

Special Education: A Maryland Handbook

Ellen A. Callegary, Esq. & Wayne D. Steedman, Esq.

Third Edition

CALLEGARY & STEEDMAN, P.A.

201 N. Charles Street, Suite 1402

Baltimore, Maryland 21201

Office: 410-576-7606

Fax: 410-576-0454

BEL AIR OFFICE:

24 Office Street

Bel Air, MD 21014

ROCKVILLE OFFICE

50 West Montgomery Avenue, Suite 200

Rockville, MD 20850-4245

www.callegarysteedman.com

Ellen A. Callegary, a practicing attorney for over 30 years and a founding partner of the law firm of Callegary & Steedman, P.A., focuses on special education, disability and family law issues. She represents children and adults with disabilities to help them get appropriate services such as special education and rehabilitation services throughout the state. She also helps families through the guardianship, mental health, and health care decision making processes. Ms. Callegary has a long history of involvement in disability issues. During her ten years as an assistant attorney general for the State of Maryland, she worked directly with two Attorneys General advising state agencies on matters related to the rights of persons with disabilities and serving as principal counsel for the Department of Juvenile Services. She has lectured extensively on special education and health law, and taught an AIDS Legal Clinic and a Mental Health Law Clinic as a clinical law professor at the University of Maryland Francis King Carey School of Law where she most recently taught the “Civil Right of Persons with Disabilities Seminar” as an adjunct professor. She is a Co-Editor of *Guardianship and Its Alternatives: A Handbook on Maryland Law*. *The Daily Record* named Ellen one of Maryland’s Top 100 Women for 2000 & 2004 and in 2008 Ellen was inducted into the Circle of Excellence after receiving the Top 100 Award for the third time. She received the 2007 Stanley S. Herr Award for Advocacy Leadership from the Arc of Baltimore. Ellen is also a winner of *The Daily Record’s* 2012 Leadership in Law Award.

Wayne D. Steedman is a partner in the law firm of Callegary & Steedman, P.A. His practice is devoted primarily to the representation of children with disabilities. He has represented his clients in administrative due process hearings and state and federal courts. Mr. Steedman obtained his J.D. degree from the University of Maryland Law School. In addition to his law degree, Mr. Steedman has a Masters degree in social work from the University of Maryland School of Social Work. Prior to practicing law, Mr. Steedman was in charge of the clinical treatment program at the Forbush School at Shepherd Pratt Hospital where he was employed for more than 20 years. Additionally he served for approximately ten years as a Due Process Hearing officer in special education cases. Mr. Steedman has written numerous articles and is a nationally recognized speaker on the legal rights of children and adults with disabilities.

TABLE OF CONTENTS

Introduction.....	i
Chapter 1: A Brief Summary of the Special Education Process.....	1
Timelines for the IEP Process.....	4
Chapter 2: Free Appropriate Public Education.....	5
What is a “free, appropriate, public education”?.....	5
What is “special education”?.....	5
What are “related services”?.....	6
What should I do if I think my child has a disability?.....	7
Assessment Procedures.....	8
Assessment Reports.....	9
Independent Educational Evaluations.....	10
Chapter 3: Developing an IEP.....	12
Who is a “student with a disability”?.....	12
Educational Disabilities.....	13
IEP Team Meetings.....	16
Parent Participation in IEP Teams.....	18
The IEP Development Process.....	19
Chapter 4: Sections of the IEP.....	21
Present Levels of Academic Achievement and Functional Performance.....	21
Accommodations & Modifications, Supplementary Aids & Services.....	21
Extended School Year Services.....	22
Goals & Objectives.....	23
Special Education & Related Services, Placement.....	23
Measuring IEP Progress.....	24
How are Placement Decisions Made for students with disabilities?.....	24
Unilateral Placements and Important Legal Notice Requirements.....	25
Chapter 5: Procedural Safeguards.....	28
Prior Written Notice.....	28
Mediations.....	28
Resolution Sessions.....	29
Due Process Hearings.....	30
State Complaints.....	34
Appeals.....	35
Statutes of Limitations.....	36
Chapter 6: Behavior and Discipline.....	37
Manifestation Determinations.....	38
FBAs and BIPs.....	40
Seclusion and Restraint.....	40
Chapter 7: Bullying.....	44
What is bullying?.....	44
Reporting Bullying.....	44
Chapter 8: Important Case Law.....	48
Chapter 9: Legislative Update: Habilitative Services in Maryland.....	49

INTRODUCTION

Introduction from the IDEA

“Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of **ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.**”¹

“The purposes of the IDEA are:

- 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 and prepare them for further education, employment, and independent living;**
- to ensure that the rights of children with disabilities and parents of such children are protected; and
- to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.”²

Sources of the Law

Most special education provided in public schools is the result of the Individuals with Disabilities Education Improvement Act (commonly referred to as the IDEA), a section of the U.S. Code at 20 U.S.C. § 1400. There are federal regulations derived from the IDEA included in the Code of Federal Regulations. Much of what is included in this handbook is taken from the Code of Maryland Regulations, or COMAR – regulations that only apply in Maryland, and are based on IDEA and its implementing federal regulations.

Readers should know that special education services and accommodations can also be provided under 29 U.S.C. § 794 (commonly called Section 504 of the Rehabilitation Act of 1973, or just Section 504). Federal regulations for Section 504 provide that public school systems “shall provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap.”³

This Handbook is intended to serve as a **brief introduction** to some of the most important sections of the laws dealing with special education in Maryland. This Handbook is not a comprehensive review of all statutes, regulations and case law dealing with special education. If you have any questions about the applicability of the law to an individual case, you should consult an attorney who can provide more comprehensive answers to your specific questions.

¹ 20 U.S.C. § 1400(c)

² 20 U.S.C. § 1400(d)(1)

³ 45 C.F.R. § 84.33(a)

CHAPTER 1

A Brief Summary of the Special Education Process

Federal and state laws require that children with disabilities receive a “free, appropriate public education” (FAPE). These materials provide an introduction to the process of obtaining services for your child.

What is a “free, appropriate public education”?

“Free, appropriate public education” (FAPE) is a legal term. It means that the education is provided at no charge to the parents, meets the requirements of federal and state law, and is in accordance with an individualized education program (IEP) that has been written specifically for your child.

The federal Individuals with Disabilities Education Improvement Act (IDEA) states that a FAPE should be designed to “meet [your child’s] unique needs and prepare [the child] for further education, employment, and independent living.” Reviewing your child’s education with this standard in mind can help you determine whether your child is receiving FAPE.

What should I do if I think my child has a disability?

If your child is currently in public school, begin by telling your child’s teacher that you think she has a disability and needs special education. Write a follow up note to the teacher and the principal confirming your conversation and asking for an Individualized Education Program (IEP) Team Meeting. The school will need to convene an (IEP) Team Meeting to consider whether your child is eligible for services.

If your child is in private school or does not yet attend school, contact your county’s Child Find office. You can get the telephone number for Child Find through your county’s board of education or your local public school.

Important points to remember:

- After you talk to your child’s public school teacher, **follow up with a letter** saying that you believe your child has a disability and you want her to be evaluated. Send the letter to the principal of your child’s school. Make sure you date the letter, and keep a copy.
- The **school will convene an IEP Team Meeting** to consider your child’s needs and develop an evaluation plan. You will receive 10 days’ written notice of the meeting. If the time and date of the meeting are not convenient for you, you have the right to have the meeting rescheduled.
- At your first IEP Team Meeting, the school should give you a copy of the “Procedural Safeguards and Parental Rights” booklet. That booklet contains specific information about your rights, including procedures for requesting a Due Process Hearing or filing a complaint with the Maryland State Department of Education.
- **As a parent or guardian, you are an equal member of your child’s IEP team**, along with your child’s teacher and other school personnel. You have the right to

bring a lawyer to the meeting. You have the right to invite “persons with knowledge or special expertise” regarding your child to participate in the IEP team. For example, if your child is receiving private speech therapy, you can and should invite the therapist to attend the IEP meeting.

- **Once you have signed permission for an initial evaluation, the school has 60 calendar days to complete the evaluation and write reports.** Follow up with the principal as soon as possible to make sure that an IEP Team meeting is scheduled to review the evaluations. At the IEP meeting to review the evaluation results, the IEP Team will determine whether your child has a disability and is eligible for special education. **The school is required to give you copies of all evaluation reports at least 5 school business days before the meeting so that you have a chance to review them. In addition, the school is required by law to provide copies of the IEP no more than 5 school business days after the meeting.**

How does the public school system make placement decisions for students with disabilities?

Once the IEP team determines that your child is eligible for special education, it has 30 days to develop an IEP - the plan that will determine your child’s placement. The IEP includes information about your child’s current levels of performance in academic and other areas related to her disability (for example, social skills or speech and language), appropriate goals and objectives for each area, and information about the accommodations, modifications, services, and supports that will be provided to help your child achieve her goals and objectives. As a parent or guardian, you are an equal member of the IEP team, and you will participate in the process of developing the IEP.

The IEP is written to fit the child, not the school. The IEP should be based on your child’s unique strengths and needs, which have been identified through the evaluation process. Accommodations, modifications, services, and supports are determined based on what your child needs to achieve her goals and objectives, not what services are available at the school. For example, if your child needs an hour a week of speech and language therapy, the IEP must provide for that one hour a week, even if your school’s speech and language pathologist does not have an extra hour in her schedule. If your child needs smaller classes in order to be successful, that must be included in the IEP, even if smaller classes are not available at your child’s school.

The IEP determines the placement. Once an IEP has been written to fit the unique needs of your child, the team must determine where the IEP can be implemented. By law, your child must be placed in the **least restrictive environment (LRE)** that can meet her needs. This means that if possible, your child must be accommodated in the school she would attend if she did not have disabilities. If that is not possible, the child’s placement must be as much like the regular school as possible. To the maximum extent appropriate, children with disabilities must be integrated into the same classrooms and programs that are attended by children who do not have disabilities.

First, the IEP team will look at your “home school,” the school your child would attend if she did not have disabilities. If the IEP can be implemented at the home school with the services that are currently available, the process ends there. If the home school does not have the services your child needs, the team must consider whether changes can be made to make the school

appropriate. For example, if your child needs speech/language therapy and the school's speech/language pathologist does not have time in her schedule, another speech/language pathologist can be brought in. An additional teacher or aide might be assigned to your child's classroom to give him extra help.

If the home school cannot meet your child's needs, even with modifications, the team must consider whether there is another public school in your county that can meet your child's needs. The IEP team should include a representative from your county's central Office of Special Education who is knowledgeable about the different programs in your county. Sometimes the IEP is sent to someone in the central office who makes a recommendation about placement.

If there is no public school available that can meet your child's needs, the school system can choose to place your child in a private school for children with disabilities (called a "nonpublic" school). Decisions about non-public placements are often made at a separate Central IEP Team meeting, which you will be invited to attend. School systems are often reluctant to place a child in a non-public school, in part because often all of the children who attend the non-public school have disabilities, and the students generally do not have the opportunity to interact with children who do not have disabilities. However, **some children need intensive, specialized services that only a non-public placement can provide, and the child's needs are ultimately what determine the placement.**

What should I do if I don't think the public school placement can meet my child's needs?

First, tell the IEP team. Often, changes can be made that will make the public placement work. Additional staff can be added. Staff may need specific training in order to meet your child's needs. Assistive technology devices can be provided. **If you have had your child evaluated privately, bringing those outside professionals to an IEP meeting to talk to the team may help.**

If, after working with the IEP team, you still disagree about the appropriate placement for your child, you can request mediation or a due process hearing. In mediation, you and school system representatives will talk to a mediator and try to work out a solution. A due process hearing is like a trial, with an Administrative Law Judge presiding. You can retain an attorney to represent you at the mediation or hearing. The Administrative Law Judge can order the school system to provide particular services or a specific placement to your child, or she can order the school system to hold another IEP meeting to reconsider your child's situation. Either the parents or the school system can appeal due process hearing decisions to state or federal court.

Unilateral Placements and Important Legal Notice Requirements

Sometimes, parents choose to place their child in a non-public school without the agreement of the IEP team, and then ask the public school system to reimburse them for the cost. This is called a "unilateral placement." **If you choose to make a unilateral placement, you must give the school system written notice of your decision.** This should be in the form of a signed, dated letter to your school's principal (or to the chairperson of your IEP team if your child is not enrolled in public school) stating that you are rejecting the school system's proposed placement and intend to enroll your child in a specific non-public school at public expense. This "notice letter" must include the reasons you don't think the placement offered by the public

school system is appropriate and asking the local school system to pay for the private placement including tuition, transportation and related services. It is also helpful to give reasons why you believe the non-public school is appropriate for your child. The school system must receive your letter at least 10 school business days before you remove your child from public school. Instead of writing a letter, you can also give notice orally at the last IEP team you attend *before* you remove your child from public school. The oral notice must include the same information and requests that are included in a written notice. **Make sure your notice statement is included in the written summary of the meeting.** The law requires public school systems to place a child in a separate, non-public school if the public school cannot meet the child's needs and enable the child to learn.

Timelines for the IEP Process

“Promptly”: time to request parental consent for evaluation after receiving a referral⁴

3 years: longest time that should pass between re-evaluations⁵

2 years: time limit to begin a due process hearing after a dispute between parents and school⁶

1 year: anticipated term for an IEP⁷

90 days: time to develop or revise an IEP after receiving parental consent for evaluation⁸

60 days: time to complete initial evaluation after receiving parental consent⁹

30 days: time to develop an IEP after an evaluation is complete¹⁰

10 days: time before an IEP Team Meeting that the school should provide notice of who will attend and the purpose of the meeting¹¹

5 business days: time before an IEP Team Meeting that the school should share documents to be discussed; and time after an IEP Team Meeting that the school should share a revised IEP¹²

“As soon as possible”: time to begin implementing IEP after it is developed¹³

⁴ COMAR 13A.05.01.04A(3)

⁵ COMAR 13A.05.01.06E(2)(b)

⁶ 34 C.F.R. § 300.507(a)(2)

⁷ COMAR 13A.05.01.08B(1)

⁸ COMAR 13A.05.01.06E(6)

⁹ COMAR 13A.05.01.06A(1)(a)

¹⁰ COMAR 13A.05.01.08A(1)

¹¹ COMAR 13A.05.01.07D(2)

¹² Maryland Code, Education Article, § 8-405(e); COMAR 13A.05.01.07D(3)

¹³ COMAR 13A.05.01.09D(3)

CHAPTER 2

FREE APPROPRIATE PUBLIC EDUCATION

*What is a “free, appropriate public education”?*¹⁴

“Free appropriate public education (FAPE)” means special education and related services that:

- Are provided at public expense, under public supervision and direction;
- Meet the standards of the Department, including [that the services are available even if a student is advancing from grade to grade]¹⁵; [and that a student with a disability receives services even if the student is removed from his or her school placement for disciplinary reasons]¹⁶.
- Include preschool, elementary, or secondary education; and
- Are provided in conformity with an IEP[.]

*What is “special education”?*¹⁷

Commentary: The legal definition of special education is incredibly broad and all encompassing. Despite its breadth, special education is too often interpreted as simply instruction delivered by a special educator. To be effective, it needs to truly be specially designed to meet the child’s unique needs. That means looking at the content of the curriculum and thinking about how it can be modified so that the specific student with a disability can learn. It means looking at the teaching methodology and the delivery of instruction and modifying it so that it is truly individualized for each student’s unique needs. Too often, it is misinterpreted to mean finding an existing classroom that the student can most easily fit into and assigning the student to what happens to be available. Parents should ask for a written description of how the content, methodology and delivery of instruction have been modified to meet their child’s unique needs. Please also note that special education can be provided in the child’s home and in other settings.

“Special education” means specially designed instruction, at no cost to the parents, to meet the unique needs of a student with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. It includes speech-language pathology services, travel training, career and technology education, and instruction in physical education if the service consists of specially designed instruction.

“Specially designed instruction” means the adaptation of content, methodology, or delivery of instruction to address the unique needs of a student with a disability to

¹⁴ COMAR 13A.05.01.05C

¹⁵ 34 C.F.R. § 300.101

¹⁶ 34 C.F.R. § 300.530(d)

¹⁷ COMAR 13A.05.01.03B(71)-(72)

ensure access to the general curriculum, so that the student can meet the educational standards that apply to each student within the jurisdiction of the public agency.

*What are “related services”?*¹⁸

Commentary: There are no limits to what services can be provided as “related services” on a student’s IEP. Any service that is required to assist a student with a disability to benefit from special education should be included on her IEP. Some examples of related services that are not on the list that IEP teams may consider depending on the child’s unique needs include music therapy, aquatic therapy, and therapeutic horseback riding.

Additionally, there is no limit to the number of related service hours that can be on an IEP. It is not a sufficient legal basis for limiting speech-language services to 3 times per week because the speech-language pathologist has two other schools on her caseload and she is only in the child’s school three days a week. Related services must be provided for the duration and frequency needed for the student to make appropriate progress on her IEP.

It is also important to include indirect service hours on a child’s IEP to the extent needed for the related services providers to train and consult with other school staff members and parents in the proper approaches and interventions for the child.

“Related services” means transportation and such developmental, corrective, and other supportive services as may be required to assist a student with a disability to benefit from special education. “Related services” include but are not limited to:

- Speech-language pathology;
- Audiology;
- Interpreting services;
- Psychological services;
- Physical and occupational therapy;
- Recreation, including therapeutic recreation;
- Early identification and assessment of disabilities in students;
- Counseling services, including rehabilitation counseling;
- Orientation and mobility services;
- Medical services for diagnostic or evaluation purposes;
- School health services, including school nursing services;
- Social work services in schools; and
- Parent counseling and training.

“Related services” do not include:

- A surgically implanted medical device;
- The optimization of the device’s functioning;
- Maintenance of the device; or
- Replacement of the device.

¹⁸ COMAR 13A.05.01.03B(65)

Evaluation Process

Commentary: The evaluation process is vitally important to the development of a truly individualized IEP designed to meet the child's unique needs. The IEP Team will use these evaluations to determine the needs that will be addressed on the IEP. It is important to remember that each assessment must include information from the parent about the student's functioning in each area of suspected disability. Not every assessment needs to be a formal standardized assessment. In fact, observational data from a variety of settings including home and community can provide extremely valuable insights into a child's functioning.

When an IEP Team is developing a student evaluation plan, parents need to be informed about what each proposed evaluation is designed to assess and why the specific assessment is being proposed so that they can provide informed consent or informed refusal for each assessment. Parents can also request that specific areas of suspected disability be assessed and that specific tests be administered.

What should I do if I think my child has a disability?¹⁹

A student with a suspected disability who may need special education shall be referred, in writing, to a public agency. An initial referral may be initiated by:

- The student's parent; or
- A school system representative.

A public agency shall promptly request parental consent to assess a student to determine if the student needs special education and related services:

- When, prior to a referral, the student has not made adequate progress after an appropriate period of time when provided instruction[]; and
- Whenever a student is referred for an evaluation.

A public agency shall adhere to the time frames described on page 4 above, unless the student's parent and the IEP team extend the time frame by mutual written agreement.

An IEP team shall complete an initial evaluation of a student.²⁰ The team should determine any areas in which assessments need to be completed, and should provide notice to the parent of any assessment procedure that would be conducted.²¹

A student shall be assessed in all areas related to the suspected disability.²²

A variety of assessment tools and strategies shall be used to gather sufficient relevant functional, cognitive, developmental, behavioral, academic, and physical information, and information provided by the parent to enable the IEP team to determine:

¹⁹ COMAR 13A.05.01.04A

²⁰ COMAR 13A.05.01.06A

²¹ 34 C.F.R. § 300.

²² COMAR 13A.05.01.05B(1)

- If the student is a student with a disability;
- The student's educational needs;
- The content of a student's IEP, including information related to enabling the student to be involved in and progress in the general curriculum, or, for preschool students, to participate in appropriate activities; and
- Each special education and related service needed by a student, regardless of whether the need is commonly linked to the student's disability.²³

A single procedure may not be used as the sole criterion for determining:

- **If a student is a student with a disability; and**
- **An appropriate educational program for a student.**²⁴

Assessment Procedures

A public agency shall ensure that testing and assessment materials and procedures used to assess a student's need for special education and related services are:

- Technically sound; and
- Provided and administered in the student's native language or other mode of communication, in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer.

A standardized test administered to a student shall be:

- Valid for the specific purpose for which it is used; and
- Administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of the test.

Tests and other assessment materials are not limited to procedures designed to provide a single general intelligence quotient and include procedures tailored to assess:

- Specific areas of educational need; and
- The extent to which a student with limited English is a student with a disability, rather than measuring a student's English language skills.

The results of assessment procedures selected for use with a student with impaired sensory, manual, or speaking skills shall accurately reflect the student's aptitude or achievement level, and the other factors procedures purport to measure, rather than the student's impaired sensory, manual, or speaking skills, except when those skills are the factors that procedures purport to measure.²⁵

²³ COMAR 13A.05.01.05B(2)

²⁴ COMAR 13A.05.01.05B(3)

²⁵ COMAR 13A.05.01.05C

Assessment Reports

A report of assessment procedures administered to a student in each area of suspected disability shall be available to the IEP team at the time of the evaluation. Each report of assessment procedures shall be written, dated, and signed by the individual who conducted the assessment.

Each report of assessment procedures shall include:

- **A description of the student's performance in each area of suspected disability;**
- **Relevant information [about the student's functional, cognitive, developmental, behavioral, academic, and physical performance, and information provided by the parent];**
- **Instructional implications for the student's participation in the general curriculum or, for a preschool student, participation in appropriate activities.**

If the assessment included procedures that were not administered under standard conditions, the report should describe how and why.²⁶

Following the completion of assessments, the IEP team shall draw on information from a variety of sources, including:

- Existing data;
- Current classroom-based, local, and Statewide assessments;
- Parent input; and
- Observations by teachers and related service providers.²⁷

The IEP team shall carefully consider and document information used as a basis of the team's decision regarding whether a student is a student with a disability.²⁸

The IEP team shall document its decision in a written decision that includes:

- Information provided by the parent;
- Results of assessment procedures used as a basis for determination;
- A statement as to whether the assessment procedures were valid for the purposes intended and valid for the student; and
- Whether the student is a student with a disability.²⁹

The IEP team may not determine that a student is a student with a disability if the deciding factor for the determination is:

- The lack of appropriate instruction in reading, defined in §1208(3) of the Elementary and Secondary Education Act of 1965, including explicit and

²⁶ COMAR 13A.05.01.05D

²⁷ COMAR 13A.05.01.06C(1)(a)

²⁸ COMAR 13A.05.01.06C(1)(b)

²⁹ COMAR 13A.05.01.06C(2)

- systematic instruction in phonemic awareness, phonics, vocabulary development, reading fluency and oral reading skill, and reading comprehension strategies;
- A lack of instruction in math; or
 - Limited English proficiency.³⁰

The IEP team shall provide the parent with a copy of the IEP team decision.³¹

Independent Educational Evaluations

***Commentary:* Independent educational evaluations are one of the most important tools that parents have in the IEP process. If parents disagree with the school system’s evaluations or refusal to evaluate, they can request that an independent educational evaluation (IEE) be completed at the school system’s expense. An IEE can be done in any area of suspected disability including occupational therapy, speech-language functioning and neuropsychological functioning. The school system must provide the requested IEE or file a due process complaint to demonstrate why their evaluation (or lack of evaluation) was appropriate.**

Once the IEE is completed, parents and other IEP Team members will review the IEE Report at an IEP Team meeting. The person who completed the IEE should participate in the meeting and in the development of IEP Goals and Objectives to meet the needs identified in the IEE Report. The public school system should cover the costs of the evaluator’s participation in the team meeting at which the report is reviewed.

A parent of a student with a disability may obtain an independent educational evaluation. On request, a school system shall provide the parent with information about where an independent educational evaluation may be obtained and the public agency’s criteria applicable for independent educational evaluations (described below).³²

If a parent disagrees with the evaluation obtained by the public agency, the parent may request an independent educational evaluation at public expense.³³ When a parent requests an independent educational evaluation at public expense, the public agency shall:

- Provide an independent educational evaluation; or
- File a due process complaint to demonstrate that the public agency’s evaluation is appropriate.³⁴

If an impartial hearing officer determines that the evaluation obtained by the public agency is appropriate, the parent may not obtain an independent educational evaluation of the student at public expense.³⁵

³⁰ COMAR 13A.05.01.06C(3)

³¹ COMAR 13A.05.01.06C(4)

³² COMAR 13A.05.01.14A

³³ COMAR 13A.05.01.14B(1)

³⁴ COMAR 13A.05.01.14B(2)

³⁵ COMAR 13A.05.01.14B(3)(a)

If an impartial hearing officer determines that the evaluation obtained by the public agency is not appropriate, the public agency shall provide an independent evaluation of the student at public expense. If an impartial hearing officer requests an independent educational evaluation as part of a due process hearing, the cost of the independent educational evaluation shall be at public expense.³⁶

When an independent educational evaluation is provided at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria used by the public agency when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.³⁷ The results of an independent educational evaluation obtained at public or private expense:

- Shall be considered by an IEP team in making any decision regarding the provision of FAPE for the student; and
- May be presented as evidence at a due process hearing.³⁸

Except for the criteria used by the school system in its own assessments, a public agency may not impose conditions or time lines related to obtaining an independent educational evaluation at public expense.³⁹ A parent is entitled to not more than one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.⁴⁰

³⁶ COMAR 13A.05.01.14B(3)(b)-(c)

³⁷ COMAR 13A.05.01.14B(4)

³⁸ COMAR 13A.05.01.14B(5)

³⁹ COMAR 13A.05.01.14B(6)

⁴⁰ COMAR 13A.05.01.14B(7)

CHAPTER 3

DEVELOPING AN IEP

Who is a “student with a disability”?

Commentary: After evaluations are completed and reviewed by the IEP Team, a decision is made about whether the child is a “student with a disability” and therefore entitled to an IEP. This decision can sometimes be very difficult and painful for families who may just be beginning to emotionally and intellectually understand their child’s disability. Often one disability category under IDEA does not reflect the complexities of their child. Two recent changes to disability categories were made in Maryland law in an attempt to use less stigmatizing language to describe these disabilities: “mental retardation” was changed to “intellectual disability” and emotional disturbance was changed to “emotional disability.”

Although the disability chosen as the primary disability impacting the student’s educational progress is not supposed to determine placement, many parents have heard that their child needs to go to an “ED” program when their child is labeled as having an emotional disability or that their child must go to the autism program when the decision is to label their child as a student with “autism.” This is illegal. Placement decisions must be made based on the needs of the student not on any label. Sometimes school systems will have their own internal standards or policies governing who fits into which disability. Although these policies may provide some guidance in decision making, they are not the law and it would be illegal for a team to rely solely on a policy to make decisions about which disability is most appropriate for a student.

A student may be a student with a disability if an IEP Team conducts an evaluation, as outlined above, and finds that he or she has a disability of:

- Autism
- Deaf-blindness
- Emotional disability
- Hearing impairment, including deafness
- Intellectual disability
- Multiple disabilities
- Orthopedic impairment
- Other health impairment
- Specific learning disability
- Speech or language impairment
- Traumatic brain injury
- Visual impairment, including blindness.⁴¹

⁴¹ COMAR 13A.05.01.03B(78)(a)

Under Maryland law, “appropriate special education and related services are available to a child with a disability from birth through the end of the school year in which the child turns 21 years of age.”⁴² From birth through age 2, those services should be provided by the local Infants & Toddlers Program.⁴³ If an IEP team determines that a student is a student with a disability, that student is eligible to receive special education services from his or her third birthday until the end of the school year in which the student turns 21 years old, or until the student graduates with a high school diploma (for example, if a student turns 21 in November, and has not received a high school diploma, he or she could continue to receive special education until the end of that school year).⁴⁴

Educational Disabilities

Autism – a developmental disability that:

- Significantly affects verbal and nonverbal communication and social interaction;
- Is generally evident before 3 years old;
- Adversely affects a student’s educational performance;
- May be characterized by:
 - a) Engagement in repetitive activities and stereotyped movements,
 - b) Resistance to environmental change or change in daily routines, and
 - c) Unusual responses to sensory experiences.⁴⁵

Deaf-blindness – concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that the student cannot be accommodated solely as a student with deafness or a student with blindness.⁴⁶

Emotional disability – a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, that adversely affects a student’s educational performance:

- An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- Inappropriate types of behavior or feelings under normal circumstances;
- A general, pervasive mood of unhappiness or depression; or
- A tendency to develop physical symptoms or fears associated with personal or school problems.

A student diagnosed with schizophrenia can be found eligible for services as a student with an emotional disability.⁴⁷

⁴² Maryland Code, Education Article, § 8-403(b)

⁴³ COMAR 13A.13.01.01

⁴⁴ COMAR 13A.05.01.03B(78)

⁴⁵ COMAR 13A.05.01.03B(8)

⁴⁶ COMAR 13A.05.01.03B(17)

⁴⁷ COMAR 13A.05.01.03B(23)

Hearing impairment – an impairment in hearing, whether permanent or fluctuating, that adversely affects a student’s educational performance, but which is not deafness.⁴⁸

Deafness – a hearing impairment which:

- Is so severe that the student is impaired in processing linguistic information through hearing, with or without amplification; and
- Adversely affects the student’s educational performance.⁴⁹

Intellectual disability – general intellectual functioning, adversely affecting a student’s educational performance, that:

- Is significantly subaverage;
- Exists concurrently with deficits in adaptive behavior; and
- Is manifested during the developmental period.⁵⁰

Multiple disabilities – concomitant impairments (for example, intellectual disability-blindness or intellectual disability-orthopedic impairment) the combination of which causes such severe educational problems that the student cannot be accommodated in special education programs solely for one of the impairments. This does not include students with deaf-blindness.⁵¹

Orthopedic impairment – a severe orthopedic impairment that adversely affects a student’s educational performance, including impairments caused by congenital anomaly (e.g., clubfoot or missing limbs); caused by disease (e.g., poliomyelitis or bone tuberculosis); or caused by other factors (e.g., cerebral palsy, amputations, fractures, burns).⁵²

Other health impairment – 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 is adversely affecting a student’s educational performance, due to chronic or acute health problems. Chronic or acute health problems can include, but are not limited to:

- Asthma
- Attention-deficit/hyperactivity disorder
- Diabetes
- Epilepsy
- Heart condition
- Hemophilia
- Lead poisoning
- Leukemia
- Nephritis

⁴⁸ COMAR 13A.05.01.03B(29)

⁴⁹ COMAR 13A.05.01.03B(18)

⁵⁰ COMAR 13A.05.01.03B(36)

⁵¹ COMAR 13A.05.01.03B(44)

⁵² COMAR 13A.05.01.03B(50)

- Rheumatic fever
- Sickle cell anemia
- Tourette syndrome⁵³

Specific learning disability – a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, consistent with Department criteria.

This can include conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. It does not include students who have learning problems which are primarily the result of visual, hearing, or motor impairments, intellectual disability, emotional disturbance, or environmental, cultural, or economic disadvantage.⁵⁴

Speech or language impairment - a communication disorder such as stuttering, impaired articulation, voice impairment, or language impairment that adversely affects a student's educational performance.⁵⁵

Traumatic brain injury – an acquired injury to the brain, caused by an external force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a student's educational performance. Traumatic brain injury can include open or closed head injuries, resulting in impairment in:

- Cognition
- Language
- Memory
- Attention
- Reasoning
- Abstract thinking
- Judgment
- Problem solving
- Sensory, perceptual, and motor abilities
- Psychosocial behavior
- Physical functions
- Information processing
- Speech

It does not include congenital, degenerative or birth trauma-induced brain injuries.⁵⁶

Visual impairment, including blindness – impairment in vision which, even with correction, adversely affects a student's educational performance, including partial sight and blindness.⁵⁷

⁵³ COMAR 13A.05.01.03B(51)

⁵⁴ COMAR 13A.05.01.03B(73)

⁵⁵ COMAR 13A.05.01.03B(74)

⁵⁶ COMAR 13A.05.01.03B(82)

⁵⁷ COMAR 13A.05.01.03B(84)

IEP Team Meetings

Commentary: IEP Team Meetings are a wonderful opportunity to have open and candid discussions about a student's needs, what is working and what is not, to engage in creative problem solving and exchange of ideas among parents and professionals who know and who are working with their child. What often happens is that tired, overworked school team members provide quick, superficial reports about the student and then ask if they can leave the meeting. Often too little time is set aside for any real discussion of the student's needs and school team members look anxiously at their watches each time parents ask tough questions and parents walk out of the meeting just as confused about their child's needs and progress as when they walked in. It can be intimidating to sit in a room with school personnel who are using education jargon filled with dense acronyms. It is important for school based team members to welcome parents as equal partners and to make sure that they truly understand how their child is progressing and what they are doing to ensure continued progress. Although IEP Team Meetings must be convened at least annually, school team members and parents can and should convene a meeting whenever there is a concern or change in the student's performance.

A school system shall ensure that an IEP team meets to conduct an evaluation before the initial provision of special education and related services to a student with a disability; and to develop, review, and revise, as appropriate, a student's IEP.⁵⁸

A school system shall also ensure that meetings to determine a student's need for extended school year services – provided over the summer – are conducted early enough in the school year to provide the parent the opportunity to request mediation or file a due process complaint if they disagree with the team's ESY determination.⁵⁹

The school system should ensure that the IEP team for a student with a disability includes:

1. Parents of the student;
2. At least one regular education teacher of the student, if the student is or may be participating in the regular education environment;
3. At least one special education teacher of the student, or another special education provider of the student;
4. A school system representative:
 - Qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of students with disabilities, and
 - Knowledgeable about the general curriculum and about the availability of school system resources;
5. An individual who can interpret the instructional implications of evaluation results (this may be one of the previously described team members);

⁵⁸ COMAR 13A.05.01.07B(1)

⁵⁹ COMAR 13A.05.01.07B(2)

6. Other individuals, at the discretion of the parent or public agency, who have knowledge or special expertise regarding the student, including related service personnel, as appropriate; and
7. If appropriate, the student.⁶⁰

A member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parents and the school system agree that attendance is not necessary. A member of the IEP team may also be excused from the meeting, in whole or in part, if the meeting involves discussion of that team member's area of knowledge, as long as:

- The parent and the school system agree to excusing the team member in advance of the meeting; and
- The team member submits a written summary of input into the development of the IEP, and provides the written summary to the parent and the team.

If the parent and school system agree to excuse a team member from the meeting, that agreement must be in writing.⁶¹

Tip: It is important to include a representative from the central school system in every IEP Team Meeting. There needs to be someone at the meeting who has the power to make decisions about placement and about any additional services the student may need that are not currently available at the child's school.

The school system must ensure that the IEP team meets periodically, at least annually, to review and revise the IEP, as appropriate, to:

- Determine whether the student is achieving the annual goals;
- Address any lack of expected progress in the annual goals or in the general curriculum;
- Review data and information from assessment procedures;
- Address any information about the student provided to or by the parent;
- Address the student's anticipated needs; and
- Discuss other matters, as identified on the notice of the IEP team meeting.

In addition, a parent or a public agency may request a meeting at any time to review and, as appropriate, revise the student's IEP.⁶²

After the annual review meeting, the IEP may be revised by convening the IEP team, or by an amendment without redrafting the entire IEP. The parent and the school system can amend or modify the IEP without convening an IEP team through a written document. If the IEP is amended, the school system must ensure that the IEP incorporating the amendments is accessible to service providers, and is also provided to the parents.⁶³

⁶⁰ COMAR 13A.05.01.07A

⁶¹ COMAR 13A.05.01.07C

⁶² COMAR 13A.05.01.08B(1), (3)

⁶³ COMAR 13A.05.01.08B(4)-(6)

Parent Participation in IEP Teams

A school system must take steps to ensure that one or both parents are present or are afforded an opportunity to attend and participate at meetings of the IEP team.⁶⁴

Efforts to obtain the participation of the parent include scheduling the IEP meeting at a mutually agreed on time and place; and providing written notice that includes:

- The purpose, time, date, and location of the meeting;
- Who will be in attendance;
- That parents may invite other individuals to attend and participate; and
- That the school system has determined an individual's knowledge or special expertise of relevant team members.⁶⁵

The school system must take any necessary action to ensure that parents understand the proceedings at a meeting, including arranging for an interpreter for a parent who is deaf or whose native language is other than English.⁶⁶

If neither parent can attend, the school system shall use other methods to ensure parent participation, including individual, video conference, or teleconference calls.⁶⁷ A meeting may be conducted without a parent in attendance if the school system cannot convince the parent to attend and has records of attempts to arrange a meeting, such as:

- Detailed records of telephone calls made or attempted and the results of those attempts,
- Copies of correspondence sent to the parent and any responses received, or
- Detailed records of visits made to the parent's home or place of employment and the results of those visits.⁶⁸

Meeting Notice

The parent of a student with a disability shall be provided with written notice, at least 10 days in advance of the meeting. The school system may not need to provide notice 10 days in advance of an expedited meeting to:

- Address disciplinary issues;
- Determine the placement of the student with a disability not currently receiving educational services; or
- Meet other urgent needs of the student to ensure the provision of FAPE.

However, the school system is still required to provide reasonable written notice of an expedited meeting.⁶⁹

Copies of Reports

Appropriate school personnel shall provide to parents, at least 5 business days before a scheduled meeting, an accessible copy of all assessments, reports, data charts, draft IEPs,

⁶⁴ COMAR 13A.05.01.07D(1)

⁶⁵ COMAR 13A.05.01.07D(4)

⁶⁶ COMAR 13A.05.01.07D(9)

⁶⁷ COMAR 13A.05.01.07D(7)

⁶⁸ COMAR 13A.05.01.07D(9)

⁶⁹ COMAR 13A.05.01.07D(2)

or other documents the team plans to discuss at that meeting, at least 5 business days before the scheduled meeting.⁷⁰ The school must provide these copies except in extenuating circumstances, such as a death in the family, a personal emergency or a natural disaster.⁷¹ In addition, school personnel must provide a copy of the completed IEP to parents no later than 5 business days after a team meeting, and must provide copies of the IEP at no cost to the parent.⁷²

Tips:

- **Don't go alone – take someone with you: your spouse, your partner, your friend, or a grandparent. It helps to have someone else on your side of the table.**
- **Take a break when you need one.**
- **Review the Meeting Notice carefully to make sure you understand it and everything you want to discuss is listed in the “Purpose of the Meeting” Section of the Notice. If something is missing, ask (in writing) that it be added.**
- **Parents also need to carefully look at the Meeting Participants' list on the Notice. If there are specific staff members who you think should be invited, ask that they come to the meeting.**
- **Make a written request to have copies of all documents that will be reviewed at the meeting at least one week in advance. These documents should include:**
 - **Draft IEP**
 - **Progress Reports**
 - **Assessments**
- **The school system is required by law to provide these documents at least 5 school business days in advance of the meeting. If you don't receive them, confirm in writing ahead of time that the school does not intend to review any draft IEPs, progress reports or assessments during the meeting.**
- **Provide copies of all documents that you would like the IEP Team to review at the meeting at least one week in advance. These documents should include any Reports, Assessments or IEP Goals and Objectives that you would like included on your child's IEP.**

The IEP Development Process

Commentary: Maryland law requires IEP Teams to give parents the draft IEP five business days before the team meeting. Parents should carefully review the draft IEP and write out their questions so that they can share them at the meeting. Parents can also provide feedback, including any proposed revisions, to the school prior to the meeting. It is often helpful for parents to get input on the draft IEP from any outside providers who may also be working with their child. Sometimes parents meet with specific team members before the meeting if they think that it would improve their understanding of a particular area of need.

⁷⁰ COMAR 13A.05.01.07D(3)(a)

⁷¹ Maryland Code, Education Article, § 8-405(d)(2)

⁷² COMAR 13A.05.01.07D(3)(b), (10)

When developing an IEP, the team should consider and document:

- Strengths of the student;
- Concerns of the parent for enhancing the education of the student;
- Results of the initial or most recent evaluation;
- Communication needs of the student;
- Whether the student requires assistive technology devices and services;
- The results of the student's performance on Statewide, district-wide, or alternative assessment programs, as appropriate; and
- The academic, developmental, and functional needs of the student.⁷³

If a student's behavior impedes the student's learning or the learning of others, the IEP team shall consider strategies, including positive behavioral interventions, strategies, and supports, to address that behavior.⁷⁴ If the IEP team determines that a student with a disability needs a particular device or service, including interventions, accommodations, or other program modifications, to receive FAPE, the student's IEP shall include a statement to that effect.⁷⁵ The IEP team shall consider a student's need for transportation as a related service as defined above to assist a student to benefit from special education.⁷⁶

As a member of the IEP team, a regular education teacher of the student shall, to the extent appropriate, participate in the development of the student's IEP. Participation includes assisting in the determination of:

- Appropriate positive behavioral interventions and strategies for the student; and
- Supplementary aids and services, program modifications, and supports for school personnel.⁷⁷

The goal of these behavior interventions, aids, services and supports is to enable the student to advance appropriately to attaining IEP goals, be involved in the general education curriculum, participate in extracurricular activities, and participate with other students in the school, with or without disabilities.⁷⁸

Tip: If you are unsure about the IEP, take time to decide. Let the IEP Team know that you need time to reflect on what has just been proposed for your child and that you will let them know at some specified time whether you agree to the proposed IEP. Ask that the IEP remain in "draft" form until you get back to them. Have someone else review the draft IEP and discuss it with you. If you can't explain it, then you don't understand it. If you still have questions or concerns, have an educational consultant and/or an attorney review the draft IEP.

⁷³ COMAR 13A.05.01.08A(3)

⁷⁴ COMAR 13A.05.01.08A(4)

⁷⁵ COMAR 13A.05.01.08A(8)

⁷⁶ COMAR 13A.05.01.08A(10)

⁷⁷ COMAR 13A.05.01.08A(9)

⁷⁸ 34 C.F.R. § 300.320, COMAR 13A.05.01.09A(1)(d)

CHAPTER 4

SECTIONS OF THE IEP

Present Levels of Academic Achievement and Functional Performance

Commentary: When you read the section of the IEP containing the student's Present Levels of Academic Achievement and Functional Performance, you should have a clear understanding of the student's actual functioning. In addition to assessment results, it should contain a narrative description of what the student can actually do. For example, if it is a description of a student's functioning in written language, the present level should include a detailed description of the quality of the student's writing and a detailed description of what difficulties the student has with the writing process. Measures that are specific to an individual school system should be avoided because the IEP is a legal document that needs to be understood throughout the United States. That way, confusion can be avoided if the child moves to a different county or state.

The IEP for a student with a disability shall include a statement of the student's present levels of academic achievement and functional performance, including:

- How the student's disability affects the student's involvement and progress in the general curriculum, or
- For a preschool student, as appropriate, how the disability affects the student's participation in appropriate activities.⁷⁹

Accommodations & Modifications, Supplementary Aids and Services

Commentary: There are no limits to what supports are included in these sections of the IEP. If a student needs accommodations, modifications, supplementary aids or services in order to learn and/or demonstrate what they have learned, then they must be provided.

This section of the IEP provides IEP teams an opportunity to think creatively about how the student's total environment can be crafted and individualized to support the student's learning. Rather than rely on generic lists of supports, teams can work with parents to individualize the list so that it actually reflects what works for the unique needs of the child.

The IEP for a student with a disability shall include the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, including staffing support, to be provided to the student, or on behalf of the student, and program modifications or supports for school personnel that

⁷⁹ COMAR 13A.05.01.09A(1)(a)

will be provided for the student.⁸⁰ “Supplementary aids and services” means aids and services and other supports that are provided in regular education classes, other education-related settings, and extracurricular and nonacademic settings to enable a student with a disability to be educated with students without disabilities to the maximum extent appropriate. “Modifications” means practices that change, lower, or alter learning expectations. “Accommodation” means practices and procedures that provide students with disabilities equitable access during instruction and assessments in the areas of:

- Presentation;
- Response;
- Setting; and
- Scheduling.

Tip: You can always ask for training in the methods that teachers are using with your child. If an intervention works, it helps to use it at school and at home.

Extended School Year Services

Commentary: The provision of extended school year (ESY) services can be vital to students in helping them maintain the progress they have made during the school year. It is also helpful to support a child when they are transitioning to a new school if the student has difficulties with transitions.

Contrary to what is often stated by school systems, ESY services need not be limited to a ½ day program for four weeks in the summer. If a child needs more hours or a different program than the one currently being offered that summer, ESY services should be individualized to meet the unique circumstances and needs of the student.

At least annually, the IEP team shall determine whether the student requires the provision of extended school year services. The IEP team shall consider:

- Whether the student’s IEP includes annual goals related to critical life skills;
- Whether there is a likelihood of substantial regression of critical life skills caused by the normal school break in the regular school year and a failure to recover those lost skills in a reasonable time;
- The student’s degree of progress toward mastery of IEP goals related to critical life skills;
- The presence of emerging skills or breakthrough opportunities;
- Interfering behaviors;
- The nature and severity of the disability; and
- Special circumstances.⁸¹

A “critical life skill” is a skill determined by the IEP team to be critical to the student’s overall educational progress.⁸²

⁸⁰ COMAR 13A.05.01.09A(1)(b)

⁸¹ COMAR 13A.05.01.08B(2)(a)-(b)

⁸² COMAR 13A.05.01.03B(15)

Following the consideration of these factors, the IEP team shall determine whether the benefits the student with a disability gains during the regular school year will be significantly jeopardized if that student is not provided with an educational program during a normal break in the regular school year.⁸³

Goals & Objectives

Commentary: IEP Goals and Objectives should be written so clearly that all team members can visualize what students will be able to do at the end of the school year that they are unable to do now because of their disabilities. They should also clearly state how progress will be measured and how data will be taken to document progress in a systematic, accurate, reliable, and valid way.

Maryland has chosen to keep the requirement that IEPs contain annual goals and objectives. IDEA no longer requires IEPs to include objectives. This requirement benefits students with disabilities because it gives IEP teams the opportunity to spell out more clearly and in more detail exactly what specific skills we expect a student to acquire in the upcoming school year. Because objectives also break down skills into more fine tuned segments, the data collected on each objective will help teams better determine exactly where their interventions should be targeted. Additionally, objectives serve to document the hierarchy of skills that are needed to achieve the annual goal.

The IEP for a student with a disability shall include measurable academic and functional annual goals, including benchmarks or short-term instructional objectives related to:

- Meeting the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general curriculum, and meeting each of the student's other educational needs that result from the student's disability; or
- For a preschool student, as appropriate, to participate in appropriate activities.⁸⁴

Special Education & Related Services, Placement

A school system must ensure that students with disabilities, including students in public or private institutions, are educated with students who are not disabled to the maximum extent appropriate.⁸⁵

The school system must provide special classes, separate schooling, or other removal of students with disabilities from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁸⁶

⁸³ COMAR 13A.05.01.08B(2)(c)

⁸⁴ COMAR 13A.05.01.09A(1)(b)

⁸⁵ COMAR 13A.05.01.10A(1)

⁸⁶ COMAR 13A.05.01.10A(2)

The school system must ensure that a continuum of alternative placements is available:

- To the extent necessary to implement the IEP; and
- To meet the needs of students with disabilities for special education and related services.⁸⁷

The school system's alternative placements must include instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.⁸⁸ The school system must ensure that provisions for supplementary services, such as resource room and itinerant instruction, are available in conjunction with regular class placement.⁸⁹

Measuring IEP Progress

An IEP shall include how a parent is to be regularly informed of the:

- Student's progress toward the annual goals; and
- Extent to which the progress is sufficient to enable the student to achieve the goals within a year.⁹⁰

A parent of a student with a disability shall be informed of the student's progress at least as often as a parent is informed of a nondisabled student's progress. A school system shall make a good faith effort to achieve the student's annual IEP goals. A public agency, teacher, or other individual may not be held accountable if a student does not achieve the growth projected in the IEP.⁹¹

Tip: When the school writes the IEP, make sure that progress is clearly tracked. After the IEP is complete – but before any meeting to review progress – meet with the teacher and review how data is collected. Take a look at what data sheets are already prepared. Make sure you ask for and review all progress data before the meeting. If they don't have it before the meeting, ask them to bring it to the IEP Meeting.

How are placement decisions made for students with disabilities?

A school system must ensure that the educational placement decision of a student with a disability is:

- Made by the IEP team;
- Made in conformity with Least Restrictive Environment;
- Determined at least annually;
- Based on the student's IEP; and
- As close as possible to the student's home.⁹²

⁸⁷ COMAR 13A.05.01.10B(1)

⁸⁸ COMAR 13A.05.01.10B(2) and COMAR 13A.05.01.03B(71)

⁸⁹ COMAR 13A.05.01.10B(3)

⁹⁰ COMAR 13A.05.01.09B(1)

⁹¹ COMAR 13A.05.01.09B(2)-(4)

⁹² COMAR 13A.05.01.10C(1)

Unless the IEP of a student requires some other arrangement, the student is educated in the school or typical early childhood setting that the student would attend if not disabled. In selecting the least restrictive environment, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs. A student with a disability is not removed from education in an age-appropriate regular classroom or typical early childhood setting solely because of needed modifications in the general curriculum.⁹³

If the IEP team determines a student with a disability cannot be educated in the school or typical early childhood setting the student would attend if not disabled, the IEP shall document the specialized transportation needs of the student, including consideration of the effect transportation may have on the student in relation to the:

- Student's age and disability;
- Specialized equipment needs of the student;
- Personnel needed to assist the student during transportation;
- Amount of time involved in transporting the student; and
- Distance the student will be transported.⁹⁴

If a student's IEP cannot be implemented in a public school program, the local school system shall take steps to ensure that the student is provided FAPE. Before the local school system proposes a placement of a student with a disability in a nonpublic school, the local school system shall ensure that an IEP has been developed for the student.⁹⁵

A local school system shall initiate and conduct meetings to review the student's IEP in accordance. A nonpublic school shall contact the local school system to request IEP team meetings to review the student's IEP. Legal responsibility for the student's IEP remains with the local school system.⁹⁶

Unilateral Placements and Important Legal Notice Requirements⁹⁷

If a local school system has made FAPE available to a student with a disability and the parent chooses to place the student in a nonpublic school, the local school system is not required to pay for the student's education at the nonpublic school.

Before removing a student from a local school system, a parent shall notify the local school system of the parent's:

- Decision to reject the local school system's proposed placement;

⁹³ COMAR 13A.05.01.10C(1)(b)-(d)

⁹⁴ COMAR 13A.05.01.10C(1)(e)

⁹⁵ COMAR 13A.05.01.16A(1)-(2)

⁹⁶ COMAR 13A.05.01.16A(3)-(5)

⁹⁷ COMAR 13A.05.01.16C

- Concerns leading to the decision to remove the student from the local school system; and
- Intentions to enroll the student in a nonpublic school at public expense.

The parent shall provide notice by:

- Informing the IEP team at the most recent meeting the parent attended before the removal of the student; or
- Providing the local school system with written notice at least 10 business days, including holidays that occur on business days, before the removal of the student.

If the parent decides to enroll the student in a nonpublic school without the consent or referral of the local school system, an impartial hearing officer or a court may require the local school system to reimburse the parent for the reasonable costs of the placement if the local school system had not made FAPE available to the student in a timely manner before the parent enrolled the student in the nonpublic school.

Reimbursement may be reduced or denied by the impartial hearing officer or court if the:

- Parent failed to notify the local school system of the decision;
- Parent's actions were unreasonable; or
- Parent failed to make the student available for assessment, before the student's removal, after the local school system provided the parent with written notice of its intention to assess the student.

An impartial hearing officer or court may not reduce or deny reimbursement if:

- The public agency prevented the parent from providing notice;
- The parent was not provided with a copy of the procedural safeguards notice;
- Providing notice would likely result in physical harm to the student;
- The parent is illiterate or cannot write in English; or
- Providing notice would likely result in serious emotional harm to the student.

Disagreements between a parent and a local school system regarding the availability of FAPE and the question of financial responsibility are subject to due process complaints and due process hearings. A unilateral placement in a nonpublic school by a parent may be found to be appropriate by an impartial hearing officer or court even if the placement does not meet State standards that apply to education provided by a public school system.

***Commentary:* This regulation provides parents the right to remove their child from a program or placement which the parents believe to be inappropriate, and place their child in a private school without giving up their right to seek funding from the school system for their private placement. However, parents must follow certain procedures in order to preserve their right to seek funding. Before removing their child from the public school, parents must provide notice to the school that (1) they are rejecting the placement offered by the school system, (2) their concerns or reasons for rejecting the placement, (3) that they are placing their child in a private school, and (4) that they want the school system to be responsible for funding that placement.**

Tip: It is important to include all four elements in the notice to the school system or else the requested funding can be reduced or denied even if the parents prevail in a due process hearing. The notice must take place either at the last IEP meeting prior to removing the child, or in writing ten *business* days prior to the removal. Remember, business days are not the same as school days. Providing the notice only preserves the parents' right to seek reimbursement for the costs of the private placement. If the school system rejects the parents' request for funding, the case may have to be decided by an Administrative Law Judge in a Due Process Hearing. The party filing for the Hearing, in this case the parents, will have the burden of proving that the program the school system offered was not appropriate and the private program is appropriate.

CHAPTER 5

PROCEDURAL SAFEGUARDS

Prior Written Notice⁹⁸

A school system shall provide written notice to the parent of a student with a disability before the school system proposes or refuses to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE to the student. A parent of a student with a disability may elect to receive written notice by an electronic mail communication, if the school system makes that option available.

The notice shall include:

- A description of the action proposed or refused;
- An explanation of why the public agency proposes or refuses to take the action;
- A description of the options the public agency considered and the reason the options were rejected;
- A description of each assessment procedure, test, record, or report the public agency uses as a basis for the proposal or refusal;
- A description of any other factors relevant to the proposed or refused action;
- A statement that the parent has protections under the procedural safeguards of the Act and the manner in which the parent may obtain a copy of the procedural safeguards;
- A list of sources a parent may contact to obtain assistance in understanding the law; and
- If an action proposed by a public agency also requires parental consent, a public agency may provide notice at the same time it requests consent.

Tips: The Prior Written Notice (PWN) is a very important document and should be reviewed carefully. If it does not accurately reflect the decisions made or the basis for the decision made at the meeting you should follow-up with a correction letter and ask that it be attached to the PWN.

Mediations⁹⁹

A parent of a student or the public agency may request mediation when there is a dispute about any matter related to the identification, evaluation, or educational placement, or the provision of FAPE to a student. Mediation is voluntary on the part of the parties. Mediation may not be used:

- To deny or delay a parent's right to a hearing on the parent's due process complaint; or
- To deny any other rights afforded parents under the law.

⁹⁸ COMAR 13A.05.01.12

⁹⁹ COMAR 13A.05.01.15B

A party to the mediation has the right to be accompanied or advised by counsel. A party's request for mediation shall be made in writing to the other party and the Office of Administrative Hearings. Reasonable efforts shall be made to schedule a mediation session within 20 calendar days of the receipt of a written request and shall be held in a location that is convenient to the parties of the dispute. Mediation sessions are closed proceedings. An agreement reached by the parties to the dispute in the mediation shall be set forth in a written mediation agreement.

Commentary: Mediation is a nonadversarial process with the goal of settling the dispute between the parties. Anything that is said in the mediation is confidential and may not be used in a Due Process Hearing. The Office of Administrative Hearings assigns a mediator to facilitate a resolution. The mediator must be impartial. The Mediator does not have any power to force a resolution. Mediation is most often successful when both parties are willing to compromise. The party requesting mediation is usually asked to explain their reason for seeking the relief they have requested. The mediator often meets with both parties together at the start of the mediation but may caucus with the parties separately as a type of “shuttle diplomacy” to facilitate an agreement. If an agreement is reached, it is legally binding and enforceable in a court of law.

Resolution Sessions

The school system shall convene a meeting with the parent and the relevant members of the IEP team who have specific knowledge of the facts identified in the due process complaint before being provided the opportunity for an impartial due process hearing.¹⁰⁰

The parent and the school system determine the relevant members of the IEP team to attend the resolution session. The resolution session must include a representative of the school system who has decision-making authority on behalf of the system. The resolution session may not include a school system attorney unless the parent is accompanied by an attorney. The purpose of the resolution session is for the parent to discuss the due process complaint, and the facts that form the basis, so that the school system has the opportunity to resolve the dispute.¹⁰¹

If the parties reach a resolution, the parties shall execute a legally binding agreement. A party may void the agreement within 3 business days.¹⁰²

A resolution session need not be held if:

- The parent and the public agency agree in writing to waive the meeting;
- The parent and the public agency agree to try mediation; or

¹⁰⁰ COMAR 13A.05.01.15C(11)(a)

¹⁰¹ 34 C.F.R. § 300.510(a)

¹⁰² COMAR 13A.05.01.15C(11)(g)-(h)

- The public agency initiated the due process complaint.

If a party requests mediation and a due process complaint is filed within the same written request, the issue shall proceed directly to mediation if the noncomplaining party agrees to mediate.¹⁰³

The parent may seek the intervention of the hearing officer to begin the due process hearing time line if the public agency fails to:

- Hold a resolution session within 15 days of receiving the due process complaint; or
- Participate in the resolution session.¹⁰⁴

A due process hearing may occur if the issues in the due process complaint are not resolved to the satisfaction of either party within 30 calendar days of the receipt of the due process complaint. A due process hearing may not occur unless the parties:

- Attend a resolution session to resolve the issues in the due process complaint;
- Agree, in writing, to waive the resolution session;
- Attend mediation to resolve the issues in the due process complaint; or
- Participate in some other means to resolve the issues in the due process complaint.¹⁰⁵

Commentary: A resolution session is like mediation with a few exceptions. There is no mediator involved in the resolution session. Whereas mediation is voluntary, resolution is required unless both parties agree to waive it. Additionally, the law is not clear whether discussions that take place in a resolution session are confidential. A resolution session is only scheduled after a Due Process Hearing has been requested. Mediation can take place with or without a Due Process Hearing pending. Ultimately the goal of a resolution session is the same as mediation- to resolve the disagreement between the parties. As with mediation, resolution is most often successful when both parties are willing to compromise. The regulations specifically note that a resolution agreement may be voided by either party up to three business days after signing the agreement. The same provision does not apply to a mediation agreement.

Due Process Hearings

A parent or a public agency may file a due process complaint on any matter related to the identification, evaluation, or educational placement, or the provision of FAPE to a student with a disability. A party's due process complaint shall be made in writing to the other party and the Office of Administrative Hearings.¹⁰⁶ The due process complaint must include:

¹⁰³ COMAR 13A.05.01.15C(11)(d) & (i)

¹⁰⁴ COMAR 13A.05.01.15C(11)(c)

¹⁰⁵ COMAR 13A.05.01.15C(e)-

¹⁰⁶ COMAR 13A.05.01.15C(1)-(3)

- The name of the child;
- The address of the residence of the child;
- The name of the school the child is attending;
- A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
- A proposed resolution of the problem to the extent known and available to the party at the time.¹⁰⁷

Commentary: A form for completing a due process complaint may be obtained from the local school system or the Maryland State Department of Education.

A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements specified above.

When a party files a due process complaint, the public agency responsible for the student's education shall:

- Inform the parent of free or low cost legal and other relevant services available;
- Provide the parent with a copy of the procedural safeguards; and
- Inform the parent of the availability of mediation.

The due process complaint shall be considered sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the content of the due process complaint does not meet the requirements specified above. A party may only amend its due process complaint if:

- The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting; or
- The hearing officer grants permission at any time not later than 5 days before the due process hearing begins.

If a party files an amended due process complaint, the time line for the resolution meeting and the time period to resolve the complaint begins again with the filing of the amended due process complaint.¹⁰⁸

When a parent files a due process complaint, the school system must send a response to the parent within 10 days that includes:

- An explanation of why the school system proposed or refused to take the action raised in the due process complaint;
- A description of other options that the IEP Team considered and the reasons why those options were rejected;
- A description of each evaluation procedure, assessment, record, or report the school system used as the basis for the proposed or refused action; and

¹⁰⁷ 34 C.F.R. § 300.508

¹⁰⁸ COMAR 13A.05.01.15C(4)-(8)

- A description of the other factors that are relevant to the school system’s proposed or refused action.¹⁰⁹

Commentary: If the local school system has not provided a PWN that addresses the subject of the parents’ complaint, it must send a response to the parents within 10 days that includes all the elements of a PWN.

The time line for filing a due process complaint does not apply if the parent was prevented from filing a due process complaint because the public agency:

- Made specific misrepresentations that the problem forming the basis of the due process complaint was resolved; or
- Withheld information from the parent that the public agency is required to provide the parent under this chapter.¹¹⁰

Commentary: The IDEA establishes a two year statute of limitations on a complaint. A case not filed within two years of an alleged violation will be dismissed unless the parents were prevented from filing a due process complaint because the local school system engaged in either of the activities noted above.¹¹¹

The Office of Administrative Hearings shall appoint a qualified impartial hearing officer to conduct a due process hearing. An impartial hearing officer shall conduct a due process hearing and provide a written decision to each of the parties.¹¹²

The 45 day time line for a due process hearing decision begins after one of the following events occurs:

- Both parties agree in writing to waive the resolution meeting of this regulation;
- Both parties agree in writing that no agreement is possible after either the mediation or resolution meeting starts but before the end of the 30 day resolution period; or
- Both parties agree in writing to continue to try to resolve the disagreement at the end of the 30 day resolution period, but later, the parent or the public agency withdraws from the mediation process.¹¹³

An expedited due process hearing shall occur within 20 school days of the date the hearing is requested and shall result in a decision within 10 school days of the hearing if:

- At the time of the hearing request, the student is not enrolled and attending an approved educational program; or
- The due process hearing request concerns the placement or manifestation determination of a student due to a violation of the rules of conduct.

¹⁰⁹ 34 C.F.R. § 300.508(e)

¹¹⁰ COMAR 13A.05.01.15C(10)

¹¹¹ 34 C.F.R. § 300.507(a)(2)

¹¹² COMAR 13A.05.01.15C(12)-(13)

¹¹³ COMAR 13A.05.01.15C(14)

If, at the time of the hearing request, the student has been removed from the student's current education program for disciplinary reasons, the due process hearing shall be expedited.¹¹⁴

A party to a due process hearing has the right to:

- Be represented by an attorney
- Be accompanied and be advised by individuals with special knowledge or training with respect to the problems of children with disabilities;
- Present evidence and confront, cross-examine, and compel the attendance of witnesses;
- Prohibit the introduction of any evidence at the hearing which has not been disclosed to all parties at least 5 days before the hearing;
- Obtain a written or electronic verbatim record of the hearing; and
- Obtain written findings of fact and decisions.

Parents involved in the hearings must be given the right to:

- Have the child who is the subject of the hearing present; and
- Open the hearing to the public.¹¹⁵

Unless the parent and the public agency agree on an alternative placement, the student shall remain in the present educational placement during the pendency of an administrative or judicial proceeding.¹¹⁶

Commentary: This is often referred to as the “stay put” provision of the IDEA. Administrative and judicial proceedings can take years. Thus, the stay put provision can be a powerful tool.

A public agency shall comply with the decision of the impartial hearing officer within the time line specified unless either party obtains a court order granting a stay of the decision.¹¹⁷

In an action or proceeding under this section, courts may award reasonable attorneys' fees to the prevailing party who is the parent of a child with a disability. Courts may award reasonable attorneys' fees to a prevailing party which is a school system against attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation. Courts may award reasonable attorneys' to a prevailing party which is a school system against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.¹¹⁸

¹¹⁴ COMAR 13A.05.01.15C(15)-(16)

¹¹⁵ Maryland Code, Education Article, § 8-413(f)

¹¹⁶ COMAR 13A.05.01.15C(19)

¹¹⁷ COMAR 13A.05.10.15C(21)

¹¹⁸ COMAR 13A.05.01.15C(22) & 34 C.F.R. 300.517(a)

Commentary: When parents prevail in a due process hearing they are entitled to reimbursement of reasonable attorneys' fees and costs. Costs do not include expert witness fees. When a school system prevails, it may be entitled to reimbursement of its attorneys' fees from the parents' attorney if the action was frivolous, unreasonable or without foundation. The parents' attorney and the parents may be required to reimburse the school system for attorneys' fees if a court finds that the parents' action was filed for an improper purpose such as to harass, to cause unnecessary delay, or needlessly increase the cost of litigation.

Tip: Don't go to a Due Process Hearing until you have an expert on your side – a speech-language pathologist, an educational consultant with a degree in special education, or a psychologist. School systems have experts – teachers, speech therapists, school psychologists – that will take the stand during a hearing. Parents going to hearing without an expert face nearly insurmountable odds.

State Complaints

An organization or individual may file a signed written complaint with the Maryland State Department of Education ("MSDE") regarding an alleged violation of the IDEA. A school system shall provide parents and other interested parties with information regarding the procedures for filing a complaint.

The content of a signed written complaint shall include:

- A statement that a public agency has violated a requirement of the IDEA; and
- The facts on which the statement is based; and
- The signature and contact information for the complainant.

If the complaint alleges violations with respect to a specific child, it shall include:

- The name and address of the residence of the child;
- The name of the school the child is attending;
- A description of the nature of the problem of the child, including facts relating to the problem; and
- A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

The complaint shall allege a violation that occurred not more than 1 year prior to the date that the complaint is received by MSDE.¹¹⁹

Either party to the complaint shall be given the opportunity to submit additional information and documentation about the allegations in the complaint, which will be considered in making the final decision. Following the receipt of the complaint, MSDE shall conduct an investigation, consistent with guidelines and procedures established by MSDE, of any complaint that meets the requirements above. MSDE shall issue a written decision to the complainant that addresses each allegation and contains:

¹¹⁹ COMAR 13A.05.01.15A(1)-(4) & 34 C.F.R. 300.153(b)

- Findings of facts and conclusions;
- The reasons for the final decision; and
- Procedures for effective implementation of the final decision including technical assistance, negotiations, and corrective actions required to achieve compliance.

MSDE shall issue the written decision within 60 days unless:

- Exceptional circumstances exist with respect to the State complaint that requires an extension of the time limit; or
- The complainant and the school system agree to extend the time line in order to engage in mediation or other alternative means of dispute resolution.¹²⁰

MSDE shall set aside any part of a State complaint that is being addressed in a due process hearing until the conclusion of the hearing when MSDE receives a State complaint that:

- Is also the subject of a due process hearing; or
- Contains multiple issues of which one or more are part of a due process hearing.

MSDE shall resolve any issue in a State complaint that is not part of a due process hearing within the 60 day time line using the procedures described above. MSDE shall inform the complainant that a due process hearing decision is binding when a complainant raises an issue in a State complaint that was the subject of a previous due process hearing decision involving the same parties.¹²¹

Commentary: Compared to a due process hearing, a state complaint is an inexpensive, and often faster, mechanism for parents to seek a remedy for a violation. However, it is not an evidentiary hearing and the MSDE bases its decision entirely on the documents it reviews. Further, MSDE will only order procedural remedies, not substantive. Which means if you believe your child’s IEP is inadequate or the placement is inappropriate, MSDE will not address that issue. If you file for due process and a state complaint on the same issues, MSDE will stop any investigation on issues common to both complaints.

Tip: If MSDE finds that the school system has violated the law, but does not offer a remedy you consider reasonable, you can still file a due process complaint and use MSDE’s findings as evidence to support your argument.

Appeals

A party aggrieved by the findings and decision of a due process hearing may bring a civil action in State or federal court.¹²² The party bringing the action shall have 90 days from the date of the decision of the hearing officer.¹²³ MSDE shall forward the

¹²⁰ COMAR 13A.05.01.15A(5)-(7)

¹²¹ COMAR 13A.05.01.015A(8)-(10)

¹²² COMAR 13A.05.01.15C(20)

¹²³ 34 C.F.R. § 300.516(b)

records of the administrative proceedings to the court, on request, when an aggrieved party brings a civil action.¹²⁴ The court:

- Receives the records of the administrative proceedings;
- Hears additional evidence at the request of a party; and
- Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.¹²⁵

Commentary: Most “appeals” are filed in federal court because the IDEA is a federal law. In the vast majority of cases there is not a full evidentiary hearing. Rather, the court often decides the case on “Cross Motions for Summary Judgment” which are memoranda of law. Often, no appearance in court is required.

Statutes of Limitations

State Complaints: The complaint shall allege a violation that occurred not more than 1 year prior to the date that the complaint is received by MSDE.

Due Process: The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.¹²⁶

¹²⁴ COMAR 13A.05.01.15C(24)

¹²⁵ 34 C.F.R. § 300.516(c)

¹²⁶ 34 C.F.R. § 300.507(a)(2)

CHAPTER 6

BEHAVIOR AND DISCIPLINE

A student with a disability may be removed from the student's current placement for not more than 10 consecutive school days for any violation of school rules to the same extent that removal is applied to students without disabilities. Unless it is determined that the removal constitutes a change of placement, a student with a disability may be removed:

- To an alternative educational setting;
- To another setting; or
- By suspension.

A public agency is not required to provide services to a student with a disability if services are not provided to students without disabilities.¹²⁷

Commentary: In Maryland the school principal has authority to remove any student from school for up to 10 days for violations of school rules, even if the behavior for which a student with a disability is disciplined is the direct result of the student's disability. Any removals in excess of 10 consecutive school days must be approved by the superintendent or her designee.¹²⁸

A student with a disability may be removed from the student's current placement for up to 10 consecutive school days for each incident of misconduct in a school year if the cumulative effect of the removals does not constitute a change of placement. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement is appropriate for a student with a disability who violates a code of student conduct.

For each period of removal after a student with a disability has been removed for the cumulative equivalent of 10 school days in a school year, school personnel shall consult with at least one of the student's teachers to determine what services to provide to enable the student to appropriately:

- Progress in the general curriculum; and
- Advance toward achieving the goals of the student's IEP.

¹²⁷ COMAR 13A.08.03.03A

¹²⁸ In 2014, the Maryland State Board of Education adopted revised regulations dealing with how all students – with or without disabilities – are disciplined. The new regulations require that local school boards adopt discipline policies “based on the goals of fostering, teaching, and acknowledging positive behavior.” Generally, the revised regulations were intended to ensure that discipline was not imposed at the cost of educational opportunity and progress, while maintaining safe schools and allowing for discretion in imposing discipline. The new regulations also require school systems to determine whether the discipline process affects minority students at a disproportionate rate and whether it has a discrepant impact on special education students. See COMAR 13A.08.01.11, COMAR 13A.08.01.12, 13A.08.01.15 and 13A.08.01.21.

A student with a disability may be removed for more than 10 consecutive school days for a violation of school rules to the same extent removal is applied to students without disabilities if the student's IEP team determines that the behavior subject to the removal is not a manifestation of the student's disability.

A student with a disability removed for more than 10 consecutive school days shall:

- Continue to receive educational services in another setting, so as to enable the student to continue to participate in the general education curriculum and progress toward meeting the goals set out in the student's IEP; and
- Receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior violation to prevent its recurrence.¹²⁹

***Commentary:* Even if the behavior for which the student has been removed from school is found not to be a manifestation of the student's disability, the school system is required to provide the student a FAPE. This may be in an "alternative school" or even at home. If the behavior is a manifestation, the school cannot remove the student for more than 10 days, although the IEP team may meet to discuss whether the IEP and placement remain appropriate.**

Manifestation Determinations¹³⁰

The IEP team shall meet to determine whether a student's behavior that resulted in a disciplinary removal is a manifestation of the student's disability each time the student is subject to a removal:

- For longer than 10 consecutive school days;
- That constitutes a change of placement; or
- To an interim alternative educational setting.

The IEP team shall meet within 10 school days of the date when school personnel take disciplinary action for the removal of a student with a disability to determine:

- Whether the student's behavior that resulted in disciplinary removal is a manifestation of the student's disability; and
- The services to be provided during the removal to ensure the provision of FAPE.

In determining whether the student's behavior was a manifestation of the student's disability, the IEP team shall review:

- All relevant information in the student's file;
- Any teacher observations;
- Any relevant information supplied by the parents; and
- The student's IEP.

¹²⁹ COMAR 13A.08.03.03B

¹³⁰ COMAR 13A.08.03.08

To determine that the behavior subject to the disciplinary action is a manifestation of the student's disability, the IEP team and other qualified personnel must make the determination that the student's behavior was:

- Caused by or had a direct and substantial relationship to the student's disability; or
- The direct result of the school system's failure to implement the student's IEP.

Commentary: The manifestation determination should not be based solely upon the student's identified disability, although it is a factor. Rather, as stated in section C above, the IEP team should look at all relevant information pertaining to the student.

If the IEP team determines the student's conduct was the direct result of the school system's failure to implement the student's IEP, the public agency shall take immediate steps to remedy those deficiencies.

If the IEP team determines that the student's conduct was caused by the student's disability, or was the direct result of the school system's failure to implement the IEP, the IEP team shall consider the behavior a manifestation of the student's disability.

If the IEP team determines that the student's behavior is a manifestation of the student's disability, the IEP team shall, as appropriate:

- Conduct a functional behavioral assessment and implement a behavioral intervention plan if the public agency had not conducted such assessments prior to a disciplinary removal;
- Review the student's behavioral intervention plan and modify it, if necessary, to address the behavior; and
- Return the student to the student's placement from which the student was removed unless the parent and the public agency agree to a change of placement as part of a modification of the student's behavioral intervention plan.

If the IEP team determines that the behavior is not a manifestation of the student's disability, the student may be disciplined in the same manner as students without disabilities, including a period of suspension or expulsion.

The IEP team shall also determine the extent to which services are necessary during the period of suspension or expulsion to enable the student to appropriately:

- Progress in the general curriculum; and
- Advance toward achieving the goals of the student's IEP.

On initiation of disciplinary actions, the principal shall transmit the student's special education and disciplinary records to the local school superintendent.

Tip: If you think your child has behaviors that may be a problem in school, ask the IEP Team to perform a Functional Behavior Assessment right away, and ask them to consider a Behavior Intervention Plan. Don't wait until your child gets in trouble

– it’s better to be proactive by having school staff conduct a functional behavior assessment (FBA) than to have a suspension in the records.

FBA and BIPs¹³¹

A “Behavior intervention plan” is a proactive plan designed to address problem behaviors exhibited by a student in the educational setting through the use of positive behavioral interventions, strategies, and supports.

A “Functional behavior assessment” is the systematic process of gathering information to guide the development of an effective and efficient behavior intervention plan for the problem behavior. The functional behavior assessment includes the:

- Identification of the functions of the problem behavior for the student;
- Description of the problem behavior exhibited in the educational setting; and
- Identification of environmental and other factors and settings that contribute to or predict the occurrence, nonoccurrence, and maintenance of the behavior over time.

Seclusion and Restraint¹³²

School personnel shall only use exclusion, restraint, or seclusion after less restrictive or alternative approaches have been considered, and:

- Attempted; or
- Determined to be inappropriate.

School personnel must use exclusion, restraint or seclusion in a humane, safe, and effective manner, without intent to harm or create undue discomfort; and consistent with known medical or psychological limitations and the student’s behavioral intervention plan.

Commentary: “**Restraint**” means the use of a physical or mechanical restraint.

Restraint

The use of **physical restraint** is prohibited in public agencies and nonpublic schools, unless:

- There is an **emergency situation** and physical restraint is necessary to protect a student or other person from imminent, serious, physical harm after other less intrusive, nonphysical interventions have failed or been determined inappropriate;
- The student’s **behavioral intervention plan or IEP describes the specific behaviors** and circumstances in which physical restraint may be used; or
- The parents of a nondisabled student have **otherwise provided written consent** to the use of physical restraints while a behavior intervention plan is being developed.

¹³¹ COMAR 13A.08.04.02B

¹³² COMAR 13A.08.04.05

Physical restraint shall be applied only by school personnel who are trained in the appropriate use of physical restraint. In applying physical restraint, school personnel shall only use reasonable force as is necessary to protect a student or other person from imminent, serious, physical harm.

Physical restraint must be removed as soon as the student is calm; and may not exceed 30 minutes. School personnel may not:

- Place a student in a face down position;
- Place a student in any other position that will obstruct a student's airway or otherwise impair a student's ability to breathe, obstruct a staff member's view of a student's face, restrict a student's ability to communicate distress, or place pressure on a student's head, neck, or torso; or
- Straddle a student's torso.

The use of **mechanical restraint** is prohibited in public agencies and nonpublic schools unless a public agency or nonpublic school is certified by and meets the requirements of the Joint Commission for the Accreditation of Health Care Organizations.

This does not prohibit school personnel from using a protective or stabilizing device:

- As prescribed by a health professional; or
- For a student with a disability, in accordance with the student's IEP or behavior intervention plan.

***Commentary:* "Mechanical restraint" means any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove. "Mechanical restraint" does not include a protective or stabilizing device.**

Each time a student is in a restraint, school personnel shall document:

- Other less intrusive interventions that have failed or been determined inappropriate;
- The precipitating event immediately preceding the behavior that prompted the use of restraint;
- The behavior that prompted the use of a restraint;
- The names of the school personnel who observed the behavior that prompted the use of restraint; and
- The names and signatures of the staff members implementing and monitoring the use of restraint.

Documentation shall include a description of the restraint event, including:

- The type of restraint;
- The length of time in restraint;
- The student's behavior and reaction during the restraint; and
- The name and signature of the administrator informed of the use of restraint.

The documentation shall be maintained in the student's educational record and available for inspection by the student's parent or legal guardian. Each time restraint is used, parents shall be provided oral or written notification within 24 hours, unless otherwise provided for in a student's behavior intervention plan or IEP.

Seclusion

The use of seclusion is prohibited in public agencies and nonpublic schools unless:

- There is an **emergency situation** and seclusion is necessary to protect a student or another person after other less intrusive interventions have failed or been determined to be inappropriate;
- The student's **IEP or behavioral intervention plan** describes the specific behaviors and circumstances in which seclusion may be used; or
- The parents of a nondisabled student have **otherwise provided written consent** for the use of seclusion while a behavior intervention plan is being developed.

Commentary: "Seclusion" means the confinement of a student alone in a room from which the student is physically prevented from leaving.

At a minimum, a room used for seclusion shall:

- Be free of objects and fixtures with which a student could self-inflict bodily harm;
- Provide school personnel an adequate view of the student from an adjacent area; and
- Provide adequate lighting and ventilation.

School personnel shall view a student placed in seclusion at all times; and provide a student placed in seclusion with an explanation of the behavior that resulted in the removal and instructions on the behavior required to return to the learning environment. Seclusion shall only be applied by school personnel trained in the appropriate use of seclusion.

A seclusion event:

- Shall be appropriate to the student's developmental level and severity of the behavior;
- May not restrict the student's ability to communicate distress; and
- May not exceed 30 minutes.

Each time a student is placed in seclusion, school personnel shall document:

- Other less intrusive interventions that have failed or been determined inappropriate;
- The precipitating event immediately preceding the behavior that prompted the use of seclusion;
- The behavior that prompted the use of seclusion; and
- The names and signatures of the staff members implementing and monitoring the seclusion.

The documentation shall include a description of the seclusion event, including:

- Justification for initiating the use of seclusion;
- The length of time in seclusion;
- The student's behavior and reaction during the seclusion; and
- The name and signature of the administrator informed of the use of seclusion.

The documentation shall be maintained in the student's educational record and available for inspection by the student's parent or legal guardian. Unless otherwise provided for in the student's behavior intervention plan or IEP, each time seclusion is used, school personnel shall provide the student's parent with verbal notification or send written notice within 24 hours.

If restraint or seclusion is used for a student who has not been identified as a student with a disability, the student shall immediately be referred to the school's pupil services team or an IEP team. If restraint or seclusion is used for a student with a disability, and the student's IEP or behavior intervention plan does not include the use of restraint or seclusion, the IEP team shall meet within 10 business days of the incident to consider:

- The need for a functional behavioral assessment;
- Developing appropriate behavioral interventions; and
- Implementing a behavioral intervention plan.

If restraint or seclusion is used for a student with a disability, and the IEP or behavior intervention plan includes the use of restraint or seclusion, the student's IEP or behavior intervention plan shall specify how often the IEP team shall meet to review or revise, as appropriate, the student's IEP or behavior intervention plan.

CHAPTER 7

BULLYING

All public school systems and all non-public schools in Maryland are required to have in place a policy prohibiting bullying, harassment or intimidation.¹³³

*What is bullying?*¹³⁴

“Bullying, harassment, or intimidation” means intentional conduct, including verbal, physical, or written conduct, or an intentional electronic communication. Electronic communication includes communication transmitted by any electronic device, including a cell phone, computer or pager.

Such conduct is bullying if it creates a hostile educational environment by substantially interfering with a student’s educational benefits, opportunities, or performance, or with a student’s physical or psychological well-being and is:

- Motivated by an actual or a perceived personal characteristic including race, national origin, marital status, sex, sexual orientation, gender identity, religion, ancestry, physical attributes, socioeconomic status, familial status, or physical or mental ability or disability; or
- Threatening or seriously intimidating.

Within the context of schools, bullying is conduct, described above, that:

- Occurs on school property, at a school activity or event, or on a school bus; or
- Substantially disrupts the orderly operation of a school.

Reporting Bullying

The Maryland State Department of Education (“MSDE”) requires county boards to report incidents of bullying, harassment, or intimidation against students attending a public school under the jurisdiction of the county board. An incident of bullying, harassment, or intimidation may be reported by:

- A student;
- The parent, guardian, or close adult relative of a student; or
- A school staff member.¹³⁵

MSDE has created a standard victim of bullying, harassment, or intimidation report form. This standard report form allows the reporter to:

- Identify the victim and the alleged perpetrator, if known;
- Indicate the age of the victim and alleged perpetrator;
- Describe the incident, including alleged statements made by the alleged perpetrator;

¹³³ Maryland Code, Education Article, §§ 7-424.1(c) & 7-424.3(b)

¹³⁴ Maryland Code, Education Article, § 7-424(a)

¹³⁵ Maryland Code, Education Article, § 7-424(b)

- Indicate the location of the incident;
- Identify any physical injury suffered by the victim and describe the seriousness and any permanent effects of the injury;
- Indicate the number of days a student is absent from school, if any, as a result of the incident;
- Identify any request for psychological services initiated by the victim or the victim's family due to psychological injuries suffered; and
- Include instructions on how to fill out the form and the mailing address to where the form shall be sent.

School systems must distribute copies of the victim of bullying, harassment, or intimidation report form to each public school under the county board's jurisdiction.¹³⁶ The information contained in a victim of bullying, harassment, or intimidation report form:

- Is confidential and generally may not be disclosed; and
- May not be made a part of a student's permanent educational record.¹³⁷

Commentary:

Despite the law, too many schools fail to take bullying seriously

In April and May of 2014, the *Washington Post* ran a series of chilling articles about a St. Mary's County high school student with an autism spectrum disorder who was brutally abused by "friends." The perpetrators' video recorded many of their activities. One video showed the student being coaxed onto a frozen pond and slipping into icy water while fellow students sat on a guardrail, laughing. Another showed a girl holding a knife to the boy's throat; a third showed students trying to run him over with a car.¹³⁸

While the St. Mary's County case is exceptionally inhumane, incidents of bullying, harassment and intimidation are tragically common in Maryland schools. According to MSDE, there were more than 4,500 such events last year.¹³⁹ MSDE acknowledges that the real figure is even higher.¹⁴⁰ Despite years of legally mandated reporting, many Maryland public school officials across the state fail to faithfully document bullying.

Large-scale statistical analyses have shown that students who are bullied are more likely to suffer from depression and other mental health problems. Studies also show that students with disabilities are bullied at higher rates, are more frequently goaded by their peers into meltdowns, and are at a higher risk to engage in dangerous behavior in misguided efforts to gain peer acceptance.¹⁴¹

¹³⁶ Maryland Code, Education Article, § 7-424(c)

¹³⁷ Maryland Code, Education Article, § 7-424(e)

¹³⁸ Washington Post, *Md. Boy Says He Wants to Resume Relationship with Girls Accused of Assault* (April 20, 2014); Washington Post, *In Autistic Boy's Assault Case, Prosecutor Says Teen Girls' Cellphone Videos Make His Job Easy* (April 25, 2014); Washington Post, *Girl, 17, Pleads Guilty in Juvenile Court in Abuse of Autistic Boy in St. Mary's County* (May 29, 2014).

¹³⁹ Maryland State Department of Education, *Bullying, Harassment, or Intimidation in Maryland Public Schools*, at 4 (March 31, 2015).

¹⁴⁰ *Id.* at 20.

¹⁴¹ See, i.e. Connie Anderson, *IAM Research Report: Bullying and Children with ASD*, Interactive Autism Network (March 26, 2012) available at

Bullying and Students with Disabilities: FAQs

Q: My child is being bullied. Can I raise this issue at an IEP team meeting?

A: Yes. In August 2013, the United States Department of Education, Office of Special Education and Rehabilitative Services (OSERS), provided new guidance on the intersection of IDEA and bullying. OSERS defines bullying as “aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential be repeated over time.”¹⁴² The OSERS guidance states unequivocally that if bullying results in a student not receiving meaningful educational benefit, the student has been denied FAPE, and the school system has an affirmative duty to remedy the problem. The guidance also makes clear that bullying is an appropriate topic for discussion at an IEP team meeting. This is true regardless of whether the bullying is related to the student’s disability. If bullying causes a disabled student to be denied meaningful educational benefit, it must be remedied under the IDEA.

Q: My child is bullying another student. Can I raise this issue at an IEP team meeting?

A: Yes. If the student who is engaging in the bullying is a student with a disability, the IEP team should review the student’s IEP to assess whether the student would benefit from additional supports and services to address the inappropriate behavior.¹⁴³

Q: Can bullying result in a civil rights violation?

A: Yes. In 2000, OSERS and the United States Department of Education Office for Civil Rights (OCR) issued guidance¹⁴⁴ clarifying that school-based harassment on the basis of disability may also be a civil rights violation under Section 504 of the Rehabilitation Act of 1973 (Section 504)¹⁴⁵ and Title II of the Americans with Disabilities Act of 1990 (ADA Title II).¹⁴⁶ Under Section 504 and ADA Title II, schools are required to provide students with disabilities with educational opportunities equal to their non-disabled peers. All educational institutions that receive federal funds are required to comply with Section

http://www.iancommunity.org/cs/ian_research_reports/ian_research_report_bullying; Washington Post, *Parents of Autistic Children Fear Their Children Being Bullied—For Good Reason* (April 24, 2013); Kimberly A. Twyman et al., *Bullying and Ostracism Experiences in Children with Special Health Care Needs*, J. Dev. Behav. Pediatr. 31:1-8 (2010); Rose et al, *Bullying and Victimization among Students in Special Education and General Education Curricula*, Exceptionality Education International, No. 3, Vol. 21, 2011.

¹⁴² United States Department of Education, Office of Special Education and Rehabilitative Services, “Dear Colleague” Letter (August 20, 2013).

¹⁴³ *Id.*

¹⁴⁴ United States Department of Education, Office of Special Education and Rehabilitative Services and United States Department of Education Office for Civil Rights, *Reminder of Responsibilities under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act* (July 25, 2000) [Hereinafter, Department of Education Notice].

¹⁴⁵ 29 U.S.C. § 794.

¹⁴⁶ 42 U.S.C. § 12131 *et seq.*

504. ADA Title II applies to all state and local entities, including public school districts, regardless of whether they receive federal funds.

Section 504 and ADA Title II prohibit disability harassment, which is defined by the United States Department of Education as “intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program.” “When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations.”¹⁴⁷ If disability harassment has a negative effect on a student’s ability to participate in, or benefit from, a school’s programs or activities, the educational institution has an obligation to investigate the matter and respond effectively.¹⁴⁸

Q: Can bullying result in a criminal violation?

A: Yes. In 2013, the Maryland General Assembly unanimously passed “Grace’s Law”, named after Grace McComas, a 15-year-old high school student who committed suicide after being harassed on social media sites.¹⁴⁹ Grace’s Law criminalizes the malicious use of electronic communication. A violation of Grace’s Law is a misdemeanor criminal offense punishable by up to one year of imprisonment, a fine not to exceed \$500.00, or both. *Id.*¹⁵⁰ Extreme cases of bullying may be prosecuted under Maryland’s harassment law, which prohibits “following another in or about a public place or maliciously engage[ing] in a course of conduct”¹⁵¹ and Maryland’s stalking law, which prohibits “a malicious course of conduct . . . where the person intends to place or knows or reasonably should have known the conduct would place another in reasonable fear . . . of serious bodily injury; . . . of an assault in any degree; . . . or . . . of death.”¹⁵²

¹⁴⁷ See Department of Education Notice.

¹⁴⁸ *Id.*

¹⁴⁹ See Maryland Code, Criminal Law, § 3-805.

¹⁵⁰ See *Id.*

Former Maryland Attorney General Douglas F. Gansler announced a new pilot initiative in which each school district in Maryland will designate one person to work directly with Facebook in an effort to make it easier to have offensive or hurtful language taken off the site. See Baltimore Sun, *Facebook and Md. Schools Partner to Combat Bullying* (Oct. 3, 2013).

¹⁵¹ Md. Code Ann. Crim. Law, § 3-803

¹⁵² Md. Code Ann. Crim. Law, § 3-802.

CHAPTER 8

Important Case Law

The U.S. Supreme Court – which has the ultimate decision-making authority in cases involving the IDEA – has issued several important decisions involving special education over the past 30 years. Following are quick summaries of these decisions:

Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). The Supreme Court discussed what constitutes a Free Appropriate Public Education under the law.

Sch. Comm. of the Town of Burlington, Mass. v. Dep’t. of Educ. of Massachusetts, 471 U.S. 359 (1985). The IDEA allows courts and administrative law judges to order that school systems reimburse parents for a unilateral placement, if the parent prevails at a later hearing and/or court proceeding. The IDEA also allows for orders that school systems fund a student in a nonpublic placement as a remedy for failure to provide a Free Appropriate Public Education.

Honig v. Doe, 484 U.S. 305 (1988). The “stay-put” provision of IDEA stops school systems from unilaterally changing the placement of a student with a disability.

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). A school system may provide a sign-language interpreter to a deaf student enrolled in a religious-affiliated school without violating the First Amendment.

Florence Co. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). When parents unilaterally place their child in a nonpublic school, they can still seek reimbursement from a school system for the placement even if the nonpublic school does not comply with all requirements placed on public schools.

Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66 (1999). School systems are obligated to provide “related services” to the extent necessary for students with disabilities to receive an appropriate education.

Schaffer v. Weast, 546 U.S. 49 (2005). Unless state laws provide otherwise, parents appealing the decision of an IEP Team have to prove that the IEP is inappropriate.

Arlington Cent’t Sch. Dist. Bd. Of Educ. v. Murphy, 548 U.S. 291 (2006). Parents cannot recover fees for expert witnesses relied on in due process hearings.

Winkleman v. Parma City Sch. Dist., 550 U.S. 516 (2007). Parents may represent themselves in due process hearings and judicial appeals from hearing decisions – parents are not obligated to retain an attorney if they appeal an adverse hearing decision.

Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009). A student need not have received special education services from a school system in order to receive reimbursement for unilateral placement in a nonpublic school.

CHAPTER 9

Legislative Update: Habilitative Services

Effective July 1, 2014, local school systems are required to provide parents of children with disabilities with written and verbal information about access to habilitative services, including a copy of the Maryland Insurance Administration's *Parents' Guide to Habilitative Services* (1) during the transition meeting for a child moving from the Maryland Infants and Toddlers Program to a local school system; (2) during a child's initial IEP team meeting; (3) at least one time each year at a child's IEP meeting; and (4) on the approval or denial of a parent's or guardian's request for a related service to enable a child with a disability to benefit from special education.¹⁵³

The Parents' Guide provides information in a Q&A format regarding how "habilitative services" are defined¹⁵⁴, which health conditions qualify a student for habilitative services¹⁵⁵, which insurance companies and HMOs are required by law to provide habilitative services, and how to file an appeal if a health insurance company or HMO denies a request to provide habilitative services.

A copy of *Parents' Guide to Habilitative Services* is available online at <http://www.mdinsurance.state.md.us/sa/docs/documents/consumer/publicnew/parents'-guide-to-habilitative-services.pdf>

¹⁵³ Md. Code Ann. Educ. § 8-418.

¹⁵⁴ "Habilitative services" are defined in the Maryland Code as "services, including occupational therapy, physical therapy, and speech therapy, for the treatment of a child with a congenital or genetic birth defect to enhance the child's ability to function. Md. Code Ann. Ins. § 15-835

¹⁵⁵ Habilitative services may be available to a child with a "congenital or genetic birth defect", defined as "a defect existing at or from birth, including a hereditary defect, which includes, but is not limited to, an autism spectrum disorder; cerebral palsy; intellectual disability; Down syndrome; spina bifida; hydroencephalocele; and congenital or genetic developmental disabilities. Md. Code Ann. Ins. § 15-835.

These materials are provided for informational purposes only, and are not a substitute for individualized legal advice. Anyone seeking legal advice about a specific situation should seek the services of a competent attorney.

© This document is copyright 2015, Callegary & Steedman, P.A. It may be copied and distributed without additional permission, so long as it is attributed to Callegary & Steedman and no fee is charged. It is requested, but not required, that you contact the authors of this document before redistributing any large number of copies, to give them a chance to provide you with an updated version of the document.