

## Basic Rights Workshop

Brookline PAC  
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## **I. General Overview & Context for Special Education Law**

### **A. Sources of Law**

1. Judicial - federal & state court decisions; administrative hearing decisions
2. Legislative - federal & state statutes and regulations

### **B. Individuals with Disabilities Education Act**

1. FAPE (free & appropriate public education) = special education & related services
2. Special education = specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability
3. Related services = transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education

### **C. Section 504**

1. Civil rights protection for otherwise qualified individuals with disabilities in programs that receive federal financial assistance

### **D. Americans with Disabilities Act**

1. Similar to Section 504 except no requirement of federal financial assistance - addresses broader issues such as transportation, architecture, employment - services and reasonable accommodation options

### **E. No Child Left Behind Act**

1. Statute focusing on school and system wide accountability for student performance

### **F. Chapter 71B (766)**

1. Massachusetts special education statute - tracks federal statute in large part

## Overview: New Developments

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### **IDEA**

- Signed by President in December, 2004
- Effective July 1, 2005 with exception of Highly Qualified Teacher provision (effective July, 2006)
- Regulations effective October 13, 2006
- Focus on scientifically based instructional and reading programs; renewed commitment to resolve disagreements between schools & parents; renewed focus on overrepresentation of minority students in special education

### **No Child Left Behind & IDEA**

- Impact of NCLB accountability requirements & implications for children with disabilities: note that NCLB is system focus while IDEA is individual focused
- Impact of NCLB definition of “adequate yearly progress” & requirement that such progress shall equal “continuous and substantial improvement” - note that not applied to individual students
- Does not require a “high stakes test”
- Note that there is no right to seek an individual remedy under NCLB unlike IDEA

## II. Eligibility

### A. Definition

1. Child with a disability means a child with mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
2. Who, by reason thereof, needs special education and related services
3. Eligibility = disability + lack of effective progress in regular education without specially designed instruction
  - a. Effective progress = to make documented growth in the acquisition of knowledge & skills, including social-emotional development, within the general education curriculum, with or without accommodations, according to the chronological age and developmental expectations, the individual educational potential of the child, and the learning standards ...

### B. Age = 3 to 22

- C. 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 an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. See also Additional Procedures (300.450)

*1. Note - no need to use discrepancy model; new RTI model*

- D. Determination of Eligibility - qualified professionals and parent determine eligibility

## Eligibility: New Developments

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### **IDEA**

- Child may not be eligible if determining factor is a lack of appropriate instruction in reading including essential components of reading instruction 1414(b)(5)
- Learning Disability - not required to take into account discrepancy model 1414(b)(6)(A) & (B)
- Termination of Eligibility - no need for evaluation if graduation or turning 22

### III. Evaluations

#### A. School Evaluations

1. Points in time when school evaluations are conducted:
  - a. Initial evaluation - 1414(a)(1) - to assess eligibility - *parental consent required - district can seek override - 60 day timeline.*
  - b. Reevaluation - 1414(a)(2) - if conditions warrant, if parent or teacher requests a reevaluation. *Limited to once per year unless parties agree otherwise. Must conduct at least every 3 years unless parties agree otherwise.*
  - c. Evaluation before change in eligibility/termination of eligibility - 1414(c)(5) - must be evaluated prior to determining no longer eligible *but not for aging out or graduation*
  
2. Evaluation Procedures - 1414(b)
  - a. Notice - to parents describing evaluation
  - b. Conduct - use variety of tools and strategies; involve parent; assess ability to be in general curriculum
    - not use any single test/procedure as sole factor for making decisions
    - use technically sound instruments in addition to physical & developmental factors
  - c. Non-discrimination factors; standardized test requirements; assessment in all areas of suspected disability
  
3. Additional requirements - 1414(c)
  - a. Review of existing data - identify what additional data needed to determine - **see** 1414(c)(1)(B)

## Evaluations: New Developments

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### **IDEA**

- Initial Evaluations (1414(a)(1)(C): conduct evaluation within 60 days of parental consent but note exceptions; district must make reasonable efforts to obtain parental consent but if no consent, then can use dispute resolution options; if no consent provided, then district not responsible for later alleged violations of FAPE
- Screenings by teacher or specialist to determine appropriate strategies shall not be considered an evaluation
- Reevaluations (1414(a)(2) - not more than once per year unless agree otherwise; 3 year reevaluation required unless agree otherwise
- Termination (1414(c)(5) - must be evaluated prior to determining not eligible except for graduation or aging out (summary instead)

## **IV. TEAM Process**

### **A. The TEAM - 1414(d)(1)(B)**

1. Parents
2. At least one regular ed teacher if child in reg ed
3. At least one sped teacher
4. School district rep who can provide/supervise education; knows curriculum; & knows resources
5. Individual who can interpret tests
6. At discretion of parents or district, other knowledgeable individuals
7. Child, if appropriate
8. *Note exceptions under IDEA 2004*

## TEAM Process: New Developments

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### **IDEA**

- Teacher/specialist attendance not required if parties agree because curriculum area or related services not being discussed or modified
- Teacher/specialist can file report in lieu of attendance if agree and report provided in advance of meeting
- Need written parental consent for both of above attendance exceptions
- 1414(d)(1)(c)

## V. IEP

### A. In General - 1414(d)(1)(A)

1. Written statement for each child that is developed, reviewed, revised
2. Child's present levels of *academic achievement & functional performance*
3. Special education & related services to be provided to child
4. Explanation why child will not participate in regular education
5. Statement related to statewide assessments & *alternate assessments*
6. Timelines for services - duration, frequency *but no short term objectives or benchmarks except for alternate assessment students*
7. *Statement of annual goals and need for periodic progress reports (ie, quarterly reports like report card issuance)*
8. Statement of transition services *starting at 16*

### B. Development of - 1414(d)(3)

1. General: strengths & concerns/results of most recent evaluations
2. Special factors: behavioral, limited english proficiency, visual or hearing impairments, assistive technology
3. Note specific requirement for regular education teacher to be present but *exceptions under IDEA 2004*
4. Review IEP periodically, at least yearly, but *exceptions under IDEA 2004*

## IEP: New Developments

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### **IDEA**

- Adds academic achievement & functional performance to “level of performance” statements
- Alternate assessment language added - alternate assessments must be aligned to alternate achievement standard with benchmarks & short term objectives
- No benchmarks & short term objectives necessary for other students
- Transition services now begin at 16 instead of 14 - note: IEP should have appropriate measurable post secondary goals
- New statement in statute that says nothing more needed in IEP than required by statute
- Parents & district can agree to modify IEP without a meeting
- Can amend an IEP with rewriting the entire IEP
- Pilot multi-year IEP project in statute

## VI. Services

A. FAPE - Each child entitled to a free & appropriate public education (FAPE) which is special education & related services (1401(9))

1. Special Education = specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability; includes instruction in classroom, home, hospitals, institutions & other settings (1401(29))
2. Related Services = transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education ... (1401(26))
  - a. *Includes interpreter services and school nurse services*
3. Assistive Technology = any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified that is used to increase, maintain, or improve functional capabilities of a child with a disability. (1401(1), (2))
  - a. *Does not include surgically implanted devices*
4. *Lack of Parental Consent for Services - district cannot override*

## Services: New Developments

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### **IDEA**

- Assistive Technology - excludes medical device that is surgically implanted or replacement of such device. 1401(1)(B)
- No override for lack of parental consent
- New transfer of students provision within state (comparable services until deciding on IEP) or out of state (services until evaluation conducted)
- Mandatory medication - prohibited as condition for attending school
- Related services includes interpreter & school nurse services

## **VII. Placement**

### **A. LRE**

1. Least Restrictive Environment (LRE) = 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 education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (1412(5))

### **2. Children in Private Schools**

- A. District has “child find” obligation for parentally placed children in private schools *in the district*
  1. *Can supplement federal funds*
  2. *Data maintenance requirements*
- B. School district may place child in private school - 1412(10)(B)
- C. Parental Placement - parents may place & seek reimbursement
  1. 1412(10)(C) - checks/limits on unilateral placements - notice via TEAM meeting or 10 day written notice of intent to remove

Placement: New Developments

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**IDEA**

- State may not use a funding mechanism that results in a failure to provide FAPE - 1412(a)(5)
- Increased child find responsibility for private school students - 1412(10)(a)(ii)
- Participation in Assessments - aligns IDEA with NCLB requirements - adds accommodation section & provides for alternate assessments

**VIII. Miscellaneous Procedural Safeguards**

- A. Records Access - 1415(b)(1)
- B. Independent Evaluation - 1415(b)(1)
- C. Surrogate parent - 1415(b)(2)
- D. Notice requirements = when notice required
  - 1. Proposal to initiate or change or refuses to initiate or change the identification, evaluation, or placement - 1415(b)(3) = general notice
    - a. Content of notice - 1415(c)
      - 1. Description of action proposed or refused
      - 2. Explanation
      - 3. Description of other options considered
      - 4. Description of each evaluation, test, report relied on
      - 5. Description of other factors
      - 6. Statement of procedural safeguards
      - 7. Sources for parents to seek help
    - b. Opportunity to Present Complaint/Hearing Request - 1415(b)(6) & (7)
      - 1. *New Statute of Limitations - 2 years*
      - 2. *Notice to Other Party & Copy*
        - a. *copy to other party & State*
        - b. *must include - child name, problem, resolution*
      - 3. *District response within 10 days*
      - 4. *HO determination of sufficiency if sufficiency raised*
      - 5. *Amended Complaint - by agreement or HO approval but not less than 5 days before hearing*
  - 2. *Upon initial referral for evaluation, IEP meetings, reevaluation,*

*& complaint filing - 1415(d)(2) = procedural safeguards notice*

a. Content of notice - 1415(d)(2)

E. Stay Put - 1415(j)

1. Pending resolution of dispute, child stays in then current educational placement

a. Resolution of dispute = hearing request, etc

b. Current educational placement = last agreed upon placement

c. *Note exception in discipline*

F. Transfer of rights at age of majority - 1415(m)

1. Note traditional competency issues - age of majority

2. Note provision when deemed not having ability to provide informed consent

G. Procedural Violations & FAPE

1. *Generally, procedural violations will only be deemed to deny a child a free & appropriate public education when it results in some type of educational harm or is egregious.*

## Procedural: New Developments

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### **IDEA**

- New Statute of Limitations - 2 years
- Complaint/Hearing Requests
  - Notice to Other Party & Copy
    - copy to other party & State
    - must include - child name, problem, resolution
  - District response within 10 days
  - HO determination of sufficiency if sufficiency raised
  - Amended Complaint - by agreement or HO approval but not less than 5 days before hearing
- Note stay put exception in discipline
- Generally, procedural violations will only be deemed to deny a child a free & appropriate public education when it results in some type of educational harm or is egregious.

## **IX. Discipline**

### **B. 10 School Days or Less Rule**

1. School personnel remove student who violates code of conduct for not more than 10 school days to interim alternative setting, another setting, or suspension for not more than 10 school days
  - a. For these first 10 cumulative days, no services need to be provided to the student
  - b. (k)(1)(B)

### **C. 10 School Days or More Rule (k)(1)(B)**

1. If district seeks to order change in placement that would exceed 10 school days and behavior is not a manifestation of disability, then discipline like regular ed student
  - a. continue to receive educational services meaning access to general ed curriculum & progress toward IEP goals
  - b. receive FBA too
2. If behavior is a manifestation of disability, then MD rules apply

### **D. 45 School Days Rule**

1. School personnel may remove to an appropriate interim alternative educational setting for not more than 45 days if child:
  - a. carries weapon to school or school function or
  - b. possesses sells illegal drugs or controlled substance
  - c. *inflicted serious bodily injury upon another person while at school, on school premises, or at school function*
  - d. TEAM must conduct FBA - (k)(1)(C)

- e. Must conduct Manifestation Determination (k)(1)(E)
- f. Services continue in alternate setting (k)(1)(D)

#### **E. Services During Discipline (k)(1)(D)**

1. When removing student for more than 10 school days or for 45 school days:
  - a. must continue to receive educational services so can participate in general educational curriculum and make progress toward goals in IEP
  - b. must receive FBA, behavioral intervention services and modifications so that does not occur again

#### **F Manifestation Determination**

1. Manifestation determination means the *district, parents, and relevant members of IEP TEAM* reconvene within 10 school days of change in placement due to student conduct in order to conduct this determination which is an assessment of whether the conduct in question was caused by, or had a *direct and substantial relationship to, the child's disability* or if the conduct was a direct result of the district's failure to implement the IEP
  - a. must consider relevant information in student files (observations, IEP, information provided by parents, evaluations)
  - b. (k)(1)(E)(I)
2. If behavior is linked to disability, then TEAM must:
  - a. conduct FBA
  - b. if already FBA, review and modify
  - c. return child to placement unless agree otherwise

3. If behavior is not linked to disability, then can be disciplined like any other regular education student but must always deliver special education services

## **G. Appeals**

1. Parent may appeal if disagrees with any decision regarding placement or MD
2. District may appeal if believes maintaining current placement is substantially likely to result in injury to child or others
3. Hearing Officer Authority:
  - a. can order return to original placement or removal for 45 school days if current placement is substantially likely to result in injury to child or others
4. Placement During Appeals
  - a. child stays in interim setting pending HO decision or until disciplinary time expires, whichever occurs first - *expansion of interim setting as stay put placement*
5. Timeline - *hearing requests must be treated as expedited (hearing in 20 days; decision in 10 days)*

## **H. Children Not Yet Eligible**

1. Children not yet eligible who has been disciplined may invoke protections of IDEA if can show that district had knowledge of need for services
  - a. Knowledge = parent expresses concern in writing; *behavior or performance indicates need for service (deleted language)*; parent has requested evaluation; teacher or other personnel have expressed a specific concern about a pattern of behavior to director
    1. Exception - no knowledge deemed if parent refused to allow evaluation or refused services or child already evaluated and found not eligible
  - b. If no knowledge, then regular discipline applies
  - c. If request for evaluation made, then conduct evaluation in expedited manner; pending evaluation, student receives services as determined by district
  - d. (k)(5)

#### **I. Referral to Law Enforcement (k)(6)**

1. Districts permitted to report crimes of students with disabilities to authorities and can transmit records

## Discipline: New Developments

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### **IDEA**

- 45 day removal now includes situations where student inflicted serious bodily injury upon another person while at school, on school premises, or at school function
  
- Manifestation determination means the *district, parents, and relevant members of IEP TEAM* reconvene within 10 school days of change in placement due to student conduct to in order to conduct this determination which is an assessment of whether the conduct in question was caused by, or had a *direct and substantial relationship to, the child's disability*
  
- Placement During Appeals = child stays in interim setting pending HO decision or until disciplinary time expires, whichever occurs first - *expansion of interim setting as stay put placement*
  
- Timeline - *hearing requests must be treated as expedited (hearing in 20 days; decision in 10 days)*
  
- Children not yet eligible who has been disciplined may invoke protections of IDEA if can show that district had knowledge of need for services. Knowledge = parent expresses concern in writing; *behavior or performance indicates need for service (deleted language)*

## **X. Dispute Resolution Options**

### **A. Mediation - 1415(e)**

1. Basics = voluntary, cannot delay due process, impartial mediator
2. Written Agreement - *legally binding, confidential, not for evidence, enforceable in court*

### **B. Hearing process**

1. Jurisdiction - 1415(b)(6) & (k)
  - a. (b)(6) = any matter relating to identification, evaluation, or educational placement of child or provision of FAPE
  - b. (k) = discipline
2. Hearing Request - 1415(b)(7)
  - a. Name, residence, school attending
  - b. Nature of problem & facts
  - c. Proposed resolution
3. *Resolution Session - convened by district within 15 days - written agreement with 3 day opt out*
4. Hearing Officers - impartial - 1415(f)(3) & (g)/615(b)
5. Time line - 45 days from date of request = issuance of decision
6. Rights of parties (called procedural safeguards) - 1415(h)/615(h)
  - a. May bring counsel or others with special knowledge
  - b. Right to present evidence, confront, cross-examine and compel attendance of witnesses
  - c. Right to written or electronic recording of proceeding - parental choice
  - d. Right to written or electronic findings - parental choice

## C. Judicial Appeals

1. Jurisdiction - 1415(i)(2)
  - a. No amount in controversy necessary
  - b. Additional evidence rule
  - c. Preponderance of evidence
2. Time
  - a. *90 days under IDEA*

## D. Remedies

1. Damages
2. Compensatory Education
3. Attorney Fees
  - a. IDEA - 1415(I)(3)
    1. *note that districts can be prevailing party*
    2. Note that fees claim may not be allowed if:
      - A. Written offer of settlement made by district more than 10 days before hearing proceeding begins;
      - B. Offer is not accepted within 10 days; and
      - C. Relief finally obtained by parents is not more favorable to parents than the offer of settlement
    3. also note that fees not allowed for TEAM meeting etc. unless ...

## Dispute Resolution: New Developments

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### **IDEA**

- Mediation Written Agreement - legally binding, confidential, not for evidence, enforceable in court
- Resolution Session - convened by district within 15 days - written agreement with 3 day opt out
- Appeal from Hearing Officer Decision to Court - 90 days under IDEA
- Attorney Fees - no response to Buckhannon case - note that districts can be prevailing party

