

CHAPTER FOUR

The Special Education Process for Children with Epilepsy: The Individuals with Disabilities Education Act (IDEA)¹

D R A F T J U L Y 2007

4.1 Q: What are the rights of children under the IDEA?

A: Under the IDEA, children with disabilities have the right to a free, appropriate, public education in the least restrictive environment in which their needs can be met. A school district must find children with disabilities, assess them to determine if they have disabilities that adversely affect their ability to benefit from education, provide individualized special education and related services that enable children with disabilities to make meaningful educational progress, and reevaluate the children periodically. In addition, the district must provide procedural safeguards to the child and his or her parents governing all aspects of the special education process from access to records and notice of meetings and proposed school district actions to administrative due process hearing rights.

In many cases, a student's epilepsy might not adversely affect his or her educational performance, but the student may need some accommodations to be successful or safe at school. In these cases, the student should have a Section 504 plan that outlines all necessary accommodations. See Chapter 5: Special Education and Section 504 of the Rehabilitation Act for more information.

4.2 Q: Are children with epilepsy automatically entitled to special education and related services?

A: No. In order to qualify for special education and related services under the IDEA, a child's disability must adversely affect his or her educational performance and the child must need special education as a result. 34 C.F.R. 300.8.

4.3 Q: Does a school district have any responsibility to locate children with epilepsy who may be eligible for special education and related services?

4.4 A: Yes. The "child find" requirements of the IDEA place the responsibility on states to have in effect policies and procedures to identify children within the district who may be eligible for special education and serve them appropriately. 34 C.F.R. 300.111. This means that local educational agencies must have child find procedures for the children within their boundaries, although the effectiveness of these procedures varies from district to district and state to state.

4.5 Q: What are the steps of the special education process?

¹ See Chapter 2 for a basic introduction to the requirements of the IDEA.

A: Although the steps of the process may have different names in different states, essentially the special education process consists of an evaluation process, which is the process of determining whether a child has a disability and the nature and extent of the special education and related services the child needs (34 C.F.R. 300.14), development of an individualized education program (IEP), placement, review, and reevaluation. The evaluation process consists of several steps: referral for special education, assessment, and identification of the student as having a disability that adversely affects his or her educational performance. Following evaluation, if a student is identified as needing special education, an (IEP) is developed for the student, and he or she is placed into an education program that is supposed to meet his or her needs appropriately. The student's IEP is required by law to be reviewed and revised annually, and at least every three years, the student must be formally reevaluated. Parents have the right to be full participants in this process and must be notified of each step of the process and each proposed action the school system plans or refuses to take.

4.6 Q: Who may refer a child with epilepsy for special education?

A: Anybody may make a referral of a child for special education. Most frequently, referrals come from parents, outside professionals such as pediatricians or specialists, or a child's teacher.

4.7 Q: What happens when a child is referred for special education?

A: When a child is initially referred for special education, a team of specialists is supposed to meet; generally, the team will be comprised of staff from the child's school and will usually include the child's teacher, a special education teacher, a psychologist, a social worker, and other specialists, such as the school nurse or a speech pathologist, depending on the child's possible disability.

4.8 Q: What is the timeline for referral of a child for special education?²

A: Federal law does not set a timeline for when the team must meet after a written request for referral is made. However, state law may impose a timeline for this step of the process, and attorneys and advocates need to check their state statutes and regulations. Other steps of the process have timelines and will be addressed later in this chapter.

4.9 Q: What kinds of decisions might the team make at the referral stage, and what happens if a parent disagrees with the team's decision?

A: The team could decide that the student has a disability and needs special education and would then develop an individualized education program for the student. More likely, the team might decide that the student may need special education because he or she likely has a disability that is adversely affecting his or her educational progress

² See end of chapter for chart with timeline for steps of special education process with legal cites.

and should be assessed further to determine the disability and needed services. Or the team might decide that the student has a disability but that there is no indication that the disability adversely affects the student's educational progress. Finally, the team might decide that there is no evidence to conclude that the student has a disability and is in need of assessment.³ The student's parents may appeal any decision of the team by requesting mediation or a due process hearing, or by filing a complaint with the state department of education. See Chapter 8, Dispute Resolution and Legal Remedies.

4.10 Q: What kinds of assessments might be warranted for a student with epilepsy to determine special education eligibility?

A: The school district is responsible for using a variety of assessment tools to determine the functional, developmental, and academic needs of the student. 34 C.F.R. 300.304. See Question 4.11. For a student with epilepsy, it will first be important to establish that the student has epilepsy. Often, parents provide medical information to an IEP team regarding their child. Parents may wish to provide current medical reports from the student's neurologist and pediatrician that include a diagnosis, current medications, and any information or recommendations that relate to the student's performance or needs in school. An IEP team must consider any private evaluations provided by parents, although the IEP team is not obligated to adopt the findings or recommendations of the evaluation.

If the IEP team chooses not to accept the reports provided by the student's parents, the school district will be responsible for obtaining its own medical evaluation of the child. Medical services are included as a related service in the IDEA for "diagnostic or evaluation purposes" and are defined as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. 300.34(a) and(c) (5).

Second, it will be necessary to assess the student's educational performance. A complete educational assessment will be important, and perhaps a cognitive psychological assessment will be warranted as well. It will also be important to have a nursing assessment done if the student's seizures are not completely controlled and if the student will be taking medication during the school day. Depending on other areas of need, a psychosocial assessment, speech and language, functional behavioral assessment, occupational therapy, or physical therapy assessment might be warranted.

4.11 Q: What are the requirements for evaluation?

A: The school district must use a variety of assessment tools and strategies to collect relevant functional, academic, and developmental information about the child, and must include information provided by the child's parents. The district may not use a single measure or assessment as the only criterion for determining whether a student has

³ The student might have a disability that impairs a major life activity but does not adversely affect his or her educational performance. In this situation, it would be appropriate to seek a Section 504 plan for the student. See Chapter 5: Special Education and Section 504 of the Rehabilitation Act.

a disability or determining an appropriate educational program. The district must use technically sound assessment instruments that may assess the extent to which cognitive and behavioral factors as well as physical and developmental factors contribute to the student's situation. 34 C.F.R. 300.304(b). Assessment tools cannot be racially or culturally discriminatory, must be provided in the student's native language or mode of communication and in the form most likely to provide accurate information about what the child knows and can do academically, functionally, and developmentally, unless it is clearly not feasible to provide or administer the assessment in such a form.

Additionally, assessments must accurately reflect what the test is supposed to measure and not the student's impaired skills unless that is the purpose of the test. 34 C.F.R. 300.304(c). For example, a cognitive psychological assessment must be administered to a student with epilepsy in a manner that takes into account the student's side effects from seizure medication if the student works more slowly than would otherwise be expected, or becomes fatigued more easily; otherwise, the assessment will be measuring the student's impaired skills, rather than his or her true cognitive level.⁴ Additional evaluation requirements apply for students suspected of having learning disabilities. 34 C.F.R. 300.307-309.

4.12 Q: What is the timeline for evaluation?

A: Evaluations must be conducted within 60 days of receipt of parental consent or within the timeline established by state law. 20 U.S.C. 1414(a)(1)(C)(1)(i); 34 C.F.R. 300.301(c)(1)(i).

4.13 Q: Are there requirements for reevaluating students who have been receiving special education?

A: Yes. A student must be reevaluated at least once every three years unless the parent and the school district agree that a reevaluation is not necessary. A student must be reevaluated sooner if the district determines that the educational or related services needs of the student, including his or her improved academic achievement and functional performance, warrant reevaluation or if the parent or the student's teacher request reevaluation, but the student should not be reevaluated more than once a year unless the parent and district agree otherwise. 34 C.F.R. 300.303.

When a student is reevaluated, the team must review existing evaluation data and obtain input from the student's parent. The team must decide if additional data are needed to determine if the student continues to have a disability, to determine the student's educational needs and if he or she continues to need special education and

⁴ Many districts and states are now in the process of developing a Response to Intervention framework for identifying students with learning disabilities. Under this model, all children are screened to identify those who may be at risk of learning problems, and those who are at risk receive interventions prior to being referred and assessed for special education. The IDEA does not mandate Response to Intervention but displays a clear preference for it over the traditional method of determining if a student has a discrepancy between his or her performance and potential. 34 C.F.R. 300.307.

related services. If so, the team must then determine if any additions or modifications are needed to the student’s special education and related services to enable the student to meet the measurable annual goals set out in his or her IEP and to participate, as appropriate, in the general education curriculum. 34 C.F.R. 300.305.

4.14 Q: What happens if parents disagree with an evaluation that has been done by the school district?

A: Parents may request an independent educational evaluation at public expense. The school district must either ensure that the evaluation is provided at public expense or initiate a due process hearing, at which the district will have the burden of proving that its evaluation is appropriate and, therefore, that it should not have to fund an independent evaluation. The district must either initiate a hearing or pay for the independent evaluation “without unnecessary delay.” 34 C.F.R. 300.502. The district may ask parents why they disagree with the district’s evaluation, but parents do not have to provide a reason, and the district cannot delay payment or its due process hearing request if parents do not provide a reason. Parents are entitled to only one independent educational evaluation at public expense each time the school district conducts an evaluation with which the parents disagree. 34 C.F.R. 300.502.

4.15 Q: Does a school district have to adopt an independent evaluation obtained by parents at their own expense?

A: No, but the IEP team must “consider” the evaluation. 34 C.F.R. 300.502 (c)(1). The law does not define “consider,” but a common-sense interpretation is that the team must review the evaluation and have a meaningful discussion about the recommendations.

4.16 Q: Is epilepsy an identified disability under the IDEA? If not, how would a child with epilepsy be identified as needing special education?

A: Epilepsy is not specifically listed in the IDEA as a stand-alone disability that qualifies students for special education. However, epilepsy is listed in the definition of “other health impairment,” which is defined by the IDEA’s regulations at 34 C.F.R. 300.8(b)(9) as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome, and
- (ii) Adversely affects a child’s educational performance.

If a child has epilepsy but the condition does not adversely affect his or her educational performance, the child will not be eligible for special education under the IDEA. However, as with each of the other disabilities listed in the IDEA, if the child's educational performance is adversely affected, then the child will qualify for services under the IDEA, if the child needs special education in order to make educational progress.

4.17 Q: If a child with epilepsy is identified as needing special education services, what happens next?

A: The team will develop an individualized education program (IEP).

4.18 Q: What are the components of an IEP?

A: In accord with 34 C.F.R. 300.320 and 34 C.F.R. 300.324, the IEP must contain the following components:

- A statement of the student's present levels of academic achievement and functional performance, including how the student's disability affects his or her involvement and progress in the general education curriculum, or if the student is in preschool, how his or her disability affects his or her participation in appropriate activities
- A statement of measurable annual goals that include academic and functional goals designed to meet the student's needs that result from his or her disability, to enable the student to be involved in and make progress in the general education curriculum and to meet each of the student's other educational needs that result from his or her disability
- Short-term objectives or benchmarks, for students who take alternate assessments aligned to alternate standards, which in practice, means students with significant cognitive disabilities⁵
- The times that progress reports will be provided
- A statement of the special education and related services the student will receive, along with the supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided⁶

⁵ Some states have chosen to retain the requirement that IEPs contain short-term objectives or benchmarks for all students.

⁶ The program modifications and supports for school personnel are meant to enable the student to make progress towards the annual goals, to be involved in and make progress in the general curriculum, and to be educated and participate with other children with and without disabilities in academic and nonacademic and extracurricular activities.

- An explanation of the extent to which the child will not participate with nondisabled children
- A statement of any individual accommodations that are necessary for testing
- A transition plan, for students 16 and older
- A start date, and the frequency, duration, and location of services⁷

4.19 Q: What are some of the typical special education services that students with epilepsy might require?

A: Because the hallmark of special education is the individualization of services to meet the unique needs of a student, it is impossible to list specific services that should automatically be included on any IEP for a student with epilepsy, especially because epilepsy affects students in different ways, and many students with epilepsy do not need special education. However, if epilepsy adversely affects a student’s educational progress such that the student needs special education, then the student should have goals that address his or her educational needs. Does the epilepsy affect the student’s progress in reading? Math? Other academic areas? Does the student’s cognitive ability fluctuate depending on seizures and side effects from medication? Does the student have memory impairment from seizures? Does the student make progress, then regress because of seizures? Does the student have particular dietary needs? Does the epilepsy affect the student’s social relationships in the school setting? How old is the student? If the student is approaching or is of transition age, is he or she able to manage medical care independently or is that an attainable transition goal? Where will the student live after he or she leaves school? What will he or she do during the day?

In addressing these questions, the IEP team needs to consider all aspects of the student’s epilepsy, including frequency of seizures, level of seizure control, what happens before, during, and after seizures, side effects of medications, needed accommodations for homework, testing, and class work, and any needed restrictions on activities such as physical education or driver’s education if it is offered at the school. The team then needs to develop goals for the student that take these issues into account. The team cannot look at the student’s disability in isolation but must, rather, develop an IEP for the student that looks at all of his or her educational needs that stem from the epilepsy.

4.20 Q: What are some of the typical related services that students with epilepsy might require?

A: Related services are services that enable a student with disabilities to benefit from his or her special education. For a student whose only disability is epilepsy, but who needs special education because of the adverse effect the epilepsy has on his or her

⁷ For students who are blind or visually impaired, deaf or hearing impaired, who have disruptive behaviors, or who have limited English proficiency, the IEP team has certain additional considerations, and for all students, the IEP team must consider the appropriateness of assistive technology. 34 C.F.R. 300.324.

educational progress, school health services might be the only needed related services. Or, depending on the student's situation and needs, counseling might be an important related service to assist the student in coping with his or her epilepsy in the school setting with his or her peers.

Other related services may also be needed. For a student with Landau-Kleffner syndrome, for example, where speech loss is part of the syndrome, speech and language services may be an important related service. Depending on the needs of a student with epilepsy and on whether he or she has other disabilities, occupational or physical therapy might be educationally necessary to enable him or her to benefit from the special education he or she receives. For a student with behavioral issues, the team should be asked to conduct a functional behavioral assessment and develop a behavioral intervention plan based on positive behavior supports and interventions to minimize the chances of disciplinary action against the student. For a student who becomes fatigued easily or needs to sleep because of seizures or medication he or she takes to control seizures, the IEP team can include sleep or rest time on the IEP as a program modification or support, or as part of the health services plan. For a student on a special diet for seizure control such as the ketogenic or Atkins diet, the IEP should reflect that the student is on that regimen for seizures; the school system is not required to provide the food but needs to implement the diet during school hours and maintain the integrity of the diet to ensure that the student remains safe. Maintenance of the diet during school hours should not be viewed any differently than administering a dose of medication to a student.

4.21 Q: Is a child with epilepsy entitled to a one-to-one aide or to a nurse?

A: A student with epilepsy is not automatically entitled to a one-to-one aide or a nurse. If a student's individual needs require that a student receive the assistance of a one-to-one aide or a nurse in order for the student to receive a free appropriate public education, then the student will be entitled to the aide or nurse as an IEP related service.

4.22 Q: If a child with epilepsy needs a one-to-one aide or nurse, is the parent entitled to choose the provider or staff person who will be assigned to the child?

A: No. Parents do not have the right to choose the staff who will be assigned to work with their child. However, if a school team and a student's parents have a good working relationship, they may be able to agree that it is educationally appropriate for the parents to have some involvement in the process, or at least to meet the person who is identified and be part of the training process.

4.23 Q: Can training of the aide or nurse be included on the IEP?

A: Yes. Training should be included on the IEP. The type and amount of training the provider will need should be specified on the IEP, along with who will provide the training. Training should be viewed as a support service for staff in accord with 34

C.F.R. 300.324(a)(3)(ii), which requires that the IEP team make a determination of “[s]upplementary aids and services, program modifications and support for school personnel” that will enable a student to participate in the general education curriculum and participate in extracurricular and nonacademic activities.

4.24 Q: Who participates in the development of the IEP?

A: The IEP team must include the student’s parents; at least one general education Teacher, if the student participates or may participate in general education; at least one special education teacher; a representative of the school district who is qualified to provide or supervise special education and is knowledgeable about the general education curriculum and the district’s resources; a person who can interpret the instructional implications of evaluation results; the student, whenever appropriate; and at the discretion of the parents or district, other individuals who have knowledge or special expertise regarding the student. 34 C.F.R. 300.321.

4.25 Q: Are there any requirements regarding meeting attendance?

A: Yes. A member of the IEP team may be excused from attending a meeting if the parent and the district agree in writing that the team member’s attendance is not necessary because the member’s area of the curriculum or the related service the member provides is not being changed or discussed in the meeting. 34 C.F.R.300.321(e)(1). A member of the IEP team whose area of expertise is being discussed or whose area is being modified may be excused if the parent consents in writing and the district agrees, and if the member provides input into the development of the IEP to the parent and the IEP team before the meeting. 34 C.F.R.300.321(e)(2).⁸

4.26 Q: What steps can attorneys and advocates take to prepare for an IEP meeting?

A: First, an attorney or advocate can help the family prioritize their goals for the meeting. What is most important to the family and is an absolute must-have? What is important but could be set aside if the IEP team will not agree? What would be nice to have but could be dispensed with if the IEP team will not agree? How long is each list? Should some items be deferred for another meeting so as not to dilute the list of the most

⁸ Parents and their advocates should be wary of these provisions and if requested by a district to consent, should consider the circumstances very carefully. The team process benefits from the participation of a diverse group of service providers, and not all issues or the course of a discussion can be anticipated prior to a meeting. Even when a provider’s area may not be discussed, that provider may have valuable input into the discussion. The provisions may be useful in a situation in which parents have a longstanding, good relationship with their IEP team and need an IEP meeting to discuss particular, circumscribed issues that do not require the entire team. For instance, if a child with epilepsy has changed medications and needs a revision to the health services portion of his or her IEP, the parent might want to consent to an IEP meeting without the presence of the occupational therapist, the speech therapist, and the school social worker. Or the parent could choose to agree to a school system request to revise the school health services portion of the IEP without any IEP meeting at all, which is another option under the IDEA regulations. 34 C.F.R. 300.324(a)(4).

important items? Once this task has been accomplished, the attorney or advocate can identify the evidence that is necessary to support the family's position. Are there current evaluations, reports from outside service providers, physicians, teachers, others? Are there outstanding assessments that will be reviewed at the IEP meeting? If so, the attorney or advocate can ask for copies ahead of time. Although the IDEA does not require that IEP teams make copies of evaluations available to parents or their representatives ahead of time, it is good practice, and some districts or schools do, and parents and their representatives should always ask.

Sometimes, IEP teams draft IEPs in advance. This is a permissible practice, so long as parents have input into the final IEP, which must be developed at the meeting. If the team has a draft of the IEP, the attorney or advocate should ask for a copy ahead of time and work with the parents to determine what changes they would like to propose. On occasion, drafts can be exchanged prior to the meeting; when this is able to occur, the meeting will tend to be more efficient.

If the district has sent a meeting notice that does not include all of the items that the parents would like to discuss, the attorney or advocate can send a letter requesting that the additional items be added to the agenda. The attorney can ask that additional time be allotted for the meeting or that the team be prepared to continue the meeting to another day as it may not finish on the scheduled day. Additionally, the attorney or advocate should be sure to provide written notice or have the parents provide notice that the attorney or advocate will be in attendance; many, but not all, districts send their own lawyer to IEP meetings if the parents bring representation.

4.27 Q: What happens if a parent disagrees with an initial or subsequent IEP?

A: The parent can file a complaint with the state department of education or can ask for mediation or a due process hearing. Generally, mediation or a due process hearing request will be more effective in resolving an IEP dispute than a complaint if the issue is the appropriateness of the IEP, as state departments of education will usually not second-guess the substantive decision of an IEP team. See Chapter 8, Dispute Resolution and Legal Remedies for more information regarding mediation, due process hearings, and complaints.

4.28 Q: Is there a timeline for IEP implementation?

A: No, federal law simply requires that special education and related services be provided in accord with an IEP as soon as possible after the development of the initial IEP and that at the beginning of each school year, each child with a disability must have an IEP in effect. 34 C.F.R. 300.323. However, states may have their own regulations that set specific IEP implementation timelines. The timelines for the special education process are set out at the end of this chapter.

4.29 Q: Where do students with epilepsy or other disabilities receive special education services?

A: The IDEA requires a continuum of placement options for students with disabilities. Depending on their needs, students with epilepsy may receive special education in the general education classroom, a separate classroom, a separate school, a residential school, or at home or in the hospital, or in some combination of placements. The continuum ranges from least restrictive to most restrictive. In the least restrictive placements, students with disabilities are educated with students without disabilities, and in the most restrictive placements, they are educated only with other students with disabilities.

4.30 Q: How is a special education placement made?

A: A group of persons knowledgeable about the student, his or her evaluation data, and placement options must make placement decisions. The group must include the student’s parents. 34 C.F.R. 300.116(a)(1); 34 C.F.R. 300.327. Generally, the IEP team determines where the IEP can be implemented. Placement must be determined at least annually and must be based on the student’s IEP. 34 C.F.R. 300.116(b). In making placement decisions, the team must place the student in the least restrictive environment in which the IEP can be implemented.

4.31 Q: What is placement in the “least restrictive environment”?

A: The IDEA requires that students be placed in the least restrictive environment in which their needs can be met. This means that if possible, a student should be placed in the general education classroom with students who are not disabled. 34 C.F.R. 300.114. Students with disabilities should attend the school they would attend if not disabled, unless their IEPs require some other arrangement, and should attend the school closest to home (“neighborhood school”), unless their IEPs require some other arrangement. 34 C.F.R. 300.116(b)(3) and (c).⁹

4.32 Q: Does a school district have any responsibility to students to help them be placed successfully in less restrictive settings?

A: Yes. Only if the student cannot be educated satisfactorily, even with the use of supplementary aids and services, should he or she be removed to a separate class or school. 34 C.F.R. 300.114.

4.33 Q: Must a school district place a student in a general education classroom if it would be harmful to the student?

A: No. In determining the least restrictive environment for a student, the IEP team must consider any potential harmful effect on the student or on the quality of services that he or she needs. 34 C.F.R. 300.116(d).

4.34Q: Must a child fail in general education before he or she can be moved to a

⁹ See discussion of least restrictive environment cases at the end of this chapter for more information.

more restrictive environment?

A: No. The IDEA does not impose a requirement that students fail before they can be moved to a more restrictive setting. Rather, the IEP team must determine that even if supplementary aids and services and program supports and modifications are put in place, the student cannot be educated satisfactorily.

4.35 Q: What if a child needs access to a licensed person to administer Diastat (rectally administered diazepam gel) or provide other health care services at school and the school district tells the parent the child must go to a separate special education school in order to have access to the person and the service?

A: Although courts have held that cost can be a consideration when addressing inclusion of students with disabilities into regular education, the Department of Education has made clear that students must be placed on the basis of their abilities and needs and their individual IEPs, not solely on factors such as category of disability, severity of disability, availability of special education and related services, the configuration of the service delivery system, availability of space, or administrative convenience. *See* Comments to IDEA Regulations, Federal Register, Vol. 71, No. 156, August 14, 2006, p. 46588. Placement of a student with epilepsy into a separate special education school simply to have access to a licensed health care professional who is authorized under state law to administer Diastat would constitute placement for administrative convenience or placement made because of the way the service delivery system is set up.. It would be unlikely to withstand a challenge. For a detailed discussion of the obligation of schools to ensure that students have access to this medication, see Chapter 7: Administration of Diastat in Schools.

4.36 Q: What happens if a parent disagrees with a placement decision?

A: The parent may appeal the decision by requesting mediation or a due process hearing. See Chapter 8: Dispute Resolution for more information.

4.37 Q: Are students with epilepsy entitled to services during the summer?

A: If students with epilepsy need services during the summer in order to continue to make educational progress during the school year, they may qualify for extended school year services.¹⁰ There is no absolute entitlement to these services; eligibility will depend on a student's individualized needs. Generally, school districts look at factors such as whether a student will likely regress or take a lot of time to recoup lost skills, and

¹⁰ 34 C.F.R. 300.106 of the IDEA regulations define extended school year services as “special education and related services that (1) Are provided to a child with a disability—

- (i) Beyond the normal school year of the public agency;
 - (ii) In accordance with the child's IEP; and
 - (iii) At no cost to the parents of the child; and
- (2) Meet the standards of the SEA.

they may look at other factors, such as the rate of the student's progress, whether or not the student has emerging skills, and whether the student's progress during the year will be significantly jeopardized. How a district approaches extended school year services depends very much on whether there is any controlling case law in the circuit in which the district is located. See the discussion of extended school year services in the case discussion section at the end of this chapter for more information.

4.38 Q: What happens if a parent wants to place his or her child with epilepsy in a private school?

A: Parents may withdraw their child from the public school system and place him or her in a private school because they want a private school education for their child for any number of reasons. However, parentally-placed private school children do not have an individual entitlement to a free appropriate public education. The school district is required to consult with the private schools in the district to determine the needs of privately-placed students within its boundaries, and then allocate among the private schools the amount of federal money that would otherwise be allocated per student in the public school system. 34 C.F.R. 300.130-144. This means that some students might receive no services and others might receive some of the services they would receive if they were in the public system.

Parents may also choose to place their child in a private school because they believe the school district's special education program is inappropriate. In this situation, parents may find a school that serves students with disabilities and then seek reimbursement of the private placement from the district. The IDEA regulations impose strict notice requirements on parents who will be placing their child and asking for tuition reimbursement. It is important that parents and their attorneys or advocates be thoroughly familiar with these requirements, as failure to comply with them carries the risk that tuition reimbursement will be denied by a hearing officer or a judge. 34 C.F.R. 300.148.

4.39 Q: Can a student with epilepsy be disciplined?

A: Yes. Students with disabilities can be disciplined, but certain procedural safeguards apply.

4.40 Q: What happens during the discipline process for a student with epilepsy?

A: A student with epilepsy is treated the same as a student with any other disability. If the student has an IEP, how he or she is treated will depend on whether he or she is suspended for 10 or more days, whether this is the first suspension or another of several and, if not the first, whether it constitutes part of a pattern of suspensions. If the student is suspended for 9 or fewer days, the student can be removed to an interim alternative education setting if nondisabled students are so removed. Administrators have the discretion to consider unique circumstances on a case-by-case basis in determining if a change in placement should occur. 34 C.F.R. 300.530 (a). If the suspension is for 10

or more days or is part of a pattern of suspensions, the IEP team will need to meet to determine if the student's conduct was caused by, or had a direct relationship to, his or her disability or if the student's conduct was the direct failure of the school district to implement his or her IEP. 34 C.F.R. 300.530(e). This is known as the "manifestation determination."

A student who brings or possesses a weapon or drugs to or at school or a school function, or a student who has inflicted serious bodily injury upon another person while at school or a school function can be removed by the school administrator to an interim alternative education setting for up to 45 days. 34 C.F.R. 300.530(g) A hearing officer may remove a student whom the school district believes poses a substantial likelihood of harm and may order placement of the student into an interim alternative education setting for no more than 45 days. 34 C.F.R. 300.532(a).

Case Scenarios:

Case Scenario 1—Possible Learning Disability Related to Epilepsy:

Melissa is a ten year old fifth grader who has epilepsy; she has a health care plan at school to address her seizures when they occur. She is struggling in her classes, and her reading and writing skills are significantly below average. Her parents think she may have a learning disability in addition to her epilepsy. The school staff think she is just lazy and is using her epilepsy as an excuse not to work hard. Melissa is becoming increasingly frustrated and depressed about going to school, and she has begun to have more frequent seizures. Her parents seek advocacy assistance.

Discussion and Possible Advocacy Strategy: Melissa's parents may be correct that she may have an unidentified learning disability. Her seizure medication may also be having an impact on her academics, and she may also be showing signs of depression. If they have not already done so, Melissa's parents should make a written request that Melissa be evaluated for special education. While an attorney or advocate may not be necessary at this early stage, Melissa's parents may benefit from some technical assistance as they begin the special education process. A possible strategy might include the following steps:

- 1) Melissa's parents should make a written request to the principal of Melissa's school asking that Melissa be evaluated for special education. They should hand-deliver a letter and have the secretary date-stamp a copy for their records, or should send the letter by certified mail, return receipt requested. Advise Melissa's parents that they should retain copies of any documents they send to the school district.

- 2) Melissa's parents should gather all the information they have to support their position that Melissa may have a learning disability or disability other than epilepsy. Do they have any report cards, any teacher reports describing poor performance or a decline in performance, or any outside evaluations that support their position? These documents

should be provided to the team that will be convened to determine if Melissa should be evaluated for special education.

3) If Melissa and her parents are in a school district that is utilizing Response to Intervention¹¹ as an element of determining if students have learning disabilities, Melissa's parents should be aware of the importance of finding out if Melissa has been screened and how she has performed on subsequent progress monitoring tests. This information is essential, as it will provide an indication of how she is performing on a standardized test that is administered to all of the children in her grade or her school. The Response to Intervention process cannot delay a referral for special education if Melissa's parents make such a request, however.

4) At the initial meeting, Melissa's parents should ask that Melissa be assessed to determine the full range of her disabilities. She should receive a full educational assessment and a psychological assessment to determine if she has a learning disability. However, because of her seizure disorder, her seizure medicines, and the recent increase in her seizures, she should also have a neurological evaluation to rule out a medical cause for her academic difficulties. Additionally, it would be appropriate to ask the team to order a psychiatric assessment as well, since Melissa may be depressed, and it is important to determine if she has an emotional disability in addition to her epilepsy and possible learning disability.

5) If the team refuses to order assessments for Melissa, her parents should consider filing a due process hearing request, assuming they have documentation to support their position. Given the information available, it is possible that Melissa qualifies for special education as "other health impaired" on the basis of her epilepsy, or as a child with a learning disability, or even as a child with an emotional disturbance. Depending on the extent of her disabilities, she might qualify on the basis of multiple disabilities, if her disabilities each adversely affect her educational performance to the extent that they each need to be addressed in order for her to make educational progress. Without assessments, it is difficult to know what is going on with Melissa. The chances are that once her parents make a formal request for evaluation, the team will agree to assessments. If not, it is likely that if her parents ask for due process, the case will resolve when the district's compliance officer or attorney becomes involved.

6) If the team does order assessments, Melissa's parents should keep track of the 60-day timeline and request copies of the assessments in advance of the team meeting at which the assessments will be reviewed. Although the district does not have an obligation to provide the assessments in advance, it is helpful if parents can see assessments ahead of time, and the meeting will be more efficient if parents are not hearing test results for the first time.

¹¹ Response to Intervention is a process for screening students for possible learning problems and providing increasingly intensive interventions, ultimately referring for special education only those students who do not respond to the interventions. The 2004 reauthorization of the IDEA incorporated Response to Intervention as a permissible element of the identification process for students with learning disabilities.

7) If an advocate is involved, he or she should continue to provide technical assistance and be prepared to attend IEP meetings with Melissa's parents if necessary as the process unfolds.

Case Scenario 2—Diastat Administration and Placement in the Least Restrictive Environment:

Lizzie is a four year old student with epilepsy, cerebral palsy, and mild mental retardation who has been fully included in a private preschool program. She has made friends in this program and has made significant gains educationally, as well. At the IEP team meeting to determine a kindergarten placement for her, Lizzie's parents seek placement in their neighborhood school with the assistance of a licensed practical nurse (LPN) who can administer Diastat as necessary, as well as other supports and services. The team recommends placement in the district's separate special education school because there is a nurse assigned full-time to the school who would be able to administer Diastat if necessary. Lizzie's parents are strongly opposed to this recommendation and seek assistance in obtaining their neighborhood school placement, although they are willing to have their daughter placed at another elementary school nearby, even though it is not their zoned school. Their zoned school has a health aide assigned five days per week; the other elementary school has a school nurse on-site five days per week.

Discussion and Possible Advocacy Strategy: There are several possible ways in which this case could be resolved. If Lizzie's family lives in a state in which Diastat administration can be delegated to an unlicensed health aide, then it is possible that the nurse who supervises the health aide at Lizzie's zoned school could delegate the Diastat administration to her. Alternatively, because the other nearby elementary school has a school nurse on-site every day, arrangements could be made to send Lizzie to that school instead of her zoned school, since she would still be included in general education and would still be close to home. The following strategy can be applied to Lizzie's situation:

- 1) If Lizzie's family lives in a state that permits delegation of Diastat administration, determine if there is a medically compelling reason why Lizzie would require an LPN to administer Diastat. If not, advocate for placement of Lizzie in her zoned school with delegation of Diastat to the health aide by the supervising nurse.
- 2) If Lizzie's family lives in a state that permits delegation of Diastat, but the nurse refuses to delegate, or there is a medically compelling reason why Diastat must be administered by a nurse, then advocate for the provision of a nurse as a related service on Lizzie's IEP and for placement of Lizzie in her zoned school. Her successful inclusion in preschool, combined with the fact that it is illegal to place students solely on the basis of their disability, the configuration of the service delivery system, or administrative convenience, support placement in her neighborhood school.
- 3) If the school district will not agree to placement in Lizzie's zoned school and her parents do not wish to challenge the decision through due process, a compromise

position would be placement in the nearby elementary school that has a nurse full-time. Lizzie would still be fully included, but she would have access to a nurse who could administer Diastat. The school district might argue that the nurse is busy with other children and might not be able to respond quickly, but the same could be argued of the nurse at the separate school. In fact, in a separate special education school, the nurse might be busier with more complicated medically-oriented tasks than a regular school nurse, who could easily be trained to administer Diastat.

- 4) If the school district refuses to agree to an inclusive placement for Lizzie, request a due process hearing. Lizzie should not have to be segregated into a separate setting simply to get access to a person who can administer Diastat to her in the event that she needs it at school.

Case Scenario 3—Suspension for Misbehavior:

Mark, a 12 year old student with epilepsy and behavior challenges gets into a fight with another student in the school cafeteria. The assistant principal breaks up the fight and while doing so, gets hit in the face by Mark, who was trying to get in one last swing at the other student. Mark then taunts the assistant principal, saying, “You can’t suspend me; I’m in special ed.” Mark is suspended for 15 days, and his parents seek legal assistance.

Discussion and Possible Advocacy Strategy: Mark’s reliance on his special education status to protect him from suspension is misplaced; administrators absolutely can suspend students with disabilities, but they must follow certain procedures and afford students and their parent’s procedural safeguards in order to do so. Assuming these procedures have been followed, an attorney or advocate becoming involved in Mark’s case may want to point out to Mark’s parents and to Mark that under the circumstances, a 15-day suspension is fairly minimal. Many other administrators would have sought an interim alternative education placement, or even expulsion. Some administrators might have pressed charges in juvenile court. It is important to determine, however, if Mark’s IEP is meeting his needs and this incident offers an opportunity to review his program and make any necessary changes. The following advocacy efforts may assist Mark:

- 1) Review Mark’s records, including all discipline records. Is this the first suspension for Mark? If not, how often has he been suspended? For how many days at a time? How far apart are the suspensions? For what kinds of incidents? Has Mark had a functional behavioral assessment? Does he have a behavioral intervention plan? If so, does it use positive behavioral supports and interventions? Was the school nurse involved in its development? Do the school staff appear to understand Mark’s epilepsy and the medications he takes, along with the relationship between the medications and his behavior?

- 2) Because Mark’s suspension is for more than 10 days, the team will need to meet to determine if his behavior was a manifestation of his disability. In making this

determination, the team will look at whether the behavior was caused by or had a direct and substantial relationship to the disability or if the behavior was a direct result of the school district's failure to implement Mark's IEP. The attorney or advocate should attend this meeting. While the team will look at Mark's identified disability of epilepsy, the attorney or advocate may want to raise the question of whether Mark's behavior challenges rise to the level of an emotional disturbance under the IDEA's definition. This needs, of course, to have been discussed with Mark's family ahead of time and will depend on what evidence exists to support such a determination.

3) Even if Mark has not in the past been identified as having emotional disturbance, his IEP is supposed to contain academic and functional goals to meet not only his needs that result from his disability to enable him to be involved in and make progress in the general curriculum, but also to meet the other educational needs that result from his disability. Therefore, his IEP should contain goals to meet his behavioral needs. If it does and they were not implemented, then the team should find that the behavior was a manifestation of his disability. (See question 40.) Additionally, the team should explore if Mark's seizure medication has any effect on his behavior.

4) If Mark has not had a functional behavior assessment, the team should conduct one and should then develop a behavior intervention plan designed to minimize the likelihood that Mark's behavior will recur. Fighting and insolence seem to be the two behaviors that need to be targeted, but the record review will have turned up any other behaviors or issues that need to be addressed.

Case Scenario 4—Extended School Year Services When Seizures Impede Progress:

Manny is a 17 year old student with multiple disabilities, including intractable epilepsy. His educational progress is very slow and often, the progress he makes is reversed by periods of intense seizure activity that cause him to regress. Recoupment of his skills does not come easily, as even during periods of less intense seizure activity, he still has several seizures a week. He has had a difficult year, with a number of medication changes and several hospitalizations. In addition to special education, he receives physical, occupational, and speech therapies, and school health services. The IEP team decides at his annual review that he has hit a plateau, and would not benefit from services during the summer, so the team finds him ineligible for extended school year services. The extended school year program offered by the district is a four week program that anyone found eligible for extended school year services receives. Manny's parents did not have representation at the IEP meeting.

Discussion and Advocacy Strategy: The IDEA regulations do not go into great detail about extended school year services, but they do state that a public agency “may not [l]imit extended school year services to particular categories of disability; or unilaterally limit the type, amount, or duration of those services.” 34 C.F.R. 300.106. The law governing extended school year services has emerged primarily through cases, and circuit courts have applied a variety of standards to the issue.¹² Essentially, however, to a

¹² See discussion of cases and relevant policy letters and rulings at the end of this chapter.

greater or lesser degree, depending on the circuit, eligibility for extended school year services tends to turn on whether a student will regress without services during the summer or, since all students regress to some extent without services during the summer, take a longer time than would be expected, to recoup skills if regression occurs. Several courts have added additional factors that must be considered, such as the nature or severity of the disability, interfering behaviors, emerging or breakthrough skills, rate of progress, and special circumstances. The primary question courts ask is whether the student's progress during the school year will be significantly jeopardized if he or she does not get services during the summer. For Manny, a possible strategy might include the following steps:

1) Request another IEP meeting at which an attorney/advocate can be present with parents. If there is relevant case law from the circuit in which Manny's family lives, bring it to the meeting, or at least be familiar with the standard applied to extended school year services.

2) Manny's seizures cause significant regression and very slow recoupment even when he is getting services. It seems likely that without services, any progress he is likely to make during the year would grind to a halt because he will spend all of his time trying to get back to where he was when school ended. If Manny has any outside therapists or service providers who can speak to this issue, get something in writing to present to the IEP team. If possible, find a school-based therapist who agrees and who will be able to attend the meeting. Have a specific plan regarding the amount and type of services Manny will need during the summer in order to make continued educational progress during the school year. If Manny needs more than four weeks of services, it is possible to build an appropriate program around the four week program offered by the school district by adding individualized services before and after the district's program.

3) Point out to the team that in addition to significant issues of regression and recoupment, there are a number of factors weighing in support of extended school year services for Manny: his multiple disabilities make his progress slow; his hospitalizations and changes in seizure medications are special circumstances that had an impact on his ability to benefit from his education; and his multiple disabilities combine to make him a person with severe disabilities.

4) Counter the team's "plateau" argument by asking for all of the records, evaluations, and other information the team members are relying on to establish their position that Manny will not make any further progress. This is consistent with the prior written notice requirements of the IDEA regulations. 34 C.F.R. 300.503.¹³ Do they mean

¹³ Under the prior written notice requirement of the IDEA regulations, the school district is required to give notice to parents a reasonable time before the agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. The notice must include "a description of the action proposed or refused, an explanation of why the agency proposes or refuses to take the action, **a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;** the parents' procedural safeguards, sources for the parents to contact

no further progress educationally? In physical therapy? Occupational therapy? Speech? All areas? It is unlikely that the team has evaluations or data to justify its position that Manny has reached a plateau in every area of his education, and it runs completely counter to the fundamental idea of the IDEA that all children are capable of making educational progress. Pushing the team members will likely get them to back down.

5) Request a due process hearing if necessary.

SELECTED CASES:

Free and Appropriate Public Education

Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)

The Court held that an elementary school student who was deaf was not entitled to a sign language interpreter in school. The EHA [now IDEA] requirement of a “free appropriate public education” is satisfied when the student is provided with personalized instruction with sufficient support services to permit him or her to benefit educationally from that instruction. If the student is educated in regular classrooms, as in this case, the IEP should be “reasonably calculated” to enable him or her to achieve passing marks and to advance from grade to grade. The EHA was meant to open the door of public education to students with disabilities, rather than to guarantee them any particular substantive level of education once they are inside the school. The state is not required to maximize the potential of each student with disabilities commensurate with the opportunity provided to nondisabled students. In EHA suits, the court must first decide if the state has complied with statutory procedures, and then to decide if the IEP developed through such procedures is reasonably calculated to enable the student to receive educational benefits. If so, the state has met the requirements of the EHA.¹⁴

Timothy W. v. Rochester, New Hampshire School District, 875 F.2d 952 (1st Cir. 1989), cert. denied, 110 S.Ct. 519 (1989)

Education includes basic functional life skills as well as traditional academic skills. A school system cannot refuse to provide any education to a child with disabilities on the basis that the child cannot benefit from educational services. The EHA [now IDEA] mandates a free appropriate public education to all children, regardless of severity of their disabilities, and does not condition receipt of such education on a child’s ability to achieve academic benefit from such services.

for assistance, a description of other options the agency considered and the reasons they were rejected, and other relevant factors. 34 C.F.R. 300.503. (Emphasis added.)

¹⁴ Many attorneys who represent children and families in special education matters believe that the *Rowley* holding has been effectively nullified by the No Child Left Behind Act because of its emphasis on adequate yearly progress and achievement for all students. While a discussion of this issue is beyond the scope of this manual, it is clear that because of No Child Left Behind, the “floor” of appropriateness established by *Rowley* is higher than it was when the case was decided.

Related Services:

Irving Independent School District v. Tatro, 468 U.S. 883 (1984)

Clean intermittent catheterization (CIC) is a “related service” under the EHA (now IDEA). Without this service, the student would be unable to attend school and thereby benefit from special education. CIC is “no less related to the effort to educate than are services that enable a child to reach, enter, or exit a school.” **CITE.** CIC is not an excluded “medical service” which is defined by the EHA as a service that is provided by a licensed physician. Related services do include school nursing services.

Cedar Rapids Independent School District v. Garret F., 526 U.S. 66 (1999)

Nursing services, including continuous nursing services, are a “related service” under the IDEA. Related services must be construed broadly. Reiterated the *Tatro* holding after a long line of circuit court cases holding that continuous nursing (constant nursing services throughout the school day) was a medical service that was excluded from coverage as a related service under the IDEA.

IEP Development/Placement:

Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988), *cert. denied* 109 S.Ct. 1131 (1989)

A student’s IEP must be developed prior to his or her placement. Placement prior to IEP development is a procedural violation of the statute that constitutes a denial of a free appropriate public education.

Least Restrictive Environment:

Roncker v. Walter, 700 F. 2d 1058 (6th Cir. 1983), *cert. denied* 464 U.S. 864 (1983)

If a segregated facility is considered superior for a student, a determination should be made if the services that make the placement superior could feasibly be provided in a non-segregated setting. If they can, then placement in the segregated setting would be inappropriate under the IDEA. The court noted that some students must be educated in segregated settings because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the child with disabilities is a disruptive force in the non-segregated setting. Cost is a proper factor to consider. Standard reiterated in *Kari H. v. Franklin Special School District*, 125 F. 3d 855 (6th Cir. 1997).

A.W. v. Northwest R-1 School Dist., 813 F. 2d 158 (8th Cir. 1987, *cert. denied* 484 U.S. 847 (1987)

Adopted the *Roncker* standard and discussed cost issues at length in denying regular education placement to student with severe mental retardation.

Daniel R.R. v. El Paso Independent School District, 874 F.2d 1036 (5th Cir. 1989)

The Fifth Circuit set out a two-part test: First, can education in the regular classroom with the use of supplemental aids and services be achieved satisfactorily? It is necessary to look at whether supplementary aids and services have been provided, whether the program has been modified, and whether the efforts of the district have been sufficient. It is also necessary to ask if the student will receive an educational benefit from regular education, recognizing that academic achievement alone is not the only reason to place a student with disabilities into general education. The court also stated that it is necessary to look at the student's overall educational experience, balancing the benefits of special and regular education for the student, and to look at the effect of the student's presence on the regular classroom environment and on the education the other students are receiving. Second, if the student cannot be educated satisfactorily in the regular classroom, has he or she been mainstreamed to the maximum extent appropriate? The court specifically notes that the IDEA does not take an all-or-nothing approach, and that students can be placed in both regular and special education to varying degrees. The *Daniel R.R.* holding was reiterated in *Brillon v. Klein Independent School District*, 100 Fed. Appx. 309 (5th Cir. 2004).

DeVries v. Fairfax County Board of Education, 882 F.2d 876 (4th Cir. 1989)

The Fourth Circuit essentially adopted the holding of *Roncker v. Walter* to deny neighborhood school placement to a student with severe disabilities. In *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996 (4th Cir. 1997), the court reiterated its *DeVries* holding, and overturned the district court's order of an inclusive placement for an elementary school student with autism. The court stated clearly that mainstreaming is not required when the child with a disability would not receive an educational benefit, when any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting, or when the child with a disability is a disruptive force in a regular classroom setting.

Barnett v. Fairfax County Public Schools, 927 F.2d 146 (4th Cir. 1991)

The court denied home school placement to a student who used cued speech interpreting, finding that whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination; it was acceptable for the school district to centralize its cued speech interpreting program at a different school and to consider cost as a factor.

Greer v. Rome City School District, 950 F. 2d 688 (11th Cir. 1991)

The Eleventh Circuit adopted the two-part *Daniel R.R.* test and found that the district failed to accommodate the student appropriately in a regular classroom. The court held

that before a district may decide to remove a student from the regular classroom, it must consider whether supplemental aids and services would permit satisfactory education in the regular classroom; it must consider the full range of supplementary aids and services. The court outlined a non-exhaustive list of factors to be considered, including the comparative benefits of the regular versus the special education classrooms, the effect of the child with disabilities on the rest of the children in the regular classroom, and the cost of the supplementary aids and services that would be necessary for the child with disabilities to obtain a satisfactory education in the regular classroom.

Oberti v. Board of Education of Borough of Clementon, 995 F.2d 1204 (3d Cir. 1993)

In holding that a district failed to make adequate efforts to include a child with Down Syndrome in regular education, the Third Circuit adopted the *Daniel R.R.* test, holding that the court should first ask whether a student can be educated satisfactorily in a regular class with supplemental aids and services, and then if not, whether the school has included the child with nondisabled children to the maximum extent appropriate. In asking the first question, the court should consider a) whether the school district has made reasonable efforts to accommodate the child in a regular classroom, b) the educational benefits available to the child in a regular class with appropriate supplementary aids and services, compared with the benefits available in a special education class, and c) the possible negative effects of the child's inclusion on the education of the other students in the class. When addressing the second question, the court noted, the school district should take intermediate steps when appropriate, such as including the child in nonacademic classes or other activities.

Sacramento City Unified School District v. Holland, 14 F.3d 1398 (9th Cir. 1994)

The Ninth Circuit affirmed an inclusive educational placement for a student with mental retardation and adopted a four-factor test that blended elements of the *Daniel R.R.* and *Roncker* standards. The court held that the following must be considered in determining placement: a) the educational benefits of placement full-time in a regular class; b) the nonacademic benefits of placement full-time in a regular class; c) the effect the child with disabilities has on the teacher and children in the regular class; and d) the costs of including the child.

Beth B. v. Van Clay, 282 F.3d 493 (7th Cir. 2002)

The Seventh Circuit declined to adopt a test for deciding least restrictive environment cases. The court found the IDEA's framework sufficient, stating that if the student's placement was satisfactory, the district would be in violation of the statute by removing her, and if not, the district's recommended placement would not violate the statute if the placement mainstreamed her to the maximum extent appropriate.

Girty v. School District of Valley Grove, 60 Fed. Appx. 889 (3d Cir. 2002)

The Third Circuit affirmed the district court's decision (163 F.Supp. 2d 527), which had applied *Oberti* to order the inclusion of a student transitioning from elementary to middle school.

L.B. v. Nebo School District, 379 F.3d 966 (10th Cir. 2004)

In finding that the district violated the student's right to placement in the least restrictive environment, the court adopted the *Daniel R.R.* test, but specifically did not apply the cost factors to the case at hand.

Tuition Reimbursement

School Committee of Burlington v. Department of Education, 471 U.S. 359 (1985)

The Court held that the EHA [now IDEA] permits courts to order school authorities to reimburse parents for their expenditures on private special education for a student if the court ultimately determines that such placement, rather than the proposed IEP, is proper. Parents do not waive their right to reimbursement if they change the student's placement during the pendency of proceedings to review the appropriateness of a proposed IEP. However, if the court ultimately determines that the proposed IEP was appropriate, the parents would be barred from obtaining reimbursement for the interim period of time in which they had placed the student in a private placement.

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1985)

Parents are entitled to reimbursement for private placement if they demonstrate that the public school placement was inappropriate under the IDEA and that the private school placement complied with the minimum standard of appropriateness established by the IDEA: that the placement is reasonably calculated to provide an educational benefit. The private school placement does not have to meet all of the specific IDEA requirements applicable to educational placements made by public school systems.

Compensatory Services

Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986)

Post-*Burlington*, this case came to the Eighth Circuit for the second time, and the court held that a plaintiff who establishes a denial of a free appropriate public education in violation of the EHA [now IDEA] is entitled to compensatory services. The court noted that a child's entitlement to a "free" education does not turn on the parent's ability to front the cost of that education and that when parents do not have the money to purchase educational services for their children, education officials cannot escape liability.

Sobol v. Burr, 888 F.2d 258 (2d Cir. 1989), *cert. denied* 110 S. Ct. 1298 (1990)

The Eleventh Amendment and the EHA [now IDEA] do not bar the award of compensatory education beyond the age of 21 to a student who has been denied a free appropriate public education.

G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295 (4th Cir. 2003)

The court held that courts and hearing officers may award compensatory educational services to be provided prospectively to compensate for a past deficiency. 343 F.3d at 308.

Reid v. District of Columbia, 401 F.3d 516 (D.D.C. 2005)

In upholding a compensatory education award to a student, the court rejected an award of one hour for each day the district denied the student an appropriate education. Instead, the court adopted a qualitative standard, finding that compensatory education should aim to place students with disabilities in the same position they would have been in had the district not violated the IDEA. The court noted that compensatory awards must rely on individualized assessments. The court also held that IEP teams do not have the authority to reduce or discontinue compensatory service awards.

Board of Education of Fayette County, Kentucky v. L.M., 478 F.3d 307 (6th Cir. 2007)

The court agreed with the *Reid* court that a flexible approach to compensatory education, rather than an hour-for-hour award, was appropriate, because some students might need short, intensive compensatory programs while others might need more extended programs that would exceed the number of hours of service they had missed. The court held that the IEP team cannot be given the power by a court or hearing board to reduce or terminate a compensatory education award.

Damages:

A.W. v. Jersey City Public Schools, Case No. 05-2553 (3rd Cir. 2007)

Damages action cannot be maintained under Section 1983 for violation of the IDEA (reversing *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995) (damages available under Section 504, and under 1983 claim predicated on Section 504 or the IDEA)

Charlie F. v. Bd. of Educ. Of Skokie School District, 98 F.3d 989 (7th Cir. 1996)

The court required exhaustion of IDEA administrative remedies in a damages case that had not even been brought under the IDEA, finding that, in principle, the relief the parents sought, was available under the IDEA.

Crocker v. Tennessee Secondary School Athletic Association, 980 F. 2d 382 (6th Cir. 1992)

Damages are not available under the IDEA or pursuant to a Section 1983 claim to enforce the IDEA.

Heidemann v. Rother, 84 F.3d 1021 (8th Cir. 1996)

Damages are not available pursuant to a Section 1983 claim to enforce the IDEA; the court relied on *Crocker*).

Sellers v. School Board of the City of Manassas, 141 F.3d 524 (4th Cir. 1998)

Damages are not available under the IDEA or pursuant to a Section 1983 claim to enforce the IDEA. Damages are available under Section 504 but the plaintiff must show bad faith or intentional discrimination.

Baird v. Rose, 192 F.3d 462 (4th Cir. 1999)

Damages may be available under the Americans with Disabilities Act.

Witte v. Clark, 197 F.3d 1271 (9th Cir. 1999)

Damages are not available under the IDEA; exhaustion of IDEA administrative remedies is not necessary.

Covington v. Knox County School System, 205 F.3d 912 (6th Cir. 2000)

A claim for money damages does not create an automatic exception to the IDEA's exhaustion requirement, but in the case at hand, money damages, which were the only remedy that could redress plaintiff's injuries, were not available in administrative process, and exhaustion would have been futile.

Padilla v. School District No. 1, City and County of Denver, Colorado, 233 F.3d 1268 (10th Cir. 2000)

The court did not address whether the IDEA permits damage awards in this case, which involved a child whose injuries during a restraint incident exacerbated her seizure disorder; the court found that exhaustion of administrative remedies was unnecessary because the relief she sought was unavailable in the IDEA's administrative remedy process.

Polera v. Board of Educ. Of Newburgh Enlarged City School District, 288 F.3d 478 (2d Cir. 2002)

The court held that damages are not available under the IDEA, but plaintiffs cannot avoid the IDEA's exhaustion requirement simply because they seek relief that is not available under the IDEA. But earlier precedent allowing damages pursuant to a Section 1983 claim for denial of access to administrative remedies under the IDEA's predecessor

statute remains valid law, and district courts within the circuit have relied on the decision to hold that damages are available on claims brought under Section 1983 for violations of the IDEA. See *Quackenbush v. Johnson Cit Sch. Dist.*, 716 F.2d 141, 148 (2d Cir. 1983), *cert. denied* 465 U.S. 1071 (1984)).

Nieves-Marquez v. Commonwealth of Puerto Rico, 353 F.3d 108 (1st Cir. 2003)

Money damages are not available under the IDEA, but the court left open the possibility of damages under Section 504 or the ADA for intentional conduct causing economic harm and possibly, but not clearly, for other claims.

Barnes v. Gorman, 536 U.S. 181 (2002)

Punitive damages are not available under Title II of the ADA and Section 504.

Extended School Year Services:

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986)

The court held that if a child will experience “severe or substantial regression” during the summer months without a summer program, the student may be entitled to year-round services. The question is “whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.” 790 F. 2d at 1158.

Johnson v. Independent School District No. 4, 921 F.2d 1022 (10th Cir. 1990)

The court held:

- a) Regression-recoupment analysis is not the only factor used to determine the necessity of a structured summer program. Other factors to be considered include the degree of impairment and the ability of the child’s parents to provide the educational structure at home, the child’s rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nondisabled children, the areas of the child’s curriculum which need continuous attention, the child’s vocational needs, and whether the requested service is extraordinary to the child’s condition or an integral part of a program for those with the child’s condition;
- b) This list is not intended to be exhaustive and it is not intended that each element impact planning for each child’s IEP;
- c) The analysis of whether or not a child’s level of achievement would be jeopardized by a summer break in services should include the application not only of retrospective data such as

past regression and rate of recoupment, but also “predictive data, based on the opinion of professionals in consultation with the child’s parents as well as circumstantial considerations of the child’s individual situation at home and in his or her neighborhood and community.” 921 F. 2d at 1028.

Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991)

The legal standard for determining eligibility of a student for extended school year services is “significant skill losses of such degree and duration so as seriously to impede his progress toward his educational goals.” A student need not demonstrate past regression in order to prove his or her need for a summer program. Where there are no such empirical data available, need may be proven by expert opinion, based upon a professional individual assessment. 917 F.2d at 1472. Extended school year services must be necessary in order to avoid “something more than adequately recoupable regression.” 917 F. 2d at 1473. Decision relied on by court in *Kenton County School District v. Hunt*, 384 F.3d 269 (6th Cir. 2004).

Reusch v. Fountain, 872 F.Supp. 1421 (D.Md. 1994)

Class action lawsuit resulted in order that the school district cease and desist from its IDEA violations and provide:

- a) notice to parents regarding the consideration of extended school year services at each annual review meeting;
- b) determination of extended school year services early enough so that parents can appeal a denial in time to obtain extended school year services if their child is found eligible;
- c) establishment of six eligibility criteria including regression, recoupment, degree of progress, emerging skills/breakthrough opportunities, interfering behavior, nature and/or severity of the disability, and special circumstances;
- d) individualized extended school year services; and
- e) written summary of extended school year services discussion within 10 working days after the meeting.

LIH v. New York City Board of Education, 103 F.Supp.2d 658 (E.D.N.Y. 2000)

The procedural safeguards, including the discipline requirements, of the IDEA apply equally to summer school programs. The IDEA applies to every school day. Summer school days satisfy that definition.

M.M. v. School District of Greenville County, 303 F.3d 523 (4th Cir. 2002)

Extended school year services are necessary for the provision of a free appropriate public education when the benefits gained by the child during the regular school year will be “significantly jeopardized” if he or she does not receive an educational program during the summer. A showing of actual regression is not required; the need for extended

school year services may be established by expert testimony based on a professional individual evaluation. The mere fact of likely regression is not sufficient. Rather, extended school year services are required under the IDEA only when such regression will “substantially thwart the goal of meaningful progress.” 303 F. 3d at 538.

JH v. Henrico County School Board, No. 02-1418 (4th Cir., April 28, 2003)

The court vacated the district court’s decision in light of the *M.M.* decision. In remanding the case to the district court to remand to the hearing officer, however, the Fourth Circuit ordered that the hearing officer consider evidence regarding “window of opportunity” evidence presented by the family, i.e., evidence that there is a window of opportunity for children with autism such as JH to learn effectively to overcome their deficits, to the extent that such evidence is relevant to the determination of whether the extended school year services that had been provided to the student were sufficient to prevent the gains he had made during the school year from being significantly jeopardized.

Board of Education of Fayette County, Kentucky v. L.M., 478 F.3d 307 (6th Cir. 2007)

The court reiterated its previously-adopted standard set forth in *Cordrey v. Euckert*.

Office of Special Education Programs (OSEP) Policy Letters and Office for Civil Rights (OCR) Rulings:

Over the years, OSEP has issued a number of policy rulings addressing extended school year services, and OCR has issued a number of rulings as well. These are published by LRP in the Individuals with Disabilities Education Law Reporter (IDELR) and online in Special Education Connection, a subscription service run by LRP. A brief summary of selected important policy letters and rulings is included below, along with citations.

Letter to Baugh (July 2, 1987), 211 EHLR 481: When an issue, extended school year services must be discussed at an IEP meeting; a school system cannot limit extended school year services to students with severe and profound disabilities or limit programs in duration.

Letter to Gramm (July 25, 1988), 213 EHLR 149: Extended school year programs must be made available when necessary to provide a free appropriate public education to a child.

Letter to Myers (August 30, 1989), 213 EHLR 255: IEP team determines amount of services a student needs for appropriate extended school year program. IEP for extended school year will differ from regular school program. Reasonable that extended school year IEP will focus on areas in which child may experience regression or on skills that are needed to keep child from regressing in academics. Least restrictive environment

requirements apply to extended school year services through school district programs or alternative means such as private placements.

Letter to Harkin (September 15, 1989), 213 EHLR 263: IEP team makes the ultimate determination as to whether a student needs extended school year services in order to receive a free appropriate public education. Parents have right to request a due process hearing at any time to resolve a disagreement about extended school year services.

Letter to Myers (December 18, 1989), 16 EHLR 290: Options on the continuum of services must be made available to extent necessary to implement a student's IEP. A student's IEP for extended school year services will probably differ from regular IEP, since purpose of extended school year program is to prevent regression and recoupment problems. Federal funds can be used for services in private school placement if that is determined to be the appropriate extended school year services placement. Modification necessary to implement a student's IEP for extended school year services must be determined on a case-by-case basis.

Letter to Libous (November 15, 1990), 17 EHLR 419: Eligibility for extended school year services must be based solely on each student's unique educational needs, rather than on category of student's disability. Students may require related services as sole component of special education program during summer months to benefit from school year programs.

Letter to Anonymous (November 15, 1993), 22 IDELR 980: Children who turn three during the summer months must be provided with extended school year services if needed for the provision of a free appropriate public education. Decision must be individualized. No disability category may be excluded. Evidence appropriate to meet state standards for eligibility must be determined on a case-by-case basis, depending on needs of individual student.

Letter to Kleczka (September 29, 1998), 30 IDELR 270: No federal requirement that if student does not meet goals of IEP, he or she must participate in extended school year services.

Letter to Sims (June 27, 2002), 38 IDELR 69: IDEA's "at no cost" provision includes incidental fees if normally charged to parents of students without disabilities as well as parents of children with disabilities, but parents of children with disabilities may not be charged for a summer program that is part of the student's extended school year services.

Baltimore (MD) City Public Schools (April 18, 1986), 352 EHLR 185: District violated Section 504 because it did not determine provision of extended school year programs and services based on students' individual needs. Only students with severe disabilities in special day schools or residential facilities were considered for extended school year services.

Clark County (NV) School District (November 2, 1989), 16 EHLR 311: District violated Section 504 by failing to consider extended school year services for students, limiting summer school enrollment on basis of disability and charging some families fees for services.

Rockwood (MO) R-VI School District (November 8, 1989), 16 EHLR 506: District did not violate Section 504 by having policy that extended school year programs were generally one-half the amount of services received during the school year.

Mesa (AZ) Public Schools (November 9, 1989), 16 EHLR 316: Districted violated Section 504 by limited extended school year services to self-sufficiency areas, thereby serving mainly students with severe cognitive impairments and discriminating against other students with disabilities by failing to consider their unique needs.

Discipline:

Goss v. Lopez, 419 U.S. 565 (1975)

Suspensions of 10 or more days cause a sufficient deprivation of property and liberty interests to trigger the protections of the Due Process Clause of the United States Constitution. School systems, therefore, have had to develop suspension procedures that incorporate constitutionally-required provisions for notice of charges, an opportunity for the student to present his or her version of the story, and the opportunity for a hearing. If these procedures are not followed correctly, the suspension is voidable.

Honig v. Doe, 484 U.S. 305 (1988)

The Court refused to allow school administrators simply to exclude students on the basis of perceived dangerousness, and held that unless the parents consent to an alternative placement or the school system obtains an injunction to exclude the student on the grounds that the student's continued attendance would be "truly dangerous," the school system must permit the student to remain in his or her current placement pending agreement to an alternative placement or the completion of any administrative or court proceedings to challenge any proposed change in placement.

Much of the *Honig* holding was incorporated into the IDEA when it was reauthorized in 1997 and it was changed significantly when the IDEA was reauthorized again in 2004, particularly with regard to when a student may remain in his or her current placement and when he or she may be removed from school by administrators. However, the *Honig* decision remains instructive both for what seems to constitute "truly dangerous" behavior and for the alternatives to suspension that the Court lists. With respect to "truly dangerous" behavior, it is instructive to note the standard had not been met in this case. The Court found that the school district had failed to show a substantial likelihood that continued attendance of either student would result in injury to the students or others: one student had been suspended indefinitely for choking a fellow student with sufficient force to leave abrasions and for kicking out a school window, and the second student had been

suspended indefinitely for disruptive behavior which included stealing, extorting money from fellow students, and making sexual comments to female classmates. With respect to alternatives to suspension, the Court listed the use of study carrels, time outs, detention, or the restriction of privileges as other options.

Special Education Timelines

Referral for Special Education—No timeline in federal law; need to check state law

Assessments—Federal law requires sets a deadline of 60 days from parent consent; need to check state law for any alternative timelines

Development of IEP—No federal timeline; need to check state law

Implementation of law—Federal law requires implementation as soon as possible after development; IEP must be in effect at beginning of school year. Check state law for specific timelines.

Re-evaluation—At least once every three years