about the child; c) the child's anticipated needs; or d) any other matters which make it necessary to conduct such an IEP review. A parent can initiate a request for a new IEP for any of these reasons at any time.

When a student moves from one Wisconsin district to a new Wisconsin district, the IEP from the old district must be implemented immediately until a new evaluation and planning process is completed.

Parent role in placement decision
20 USC § 1414(e)
34 CFR § § 300.327 (2006)
Secs. 115.78(1m) and
(2), Wis. Stats.

Placement

The IDEA requires that the parents of the child are part of the group that makes the decision on the educational placement of the child. While it is not specifically stated in the IDEA statute, both state statutes and federal regulations clarify that the IEP team, which includes the parents, will make the placement decision.

Least restrictive environment
20 USC § 1412(a)(5)(A)

IDEA is quite clear that children with disabilities be placed in the least restrictive environment (**LRE**) which meets the child's needs. The statutory language on this subject is instructive. **“To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”**

Neighborhood school

It is important to note that while there is a general assumption that a child will be placed in the least restrictive environment, IDEA does not require schools to go to great expense in order to educate a child in his or her neighborhood school.⁴ (ADD ORIGINAL FOOTNOTE 4 BACK IN) (DELETE ORIGINAL FN. 5 AND RENUMBER SUBSEQUENT FN) Ultimately, the determination of LRE must be done on an individualized, fact specific basis, examining the nature and severity of the child's handicapping condition, his/her needs and abilities, and the school district's response to those needs.⁶ (ADD ORIGINAL FN 6 BACK IN)

If your child is not placed in a regular education classroom in his/her neighborhood school, be sure the IEP team specifically states the reasons why placement in a more restrictive environment is necessary to provide your child with a free appropriate public education.

Parent consent to placement

20 USC § 1414(a)(1)(D);
34 CFR § 300.300(b)(2006);
Sec. 115.792(3)(b)3, Wis. Stats.

It is important to note that the consent the school district must obtain from the parents in order to proceed with an evaluation shall not be construed as consent to receive the proposed special education supports and services. Therefore, once the school district is prepared to make a placement offer to a parent, the district must obtain written consent for that placement. The school district will provide the parents with a Notice of Placement form that is usually attached to the proposed IEP, which the parent(s) must sign in order for the school district to proceed with providing the child special education supports and services.

Section 504 of the Rehabilitation Act of 1973

Definition

29 USC § 794(a)

Section 504 is a civil rights statute designed to prohibit discrimination on the basis of disability. Section 504 states: **“No otherwise qualified individual with a disability in the United States... shall, solely by reason of his or her disability be excluded from participation in, be denied the benefit of, or be subject to discrimination under any program or activity receiving federal financial assistance.”**

Reasonable accommodations

Generally, Section 504 does not set forth specific requirements for special education supports and services. Rather, it requires school districts to provide reasonable accommodations in order for children with disabilities to receive a free appropriate public education. Examples of reasonable accommodations include providing medications, such as insulin for a child with diabetes, or physical modifications of a school building to allow a child with mobility impairments to have access to the entire school building.

Therefore, this law pertains to all public schools and school districts because they receive federal financial assistance. This law also applies to other federally funded entities such as colleges and universities, federally funded public programs, etc.

Who is covered by Section 504?

29 USC § 706(8)(B);
34 CFR § 104.3(j)(1)

Section 504 protects a much larger group of individuals than are covered under IDEA because it has a broader definition of individuals protected under its mandate. Therefore, it covers a number of children who would not be covered under IDEA. For the purposes of Section 504, an individual with a disability meets the eligibility guidelines if that person has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

“Major life activity” means activities such as caring for oneself, performing

34 CFR § 104.3(j)(2)(ii) manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

More children protected by Section 504 than by IDEA

Since the Section 504 definition of an individual with a disability is broader than the IDEA definition of children with disabilities, many children qualify for 504 protections who do not need special education services. For example, a child with a physical impairment that does not require related services may still have need for accessibility accommodations, or a child who is HIV positive may be entitled to protections against discrimination based on that condition but is not IDEA eligible.

Prohibitions

“Qualified disabled person”
34 CFR § 104.3(k)(2)

Section 504 prohibits preschool, elementary, and secondary school programs that receive federal funds from engaging in discriminatory practices against “qualified disabled” people. In educational settings, which include public preschool, elementary, secondary, and adult educational services, the term “qualified disabled person” means, a disabled person who is of an age during which it is mandatory under state law to provide such services to disabled persons, or a state is required to provide a free appropriate public education under the IDEA.

Prohibited practices
34 CFR § 104.4(b)(1)(i)-(vii) and
34 CFR § 104.21

As applied to “qualified disabled” people, practices prohibited by Section 504 in educational settings are:

- denying the opportunity to participate in any school programming;
- providing unequal access to participate in any school programming;
- providing school programming that is not as effective as that provided to nondisabled students;
- providing different or a separate programming than that provided to nondisabled students unless such programming is necessary to provide services which are as effective as those provided to others;
- denying the benefits of any school programming, excluding him/her from participation in any school programming, or otherwise discriminating against him/her because the school facilities are inaccessible to or unusable by the student with disabilities; and
- otherwise limiting the enjoyment of any right, privilege, advantage or opportunity offered by the school.

Limits of Section 504
34 CFR § 104.22(a)

It is important to understand the limits of Section 504. Section 504 requires that each service, program or activity that schools operate, when “**viewed in its entirety**”, be readily accessible to and usable by individuals with disabilities. This does not mean that a school district has to make each of its existing facilities accessible to and usable by individuals with disabilities. What school

districts must ensure is that all programs offered in inaccessible classroom buildings are also offered in other accessible classrooms in the district and that the accessible schools are comparable to those available to students without disabilities. There are several permissible ways to provide appropriate programs including reassigning services to an accessible location, providing assistive technology or equipment, assigning an aide for assistance, or eliminating barriers through structural changes.

504 Plans

34 CFR § § 104.33(a) and
104.34(a)

For some students who have disabilities but who do not qualify for special education services under IDEA a 504 plan may be appropriate. Like IDEA, school systems are required by Section 504 regulations to provide a free and appropriate education in the least restrictive environment. A 504 plan is similar to an Individualized Education Plan (**IEP**) in that it is to be done on an individualized basis tailored to the needs of the student. However, it need not contain goals and objectives but is more of an accommodation plan. It addresses any necessary accommodations or modifications needed for a student to participate in school services, activities, and programs in a non-discriminatory manner. All students protected by IDEA also qualify for 504 protections but the students protected by Section 504 are a broader group and includes individuals who may not qualify for IDEA services.

The Americans with Disabilities Act and Schools

**Protections for parents with
disabilities**

Public schools are covered under Title II of the Americans with Disabilities Act which prohibits discrimination against individuals with disabilities by government entities. Title II does not add many new obligations to schools that they did not already have towards students under Section 504. However, there are new obligations for school districts as employers, and in regards to others, such as parents with disabilities. The passage of the Americans with Disabilities Act (ADA) has brought the issues of non-discrimination and accessibility once more to the forefront and many schools are reviewing their obligations under these laws. The ADA has several requirements that schools need to look at. Under 504, only programs that received federal funds needed to meet the non-discrimination requirements. *Under the ADA, all programs regardless of their reliance on federal funds must comply.*

Schools must do the following to comply with the ADA:

ADA compliance

28 CFR § 35.107(a)

1. Designate an employee to coordinate ADA compliance.

Note: You can ask your school district's administrator (or superintendent) who the ADA compliance coordinator for your school district is.

2. Provide notice of ADA requirements.
3. Establish a grievance procedure for all problems or conflicts

28 CFR § 35.106 related to ADA compliance.

28 CFR § 35.107(b) 4. Conduct a self-evaluation of its current policies and practices, including communications, and employment to make sure they are in line with the requirements of the ADA.

28 CFR § 35.105 5. Develop a Transition Plan when structural changes to existing facilities are necessary in order to make a program, service, or activity accessible to people with disabilities.

28 CFR § 35.150(d) Just as under Section 504, the requirements of FAPE are incorporated in the statute's general prohibitions against discrimination. This includes related aids and services, such as interpreters, readers, equipment and equipment modifications, and therapies.

A school district must ensure that no qualified individual with a disability is, on the basis of disability, excluded from participation in or denied any benefit of its services, programs, or activities, or subjected to any other discrimination (this includes parents with disabilities who are excluded from participation in any phase of their child's education).

Complaints against public schools under the ADA are filed with the Department of Education, Office for Civil Rights. (See formal complaint procedures beginning on page 120.)

Filing complaints

More information on ADA Compliance and a self-evaluation checklist is available in the U.S. Department of Education, Office for Civil Rights publication entitled, "Compliance with the Americans with Disabilities Act: A Self-Evaluation Guide for Public Elementary and Secondary Schools." Call the U.S. Government Printing Office 202-512-1800.

More information

The Right to a Free Appropriate Public Education

There has also been special education litigation regarding the definition of the term "free" within the concept of FAPE. It is beyond question that parents may not be required to pay anything, including the child's social security or SSI benefits to fund special education services.⁷ (INSERT ORIGINAL FN. 7 BACK IN) This also means that parents may not be required to use private health insurance to pay for or defray the cost of special education and/or related services if use of the insurance poses a risk of financial loss to a parent or child.⁸ (INSERT ORIGINAL FN. 8 BACK IN)

Use of private health insurance
20 USC § 1402(9)(A)

Parent volunteered assistance

Needless to say, it is also a denial of the "free" element of FAPE to require a parent to volunteer his/her services whether it is in the classroom, or by transporting the child.⁹ (INSERT ORIGINAL FN. 9 BACK IN) In recent years, there has also been some concern related to requiring parents to use their private or public health insurance (e.g., Medicaid) to pay for certain special education supports and services. While it is permissible for school districts to ask parents to consent to billing private or public health insurance,

parents are not required to do so, and should examine whether such billing would affect their child's ability to receive non-school based services from their health insurance policy or program.

Most recently, the United States Supreme Court determined that it is a denial of FAPE to refuse to provide nursing services to a medically fragile student in order that the student be included in public school.

The court also found that nursing services fit within the definition of related services found within the IDEA.¹⁰ (INSERT ORIGINAL FN. 10 BACK IN)

Other Health Impairments

Definition
PI 11.35(k) WI Admin. Code
34 CFR § 300.8(c)(9)(2006)

Among the eligibility criteria and handicapping conditions set out under PI 11.35 of the WI Administrative Code is a sort of catch-all category; other health impairments (**OHI**). Included in this category are disabilities, such as asthma, epilepsy, and diabetes, that affect a student's ability to learn or participate in their education but that do not fit neatly into the other categories. In addition, some children with attention deficit disorder (**ADD**) or attention deficit hyperactivity disorder (**ADHD**) may fit into this category. However, a diagnosis of one of these disabilities does not automatically qualify a child for exceptional education services. Rather the impairment must be sufficiently severe to adversely affect a student's educational performance in order for the student to qualify.

Special Education in Private Schools

20 U.S.C. § 612(a)(10)
34 CFR §§ 129-148 (2006);
Sec. 115.791, Wis. Stats.

When parents choose to voluntarily enroll their children with disabilities in private or parochial schools, they do not give up their right for their children to receive FAPE. If the parents decide that they do not wish to enroll the child in public school, the obligations of the public school change as follows. Local school districts must spend the same proportion of their total special education expenditures on private school children with special education needs as reflected by the percentage of children with special education needs who are parentally placed in private schools. For example, if a school district has 5% of its children with special education needs who are parentally placed in private schools, it must spend 5% of its special education budget on these children. Of course, this does not dictate a particular expenditure of any given child. This means that the public school system has to allocate some of its special education funding for students with disabilities in private schools. See DPI Bulletin 99.07 for more information. The 2004 IDEA Reauthorization adds additional requirements for public schools to conduct child find activities in private schools. Private schools may file complaints if public schools fail to do this.

When it is the school district that places a child in a private school or a residential program, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

Assistive Technology

IDEA requirements

34 CFR § 300.324(a)(2)(v)(2006);
Sec. 115.787(3)(b)5., Wis. Stats.

20 USC § 1414(e)(3)(B)(v)

As schools become increasingly involved in incorporating technology into the curriculum, so too has technology become increasingly important for students with disabilities in allowing them to participate in their education. Assistive technology can range from very low-tech assistance such as a pencil grip to high technology augmentative communication devices. IDEA requires school systems, and other public agencies responsible for educating children with disabilities, to consider the use of assistive technology to aid students in benefiting from their education. This includes providing an assistive technology evaluation when requested by a parent or otherwise when it appears advisable. Assistive Technology may be considered as special education, related services, or supplementary aids and services to ensure placement in the least restrictive environment. These services must be approved by the IEP team and listed in the IEP. The 1997 IDEA reauthorization gave increasing attention to assistive technology and requires that the need for assistive technology be considered for all special education students in their IEPs. The 2004 IDEA reauthorization continues this emphasis.

What is Assistive Technology?

29 USC § 2201 *et. seq.*

The definition of assistive technology devices and services is the definition incorporated in the Technology Related Assistance for Individuals with Disabilities Act (**Tech Act**).

Assistive Technology in the IEP

There are three places in the IEP where assistive technology may appear:

1. In the **annual goals** and **short-term objectives** (when it is part of special education or specially designed instruction).
2. In a listing of **supplementary aids and services** (when it is needed to maintain the student in the least restrictive educational setting).
3. In the list of **related services** (when it is necessary for the student to benefit from his/her special education).

Discipline

20 USC § 1415(j)-(k);
34 CFR §§ 300.530-537(2006);
Sec. 115.80(8), Wis. Stats.

“Stay-put” requirement

Disciplinary procedures under the 2004 IDEA Reauthorization Amendments have undergone significant changes. The starting point for understanding discipline of children with disabilities under IDEA is that, with certain exceptions, unless they agree otherwise, parents have a right to insist on what has become known as a “stay-put” placement, if they challenge the school district’s attempt to remove their child from the current placement through suspension, expulsion, or simply change of setting which can include repeated, short term changes of setting, including repeatedly calling a parent to pick up

his/her child from school prior to the end of the school day. "Stay-put" means the same placement and program that the child was in prior to the proposed change in placement.

Alternative educational setting

There are certain exceptions to the "stay-put" concept as follows:

20 USC § 1415(k)(1);
34 CFR §§ 300.530-300.533
(2006)

1. School personnel may order a change in the placement of child with disabilities:
 - to an appropriate interim alternative educational setting (IAES), another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and
 - to an appropriate IAES for the same amount of time that child without a disability would be subject to discipline, but for not more than 45 days, if the child carries a weapon to school or school function or the child knowingly possesses or uses illegal drugs or sells or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at a school or a school function, or causes serious bodily injury upon another person at school; and

20 USC § 1415(k)(3)-(4)
34 CFR § 300.532(b)(2006)

2. A hearing officer may order a change in the placement of a child with a disability to an appropriate IAES if the hearing officer:
 - determines that the school district has demonstrated by substantial evidence that maintaining the current placement is substantially likely to result in injury to the child or to others;
 - considers the appropriateness of the child's current placement;
 - considers whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplemental aids and services; and
 - determines that the IAES is appropriate.

Note: The school district must request an expedited hearing in such cases from the hearing officer, which must occur within 20 days of the date the hearing is requested. A hearing decision must be issued within 10 days after the hearing is done..

The hearing officer must determine that all four of these points are true.

20 USC § 1415(k)(1)(G)(2);

The IAES is to be determined by the IEP team. In addition, it must enable the

34 CFR §§ 300.530-300.531

child to continue to participate in the general curriculum, and to continue to receive those services and modifications that will enable the child to meet the goals in the IEP. The IAES must also include services and modifications designed to address the problem behavior so it does not recur.

Manifestation Determination

Due to the concern that a child with a disability should not be disciplined because s/he has a disability, the IDEA includes a concept known as a **“manifestation determination”**. If a disciplinary action as described above is contemplated, or for any other disciplinary action which would involve a change of placement for more than 10 days due to a violation of a school district rule which applies to all children in the district, the school district must conduct a manifestation determination review.

Manifestation Team

First, not later, 10 school days after the decision to discipline is made, the school district must notify the parents of that decision and of the parents’ procedural rights. IDEA then requires that relevant members of the IEP team and other qualified personnel, not later than 10 days after the decision to discipline is made, to conduct a review of the child’s disability and its connection, if any, to the behavior subject to the disciplinary action. The “Manifestation Team” shall only find that the behavior was not a manifestation of the child’s disability after it first:

- considers all relevant information regarding the behavior including the child’s evaluation by professionals and other relevant information provided by the parents, as well as observations of the child,; then
- determines that the child’s IEP was being implemented; and if the conduct in question was caused by, or had a direct and substantial relationship to the child’s disability.

20 USC § 1415(k)(1)(E)
34 CFR § 300.530(e)(2006)

20 USC § 1415(k)(1)(F)
34 CFR § 300.530(f)(2006)

If the manifestation team determines that the behavior was not a manifestation of the child’s disability, then the school district may discipline the child in the same manner as it would discipline a child without a disability. *However, even in a case that could include expulsion, the school district must continue to provide FAPE to the child.*

Reporting Crimes

20 USC § 1415(k)(6);
34 CFR § 300.535

The IDEA clarifies that the Act shall not be construed to prohibit a school district from reporting a crime committed by a child with a disability to appropriate authorities, or to prevent State law enforcement and judicial authorities from exercising their powers with regard to crimes committed by a child with a disability. Moreover, if a school district reports a crime, IDEA requires it to transmit copies of the special education and disciplinary records of the child for consideration by the appropriate authorities to which the crime was reported.

Dispute Resolution under Section 504 or the ADA

Discrimination Complaints

Complaints based on violations of Section 504 or the Americans with Disabilities Act may be filed with the Office of Civil Rights (OCR):

United States Department of Education
Office for Civil Rights
Midwestern Division
Chicago Office
111 North Canal St. Room 1053
Chicago, IL 60606-7204

Complaint forms may be obtained by calling (312) 886-8434

34 CFR § 100.7(b)

Complaints must be filed with OCR within 180 days of the alleged violation except in cases of continuing conduct. In cases of alleged continuing conduct, the 180 day time line only begins to start if and/or when the discriminatory conduct ends. OCR processes complaints relatively quickly and may do on-site investigations. Often they will attempt to work out settlement agreements between the parties.

Complaints of discrimination may also be filed with the Department of Public Instruction (**DPI**) under Wis. Stats. sec. 118.13, the Pupil Non-Discrimination Statute.

PI 9.04(2), WI Admin. Code

Complaints are made to the individual school district. Each school district is required to establish policies and procedures for receiving and investigating complaints, for making determinations as to whether there has been a violation of this statute and for ensuring compliance.

PI 9.08(a)(1), WI Admin. Code

There are no time limits set for filing a complaint although a district may establish their own procedures for filing. **The school district must issue a decision within 90 days of the date it receives the complaint, unless otherwise agreed by the parties.** Any appeal of the school district decision must be filed with DPI within 30 days of the decision.

Education Department General
Administrative Regulations
Sec. 115.762(3), Wis. Stats.

IDEA (EDGAR) Complaints

Complaints based on violation of IDEA rights or Chapter 115, Wis. Stats. or PI 11, WI Admin. Code can be filed with the Department of Public Instruction:

State Superintendent
Department of Public Instruction
P.O. Box 7841
Madison, WI 53707-7841

34 CFR §§ 300.151-153

Complaints must be in writing, name the person submitting the complaint and be signed. The complaint must contain a statement alleging a violation of the law and the facts on which that allegation is based. **The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received by DPI, unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory education for a violation that occurred not more than three years prior to the date the complaint is received by DPI.** The State Superintendent informs the school district of the complaint and must carry out an investigation and issue a decision either dismissing the complaint or have a plan developed for resolution of the complaint within 60 days after receipt of the complaint. If a violation is found, the school district must develop a plan of correction including a time frame for achieving compliance which the State Superintendent must approve.

Many parents write their own IDEA complaints without the assistance of an attorney or other advocate. If you choose to write an IDEA complaint to DPI, you should be sure to include the following information which will help DPI investigate your complaint more easily:

1. *Date and sign your complaint;*
2. *Make sure you provide your complete name, address, and daytime telephone number;*
3. *Your relationship to the child on behalf of whom you are filing the complaint;*
4. *The name of the child in question and his/her date of birth;*
5. *The child's disability;*
6. *The school district about which you are complaining and the name of the school which your child attends;*
7. *List the names and job titles of anyone who may have information relevant to your complaint;*
8. *As specific an explanation of your complaint as possible, including any paperwork which may support your complaint; and*
9. *The solution you would like to see DPI order.*

Mediation

20 USC § 1415(e)

The IDEA mandates a system of mediation to resolve special education disputes. IDEA now requires that states have a mediation system that is voluntary to the parties. States must provide the funding for the mediator, and the mediation may not be used to deny or delay a parent's rights to a due

process hearing.

Sec. 115.797, Wis. Stats.

The Wisconsin Legislature has adopted the IDEA's mediation system requirement. Under this law, either a school district or a parent may request a mediator to resolve any special education dispute, whether or not a due process hearing is pending. This can even include a school district's refusal to find that a child has special education needs.

If only one party requests the mediation, the other party will be promptly notified to determine interest in participation. Since mediation is voluntary, if both parties do not agree to mediate, it will not go forward. DPI has trained special education mediators. Mediation requests should be made directly to the Special Education Mediation Project at Marquette University, which has received a contract from DPI to implement the mediation system. (*See the DPI website which explains the current mediation plan, and contains a form for making a request for mediation.*) This information may also be obtained by calling toll free 1-888-298-3857.

The actual mediation session will take place in a location agreed upon by the parties, which will usually be somewhere in the local school district. The mediator has received specialized training in both mediation and special education law. The mediator's goal is to see whether or not the parties can come to an agreement. The mediator does not and cannot make any decisions for the parties, or force them to come to an agreement. The length of the mediation varies based on the needs of the parties. It can range from a few hours to a few days. If an agreement is reached, it is put in writing, and signed by the parties, thereby creating a contract between them.

Due Process Hearings

20 USC § 1415(f)(1);
34 CFR §§ 300.507-300.514;
Sec. 115.80, Wis. Stats.

If a parent of a child with a disability who has special education needs is unable to resolve a dispute with a school district informally, the parent may request an impartial due process hearing in order to resolve virtually any special education dispute with the school district.

www.dpi.state.wi.us/dpi/dlsealen

Due process hearings are conducted by an administrative law judge (**ALJ**) housed at the Department of Administration's Division on Hearings and Appeals. However, a request for a due process hearing should be made to DPI. That request may come in letter form, or the parent may use the form provided by DPI. (*See DPI website for a copy.*)

20 USC § 1415(f)(1);
34 CFR § 300.508(e);
Sec. 115.80(4), Wis. Stats.

The 2004 IDEA Reauthorization Amendments made significant changes in due process procedures which require parents to be very cautious before requesting a due process hearing. Now, after the due process hearing request is filed, the school district must file an answer to the complaint within 10 days. That answer can also state that the complaint is insufficient. If the ALJ rules that the complaint is insufficient, the parent can make a request to amend the complaint.

In addition, within 15 days, the school district must convene a resolution session in order to try to resolve the parent's complaint. The parent and the school district may enter into mediation at this point. They may also mutually waive this resolution session. The hearing will only go forward if the parties have not resolved the complaint within 30 days after it was filed.

Unless otherwise ordered by the ALJ, at least 5 business days prior to the due process hearing, each party shall disclose to the other party all evaluations completed by that date and recommendations based on the evaluations which the party intends to use at the hearing. Failure to disclose such evaluations can result in the ALJ refusing to consider the evidence.

20 USC § 1415(h);
34 CFR § 300.512(a)

The party the files the due process hearing request has the burden of proof, and may be required to present its case first[INSERT NEW FOOTNOTE]
Both parties have the following rights at the hearing:

- to be accompanied and advised by counsel and/or individuals with special knowledge or training with respect to children with disabilities;
- to present evidence and confront, cross-examine, and compel the attendance of witnesses through subpoena;
- to receive a written, or at the parents' option, electronic verbatim recording of the hearing, at the district's expense; and
- to receive a written, or at the option of the parents, electronic findings of fact and conclusions of law.

34 CFR § 300.512(b)-(c);
Sec. 115.80(6), Wis. Stats.

The hearing will take place in the local school district and is semi-formal in nature. The witnesses are sworn to tell the truth. However, the formal rules of evidence which are used in courtrooms do not apply in these hearings.

Although parents have a right to represent themselves and their child at a due process hearing without an attorney, school districts are almost always represented by attorneys, who can make it very difficult for parents who do not have legal representation. Most parents usually retain outside assistance. In addition, the 2004 IDEA Reauthorization Amendments now allow school districts to recoup their attorney's fees, if the parent filed the due process hearing request frivolously or in bad faith to harass the school district.

20 USC § 1415(i)(2)(A);
Sec. 115.80(7), Wis. Stats.

Although in practice this rarely happens, the ALJ is obligated to conduct the hearing and render a decision within 45 days of the end of the 30 day resolution period, unless the parents request an extension.

Either party may appeal the decision of the ALJ to state court, within 45 days

of the decision. The 2004 IDEA Reauthorization Amendments allows appeals to federal court within 90 days of the decision.

Attorneys' Fees

20 USC § 1415(i)(3)(B);
34 CFR § 300.517(2006)
Sec. 115.80(9), Wis. Stats.

If the parents of a child with a disability prevail either at a due process hearing, or ultimately on appeal, they may obtain their reasonable attorneys' fees by petitioning either state or federal court. As stated above, school districts may now obtain attorney's fees from parents, if the parent filed the due process hearing request frivolously or in bad faith to harass the school district.

Other References

www.dpi.state.wi.us/dpi/dlseal/een/par_matls.html

An Introduction to Special Education, 2000, written by the Parent Education Project and the Wisconsin Department of Public Instruction. Available on the Internet in English, Spanish, and Hmong.

www.ed.gov/offices/OSERS/OSEP/

U.S. Office of Special Education Programs

www.dpi.state.wi.us

Department of Public Instruction

www.wifacets.org

FACETS: 877-374-4677, Parent Resource Center

