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# CYBER LEGAL ADVOCACY BRIEF

A Preventive Law Series  
Cyber Center of Excellence Office of the Staff Judge Advocate  
Legal Assistance Division, Fort Gordon

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## ***SPECIAL EDUCATION LAW*** ***The Basics***

### **Q: What laws apply to special education?**

There are three main laws that apply to special education: 1) the Individuals with Disabilities Education Act (IDEA); 2) Section 504 of the Rehabilitation Act of 1973 (Section 504); and 3) the Americans with Disabilities Act (ADA).

### **INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)**

#### **Q: What is the purpose of the IDEA?**

To ensure that all children with disabilities have access to a free, appropriate public education (FAPE) that emphasizes special education and related services, designed to meet their unique needs and prepare them for further education, employment, and independent living.

#### **Q: What does the IDEA require?**

The IDEA requires that students with certain disabilities receive a free appropriate education (FAPE). Services provided must:

- 1) Be provided at public expense, under public supervision and direction, without any charges or fees;
- 2) Meet the standards of the state educational agency;
- 3) Include appropriate preschool, elementary, and secondary school education;
- 4) Be provided in conformity with the student's individualized education plan (IEP; see IEP information sheet); and
- 5) Include any related supplementary aids and services that the child needs.

The IDEA also requires that the student be educated in the least restrictive environment (see least restrictive environment information sheet). Additionally, a student may have an extended school year if his/her IEP team determines it is necessary.

#### **Q: To whom does the IDEA apply?**

The IDEA applies only to schools and only to students with an eligible disability between the ages of 3-21.

#### **Q: Who is eligible for IDEA protections?**

Any child with a disability that falls into one of the 13 categories and who, by reason of this disability, needs special education and related services. Special education is specially designed instruction and related services that are delivered to meet the unique needs of a child with a disability, including instruction in the classroom, at home, in the hospital, and instruction in physical education. This instruction must be designed to meet the needs of the child and ensure access to the general curriculum, so the child can meet education standards. Related services can include transportation, interpreting services, speech/language therapy, etc.

The 13 disability categories are: 1) autism spectrum disorder (ASD); 2) deafness; 3) deaf-blindness; 4) specific learning disability; 5) emotional disturbance; 6) hearing impairment; 7) intellectual disability; 8) multiple disabilities; 9) other health impairment (such as ADHD); 10) speech or language impairment; 11) visual impairment, including blindness; 12) orthopedic impairment; and 13) traumatic brain injury (TBI).

#### **Q: What happens if I believe a school has violated the IDEA?**

If a parent believes the child's school is violating the IDEA, there are a number of remedies available. The parent may seek an informal resolution at a regular IEP meeting or request mediation with the school. If those options fail, the parent can file a complaint with the state, file a Due Process Complaint, or sue in court.

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## **SECTION 504 OF THE REHABILITATION ACT OF 1973 (SECTION 504)**

### **Q: What does Section 504 require?**

Section 504 is a civil rights law requiring equal access to educational services for students with disabilities. Like the IDEA, Section 504 also uses the term free, appropriate education, but Section 504 has a different standard than the IDEA because the purpose of Section 504 is different than the purpose of the IDEA. The IDEA aims to ensure children with disabilities receive an appropriate education to prepare them for employment and independent living. Section 504's purpose is to prevent discrimination on the basis of disability.

### **Q: To whom does Section 504 apply?**

Section 504 applies to any private or public agency or program that receives federal funding and to a person of any age. Therefore, Section 504 is applied more broadly than the IDEA.

### **Q: Who is eligible for Section 504 protections and what are those protections?**

Section 504 eligibility is broader than IDEA eligibility. Under Section 504, any student with a disability qualifies. Unlike the IDEA, there are not specific categories into which the student must fall—instead, the student must have a physical or mental impairment that substantially limits one or more major life activity, have a record of an impairment, or merely be regarded as having an impairment. Therefore, Section 504 may provide coverage to students who do not qualify for protection under the IDEA.

If a student qualifies for Section 504 protections, then he/she will have a Section 504 plan to guarantee that a free, appropriate education is provided—meaning the student is receiving equal education, by making reasonable accommodations for his/her disability. These accommodations can be in the form of transportation, testing, classroom experience, etc. Section 504 accommodations may overlap with IDEA accommodations.

### **Q: What happens if I believe a school has violated Section 504?**

Like with the IDEA, the parent may seek an informal resolution with the school, request mediation, file for a Due Process hearing, or utilize the school's established grievance procedures. An additional option for Section 504 violations is filing a complaint with the Office for Civil Rights (OCR), which is a part of the United States Department of Education.

## **AMERICANS WITH DISABILITIES ACT (ADA)**

### **Q: How does the ADA apply to special education?**

The ADA applies to employment, state and local governmental services and transportation, to goods/services provided by public accommodations, and to telecommunication services—regardless of whether or not federal funding is received. In the context of special education, the ADA prohibits discrimination on the basis of disability. Private schools are included within the list of public accommodations, meaning that a private school—even one that does not receive federal funding—may not discriminate against qualified students with disabilities.

### **Q: What does the ADA require?**

The ADA requires schools to provide program access and an integrated setting, unless separate programs are necessary to ensure equal benefits or services. It also requires a school district to effectively communicate with students with disabilities, who may require use of auxiliary aids or services. Additionally, although the ADA does not explicitly state that a school district must provide a free, appropriate education (FAPE) like it does in Section 504, the Office of Civil Rights has interpreted the ADA to include FAPE as a requirement.

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## **SPECIAL EDUCATION LAW** *Disciplinary Action*

**Q: My child has an Individualized Education Plan (IEP) due to a disability. Can he/she be disciplined in school?**

Yes, if your child violates school rules regarding student conduct, he/she can be disciplined or expelled; however, if the misconduct is 1) related to the child's disability or 2) the school's failure to implement the IEP, then discipline is limited.

**Q: What is the school required to do when suspending or expelling a child with an IEP?**

Schools are still required to provide a free, appropriate public education (FAPE) to students with disabilities, regardless of a suspension or expulsion; however, the school is not required to provide services if the suspension/expulsion is for a period of 10 days or less. If a student with an IEP is removed for more than 10 days, a Manifestation Determination Review (MDR) must be held to determine whether the misconduct is a manifestation of the child's disability, because removal for more than 10 days is considered a change of placement.

**Q: What is a Manifestation Determination Review (MDR)?**

The MDR is a meeting to determine whether a child's misconduct is related to his/her disability, and it is required if the child is suspended/expelled for more than 10 days. The participants at an MDR include the relevant members of a student's IEP team, a school district representative, the child's parents, and those invited by the parents to attend—such as a child's outside therapist or advocate. The parents must receive reasonable prior notice before the MDR is conducted. After the MDR, the school must provide notification to the parents of the disciplinary action taken.

**Q: What happens if the MDR decides my child's misconduct was related to his/her disability?**

If the behavior is related to the student's disability, or if it is a result of the school's failure to implement the IEP, then the student is returned to his/her current placement (meaning the suspension/expulsion ends), and the issue is resolved through the normal IEP process. If appropriate, the IEP team may decide to have a Functional Behavioral Assessment (FBA) done to work on the student's behavior with a resulting Behavioral Intervention Plan (BIP), or they may agree to an alternate placement for the child's education.

**Q: What if the MDR decides my child's misconduct was not related to his/her disability?**

If the misconduct was not a manifestation of the student's disability, then the student is subject to the same discipline for misconduct as a child without a disability; however, the school must still provide services to allow the student to progress on his/her IEP goals, even if it is in an alternate location (such as a specialized school or at home).

**Q: I disagree with the results of my child's MDR. What can I do?**

If you disagree with the findings of the MDR, you may request a Due Process hearing. Under the Individuals with Disabilities Education Act (IDEA), you may request an expedited hearing that must occur within 20 school days of the request. After the hearing, the hearing officer must make a decision within 10 school days. The hearing officer may return to the student to his/her previous placement or order that the student's placement be temporarily changed to an alternate educational setting, so the IEP team can make a new placement decision. If the hearing officer orders this interim placement change, it may not last for more than 45 days.

**Q: Are there exceptions to the MDR requirement?**

Yes. A student may be removed to an interim alternative educational setting for a maximum of 45 days if the student 1) possessed a weapon at school or at a school activity, 2) knowingly used/distributed illegal drugs at school or a school activity, or 3) inflicted serious bodily harm on another on school grounds.

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## **SPECIAL EDUCATION LAW** *Least Restrictive Environment*

**Q: What does “least restrictive environment” (LRE) mean, as required by the Individuals with Disabilities Education Act (IDEA)?**

One of the goals of the IDEA is for students with disabilities to attend the school in their neighborhood and be integrated, to the maximum extent possible, with their non-disabled peers. Therefore, the LRE is the environment for a disabled student that is most integrated with the general education classroom environment. Special classes, separate school, or other removal of children with disabilities from the regular educational environment should only occur if the nature or severity of the disability is extensive enough that using supplementary aids and services cannot be achieved satisfactorily.

**Q: Why does the LRE matter?**

Inclusion of disabled and non-disabled students in a shared learning environment has a number of benefits. These include increased social interactions and friendships, improved academic and behavioral outcomes, increased student engagement, opportunities to learn from peer modeling, higher expectations for students, and a welcoming environment.

**Q: How is the LRE determined?**

The LRE is determined in a step-by-step process, starting with the assumption that the student will attend a mainstream, general education classroom in his/her neighborhood school.

First, the IEP team assesses whether the student’s placement in a regular, general education classroom can be achieved satisfactorily. The IEP team must consider the following factors:

- 1) Can supplementary aids and services be used to accommodate the student in a regular classroom?
- 2) In considering a range of placement and support services, how do the academic benefits of the general education classroom compare with the benefits of a segregated, special education classroom?
- 3) What is the student’s overall experience in general education, including non-academic benefits?
- 4) What impact will the student’s presence have on the general education classroom?

If the IEP team decides education in a mainstream, general education classroom is not appropriate, the team must still try to integrate the student to the maximum extent possible—at recess, assemblies, field trips, special events, etc. Furthermore, if the student is placed in a specialized program at a different school location, the school district is responsible for providing appropriate transportation for the student.

**Q: What are supplementary aids and services?**

These are items and/or services the school can provide to accommodate students with disabilities to allow them to remain in a general education classroom. This can include indirect services or direct services. Indirect services are consultations that support the student’s learning needs, without the professional directly interacting with the child—for example, a special education teacher meeting with the child’s general education teacher weekly to discuss appropriate accommodations and reading lessons for a child with ADHD. Direct services are provided directly to the student by a provider who is responsible for helping the student make progress in his/her IEP goals—for example, a one-to-one aide assigned to support a student for segments or for the entire day. Supplementary aids and services must be considered by the IEP team when making the LRE determination. Cost of the aids and services cannot be the only reason the services are not provided.

**Q: What about extracurricular activities?**

Children with disabilities have a right to participate in school athletics, clubs, field trips, and other recreational activities. The school must provide appropriate accommodations to students with disabilities to have an equal opportunity to participate.

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## ***SPECIAL EDUCATION LAW*** ***Individualized Educational Program (IEP)***

### **Q: What is an Individualized Educational Program (IEP)?**

An IEP is the written document memorializing the collaborative effort between the parents and the school district personnel to develop an educational plan for a student with disabilities. This document outlines how the child is going to be provided a free, appropriate public education (FAPE), which the school district is required to provide under the Individuals with Disabilities Education Act (IDEA).

An IEP is only required for students who qualify for protection under the IDEA. Students receiving accommodations under Section 504 of the Rehabilitation Act of 1973 receive a Section 504 plan, not an IEP.

### **Q: How does my child receive an IEP?**

The process begins with a suspicion of disability, which can arise if the child is struggling with school, having behavioral problems, etc. Schools have an obligation to identify, locate, and evaluate a child with a suspected disability, but a parent can raise that concern with the school, too. If the school is put on notice that the student may have a disability, the school must screen the student to determine whether a child should be referred for an evaluation.

Once the evaluation occurs, the IEP team holds an Eligibility Meeting to discuss the results of the evaluation, and whether the child has a disability that is affecting his/her academic performance. If a parent disagrees with the results of the evaluation or how a school psychologist is interpreting that evaluation, the parent can request an Independent Educational Evaluation (IEE). If a child is found to be eligible, an IEP must be created within 30 calendar days.

### **Q: What are the contents of an IEP?**

The IEP will detail the services, accommodations, modifications, and specialized instruction a student needs. This includes the following:

- Statement of present levels of educational performance;
- State of goals and objectives, measuring progress;
- Related services, to include the time, place, and duration of those services;
- Participation in general education classrooms and activities;
- Accommodations for assessments/tests;
- Transition services and the age of majority;
- Behavior Intervention Plans (BIPs); and
- Signatures

### **Q: What is not required to be in the IEP?**

The IEP is not required to identify particular teachers, materials to be used, or educational methodology (unless a certain methodology is not appropriate for the student—then it should be specifically excluded). Additionally, there is no requirement to list services not related to special education, recommendations that were submitted/discussed but not adopted, or administrative matters such as the profile of the class or qualifications of the teachers.

### **Q: Who is on the IEP Team?**

There are mandatory team members and optional team members. Mandatory members include:

- The parents of the child;
  - At least one of the child's general education teachers (if the child is participating in general education);
  - At least one of the child's special education teachers;
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- A representative of the school or the district who oversees special education services and is knowledgeable about both the general education curriculum and the resources available to students;
- An individual who can interpret the evaluation results; and
- The child, when appropriate

Optional team members could be:

- Any other individuals that have knowledge/expertise regarding the child (speech therapist, school counselor, etc.);
- A parent can bring an advocate or attorney to IEP meetings.

**Q: Am I supposed to be notified about an IEP meeting?**

Yes, parents are required to be notified. Per the IDEA, parents must be provided with written notice of the meeting date and time. The notice must identify all individuals in attendance, and the notice must be provided in a reasonable amount of time prior to the meeting. Because parents are necessary participants in the IEP meeting, the districts must keep records of attempts to reach mutually agreeable IEP meeting times with parents.

**Q: What are my rights as a parent in the IEP process?**

Parental consent is required by the IDEA prior to the initial evaluation (although the school can file a complaint against the parents to have a child evaluated), the initial IEP, and re-evaluation of the child (unless the school can show reasonable attempts made to contact the parent without a response). In addition, the parents have the right to inspect records pertaining to their child, participate in meetings, obtain an Independent Educational Evaluation (IEE), and also have the right to receive Prior Written Notice (PWN) for a change to an IEP or refusal to initiate a change.

**Q: Is my child's IEP reviewed?**

Yes. The IEP must be reviewed once a year, but a parent with concerns can call an IEP meeting at any time during the year. Ideally, schools should send a monthly or quarterly IEP progress report. In addition, the child's disability must be re-evaluated every three years.

**Q: What is a Functional Behavioral Assessment (FBA)?**

The FBA supplements an IEP, and its purpose is to determine what is causing a child's behavior that is interfering with the child's learning. A parent can request the FBA as a part of the IEP process. The IEP team can also create a Behavioral Intervention Plan (BIP) if the FBA shows that something is interfering with the child's learning. The BIP is a way to prevent the child's behavior from impeding his/her learning or the learning of others. Additionally, the BIP is an enforceable part of the IEP, meaning a school can be sued for not following it.

**Q: My child would benefit from a longer school year. Is that an option?**

Possibly. In some cases, a child may be eligible for an Extended School Year (ESY). An ESY can be provided to a child with a disability beyond the normal school year, in accordance with the child's IEP, at no cost to the parents of the child. A child can be eligible in two scenarios: 1) if the child will experience significant regression if they do not participate in ESY and it would take significant time to relearn those same skills; OR 2) if the progress made by the child during the school year would be significantly jeopardized by a break in programming.

**Q: My child will be graduating soon. How can we prepare for that?**

Students between the ages of 14 ½ and 22 are required to receive transition services, which includes individualized goals and services designed to prepare the student for post-secondary employment, training, education, and independent living. The student should be involved in the determination of transition services, providing input before and during the meeting about his/her interests. Starting at age 14 ½, the student must be invited to all IEP meetings. Transition services often involve coordination with outside agencies and providers.

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