

SPECIAL EDUCATION LAW

Basic Overview

Agenda

The basics of IDEA:

- Eligibility
- FAPE
- IEP Requirements
- Discipline

Section 504

Acronyms

ASD: Autism Spectrum Disorder

BIP: Behavior Intervention Plan

ED: Emotional Disturbance

EPT: Evaluation and Planning Team
(determines eligibility)

ESY: Extended School Year

FAPE: Free Appropriate Public Education (at no cost to parents)

FBA: Functional Behavioral Assessment

IDEA: Individuals with Disabilities in Education Act (Federal law)

IEP: Individualized Education Plan (for students 3-22 years of age)

LEA: Local Educational Agency (generally school district or SU)

LRE: Least Restrictive Environment (children should be educated to as great an extent as possible with their non-disabled peers).

OHI: Other Health Impaired

SEA: State Educational Agency (VT AOE)

SLD: Specific Learning Disability

TBI: Traumatic Brain Injury

Students with Disabilities

As recently as the 1970s, many students with disabilities were still excluded from public school and not provided with any other publicly funded education.

IDEA language

The Individuals with Disabilities Education Act, originally enacted in 1975, states as its purpose, in part:

“To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs....”

IDEA: 20 U.S.C. 1400 et seq

IDEA

IDEA statute is found at: 20 U.S.C. 1400 et seq

Implementing regulations for Part B of IDEA are found in 34 CFR 300.1-300.818

Vermont

Vermont Special Education Rules are found in State Board Rules 2360 -2369.

Discipline Rules are found in State Board Rules 4312-4313.

Section 504 Rules are found in State Board Rules 1251-1253.

IDEA Requirements – Part B

States and school districts must make available a **free appropriate public education** (FAPE) to all children (3-21) with disabilities.

Also, must identify, locate and evaluate all children with disabilities to determine which children are eligible for special education (Child Find).

Child Find

34 CFR 300.111; VT Rule 2360.3

- LEAs are responsible for implementing a comprehensive child find system for children birth through age 21.
- All children with disabilities in need of special education and related services shall be identified, located and evaluated.
- This includes children who are not attending public school.

Child with a Disability

IDEA and Federal Regulations define child with a disability very specifically.

Categories of disability are:

- Learning impairment
- Specific learning disability
- Visual impairment
- Deafness/hard of hearing
- Deaf/blindness

Disabilities

- Speech or language impairment
- Orthopedic impairment
- Other health impairment (OHI) (includes non-verbal learning disabilities & ADHD)
- Emotional disturbance (ED)
- Autism spectrum disorder
- Traumatic brain injury (TBI)
- Multiple disabilities

Disabilities

- For children age 3 through 9, states may include as a child with a disability a child who is experiencing developmental delays.
- In Vermont the developmental delay category is used for children 3 – 6 years of age (as well as for birth – 3, which is Part C).

Further Eligibility Requirements

Additionally,

- Disability must result in an adverse effect on child's educational performance
- and**
- Child must need special education services
 - » 34 C.F.R. 300.7

Three Gates

In Vermont the eligibility requirements are often referred to as the three gates, and a child must pass through all three gates to qualify:

- Gate one: a disability
- Gate two: adverse effect on education
- Gate three: needs special education

Adverse Effect

There is a lot of litigation over the issue of whether or not a child's disability results in an adverse effect on his/her education.

Does it need to be a significant adverse effect or merely a minimal effect?

Adverse Effect

Vermont has specific definition of adverse effect:

- **Rule 2362(d):** "To conclude that a disability has an adverse effect on the student's educational performance, the EPT shall determine and document that, as a result of his or her disability, the student is functioning significantly below grade norms compared to grade peers in one or more of the basic skills defined in Rule 2362(g)."

Basic Skills

VT Rule 2362(g)

Basic skill areas are:

- Oral expression
- Listening comprehension
- Written expression
- Basic reading skills
- Reading comprehension
- Mathematics calculation
- Mathematics reasoning
- Motor skills

Adverse Effect - Eligibility

Courts around the country have come to different conclusions about whether a student's disability adversely affects his/her education.

Most states do not define adverse effect like Vermont does – Vermont's definition is more restrictive than most.

Adverse Effect

But, courts in the Second Circuit have consistently held that it is only necessary to look at the impact on a student's academic performance.

Evaluation

34 CFR 300.301; VT Rule 2362.2

- Initial evaluations must be conducted within 60 days of receiving parental consent for the evaluation.
- Evaluation must be performed using a variety of assessment tools – may not use a single measurement or assessment in making determination.
- Reevaluations must occur at least every 3 years unless parent and LEA agree that unnecessary. (34 CFR 300.303; VT Rule 2362.2.3)

60-Day Timeline

34 CFR 300.301; VT Rule 2362.2.1(f)

- 60-day timeline for initial evaluation does not apply if parent repeatedly fails or refuses to make child available for evaluation;
- The child moves to a new LEA within 60 days, new LEA is making sufficient progress on evaluation and parent and LEA have agreed to new time within which it will be completed.

Eligibility

34 CFR 300.306; VT Rule 2362.2.2

- In Vermont, eligibility is determined by an Evaluation Planning Team (EPT).
- EPT members must include the same individuals who are required for an IEP team.
- Initial IEP must be developed within 30 days of determination that child eligible. (VT Rule 2363.1)

Specific Learning Disability

- Specific Regulations/Rules for determining if a child has a specific learning disability are found in CFR 300.307 and VT Rule 2362.2.5.
- Can use a discrepancy model or model based on whether student responds to scientific research-based intervention.

The IEP

Child has been found eligible;

You know you have to provide FAPE;

Now its time to write an IEP.

Notice of Meeting

34 C.F.R. 300.345; VT Rule 2363.5

Parents must be provided with Notice of Meeting indicating:

- Purpose, time, & place of meeting
- Who will be in attendance
- Parents' right to invite others to meeting

IEP

34 CFR 300.320; VT Rule 2363

Each disabled child receiving services must have an individualized education program (IEP) identifying the specific special education and related services to meet his/her needs.

Parents are a partner in planning and overseeing the child's program and are a member of the IEP team.

Who must be there?

34 CFR 300.344; VT Rule 2363.3

IEP team **must** include:

- Representative of LEA
- Special education teacher
- General education teacher (unless student not participating in general education at all)
- Parents/guardian/educational surrogate
- Individual who can interpret evaluation results

An individual may fill more than one role.

IEP Team

IEP Team *may* also include:

- The student, if appropriate.
- In discretion of parents or school district, anyone who has knowledge of child or special expertise.
- Related services provider, if appropriate.

Team Attendance

34 CFR 300.321(e); VT Rule 2363.3(c)

LEA and parent may agree in writing to excuse a member from meeting if:

- The member's area of curriculum or related service is not being discussed
or
- The member submits input in writing to the parent and other IEP team members prior to the meeting

IEP Team Considerations

34 C.F.R. 300.346; VT Rule 2363.6

- Child's strengths;
- Parents' concerns about enhancing the child's education;
- Results of most recent evaluation;
- Results of child's performance on assessments;
- Academic, developmental, & functional needs of child;

IEP Team Considerations

- Language needs, if child has limited English proficiency
- Requirements for assistive technology
- If student's behavior is impeding learning:
 - Positive behavioral interventions & supports
 - Strategies to assist child develop:
 - » Social skills
 - » Anger management
 - » Conflict resolution

IEP Contents

34 C.F.R. 300.347; VT Rule 2363.7

- Child's present level of academic achievement & functional performance;
- Measurable annual goals;
- Required special education and related services;
- Start date, frequency, location, and duration of services;

IEP Contents

- General characteristics of placement;
- Accommodations for statewide testing;
- Description of ESY services, if appropriate;
- Transition services, if appropriate (starting when child is 16 years old).

LRE

34 CFR 300.114; VT Rule 2364.1

- Student must be educated with non-disabled chronological peers, to greatest extent possible;
- In school he/she would attend if not disabled.
- Student should not be removed from general education unless he/she cannot be educated satisfactorily in general education classroom with use of supplementary aids & services

LRE

34 CFR 300.117; VT Rule 2364.4

LRE applies to nonacademic and extra-curricular activities.

Must ensure that child with a disability participates to as great an extent as possible with non-disabled children.

Placement

34 C.F.R. 300.130; VT Rule 2364.2

LEA must be able to offer continuum of placements

- Full-time, in general education setting with supports/modifications/accommodations
- Part-time, in general education setting
- In specialized class, in public school, with other disabled students
- Independent school – day program
- Independent school – residential program

Related Services

34 C.F.R. 300.24; VT Rule 2360.2.16

Examples:

- Speech and language therapy
- Occupational therapy
- Physical therapy
- Mental health services
- Transportation

Not an exhaustive list.

ESY

34 CFR 300.106; VT Rule 2363.7(h)

FAPE for a child may require an extended school year (ESY).

In VT, ESY may be necessary if:

- Essential for child to have opportunity to reach goals;
- Significant regression may occur;
- Transition goals require continued programming beyond school year.

Medical Services

- Cases have involved mostly what constitutes a medical service.
- IDEA defines related services as including only medical services for diagnostic and evaluation purposes only.
- Supreme Court has held that services of a physician or hospital are excluded from definition of related services.

Parental Consent

34 CFR 300.300; VT Rule 2365.1.3

- Parental consent must be obtained prior to providing initial services.
- If parent refuses consent, district may not use due process/mediation to obtain ruling that services be provided.
- Parent may revoke consent at any time.

Parental Rights

34 C.F.R. 300.503; VT Rule 2365.1.1

34 C.F.R. 300.504; VT Rule 2365.1.2

Parents must receive written notice before district proposes to change or refuses to change a student's identification, evaluation, or placement.

Parents must be given copy of *Parental Rights in Special Education* at least once per year.

FAPE

34 CFR. 300.101; VT Rule 2360

Once a child has been found eligible, and parental consent obtained, the state/LEA must provide a free appropriate public education.

What does this mean?

The *Rowley* standard

Seminal decision on requirements of FAPE is *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 553 IDELR 656, 102 S. Ct. 3034, 458 U.S. 176 (U.S. 1982).

It was the first IDEA case to reach the U.S. Supreme Court.

Rowley

Supreme Court held that IDEA required that the education provided “confer some educational benefit” on the child.

A “basic floor of opportunity” must be provided.

More *Rowley*

“FAPE is met when a child is provided with personalized instruction with sufficient support services to benefit educationally from that instruction.”

The instruction must be provided at public expense, meet the state’s educational standards, must approximate grade levels used in the state’s regular education, and must comport with the child’s IEP.

Rowley

“However, the states are not required to ‘maximize’ each child’s potential. If a child is progressing from grade to grade and making measurable and adequate gains, the FAPE requirement is met.”

New Standard?

In 2016 the U.S. Supreme Court granted *certiorari* in *Endrew F. v. Douglas County School District RE-1*, 66 IDELR 31 (10th Cir. 2015) to address the level of educational benefit a district must offer for FAPE. It is the first time the court has reviewed FAPE requirements since the *Rowley* decision.

The decision was released, March 22, 2017.

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- In a unanimous decision written by Chief Justice John Roberts, the court reversed the Tenth Circuit, rejecting the “merely more than de minimis standard) and clarified (somewhat) the FAPE standard previously set forth in *Rowley*.

The district in this case argued that *Rowley* established that “ ‘an IEP need not provide any particular level of benefit,’ so long as it is ‘reasonably calculated’ to provide **some benefit, as opposed to none.**” (emphasis added)

- In clarifying what was intended by the language “reasonably calculated to confer some educational benefit,” the court stated that “The IEP must aim to enable the child to make progress.”
- “The progress contemplated by the IEP must be appropriate in light of the child’s circumstances....”

“Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade level advancement.”

But in this case, the student was not performing well in a regular education class.

“ [The] educational program must be **appropriately ambitious in light of his circumstances**, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but **every child should have the chance to meet challenging objectives.**” (emphasis added)

- Parents argued for a more stringent standard – wanting “an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”
- This standard was also argued at the *Rowley* case, but rejected then as an entirely unworkable standard.

Therefore:

“Mindful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since Rowley was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in [the Rowley] case.”

“The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’”
(emphasis added)

“The nature of the IEP process ... ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement.”

Thus:

“A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”

Andrew F. v. Douglas County Sch. Dist. RE-1, 117 LRP 9767 (U.S. 03/22/17).

Parentally Placed Student

34 CFR 300.148

- If parent does not believe LEA has offered FAPE, may place student in an independent school and seek reimbursement.
- Must give LEA notice of disagreement with IEP and of intended placement, or may be denied reimbursement.

Parentally placed student

Reimbursement will only be ordered if the LEA did not offer FAPE; the parental placement is appropriate (but does not have to rise to the same standard as the public placement); and equities favor reimbursement.

Requirements for Reimbursement

Three Prongs

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graph TD; A[Three Prongs] --- B[District did not offer/provide FAPE]; A --- C[Placement selected by parents is appropriate]; A --- D[Equities favor reimbursement];
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District did not offer/provide FAPE

Placement selected by parents is appropriate

(lesser standard than FAPE requirements – no requirement for licensed special ed teachers or an IEP)

Equities favor reimbursement

(One factor – parents notifying district of unilateral placement)

“Burlington-Carter Test”

These requirements based on two cases:

School Committee of Town of Burlington, MA v. Dept. of Educ. Of MA, 471 U.S. 359 (1985); and

Florence County School Dist. Four v. Carter, 510 U.S. 7 (1993)

IEE

34 CFR 300.502; VT Rule 2362.2.8

- If parents disagree with an LEA's evaluation of their child, they may request an Independent Educational Evaluation (IEE) at public expense.
- If a parent requests an IEE, the LEA must, without unnecessary delay, either provide the IEE at public expense or request a due process hearing to determine that its evaluation is appropriate.

Discipline

34 C.F.R. 300.519-520; VT Rule 4313

Student with a disability:

- May be removed from placement for disciplinary reasons up to 10 days per school year, and LEA not required to provide services.
- For more than 10 days (consecutive or cumulative), LEA must provide services and hold a manifestation determination hearing.

Manifestation Determination

34 C.F.R. 300.532; VT Rule 4313.1(e)

LEA, parents, and relevant members of IEP team must meet to determine if conduct in question:

- Was caused by, or had direct and substantial relationship to child's disability;
- or
- Resulted directly from LEA's failure to implement IEP.

Dispute Resolution

Administrative Complaint – AOE investigates

Mediation – Parties try to resolve with neutral mediator

Due Process – Administrative hearing before independent hearing officer

- Evidence presented, witnesses testify, decision appealable to court

Due Process

- Required Resolution Period, unless waived by parties.
- Resolution session is parties getting together without third party to see if they can resolve issues.
- Mediation can also be requested at this time.

Due Process

Burden of Proof:

- In due process case burden of proof is on the party requesting the due process. (See VT Rule 2365.1.6.11(a)(5))

Attorney Fees – may be awarded to prevailing party. (34 CFR 300.517)

Statute of Limitations

34 CFR 300.506; VT Rule 2365.1.6.1

Two years from date filing party knew or should have known of alleged action that forms basis of complaint.

Stay-Put

34 CFR 300.518; VT Rule 2365.1.11

When request for due process is filed, student remains in placement of the most recently implemented IEP.

Stay-Put Exception

34 CFR 300.530(g); VT Rule 4313.1(g)

If student brings weapon or drugs to school or has inflicted serious bodily injury he/she can be immediately removed to “interim alternative educational setting” for 45 days.

Compensatory Education

- If there has been a failure to provide FAPE, compensatory education may be ordered.
- Compensatory education is an equitable remedy.
- Does not need to be hour for hour.

Services Plan

- Students placed in independent schools or home study by parents are not entitled to FAPE, but may receive a Services Plan from LEA (i.e., Speech, OT, or PT)
- Services may be provided at local public school or at an independent school site.

Questions?



Section 504

- Part of Rehabilitation Act of 1973
- Applies to recipients of federal funds, including preschools, elementary, & high schools, and postsecondary institutions
- Prohibits discrimination against individuals with disabilities & requires that all programs & activities be accessible to everyone

Person with a Disability

Is someone who:

- Has a mental or physical impairment that substantially limits (very broadly defined) a major life activity or bodily function
OR
- Has a record of such impairment
OR
- Is regarded as having such an impairment

Physical or mental impairment

Physiological disorder, contagious disease,
cosmetic disfigurement, anatomical loss

Mental retardation

Emotional or mental illness

Specific learning disability

Organic brain syndrome

Major Life Activities

- Hearing, sleeping, eating, speaking, seeing, breathing
- Standing, walking, working, bending, lifting
- Thinking, concentrating, reading, learning, communicating
- Immune system, neurological, endocrine, digestive, bladder, & bowel functions

Regarded as Impaired

- Actual or perceived physical or mental impairment
- Does not apply if impairment is transitory or minor with an expected duration of 6 months or less

Does not Apply to

- User of illegal drugs
- Normal pregnancy
- Physical characteristics like hair or eye color or left-handedness
- Lack of education or a prison record
- Short term condition (like a broken ankle)
 - ADA would apply to this though

Mitigating Measures

Determination of disability must be made **without** regard to mitigating measures

Mitigating measures may include:

- Medication or medical devices
- Equipment
- Prosthetics
- Hearing aids

IDEA v. 504

Section 504

- A civil rights statute
- Prohibits discrimination
- Applies to all students who have mental or physical impairments or have a record of such or are regarded as having such impairment
- Referral-to-implementation time for 504 Plan is 45 days

IDEA v. 504

IDEA

- Applies only to children with one of 12 specific disabilities and who need special education
- Evaluation w/in 60 days of parental consent (IEP w/in 30 days)
- Eligibility ends at age 22 (in Vermont)

504 – Yes IDEA - No

Examples when Section 504 may apply but not IDEA, for students who do not require specialized instruction or related services:

- Student with peanut or tree nut allergy
- Diabetic student who requires accommodations to monitor blood sugar levels
- ADHD student without other learning disabilities who may need extra time on tests, e.g.

Similarities

- Both require FAPE
- Both require mainstreaming to maximum extent possible
- Placement must meet individual needs
- Re-evaluations required
- Due process or mediation may be requested

Examples of Accommodations

- Daily journal
- Duplicate copies of tests for parents
- More time allowed to pass in hall
- Modified class schedule
- Preferential seating
- Reduction of external stimuli
- Adjusted testing procedures

More accommodations

- Computers/assistive technology devices
- Provide one-on-one directions
- Elevator use
- Special diets
- Alleviate potential for allergic reactions (to allergens such as peanuts or tree nuts)
- Avoid large amounts of written homework

Questions?

