

**PRESSURE POINTS AND RELIEF VALVES:  
MANAGING THE RIGHTS AND  
RESPONSIBILITIES OF PUPILS, PARENTS, AND  
PROFESSIONALS IN SPECIAL EDUCATION**

**Presented by Joanne Harmon Curry**

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## 2008 WASB-WSAA School Law Seminar

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### **PRESSURE POINTS AND RELIEF VALVES: MANAGING THE RIGHTS AND RESPONSIBILITIES OF PUPILS, PARENTS, AND PROFESSIONALS IN SPECIAL EDUCATION**

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#### **I. Eligibility Issues Related to Students with Disabilities**

- A. Under the Individuals with Disabilities Education Improvement Act (IDEA), the State must ensure that all children with disabilities receive a free appropriate public education (commonly referred to as “FAPE”). 20 U.S.C. § 1412(a)(1)(A).
- B. Federal and State law mandate that school districts identify, locate, and evaluate children to determine who is in need of special education and related services. 20 U.S.C. §§ 1412(a)(3)(A); Wis. Stat. Ch. 115.
- C. A child qualifies for special education and related services if the child is between three and twenty-one years of age and has one of the 10 enumerated categories of impairments and needs special education and related services as a result of that impairment. 20 U.S.C. § 1401(3).

A “child with a disability,” under the federal and State education law, is defined as a child—

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

(ii) who, by reason thereof, needs special education and related services.

- D. An evaluation to determine whether the student has an “impairment” is focused on the child’s educational needs in the education environment, which considers what the child knows and can do academically, developmentally, and functionally, in the general education curriculum. 20 U.S.C. § 1414(b)(2)(A).

- E. The term “academic achievement” is further defined by the incorporation of the definition of “core academic subjects” from the Elementary and Secondary Education Act of 1965 (commonly known as the No Child Left Behind Act). 20 U.S.C. § 7801.
- F. The term “functional” performance was added as a part of the definition of “educational performance” with the 2004 reauthorization of the IDEA, and is not further defined by statute or regulation, but is thought to include skill development in the area of self-care skills. It is unclear whether functional performance problems alone, such as social and behavioral problems, are sufficient for eligibility under the law.
- G. A child is not eligible for special education services if the determinant factor in learning problems is the lack of appropriate instruction in reading, including essential components of reading instruction, which are: phonemic awareness, phonics, vocabulary development, reading fluency including oral reading skills, and reading comprehension strategies. A child is also not eligible if the determinant factor is the lack of instruction in math or due to the limited English proficiency of the student. 34 C.F.R. § 300.306.
- H. Challenges to the Scope of Eligibility
1. A local education agency (LEA) may now opt out of using the common “severe discrepancy” factor of the specific learning disabilities (SLD) definition (i.e., a measure of the severity of a student’s discrepancy between intellectual ability and academic achievement) and replace it with a process that assesses a student’s response to a scientific, research-based intervention model (commonly referred to as “response to intervention” or “RTI”). A child may be deemed to have a SLD if:
    - a. The child does not achieve adequately for the child’s age or to meet State approved grade-level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child’s age or State approved grade level standards: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, math calculations, and math problem solving.
    - b. The child does not make sufficient progress to meet age or State approved grade level standards when using a process based on response to scientific, research-based interventions.
    - c. The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both relative to age, State approved grade level standards or intellectual development relevant to determining a SLD using appropriate assessments. 34 C.F.R. § 309(a)(1).

This model is currently being developed tested at the local level around the State. It is uncertain what the effect of this change in identifying students with a specific learning disability will have on the number of students determined eligible for special education services.

2. There are an increasing number of cases being brought before the courts challenging a school district's determination, through an individualized education program (IEP) team, that a student is not eligible for special education and related services. There are three concepts that are being scrutinized and affect eligibility determination.
  - a. The impairment must "adversely affect" the student's performance. In one case, a student with Asperger syndrome and a depressive disorder had a long history of high academic performance. The student had difficulty with peer relationships and poor social language skills, and had attempted suicide. A school district determined that the student was not eligible for special education services because it concluded that her educational performance was not adversely affected by the impairment. A reviewing court adopted a broad definition for the term "adverse effect" by explaining that the disability must have a negative effect, but there is no quantitative limit, such that *any* negative effect of the impairment on the student's educational performance is sufficient. *Mr. and Mrs. I v. Maine Sch. Administrative Dist. No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir. 2007).
  - b. The impairment must affect the student's educational performance. In the case cited above, the court gave the term "educational performance" a broad interpretation, rejecting the school district's reliance on the student's strong academic performance to deny the student eligibility for services. *Id.*
  - c. Finally, the student must "need special education services" by reason of the impairment. In one case, a student was diagnosed with attention deficit hyperactivity disorder (ADHD) and exhibited disrespectful and disruptive behaviors like hitting, throwing pencils, and use of obscene language. He, however, met the state's knowledge and skills assessment standards and passed all his courses. The school personnel concluded that the student was not eligible for special education services because his cognitive abilities and academic performance were in the average range and he was making age-appropriate academic and social progress. The appellate court explained that evidence of not only the student's academic progress, but also behavioral and social progress is to be considered in determining that the student does not need special education services by reason of his ADHD. The court recognized that the student demonstrated clear academic success and that he did not need special education despite his behavioral issues since he was achieving behavioral and social progress in school. *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378 (5<sup>th</sup> Cir. 2007).

## I. Prohibition on Mandatory Medication

School personnel are prohibited from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving special education and related services. However, teachers and other school personnel are not prohibited from consulting and sharing classroom-based observations with parents or guardian regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education and related services. 20 U.S.C. §§ 1412 (a)(25)(A-B); 34 CFR 300.174.

## J. Significant Disproportionate Representation

Disproportionate representation is defined as “the extent to which membership in a given group affects the probability of being placed in a category.” The State agency is now required to determine if significant racial or ethnic disproportionality is occurring on both the State and local level with regard to the identification, placement, and incidence and duration of disciplining students with disabilities. It must adopt policies and procedures designed to prevent inappropriate over-identification and significant disproportionate representation by race or ethnicity. If a district is determined to have significant disproportionality, then the district must reserve 15% of federal funds to provide comprehensive coordinated early intervening services. 34 C.F.R. § 300.646.

## II. Special Education: Parental Rights and Decision-Making

A. The U.S. Supreme Court has identified the right of parents to participate in the special education process as fundamental to ensuring school districts fulfill their obligations under the IDEA. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

B. The core of the statute is the cooperative process that it establishes between parents and schools. Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard. *Schaffer v. Weast*, 126 S.Ct. 528, 532 (2005).

## C. Right to Consent

1. Parents must provide informed consent to an initial evaluation to determine if their child is a child with a disability in need of special education and related services before the school district may conduct any evaluation. 34 C.F.R. § 300.300.
2. If the parent does not provide consent for an initial evaluation or fails to respond to a request to provide consent, the school district may, but is not required to, pursue the grant of authority to conduct the evaluation by requesting a due process hearing or by using a mediation process. The school district does not violate the IDEA if it declines to pursue the evaluation.

3. Informed parental consent is also required before the school district can initiate special education and related services to the student. If the parent fails to respond or refuses to consent to services, the school district may not request a due process hearing or seek mediation in order to obtain a ruling or an agreement that the services may be provided.
4. If the parent refuses to consent to the initial provision of IEP services, the school district will not be considered to be in violation of the IDEA.

D. The IEP Team Must Include the Parents. 34 C.F.R. § 300.321.

1. Complying with the IDEA by ensuring parent participation in the decision-making about a student's educational program through IEP meetings provides a strong defense for school districts when a conflict arises and a district's decision is challenged. Failure to comply with the procedural requirements of IDEA and ensure parents' rights to participate may result in liability for the school district with a finding that it denied the student a free appropriate public education.
2. When a parent challenges a school district regarding a special education issue(s), and alleges that the school district engaged in procedural violations under the IDEA, federal law requires that any decision by an administrative law judge be made on the substantive grounds of whether a child has received a free appropriate public education. 20 U.S.C. § 1415(f)(1)(E)(i); 34 CFR 300.513(a)(1); Wis. Stat. § 115.80(5)(b). Therefore, procedural flaws under the IDEA by the school district are relevant to the extent they:
  - a. Impeded the child's right to a free appropriate public education; 20 U.S.C. § 1415(f)(1)(E)(ii)(I); 34 CFR 300.513(a)(2)(i); Wis. Stat. 115.80(5)(c);
  - b. Significantly impeded the parent's opportunity to participate in the educational decision-making of their child; 20 U.S.C. § 1415(f)(1)(E)(ii)(II); 34 CFR 300.513(a)(2)(ii); Wis. Stat. § 115.80(5)(c); or
  - c. Caused a deprivation of educational benefits; 20 U.S.C. § 1415(f)(1)(E)(ii)(III); 34 CFR 300.513(a)(2)(333); Wis. Stat. § 115.80(5)(c).

E. Relevant Caselaw

*Hjortness v. Neenah Joint Sch. Dist.*, 498 F.3d 655 (7<sup>th</sup> Cir. 2007). The parents of a student with disabilities sued the school district, alleging that the school district engaged in several procedural violations in preparing their son's IEP, in particular: (1) that they did not get to participate in the development of the goals and objectives; and (2) that the school district predetermined the student's placement before the IEP was written (and, hence, without their participation). The court held in favor of the school district, finding, first, that the parents and their advocate had participated in multiple IEP meetings, but they had refused to talk about anything other than whether the school district would reimburse them for their son's private school placement. The school district personnel ended up writing the goals outside the IEP meeting. However, the court reasoned that the parents' "intransigence to block an IEP that yields a result contrary to the one they seek does not amount to a violation of the procedural requirements of the IDEA." Second, the court held that the school district did not predetermine the student's placement prior to the IEP meeting because the IDEA requires the school district to assume a public placement for the student and it was not required to consider a private placement once it determined that the public placement was appropriate. The court reasoned that the student had not been denied FAPE and had no loss of educational opportunity.

F. Instructional Methodology Decisions

1. The school district, and not the parents, has the primary responsibility for choosing the educational method most suitable to the child's needs. *Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir.), cert. denied, 488 U.S. 925 (1988).
2. The U.S. Department of Education has commented that the IDEA does not require an IEP to include specific instructional methodologies. An IEP team may address specific instructional methods in the IEP if they choose to do so, but it typically limits the discretion of the student's teachers to make those decisions at the classroom level. OSEP Proposed Rule Change 73 Fed. Reg. 46,446 (May 13, 2008).

G. Student Discipline

1. The 2004 reauthorization of the IDEA gave school districts increased authority to discipline students with disabilities. Students with disabilities are categorized into three groups for the purpose of determining the level of unilateral authority school personnel have to change their placement because of violations of the student code of conduct: students whose conduct is not a manifestation of their disability; students whose conduct is a manifestation of their disability; and students whose conduct is egregious enough to fall under several special circumstances when taking disciplinary action. 20 U.S.C. §§ 1415(k)(E-G); 34 CFR 300.530.

2. Placement in Alternative Educational Settings: Unilateral School Authority Related to Disciplinary Removals.
  - a. School personnel have the authority to order the following:
    - i. School personnel may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative education setting, another setting, or suspension, for not more than 10 school days to the extent such alternatives are applied to children without disabilities. (Previous law did not limit this type of removal to violations of a code of student conduct). 20 U.S.C. § 1415(k)(1)(A); 34 CFR 300.530(b)(1).
    - ii. Wisconsin state law limits the number of days that any student may be suspended from school to five (5) school days unless the administration provides the student and the parent (under separate mailings) with notification that it intends to recommend the student for expulsion. This means, that although a 10 day suspension is allowed under the IDEA, state law prohibits a child's suspension for more than 5 days unless expulsion is being sought. Wis. Stat. § 120.13(1)(b); 20 U.S.C. § 1415(k)(1)(B); 34 CFR 300.530(b)(2).
    - iii. The school district must notify the parents of any decision to take disciplinary action and of the procedural safeguards available to the parent under the IDEA, 20 U.S.C. § 1415(k), no later than the date on which the decision to take disciplinary action is made. 34 CFR 300.530(h).
3. Case-by-case Determination: School personnel may consider any unique *circumstances* on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. 20 U.S.C. § 1415(k)(1)(A); 34 CFR 300.530(a). (It is unclear how this provision will be interpreted, e.g., what is meant by "unique circumstances," and what additional authority this provides to school personnel, who have always considered the individual facts of each student's circumstances when asserting their disciplinary authority).
4. Manifestation Determination: When school personnel want to order a change of the student's current placement for more than 10 school days, the IEP Team must convene within 10 days to determine whether the misconduct was a manifestation of the student's disability. 20 U.S.C. § 1415(k)(1)(E); 34 CFR 300.530(e).

- a. The IEP team must review all relevant information in the student's file, including the child's IEP, teacher observations, and information provided by the parents and determine:
    - i. If the conduct was caused by, or had a direct and substantial relationship to the child's disability. 20 U.S.C. § 1415(k)(1)(E)(i)(I); 34 CFR 300.530(e)(1)(i).
    - ii. If the conduct was the direct result of the school district's failure to implement the IEP. 20 U.S.C. § 1415(k)(1)(E)(i)(II); 34 CFR 300.530(e)(1)(ii).
  - b. If the conduct fits into either of these categories, then the conduct is a manifestation of the child's disability. 20 U.S.C. § 1415(k)(1)(E)(ii); 34 CFR 300.530(e)(2).
5. If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except that the child must continue to receive a free appropriate public education, although it may be provided in an interim alternative educational setting. 20 U.S.C. § 1415(k)(1)(C); 34 CFR 300.530(d).

Under the IDEA, the IEP team must determine the proper interim setting under this subsection. 20 U.S.C. § 1415(k)(2); 34 CFR 300.531. Also, any changes in placement must be made in accordance with the procedure set forth by the school board pursuant to Wis. Stat. § 120.13(1), which governs disciplinary actions related to placement changes for students without disabilities.

6. If the IEP team makes the determination that the conduct was a manifestation of the child's disability, the IEP team shall:
- a. Conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the school district had not conducted such assessment prior to such determination, before the behavior that resulted in the change in placement under the district's unilateral authority (prior law required only that an assessment plan be developed); 20 U.S.C. § 1415(k)(1)(F)(i); 34 CFR 300.530(f)(1);
  - b. In the situation where a behavioral intervention plan (BIP) has been developed, review the behavioral intervention plan if the child already has such a BIP, and modify it, as necessary, to address the behavior; 20 U.S.C. § 1415(k)(1)(F)(ii); 34 CFR 300.530(f)(1)(ii); and

- c. Unless the parents and the LEA have agreed upon a different placement, return the child to the placement from which the child was removed (except if the child has been placed in an interim alternative educational setting for not more than 45 days as described below under Special Circumstances). 20 U.S.C. § 1415(k)(1)(F)(iii); 34 CFR 300.530(f)(2).
7. Special Circumstances: School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child’s disability, in cases whether:
- a. The child carries or possesses a weapon, as defined under federal law as a dangerous weapon, to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a school district; 20 U.S.C. § 1415(k)(1)(G)(i); 34 CFR 300.530(g)(1); or
  - b. The child knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, as defined by federal law, while at school, on school premises, or at a school function under the jurisdiction of a State or school district; 20 U.S.C. § 1415(k)(1)(G)(ii); 34 CFR 300.530(g)(2).
    - i. Illegal drug means a controlled substance, but does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional. 20 U.S.C. § 1415(k)(7)(B); 34 CFR 300.530(i)(2).
    - ii. Note that a child’s prescriptions are not illegal drugs but are considered controlled substances. A child may possess the prescriptions without offending this section. However, if a child is selling any of those prescriptions to classmates, it qualifies as a “special circumstance” and the child may be removed to an alternative setting for not more than 45 days pursuant to 20 U.S.C. § 1415(k)(1)(G). 34 CFR 300.530(i)(1).
  - c. The child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or school district. Serious bodily injury has the meaning provided in the federal criminal code at 18 U.S.C. § 1365(h)(3), which involves one of the following:
    - i. A substantial risk of death;
    - ii. Extreme physical pain;

- iii. Protracted and obvious disfigurement; or
    - iv. Protracted loss or impairment of the function of a bodily member, organ or mental faculty. 34 CFR 300.530(i)(3).
  - d. Determination of Setting: Again, the interim alternative educational setting under this subsection shall be determined by the IEP Team. Home instruction may be an appropriate interim alternative educational setting, depending on the particular circumstances of an individual case, such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and includes consideration of the child's needs and educational goals. 20 U.S.C. § 1415(k)(2); 34 CFR 300.531.
- 8. Continuation of services during disciplinary removals for more than 10 school days.
  - a. A child with a disability who is removed from his or her current placement by either (a) unilateral authority of the school personnel when the conduct is not a manifestation of the student's disability, or by (b) unilateral authority of the school personnel into an interim 45 school day placement under special circumstances (irrespective of whether the behavior is determined to be a manifestation of the child's disability) shall:
    - i. Continue to receive educational services to enable him or her to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; 20 U.S.C. § 1415(k)(1)(D)(i); 34 CFR 300.530(d)(1)(i); and
    - ii. Receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. 20 U.S.C. § 1415(k)(1)(D)(ii); 34 CFR 300.530(d)(1)(ii).

H. Harassment and Retaliation Because of a Student's Disability is Prohibited

- 1. Parents may bring claims of retaliation on their child's behalf, or in some circumstances, on their own behalf or as an advocate acting on behalf of their child, if they feel that their statutory or constitutional rights have been violated.
- 2. The basis for such a claim includes Section 504 of the Rehabilitation Act of 1973 when a student with disabilities is involved or a First Amendment free speech claim.

3. The elements of a retaliation claim under Section 504 are that: (1) a plaintiff was engaged in a protected activity; (2) the alleged retaliator knew that plaintiff was involved in a protected activity; (3) an adverse decision or course of action was taken against plaintiff; and (4) a causal connection exists between the protected activity and the adverse action. *See Weissman v. Dawn-Joy Fashions, Inc.*, 214 F.3d 224, 234 (2<sup>nd</sup> Cir. 2000).
4. The Americans with Disabilities Act (“ADA”) prohibits retaliation, stating, in relevant part, that “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.” Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12203; 28 C.F.R. Part 35.
5. The anti-retaliation provision of the ADA also prohibits interference with any individual on account of having aided any person in the exercise of any protected right. Section 504 and the ADA are generally interpreted in a consistent manner, applying the same judicial standard of review to claims.
6. **Restricting Communications Between Staff and Parents**

A school district may restrict the communications between staff and parents whose children are in special education when it is done consistent with the manner in which the district handles staff requests, generally, related to parents that are perceived to be of concern to district employees. In a complaint to the U.S. Department of Education, Office of Civil Rights (OCR), a parent alleged that the school district had retaliated against him for advocating for his child, who was a child with a disability. The school district admitted that it had restricted the manner in which the parent was permitted to communicate with staff members in person or by telephone. It required the parent to go through the Director of Pupil Services or the Assistant Superintendent for information about the student, or to arrange for meetings with individual teachers so that an administrator could be in attendance as well. It did this, the district asserted, because it believed it had the administrative prerogative to take action as an employer on behalf of concerns raised by district employees that they felt intimidated or threatened by the parent during meetings, and to ensure that the staff was not impeded from performing their essential functions as district employees. Although the parent asserted that he had a right to access the student’s teachers directly at the time and place he felt was convenient for him, and that he should have no restriction on his right to call or meet with them, the district explained that it had a longstanding practice of honoring requests from teaching staff members to have an administrator present during parent-teacher meetings. The district had concluded that the parent’s contacts with staff were disruptive to the workplace and impeded the staffs’ ability to perform the functions of their jobs. The OCR concluded that the school district’s reasons for restricting the parent’s access to teachers and teacher aides were legitimate and did not constitute prohibited retaliation. *East Bridgewater (MA) Public Schools*, 108 LRP 21714 (OCR, September 5, 2007).

### III. IEP Services Sufficient to Produce Educational Progress

- A. A student with disabilities is entitled to a free appropriate public education that:
1. Has been provided at public expense, under public supervision and direction, and without charge;
  2. Meet the standards of the State educational agency;
  3. Include an appropriate preschool, elementary, or secondary school education in the State involved; and
  4. Are provided in conformity with the individualized education program (IEP). 20 U.S.C. § 1401(9).
- B. The individualized education program (IEP) team is responsible for developing, reviewing, or revising an IEP for a child with a disability. 34 C.F.R. § 300.23.
1. In addition to the parents, an IEP team must include not less than one regular education teacher of the child (if the child is, or may be, participating in regular education); not less than one special education teacher, or where appropriate, at least one special education provider of the child; a representative of the local education agency (LEA), who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, knowledgeable about the general curriculum, knowledgeable about the availability of resources of the LEA, and must have the authority to commit the LEA to implement the IEP resulting from the meeting; an individual who can interpret the instructional implications of evaluation results (who may be one of the above members); related services personnel as appropriate; and, whenever appropriate, the child with a disability.
  2. The school district determines the specific school personnel who will fill the roles for the school's required IEP team participants and the parent has no legal right to require other members of the school district who are not designated by the school district to attend an IEP team meeting. (71 Fed. Reg. 46,674 (August 14, 2006) (Analysis of Comments and Changes).
  3. At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the child may be invited to participate at IEP meetings. 34 C.F.R. § 300.321.
  4. IEP teams are to make decisions by consensus. One court has reasoned that a majority vote for decision-making at IEP meetings is inconsistent with the IDEA and would be unworkable, encouraging the parties to "stack the deck" with participants at the IEP meetings. *Doe v. Maher*, 793 F.2d 1470 (9<sup>th</sup> Cir. 1986).

5. If consensus is not reached, the school district has the duty to formulate the plan to the best of its ability in accordance with information developed at the IEP meetings because the school district is the entity obligated to provide FAPE. The LEA representative on the IEP team speaks for the school district.
6. Parents have a right to file a complaint with the Department of Public Instruction and request a due process hearing to challenge decisions by the school district. They may also seek third party mediation of the dispute through the State Special Education Mediation System, which must be voluntary on the part of both parties.
7. Each school district must provide special education and related services to a child with a disability in accordance with the child's IEP, and make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP. 34 C.F.R. § 350(a) (1999).
8. IEP services offered by a school district must be reasonably calculated to provide some educational benefit. School districts are not required to maximize a special education student's educational performance. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
9. An IEP is not an educational contract that guarantees that a student with disabilities will achieve a certain level of academic proficiency or functional skills. No school district, teacher or other person can be held accountable if a child does not achieve the growth projected for him or her. 34 C.F.R. § 300.350(b) (1999).
10. Nothing in the IDEA limits a parent's right to ask for revisions of the child's IEP or to invoke due process hearing procedures if the parent feels that the school district is violating the student's rights. 34 C.F.R. §§ 300.507-300.520.

C. Educational Placements

1. Educational placements of students with disabilities must be made by the parents of each student with a disability and members of any group that makes decisions on the educational placement of their child. 20 U.S.C. § 1414(e); 34 C.F.R. § 300.327.
2. To the maximum extent appropriate, children with disabilities are educated with children who are not disabled. 34 C.F.R. § 300.114.
3. Nevertheless, each public agency shall ensure that a continuum of alternative placements is available. 34 C.F.R. § 300.115.

D. Relevant Caselaw

***Butler v. Evans***, 225 F.3d 887 (7<sup>th</sup> Cir. 2000). The Seventh Circuit Court of Appeals was asked to consider whether the parents of a child with severe emotional and psychological problems were eligible for reimbursement pursuant to the IDEA for the costs of their child's hospitalization where her parents had committed her for psychiatric treatment. The court concluded that the IDEA does not require a school district to bear the costs related to residential care when such residential placement is made apart from the child's special education needs because the placement was primarily related to the student's "medical, social or emotional disabilities apart from her special education needs." The Seventh Circuit established a common sense distinction between a residential placement to produce an educational benefit under an IEP and a residential placement for the purpose of care and treatment, where education is incidental to the placement.

***Dale M. by Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307***, 237 F.3d 813 (7<sup>th</sup> Cir. 2001). The court held in favor of the school district by denying the parent reimbursement for their son's residential, private placement because the purpose of the placement was primarily for confinement. The student was a serious disciplinary problem, disrupted classes, was truant, and began drinking alcohol in excess and using drugs. He was charged with residential burglary and spent time in jail. A psychologist diagnosed the student with a conduct disorder, along with depression and substance abuse. The school district offered to send Dale M. to a therapeutic day school, but his parent obtained his release from jail and placed him in a residential school, subsequently seeking reimbursement from the school district.

The court analyzed the issue as one in which it was determined whether "confinement," for the purpose of keeping the student out of jail, is a related service because that was determined to be the primary purpose of the residential placement. The court determined that Dale's problems were not primarily educational, but that he lacked proper socialization and needed to be confined to remain out of jail, and that the school district would not be responsible for such a noneducational purpose. A dissenting opinion in the case chided the majority for failing to give deference to the will of Congress to provide support services that are necessary for the meaningful delivery of educational services, and for setting the Seventh Circuit Court on a course different from all other courts that have interpreted this provision.

***School District of Wisconsin Dells v. Student***, 295 F.3d 671 (7<sup>th</sup> Cir. 2002). Affirming the federal district court, the Seventh Circuit Court of Appeals rejected the student's position that he was mislabeled and had not been provided a FAPE. The fact that the student was a child with a disability as defined by the IDEA was undisputed. The student argued that he was a student with autism, not emotional disturbance. The court stated that the correctness of the child's label is essentially irrelevant under IDEA and found that the administrative law judge exceeded the bounds of his authority, knowledge and experience when he ruled that the student had autism as well as emotional disturbance.

The court found the school district's decisions relative to the student's education reasonable. The fact that the student was initially integrated into the regular school setting upon returning from a psychiatric residential placement, subsequently exhibited serious behavioral difficulties that resulted in another briefer period of placement at the psychiatric residential facility, and then experienced difficulty in a therapeutic day setting was evidence of the district's efforts to find an appropriate educational setting for the student. Although the student experienced a month delay in the delivery of services during this time period, the court concluded that the district required a reasonable amount of time not only to convene the IEP team, but also to obtain information about other potential placements. Finally, the court concluded that the district's efforts and the student's IEPs, including placement in a homebound setting, were reasonably calculated to provide the student with some educational benefit.

*Ross v. Bd. of Educ.*, 486 F.3d 267 (7<sup>th</sup> Cir. 2007). The parents of a high school student with Rett syndrome challenged a school district's decision to place the student in a "multiple needs" program during her junior year. The program was considered a more restrictive educational placement, and the parents argued that the district had failed to provide the aids and services the student needed to succeed in regular education classes. But the district had concluded that the student only made progress toward her IEP goals when she worked with a special education teacher in a private room and, in fact, had spent little time in the regular classroom during the school year. The court held in favor of the school district, noting that the proposed special education placement provided "reverse mainstreaming opportunities," where the student would be integrated into the regular education environment and engage in periodic interaction with nondisabled students.

- E. The State Department of Public Instruction must establish goals for the performance of children with disabilities that:
1. Promote the purposes of the IDEA, that is, providing a free appropriate public education to children with disabilities, ensure the rights of children and parents are protected, and assist government agencies in providing education to all children with disabilities. 20 U.S.C. § 1412(15)(A)(i); 20 U.S.C. § 1400(d); 34 CFR 300.157(a)(1).
  2. Are the same as the State's definition of adequate yearly progress, including the State's objectives for progress by children with disabilities, under section 1111(b)(2)(C) of the Elementary and Secondary Education Act of 1965. 20 U.S.C. § 1412 (a)(15)(A)(ii); 34 CFR 300.157(a)(2).
  3. Address graduation rates and dropout rates, as well as such other factors as the State may determine. 20 U.S.C. § 1412 (a)(15)(A)(iii); 34 CFR 300.157(a)(3).

4. Are consistent, to the extent appropriate, with any other goals and standards for children established by the State. 20 U.S.C. § 1412 (a)(15)(A)(iv); 34 CFR 300.157(a)(4).
  5. Establish performance indicators that will be used to assess progress toward these goals, which may include elements of the reports required by No Child Left Behind. 20 U.S.C. § 1412(a)(15)(B); 34 CFR 300.157(b).
- F. Local educational agencies must submit a local performance plan with several statutory requirements:
- a. Assurances to the Department of Public Instruction that the school district has in effect policies, procedures, and programs that are consistent with State and federal requirements; Wis. Stat. § 115.77(4)(p);
  - b. A plan for ensuring that its personnel are appropriately and adequately prepared to comply with State and federal standards; Wis. Stat. § 115.77(4)(q);
  - c. Data regarding children with disabilities that DPI is required to collect to comply with federal data reporting requirements; this information will be used to create an annual report on the State's progress towards its special education goals; 20 U.S.C. § 1412(a)(15)(C); 34 CFR 300.157(c); Wis. Stat. § 115.77(4)(r); and
  - d. Any other information requested by the Department of Public Instruction. Wis. Stat. § 115.77(4)(s).
  - e. Local Educational Agencies are no longer required to make an annual special education performance report available to all parents in the district. Wis. Stat. § 115.77(7), *repealed by 2005 Wis. Act. 258*. Instead, similar special education data is available from the Department of Public Instruction's Annual Report. 20 U.S.C. § 1412(a)(15)(C); 34 CFR 300.157(c).

#### **IV. School Board Authority and Administrative Oversight**

##### **A. Duties and Powers of School Boards**

1. The statutory duties and powers of school boards shall be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers, if the action is not prohibited by the laws of the federal government or of this State. Wis. Stat. § 118.001.
2. Public education is a fundamental responsibility of the State and the State legislature has provided for a common understanding of what should be taught. Wis. Stat. § 118.01.

3. School boards may do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils. Wis. Stat. § 120.13.
4. Schools are responsible for controlling student attendance by enforcing the State's compulsory attendance laws when students are truant from school. Wis. Stat. § 118.16(1)(a).

B. School Board Control of School Curriculum

1. Compulsory attendance substantially curtails parental authority over curriculum. Unless a child is excused by the school board or has graduated from high school, any person having a child between the ages of six and eighteen years under his or her control shall cause the child to attend school regularly during the full period and hours that the public or private school in which the child should be enrolled is in session until the end of the school term, quarter, or semester of the school year in which the child becomes eighteen years of age. Wis. Stat. § 118.15.
2. The Wisconsin legislature exercises its authority to regulate public and private schools, including the area of educational curriculum. The school board must provide curriculum, course requirements, and instruction consistent with the goals and expectations established by State law. Wis. Stat. § 118.01(1).
3. School boards are granted broad discretion over the instructional content of public education, including the development and implementation of curricula that transmit community values, be they social, political, or moral.
4. School boards are required to make instruction available in the area of personal development, including physiology and hygiene, sanitation, the effects of controlled substances and alcohol upon the human system, symptoms of disease and the proper care of the body. Wis. Stat. § 118.01(2)(d)2.(c). No student may be required to take instruction in these subjects if his or her parent files a written objection with the teacher.
5. School boards are encouraged to make instruction available in topics related to human growth and development available to students. If the board does so, it must annually provide the parents of each student enrolled in the school district with an outline of the human growth and development curriculum used in the student's grade level and information regarding how the parent may inspect the complete curriculum and instructional materials, making them available at any time, including prior to their use in the classroom. An individual student may be exempted from taking instruction in human growth and development if the student's parent files a written request that the student be exempted with the teacher or school principal. Wis. Stat. § 118.019.

6. The school board is responsible for adopting all the textbooks necessary for use in the school under its charge. The list of the adopted books must be filed with the school district clerk. Wis. Stat. § 118.03.
7. The school board must provide adequate instructional materials, texts and library services which reflect the cultural diversity and pluralistic nature of American society. Wis. Stat. § 121.02(1)(h).

**V. General Education: Parent Participation and Decision-Making**

**A. General Parental Rights to Control Their Child's Education**

1. Parental authority regarding their child's public school educational program must be authorized by law and/or local school board policy.
2. Instruction in a private school or home-based private educational program that meets all of the criteria required of private schools may be substituted for attendance at a public school. Wis. Stat. §§ 118.15(4), 118.165.
3. Program or curricular modifications: any child's parent or guardian, or the child if the parent or guardian is notified, may request the school board, in writing, to provide the child with program or curriculum modifications leading to high school graduation or a high school equivalency diploma, including but not limited to (Wis. Stat. § 118.15(1)(d)).
  - a. Modifications within the child's current academic program.
  - b. A school work-training or work-study program.
  - c. Enrollment in any alternative public school or program located in the school district in which the child resides.
  - d. Enrollment in any nonsectarian private school or program, located in the school district in which the child resides, which complies with the requirements of federal civil rights nondiscrimination laws. Enrollment of a child under this subdivision shall be pursuant to a contractual agreement which provides for the payment of the child's tuition by the school district.
  - e. Home-bound study, including nonsectarian correspondence courses or other courses of study approved by the school board or nonsectarian tutoring provided by the school in which the child is enrolled.
  - f. Enrollment in any public educational program located outside the school district in which the child resides. Enrollment of a child under this subdivision may be pursuant to a contractual agreement between school districts.



- d. Under NCLB parents have a right to information about the student's teacher and his or her certifications.
6. Under NCLB, schools targeted for school improvement must also provide all students enrolled in the school with the option to transfer to another public school, including a charter school, served by the school district that is not targeted for improvement no later than the first day of the school year following such identification. 34 C.F.R. Part 200; 20 U.S.C. § 6301 *et seq.* (2002).
7. Parents have some constitutionally protected rights under the First and Fourteenth Amendments to the U.S. Constitution. However, expressive activity may be restricted on school property when the administration can show that the forbidden conduct materially disrupts classwork or involves substantial disorder or invasion of the rights of others.
8. Members of the public have some constitutionally protected rights to the use of school property, such as the right of entry at proper times for proper purposes, because school buildings and grounds are public property. The constitutionally-based rights cannot be arbitrarily denied even by statute.
9. Reasonable rules or laws that are aimed at maintaining a scholastic atmosphere, as well as protecting school property and preserving the moral and physical safety and well-being of the student body from purposes detrimental to or unconnected with the basic educational processes to which the properties are dedicated, are valid and enforceable.
10. If an individual's behavior violates the provisions of the disorderly conduct law, Wis. Stat. § 947.01, a school district may rely on the authority of State law to remove him or her from school premises. Local ordinances may also provide a legal basis for action. Members of the school staff can and should be delegated to supervise and enforce rules. However, in certain situations, when it is both impracticable and involves unacceptable risks to the school and the enforcer, it may be advisable to ask local police to attend and aid in enforcement, particularly when the use of physical force may be necessary.
  - a. Board policies governing conduct on school premises need to define the forbidden conduct with sufficient specificity so that a person, students and visitors alike, is aware of what is actually prohibited. Such rules may establish the time, place, and manner of entry upon school premises in order to protect school property and students and to maintain the efficient operation of the school. The policies can address the safety concerns of school districts in needing to know who is present on school grounds and enable the schools to control the conduct of individuals while on the premises.

- b. If a parent's conduct has resulted in the imposition of restrictions on their access to the classroom and school building, alternative ways for the parent to obtain information about his or her child's education should be offered.
  - i. If the child is living in a two-parent household, the nondisruptive parent can be identified as the contact/liaison parent with school personnel.
  - ii. Telephone conferences can be scheduled to discuss the child's progress in the curriculum. The administration might need to establish parameters for the use of telephone calls, such as restricting them to school hours and specified telephone numbers. If a parent has threatened an employee, the administration may require all communications to come through a specified administrator.
  - iii. E-mail communications between the child's teachers and parent can be used. However, if excessive e-mails are being sent to the teacher by the parent, the school administration may want to delineate parameters for the use of this form of communication. A specific time period might be designated for the teacher to respond to e-mails, such as once a day or once a week.