Chapter 13

SPECIAL EDUCATION

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§ 13.1 INTRODUCTION

Students with special needs are entitled to receive educational programs and services that assure their maximum possible development in the least restrictive environment. This right to appropriate special education services arises under both state and federal law. Public schools have an obligation to identify students with special needs. A separate "individualized education program" (IEP) must be prepared for each student with special needs and must be reviewed annually. Parents have the right to participate in the process whereby their child is evaluated and decisions are made concerning the content of the proposed educational program for the child. Ultimately, parents who are dissatisfied with the program proposed for their child can contest the adequacy of the proposed IEP through an administrative hearing process before the Bureau of Special Education Appeals (BSEA) of the Massachusetts Department of Education. This chapter is intended to provide a brief introduction to special education law in Massachusetts. Any assessment of individual cases requires an analysis of the published decisions of the BSEA and court decisions applying both the federal and state law.

A student's right to appropriate special education services and placement under federal law is governed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., with implementing regulations published at 34 C.F.R. §§ 300 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The Massachusetts special education statute is codified as G.L. c. 71B, but is commonly referred to as "Chapter 766," having been adopted as Chapter 766 of the statutes of 1972. The administrative regulations implementing Chapter 766 are published at 603 C.M.R. §§ 28.00 et seq., and the BSEA has published Hearing Rules for Special Education Appeals (June 1996), which governs administrative hearings. Students and parents have a right of access to student records pursuant to Massachusetts's "Regulations Pertaining to Student Records," published at 603 C.M.R. § 23, and under the provisions of the federal statute known as the Buckley Amendment, 20 U.S.C. § 1232g, with implementing regulations entitled "Privacy Rights of Parents and Students," published at 34 C.F.R. § 99. Additional reference materials are included in **Exhibit 13C**, and additional resources are listed in **Exhibit 13D**.

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§ 13.2 STATUTORY FRAMEWORK

§ 13.2.1 Chapter 766 (G.L. c. 71B)

The Massachusetts Legislature broke new ground when it adopted Chapter 766 of the Acts of 1972 (G.L. c. 71B; hereinafter referred to as "Chapter 766"), an act providing that all children with special needs are to be provided with special education services that address their individual needs. The Massachusetts statute has two important features. First, the definition of children who are eligible for such services is broad: the term "school age child with special needs" is defined as "a school age child who, because of a disability consisting of a developmental delay or an intellectual, sensory, neurological, emotional, communication, physical, specific learning or health impairment or combination thereof, is unable to progress effectively in regular education and requires special education services in order to successfully develop the child's individual educational potential . . . " G.L. c. 71B, § 1. Eligibility for special education services is not limited to narrowly defined categories based on formal diagnoses—rather, the emphasis is on a flexible definition of students who are eligible for such services based on functional need. Second, the statute expressly provides that the agencies responsible for implementing the statute shall develop a definition of special needs that shall "emphasize a thorough narrative description of each child's developmental potential so as to minimize the possibility of stigmatization and to assure *the maximum possible development in the least restrictive environment of a child with special needs* . . . " G.L. c. 71B, § 2 (emphasis added). This statute has been construed to require that an IEP address a child's special needs "so as to assure his maximum possible development in the least restrictive environment consistent with that goal." *David D. v. Dartmouth Sch. Comm.*, 615 F.Supp. 639, 646 (D.Mass. 1984). The central question in each case is what services and programs are necessary, in light of the unique needs of the child, to promote the child's maximum possible development: "[The focus must be on the child's] needs as a unique individual, rather than as an abstract representative of the category of children with [a particular disability]." *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 423 (1st Cir. 1985).

The "maximum possible development" standard described above remains in effect under Chapter 71B until January 1, 2002. The Massachusetts Legislature amended Chapter 71B in the 2000 legislative session (St. 2000, c. 159), adopting the most significant amendments to the statute since it was originally enacted in 1972. The new legislation jettisons the "maximum possible development" standard for measuring the adequacy of special education programming for disabled students. In its place, the Legislature adopted the "free and appropriate public education" standard that is contained in the federal special education statute, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (1994). (See § 13.2.2 below.) Although some provisions of the amendments to Chapter 71B are already in effect, the implementation of the "free and appropriate public education" standard was delayed until January 1, 2002.

The 766 Regulations provide that the "school district shall ensure that, to the maximum extent appropriate, children with disabilities are educated with children who do not have disabilities, and that special classes, separate schooling, or other removal of children with special needs from the general education program occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily." 603 C.M.R. § 28.06(2)(c). Regardless of whether a placement is less restrictive, it must be designed to assure the child's maximum possible development in the least restrictive environment. If two placements are equally able to assure maximum possible development, the less restrictive placement is appropriate. In most instances, however, the two programs under consideration are not equally able to assure the child's maximum possible development. As a result, there is frequently tension between the objective of assuring maximum possible development and the objective of placing the child in the least restrictive placement that is consistent with that goal. Students with disabilities are entitled to a wide array of services under the state and federal special education statutes. In addition to receiving the essential educational

programming, students are to receive "related services" that are required to assist a child with special needs to benefit from special education. *See* 34 C.F.R. § 300.13. The range of related services includes

speech therapy,

occupational therapy,

physical therapy,

speech and language therapy,

orientation and mobility services,

certain social and psychological services,

audiology and

medical services for diagnostic and evaluative purposes.

The IDEA also expressly defines "assistive technology device" and "assistive technology services" as items to be provided to disabled students in appropriate cases. 20 U.S.C. §§ 1401(1), (2). See § 13.2.2, below, for a further discussion of IDEA. See also **Exhibit 13B** for descriptions of program prototypes in the 766 Regulations.

Courts have construed "related services" broadly to ensure that disabled students have access to a wide range of services necessary to enable them to function in the school setting. *See, e.g., Irving Indep. Sch. Dist. v. Tatro,* 468 U.S. 883 (1984) ("clean intermittent catheterization" is a related service for a disabled child with spina bifida). The outer limits of "related services" have been reached when the

service was found to be virtually entirely medical in nature and required a trained nurse to constantly attend to or monitor the child. *See, e.g., Detsel v. Board of Educ.,* 637 F.Supp. 1022 (N.D.N.Y. 1986), *aff'd,* 820 F.2d 587 (2d Cir. 1987).

§ 13.2.2 Individuals with Disabilities Education Act (IDEA)

The federal act governing special education is known as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq. (1994); this federal act was first adopted in 1975 and is still widely known as P.L. 94-142. The federal act was originally called the Education for All Handicapped Children Act (EAHCA), was later renamed the Education of Handicapped Act (EHA) and is now known as the IDEA.

Under the federal act, state and local schools cannot obtain federal funds for special education unless the state education agency has submitted a plan covering all education agencies in the state. The federal act requires that such plans afford parents certain procedural and substantive rights. The procedural rights are of considerable importance.

The federal act is an example of what has been characterized as "cooperative federalism." A state is free to accept or reject the participation of the federal government in the education of its disabled students. *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 916 n.4 (1st Cir. 1983). When a state elects to participate in the federal program, the federal act "authorizes and requires a state and local administrative apparatus to effectuate both its substantive and procedural guarantees." *Burlington v. Dep't of Educ. (Burlington II)*, 736 F.2d 773, 784 (1st Cir. 1984). While compliance with certain minimum standards set forth in the federal act is mandatory for the receipt of federal financial assistance, the federal act did not impose a uniform national standard with regard to the education of

disabled children. Each state can set its own educational standards. "'Cooperative federalism' in this context, then, allows some substantive differentiation among the states in the determination of which educational theories, practices, and approaches will be utilized for educating children with a given impairment." *Burlington II*, 736 F.2d 773, 784 (1st Cir. 1984) (citing *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207–08 (1982).

The minimum substantive standard that each state must meet under the federal act is that it provide a "free appropriate public education." 20 U.S.C. § 1412(6). This federal minimum was defined by the Supreme Court in *Rowley* as only requiring that the proposed educational program is "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 206–07. The federal act does not create a substantive ceiling regarding the educational rights of disabled children; states are free to establish a higher standard. Massachusetts has done so. As noted above, the Massachusetts statute (G.L. c. 71B) has been construed to require that an IEP address a child's special needs "so as to assure his maximum possible development in the least restrictive environment consistent with that goal." *David D. v. Dartmouth Sch. Comm.*, 615 F.Supp. 639, 646 (D.Mass. 1984).

When a state adopts a substantive standard that exceeds the federal standard, that standard "supplants the federal act in prescribing the determinations to be made at the due process hearing." *Burlington II*, 736 F.2d at 785. When the state substantive standard exceeds the protection and services required by the federal act, "the state standard will operate to determine what an appropriate education requires for a particular child in a given state." *Burlington II*, 736 F.2d at 789. *See David D. v. Dartmouth Sch. Comm.*, 615 F.Supp. 639, 644 (D.Mass. 1984). Thus, in Massachusetts, the substantive standard that is enforced under both the state statute and the federal act is whether the proposed program is designed to assure the child's "maximum possible development in the least restrictive environment

consistent with that goal." *David D.*, 615 F.Supp. at 646.

As mentioned above, the substantive standard for special education services established under the federal act is a requirement that each child be provided with a "free and appropriate public education" (frequently referred to as FAPE). In order to qualify for federal financial assistance under the federal act, a state must demonstrate that it has a policy that "assures all handicapped children the right to a *free appropriate public education*." 20 U.S.C. § 1412(1). This standard has not received significant attention in any Massachusetts litigation since, as noted above, the Massachusetts standard of "maximum possible development" has been deemed to be a higher standard than is incorporated into the federal act. *See Burlington II,* 736 F.2d 773; *David D. v. Dartmouth Sch. Comm.,* 615 F.Supp. 639. A substantial body of federal law, however, has developed nationwide under the federal act, giving content to the FAPE standard. The seminal case in defining FAPE under the federal act is *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982) (hereinafter, *Rowley*). In *Rowley,* the trial court had determined that a deaf student had not been provided with a free appropriate public education. It found that the student "performs better than the average child in her class and is advancing easily from grade to grade," but "she understands considerably less of what goes on in class than she could if she were not deaf" and she was "not learning as much, or performing as well academically, as she would without her handicap." *Rowley,* 458 U.S. at 185. The disparity between the student's potential and her actual achievement led the trial court to conclude that she had not been provided with a "free appropriate public education." *Rowley,* 458 U.S. at 185–86. The Supreme Court reversed. The Court reasoned that the federal act had been adopted to provide a "basic floor of opportunity." *Rowley,* 458 U.S. at 201. The Court concluded that the requirement of a "free appropriate public education" had been satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. In embracing this standard, the Court

rejected the trial's court's analysis that compared the student's performance with her potential. The Court also rejected the parents' argument that the federal substantive standard should require that each disabled student be provided with sufficient services to "maximize each child's potential 'commensurate with the opportunity provided to other [non-disabled] children.'" *Rowley*, 458 U.S. at 198.

In light of the Massachusetts Legislature's adoption of the "free and appropriate public education" standard, which is to be implemented on January 1, 2002 (St. 2000, c. 159), the focus of advocacy and litigation in special education cases after that date will be the content and application of that standard. The legislative debates leading to the amendments replacing the "maximum possible benefit" standard with the "free and appropriate public education" standard included differing predictions regarding the effects of this amendment. The amendment was advanced by public officials and others who asserted that it would result in significant cost savings—they argued that fewer resources would be devoted to special education services. Those who supported the "maximum possible development standard" argued that any such cost savings could only be achieved if special education services were decreased, thereby depriving disabled students of necessary services.

The effects of the adoption of the "free and appropriate public education" standard on the resolution of individual cases will not be known until after January 1, 2002. After that date the adequacy of any proposed Individualized Education Program will be judged against the new standard. A body of administrative law will develop at the BSEA regarding the content of the new standard under the Massachusetts statute and regulations. Counsel will need to examine BSEA decisions carefully after that date to measure the impact of the new standard on individual cases and specific fact patterns.

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§ 13.3 ANNUAL PREPARATION OF INDIVIDUALIZED EDUCATION PROGRAMS

The procedure for obtaining special education services begins with a referral for a determination as to whether the child is in need of special education. 603 C.M.R. § 28.04(1). Within 45 school working days after the parents have provided written consent to an initial evaluation or reevaluation, the public school must conduct an evaluation, convene a team (603 C.M.R. § 28.05(1)) to review the evaluation data, and, if the child has special needs, develop an IEP and provide the parents with two written copies of the proposed educational plan. 603 C.M.R. § 28.05(1). "Individualized Education Program (IEP)" is a defined term under the 766 Regulations. 603 C.M.R. § 28.02(11). The federal act refers to "individualized education program" and uses the same acronym, IEP. 20 U.S.C. §§ 1401(19), 1414(a)(5); 34 C.F.R. § 300.343. Numerous procedural safeguards provide parents with an opportunity to participate, as members of the team, in the evaluation and review process.

A detailed plan for the educational services to be provided to each handicapped child must be prepared each year. After the presentation of the initial IEP, the public school must review the progress of each child, at least annually. 603 C.M.R. § 28.04(3). With parental consent, the school must conduct a full reevaluation every three years. 603 C.M.R. § 28.04(3). The preparation of the original IEP and the annual reviews provide parents with an opportunity to contest the adequacy of any IEP that is presented to them. The initial evaluations and subsequent

evaluations also give rise to the right to corresponding independent evaluations. 603 C.M.R. § 28.04(5). Whenever a parent is presented with a proposed IEP, the parent has several options, including the following:

he or she may accept or reject the IEP, in whole or in part;

he or she may meet with the special education administrator to negotiate mutually acceptable amendments;

he or she may postpone a decision on the IEP until an independent evaluation has been completed;

he or she may request an independent evaluation; or

he or she may request a hearing before the Bureau of Special Education Appeals (BSEA) on any IEP that has been rejected.

603 C.M.R. § 28.05(7).

Although requests for adjudicatory hearings before the BSEA ordinarily arise after the preparation and rejection of an IEP, a parent can also request a hearing on a wide range of issues during the referral process or during the implementation of an IEP. See § 13.6, Administrative Process—The Bureau of Special Education Appeals, below.

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§ 13.4 INDEPENDENT EVALUATIONS

Independent evaluations are crucial in enabling parents to obtain appropriate special education services for their children. To the extent that the public school is the sole source of information about the student, without an independent evaluation, the parent would not have a basis for evaluating or challenging the conclusions or recommendations of the public school staff. The 766 Regulations provide the parents with a right to an independent evaluation as a means of ensuring that the parent has objective data and recommendations regarding his or her child's placement. If a parent has questions concerning the scope of a child's disability or the nature of appropriate services, he or she can at least obtain some professional input regarding those issues before making final decisions concerning the child's placement.

Independent evaluations can be used to provide the parent with the following information:

the particular type of underlying disability;

the scope and severity of the child's performance deficits;

the type and amount of the appropriate services;

the qualifications of the necessary service providers;

the methodologies and curriculum materials to be used;

the environment in which the child is most likely to be successful;

the nature of an appropriate peer group for the child; and

an assessment of the child's current educational placement.

The parents need information on all of these items in order to make informed decisions regarding any proposed IEPs. In some instances, parents may have access to professionals who can provide them with this information—for example, through referrals to specialists under their health insurance plan or through direct consultation with consultants or potential expert witnesses. In other instances, the parents may wish to obtain an independent evaluation under the 766 Regulations.

The 766 Regulations provide that when a parent disagrees with an initial evaluation or reevaluation, the parent may request an independent evaluation. 603 C.M.R. § 28.04(5). As a result of the 2000 legislative amendments, public funding for independent evaluations has been limited, based upon the financial status of the family. For students whose families have the most limited financial resources (i.e. the students are eligible for free or reduced cost lunch), the independent evaluation will be publicly funded. For families with additional resources, the school district will pay a portion of the cost of the independent evaluation, the public cost-sharing phased out entirely when the family income is 600 percent of the federal poverty guidelines. (See **Exhibit 13G**, Administrative Advisory SPED 2001-3: Guidance on Using a Sliding Fee Scale for Public Payment of Independent Evaluations (IEEs) in Special Education.) The basic provisions governing independent evaluations that are funded in whole or in part by public funds are as follows:

If the parent disagrees with an initial evaluation or reevaluation of a child completed by the public school, the parent can request that an independent evaluation be conducted. 603 C.M.R. § 28.04(5)(a).

The parent has the right to one independent evaluation per evaluation or reevaluation by the public school. 603 C.M.R. § 28.04(5)(c)(v). The right to the independent evaluation expires 16 months after the evaluation by the school with which the parent disagrees. 603 C.M.R. § 28.04(5)(c)(vi).

The professionals who conduct the independent evaluations must be licensed by the Commonwealth and must "abide by the rates set by the state agency responsible for setting such rates." 603 C.M.R. § 28.04(5)(a). The "approved rates" established by the responsible state agency may be far less than the amount that the independent consultant ordinarily charges, although the regulations do indicate that unique circumstances may justify a higher rate in some cases. 603 C.M.R. § 28.04(5)(a).

If the parent requests an independent evaluation that includes assessments that are not equivalent to those conducted by the public school, the public school must either agree to pay for the assessment or initiate a hearing to demonstrate that "its evaluation was comprehensive and appropriate." 603 C.M.R. § 28.04(5)(d).

Whenever an independent evaluation takes place at the expense of the public school, the public school is entitled to receive a copy of the report. 603 C.M.R. § 28.04(5)(e).

Within 10 days after a school district receives the report of an independent evaluation, the team shall reconvene and consider the results of the evaluation and whether a new or amended IEP is appropriate. 603 C.M.R. § 28.04(5)(f).

During the time that an independent evaluation is being carried out, the child is to remain in the last agreed-upon placement. See § 13.7.3, Placement During the Pendency of a Judicial Appeal, below. The signature page of the IEP indicates that when the parents opt to have an independent evaluation, they are postponing a decision with regard to the IEP. Basically, the parents have a right to a second opinion in the form of an independent evaluation and they are not required to make a final decision regarding the IEP until the results are available.

Credible expert testimony from competent professionals is essential in every case that proceeds to a hearing. In many cases the parents can utilize the independent evaluation process under Chapter 766 to obtain access to such professionals. Parents must be alert to the fact that the school district has a right to obtain the results of any independent evaluation that is funded by the public schools under the 766 Regulations. To the extent that the parents wish to confer with a potential expert witness and obtain evaluations that will not necessarily be shared with the school officials, the parents may wish to arrange for an evaluation at their own expense. The 766 Regulations recognize that "the parent may obtain an independent evaluation at private expense at any time." 603 C.M.R. § 28.04(5)(b). The obvious disadvantage to parents is the expense. The primary benefit is that the results are private and will not be shared with school officials unless the parents choose to do so.

All parents previously had a right to a publicly funded independent evaluation. All parents other than those whose children have already been found eligible for free or reduced fee school lunch will now be required to submit financial data in order to establish eligibility for public funding of the independent evaluation. In light of the means testing by the local school district and the need for parents to disclose financial data in order to establish eligibility on a sliding fee scale, more parents may simply seek to obtain independent evaluations at their own expense.

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§ 13.5 ALTERNATIVES FOR RESOLUTION OF DISPUTES

A parent who is dissatisfied with any part of the referral process, the content of a proposed IEP, the nature of a proposed placement, the manner in which an agreed-upon IEP is being implemented, the maintenance of a placement during the pendency of an appeal (see § 13.7.3), the availability of an independent evaluation or the review of alternative plans for the delivery of special education services in the context of school discipline (see § 13.9) has several options available for resolving such disputes. Although counsel is most frequently involved in those cases that proceed to a formal hearing, most disputes are resolved without a formal hearing and the less formal dispute resolution procedures must be considered on a case-by-case basis.

The Massachusetts Department of Education is required to maintain a "Problem Resolution System" to provide for the investigation of complaints and the enforcement of the 766 Regulations. 603 C.M.R. § 28.08(2). This complaint system is mandated by the federal regulations. A response to a complainant must be provided within 60 days. 34 C.F.R. § 781(a). The advantage of the informal complaint process is that it does not require a substantial commitment of resources. The difficulties with the process include the fact that the complainant does not have an opportunity to present witnesses or to cross-examine people who have been interviewed by the investigator. Also, the investigator may be a bureaucrat accustomed to working with the special education staff against whom the complaint has been lodged. These limitations may make it difficult for the parent to get a meaningful remedy through the informal complaint process. Nonetheless, if clear procedural or substantive violations of state or federal regulations have occurred, this procedure may provide a prompt and effective remedy.

The Office of Civil Rights of the U.S. Department of Education (OCR) also

provides a relatively less formal means of resolving complaints on behalf of handicapped students. Students with disabilities are protected against discrimination by the provisions of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The OCR does not conduct formal hearings and does not provide for a forum in which witnesses are presented or cross-examined. Also, the investigation by the OCR may not be resolved promptly. A primary advantage to a parent is that a complaint can be filed in this forum without incurring substantial expense. The parent has little control over the nature, scope or timing of any investigation. The OCR complaint procedure is probably most effective when the parent is confronted with a clear violation of procedural or substantive requirements under federal law. The filing of a complaint with OCR may be the appropriate means of resolving some disputes, but most cases involving challenges to the adequacy of an IEP are presented to the Bureau of Special Education Appeals (BSEA).

The forum in which complaints are resolved through a more formal adversarial hearing process is the BSEA. Whenever a parent has a complaint about the implementation of an IEP or whenever an IEP is rejected, the parent can request that a hearing be conducted by the BSEA.

The BSEA actively encourages parties to attempt to resolve disputes through a mediation program that it administers. Parties are encouraged to participate in mediation, but are not required to do so before proceeding to a hearing. The mediators available through the BSEA are trained and experienced. Although they serve only as mediators and do not have the power to order any particular outcome, they can provide invaluable assistance in resolving some cases. Resolving the matter through mediation can save both parties time and money. Decisions need to be made on a case-by-case basis as to whether mediation is likely to lead to a resolution of the dispute.

The most difficult cases are ultimately resolved through formal hearings conducted by the BSEA. The formal hearing process can be both time-consuming and costly to parents. Hearings frequently involve three or four days of testimony. Testimony from competent professionals is essential and may require substantial expenditures, for the testing, evaluation and observation and for the time spent at the hearing. Also, as with all other litigation, the time and resources devoted to careful preparation for the adversarial hearing can be substantial.

The formal hearing process can also be difficult for the parents due to the nature of the issues that may be raised. The child's difficulties in the school setting may be attributed, directly or indirectly, to the parents, particularly if behavioral, emotional or social problems are central to the case. The parents may be accused of failing to cooperate in providing appropriate programming to the child. Lengthy testimony concerning the child's problems and limitations may be difficult to endure. Also, the process is necessarily adversarial, and the teachers and administrators are likely to testify against the parents' position. At a practical level, this is likely to make it difficult to work with these same teachers and administrators in the future. If there are other children in the school system or if the parents envision that the child who is the subject of the hearing will continue in the local school system or return to the local school at a later date, the parents may be legitimately concerned that any long-term working relationship with the local schools will be permanently affected by the formal hearing process. Having taken these matters into account, the formal hearing process is ultimately the forum where parents must turn to resolve difficult cases. If an impasse exists, parents can utilize the hearing process to provide a neutral factfinder to resolve the dispute.

§ 13.6 ADMINISTRATIVE PROCESS—THE BUREAU OF SPECIAL EDUCATION APPEALS (BSEA)

The parent's right to request a hearing is a procedural right that is carefully protected under both state and federal law. A parent who is dissatisfied with any part of the referral process or with the manner in which an agreed-upon IEP is being implemented can almost always request that a hearing be conducted to resolve problems.

> A parent . . . may request . . . a hearing at any time on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 C.F.R. §§ 104.31–104.39.

603 C.M.R. § 28.08(3)(a).

In addition, if a parent determines that a previously accepted IEP is no longer appropriate for the child, the parent can withdraw his or her consent to the IEP, ask that the team reconvene, request modifications, and pursue an appeal if necessary modifications are not made to provide appropriate services to the child. Thus, the parent has access to a remedy if an existing IEP becomes inappropriate and needs to be modified.

The Bureau of Special Education Appeals has the power to resolve complaints between parents and public schools regarding the content and implementation of IEPs for disabled students through a formal adjudicatory hearing. Prior to proceeding with a formal hearing, the parties can seek to resolve the dispute through mediation. 603 C.M.R. § 28.08(4). The Massachusetts Department of Education has a trained staff of mediators who are accustomed to working with parents and local officials to resolve disputes regarding IEPs.

Within five days after receipt of a written request for a hearing, the BSEA will assign a hearing officer to the case and will schedule a hearing date within 20 days of the receipt of the request. Rule 2A, Hearing Rules for Special Education Appeals, Massachusetts Department for Education (June 1996). (These administrative hearing rules will be identified hereinafter as "BSEA Rules.") In most instances, however, the hearing will not actually proceed on the initial date assigned to the case. Instead, the hearing officer will often utilize that first date to conduct a "prehearing conference," attempting to narrow the issues, resolve any discovery issues and establish firm dates for the actual hearing. The parties, individually or jointly, can request a postponement of the hearing (BSEA Rule 3) or the scheduling of a prehearing conference (BSEA Rule 4).

By agreement, motions and prehearing conferences can be handled by conference call. The BSEA hearing officers work with counsel to attempt to narrow the issues for hearing and to resolve prehearing disputes regarding discovery and other matters in an efficient manner.

Before proceeding to a full hearing, either party can request that the BSEA issue an "advisory opinion." The advisory opinion procedure is voluntary and is only utilized if both parties consent. Each party is allowed one hour to present its case through exhibits and up to two witnesses. The hearing officer then provides the parties with a nonbinding advisory opinion. If the issuance of the advisory opinion does not result in a settlement, the case proceeds to a hearing with a different

hearing officer.

Discovery in BSEA proceedings is governed by BSEA Rule 5. Either party can, by right, obtain discovery through the use of requests for documents and interrogatories. Responses are due within 30 days. A party who objects to a discovery request may, within 10 days after service of the request, file an objection or move for a protective order. BSEA Rule 5[B]. Depositions of witnesses may only be conducted after obtaining the prior approval of the hearing officer. BSEA Rule 5[D][3].

Motion practice before the BSEA is governed by Rule 6. Written motions must be served upon all parties, and objections may be filed within seven days after receipt of the motion. The hearing officer may schedule a hearing on a motion or may proceed to rule on the motion without a hearing. Evidence supporting a motion may consist of facts supported by "affidavit . . . [or by facts that] appear in the records, files, depositions, or answers to interrogatories, or are presented by sworn testimony." BSEA Rule 6.

The BSEA has the power to issue subpoenas for attendance at the hearing. Any party seeking a subpoena must submit a request for the issuance of a subpoena to the BSEA at least 10 days prior to the hearing. The request must specify the name and address of the person to be subpoenaed and a description of all documents to be produced. BSEA Rule 7. A person to whom a subpoena is directed may request that the hearing officer vacate or modify the subpoena. If the person who is subpoenaed fails to comply with the subpoena, the party who requested that the subpoena issue may seek enforcement of the subpoena in the Massachusetts Superior Court.

A party must provide all documents that it intends to introduce as exhibits at the hearing, together with a list of the witnesses to be called, to the opposing party and

the hearing officer at least five days prior to the hearing. BSEA Rule 8.

Hearings before the BSEA are conducted in a less formal manner than judicial hearings and hearing officers are not bound by the rules of evidence. The hearing officer has broad powers to regulate the conduct of the proceedings. BSEA Rule 9. All testimony is presented under oath and all witnesses are subject to cross-examination. The BSEA Rules state that "[t]here is no formal burden of proof" and that the "decision will be based upon the preponderance of the evidence presented." BSEA Rule 9(D). Written closing arguments are customarily presented after the close of testimony. A written decision is then issued within 25 days after the close of the hearing. Although the BSEA is required to issue a decision within 45 days of the hearing request (34 C.F.R. § 300.512[a]), most cases are not decided within that time limit.

§ 13.1

§ 13.7 JUDICIAL REVIEW

Any party aggrieved by the decision of the Bureau of Special Education Appeals may file an appeal of the decision in the federal district court or in the superior court "with jurisdiction over the residence of the child." G.L. c. 71B, § 3. An appeal must be filed within 30 days after the issuance of the BSEA decision. In judicial appeals filed on behalf of parents, the BSEA and the local education agency (LEA) are ordinarily both named as parties. Also, to protect the privacy of the disabled student and the family, it is customary to file a motion to proceed using a fictitious name. *See, e.g., David D. v. Dartmouth Sch. Comm.,* 775 F.2d 411 (1st Cir. 1985).

Virtually all claims arising under Chapter 766 or IDEA must be presented to the BSEA before any litigation is filed. The courts have consistently ruled that the doctrines of primary jurisdiction and exhaustion of administrative remedies require that disputes regarding special education be presented to the BSEA in the first instance. *Kelly K. v. Framingham,* 36 Mass.App.Ct. 483, 486–89, 633 N.E.2d 414, 417–419 (1994). An exception to the exhaustion doctrine exists when the question raised is one of law and not one of fact within the agency's particular expertise. *See, e.g., Stock v. Massachusetts Hosp. Sch.,* 392 Mass. 205, 213, 467 N.E.2d 448, 454 (1984). In most cases, however, the exhaustion doctrine requires that the matter be presented to the BSEA before litigation is initiated.

§ 13.7.1 Superior Court

Any party aggrieved by the decision of the hearing officer may file an appeal in the Massachusetts Superior Court. Such appeals are governed by the provisions of G.L. c. 30A. The decision of the BSEA is reviewed subject to the provisions of G.L. c. 30A, § 14. The scope of judicial review under Chapter 30A is more narrow than that available in federal court under the federal act.

§ 13.7.2 Federal Court

The federal courts have jurisdiction to hear appeals from the decisions of the BSEA pursuant to 20 U.S.C. § 1415. The federal act provides that "the court shall *receive the records of the administrative proceedings, shall hear additional evidence at the request of a party,* and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2) (emphasis added). The First Circuit has determined that the act calls for "something short of a complete de novo." *Colin K. by John K. v. Schmidt*, 715 F.2d 1, 5 (1st Cir. 1983). The "trial court must make an *independent ruling* based upon the preponderance of the evidence, but the Act contemplates that the source of the evidence generally will be the administrative hearing record with some supplementation at trial." *Burlington II*, 736 F.2d 773, 790 (emphasis added). "[D]ue weight" shall be accorded to the administrative proceedings. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. Bd. of Ed. v. Rowley*, 458 U.S. at 176. The federal court reviewing a decision of the BSEA must consider the BSEA findings carefully; after such consideration, the court is free to accept or reject the findings in whole or in part. *Burlington II*, 736 F.2d at 792. If the administrative decision under review is one in which the BSEA found an IEP invalid because it failed to meet Massachusetts' procedural or substantive requirements regarding a free appropriate public education, the federal court should accord deference to such findings. *Burlington II*, 736 F.2d at 792.

§ 13.7.3 Placement During the Pendency of a Judicial Appeal

Students are entitled to remain in the last agreed-upon placement during the pendency of a judicial appeal of a decision by the BSEA. "Unless the State or local education agency and the parents or guardian agree otherwise the child shall remain in the then current educational placement" during the pendency of any judicial appeal of a BSEA decision, unless the child is seeking initial admission into school, in which case "with the consent of the parents or guardian, [the child shall] be placed in the public school program." 20 U.S.C. § 1415(e)(3). Where the BSEA decision requires the local public school to place the child in a new placement and the parents or guardian agree with that decision, the public school is required to immediately implement the decision and provide the placement ordered by the BSEA. *School Comm. of Burlington v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985).

The appeal of a final decision of the BSEA does not act as a stay of the decision. G.L. c. 30A, § 14(3). If either party seeks a stay of the decision of the BSEA, it must present that request to the court having jurisdiction over the appeal. Parties to an appeal can seek injunctive relief for tuition payments for the placement during the pendency of the appeal.

§ 13.1

§ 13.8 SUMMARY OF REMEDIES

§ 13.8.1 Future Placement

The central issue in most special education appeals is the question of prospective placement. The student is entitled to a placement that will assure his or her maximum possible development in the least restrictive environment consistent with that goal. *David D. v. Dartmouth Sch. Comm.*, 615 F.Supp. 639, 646 (D.Mass. 1984). To obtain a remedy from the BSEA, the parents should be prepared to demonstrate that the proposed IEP is inadequate to meet the student's needs. A hearing officer of the BSEA has the power to order a wide range of remedies, including most importantly the placement of the student in a program that the parents have identified as necessary to meet the needs of the student and assure his or her maximum possible development.

§ 13.8.2 Reimbursement

Parents who reject an IEP on the grounds that it is inadequate and who pay for private placement or services during the pendency of an appeal can seek reimbursement for those costs, including tuition and other costs associated with the private placement. This remedy is not available if parents simply withdraw the student from the public school system, arrange for private placement and then later seek reimbursement for those expenses. The 766 Regulations previously contained express provisions governing reimbursement to the parents for the costs incurred in obtaining services for their disabled children:

> When a hearing officer rules that a child with special needs should have received a program or service(s) which a school committee did not provide, the hearing officer may

> order the school committee to pay the full cost of the program or service(s) actually rendered, including, when necessary, reimbursement to the parent of such costs. *Such reimbursement shall only be retroactive to the date the parents gave notice to the school committee by disputing or rejecting an inappropriate IEP, or other similar means, that the program or services offered were inappropriate, or to the date that the program or services could reasonably have been expected.*

Former 603 C.M.R. § 28.404.3 (emphasis added). Although the amended 766 Regulations adopted in 2000 do not include this specific provision, the hearing officers have full authority to implement the statute and the Supreme Judicial Court has ruled that the hearing officers can order reimbursement to the parents. *Amherst-Pelham Reg'l Sch. Comm. v. Dep't of Educ.*, 376 Mass. 480, 381 N.E.2d 922 (1978). *See also Kelly K. v. Framingham*, 36 Mass.App.Ct. 483, 633 N.E.2d 414 (1994).

To perfect the right to seek reimbursement, the parents must do the following:

they must request that the student be provided with an appropriate special education program;

they must seek special education services;

they must give consent to an evaluation of the student;

they must cooperate in the preparation of an IEP; and

they must reject the proposed IEP before arranging for private placement at

their own expense.

Then, if they prevail in a hearing before the BSEA, the agency has the power to order the local school system to reimburse the parents for the cost of the private services. *Amherst-Pelham Reg'l Sch. Comm. v. Dep't of Educ.*, 376 Mass. 480, 381 N.E.2d 922 (1978).

§ 13.8.3 Compensatory Services

Where a public school system fails to provide special education or related services, a student is entitled to compensatory education. *Stock v. Massachusetts Hosp. Sch.*, 392 Mass. 205, 467 N.E.2d 448 (1984). In *Stock,* the Supreme Judicial Court required that three years of compensatory services be provided to a special needs student who had been prematurely graduated. The lower court in *Stock* had determined that the student was in need of further special education services. *See also Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986). *Harris v. District of Columbia*, 19 IDELR 105 (D.D.C. 1992).

§ 13.8.4 Rejection of Conventional Damage Remedy

Parents whose children have been denied appropriate services have not been able to pursue conventional tort claims for monetary damages directly under the state or federal statutes governing special education. In *Kelly K. v. Framingham*, 36 Mass.App.Ct. 483, 633 N.E.2d 414 (1994), the Massachusetts Appeals Court rejected a claim for damages under G.L. c. 71B:

> [W]e conclude that damages for pain and suffering are not available to parents and children whose claims are, in essence,

> that they suffered harm because the child was denied his right to a free public education appropriate to his special needs. Damages for pain and suffering are not provided for in the statutory scheme, and, as the statutes provide the exclusive avenue for pursuing such a claim, the plaintiffs could not resort to other legal theories to pursue a right to damages.

Kelly K v. Framingham, 36 Mass.App.Ct. at 488–89, 633 N.E.2d at 418 (citations omitted). The *Kelly* court did note, however, that while it was rejecting a damage claim under G.L. c. 71B, it was not deciding "whether a claim of educational malpractice would ever be viable in Massachusetts." *Kelly K. v. Framingham*, 36 Mass.App.Ct. at 489 n.7, 633 N.E.2d at 417 n.6.

The U.S. Supreme Court reached the same result in construing the federal act. *Smith v. Robinson*, 468 U.S. 992 (1984). After this decision, Congress adopted amendments to the federal act that support parents' claims for damages in appropriate cases. See § 13.8.5, Compensatory Damages, below.

§ 13.8.5 Compensatory Damages

The recovery of an award of compensatory damages for the benefit of students and parents whose rights have been violated by school officials is possible under federal statutes. However, such a remedy is uncommon. The most likely source of such a remedy is not the IDEA; rather, the litigant will rely upon the provisions of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; hereinafter, "Section 504") and the provisions of the federal civil rights act (42 U.S.C. § 1983) to pursue a traditional compensatory damages remedy. A brief history of compensatory damage claims under IDEA is necessary to understand the present status of such claims.

In *Smith v. Robinson*, 468 U.S. 992 (1984), the Supreme Court rejected a claim for attorney fees by parents who had been successful in pursuing a placement for their son under the Education of the Handicapped Act (the precursor of IDEA). At the trial court level, the parents had pursued claims under the EHA, Section 504 and under 42 U.S.C. § 1983 for constitutional and statutory violations. The Supreme Court rejected the parents' claim for attorney fees by ruling

that the EHA did not include a provision for attorney fees;

that the EHA was intended to be the exclusive avenue through which a plaintiff could assert equal protection and due process claims; and

where Section 504 afforded the same protection as the EHA, that a plaintiff could not circumvent or enlarge the remedies available under the EHA by resort to Section 504.

Smith v. Robinson, 468 U.S. 992, 1012–13, 1021 (1984).

Congress responded by amending the EHA in 1986. *See* The Handicapped

Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986); H.R. Conf. Rep. No. 99-687, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.A.N.N. 1807, 1809 ("It is the conferees' intent that actions brought under 42 U.S.C. § 1983 are governed by [§ 1415(f)].") The amendments added the following provision:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(f).

Although the IDEA does not directly provide for the recovery of compensatory money damages, this provision now permits parents to pursue damage claims under Section 504 and 42 U.S.C. § 1983.

The most significant interpretation and application of the 1986 amendments to a claim for compensatory damages came in 1995 in *W.B. v. Matula,* 67 F.3d 484 (3rd Cir. 1995). In *Matula,* parents who had prevailed in multiple administrative hearings (by stipulation and by a ruling on the merits) filed an action against the school district and individual school officials seeking monetary damages for a pattern of conduct where no special education services were offered or provided to

a child with "Tourette's syndrome and a severe form of obsessive-compulsive disorder in addition to ADHD." Relying on the 1986 amendments and the decision of the Supreme Court in *Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60 (1992) (monetary damages available in an action to enforce Title IX), the Third Circuit concluded that the parents could "seek monetary damages directly under § 504, as well as the § 1983 claim predicated on § 504." *W.B. v. Matula,* 67 F.3d 484, 494 (3rd Cir. 1995).

The Third Circuit also concluded that a traditional compensatory damage award was available in a Section 1983 case predicated upon a violation of IDEA. *Matula,* 67 F.3d at 494–95. The court noted that in fashioning a remedy for an IDEA violation, a court may wish to order compensatory services or reimbursement to the parents for the cost of providing services rather than award monetary damages; the district court is to fashion "appropriate relief" in Section 1983 cases arising out of IDEA violations. Appropriate relief may include the award of monetary damages.

The award of compensatory damages under Section 504 and in Section 1983 cases based upon IDEA violations has also been embraced by other courts. In *Walker v. District of Columbia*, 26 IDELR 996 (D.C. Cir. 1997), a 16-year-old student who had been diagnosed as mildly mentally retarded brought a claim alleging "that he was misdiagnosed, that the statutorily required due process hearings that would have established his educational needs were not held in a timely manner, that his educational evaluations were conducted improperly, and that he was deprived of services related to his special educational needs." *Walker*, 26 IDELR at 998. An administrative hearing officer awarded relief in the form of two years of compensatory education, but declined to award monetary damages on the grounds that he lacked authority to award them. The parent filed a claim in federal court. The district court ruled that monetary damages could be recovered under both Section 504 and under Section 1983. In addition to holding that monetary damages

were available under Section 504, the court addressed the issue of the proof that must be presented to establish liability under Section 504: "[I]n order to show a violation of the Rehabilitation Act, something more than a mere failure to provide the 'free and appropriate education' required by the [IDEA] must be shown." *Walker,* 26 IDELR at 998. Although Section 504 may not require proof of intentional discrimination, plaintiffs will be required to demonstrate "gross misjudgment" to establish liability under Section 504. *Walker,* 26 IDELR at 998.

Much remains to be decided regarding to the nature and scope of compensatory damages to be awarded under Section 504 and Section 1983 for IDEA violations. *Matula* and *Walker* both confirm the courts' power to award compensatory damages in appropriate cases. Cases involving the most brazen violations of IDEA requirements and cases resulting in profound harm to students should result in substantial awards of compensatory damages. In appropriate cases, the claim for compensatory damages should be pursued as a means of providing the parents and student with a full and complete remedy.

Practice Note

1986 Amendments to the EHA also included the attorney fees provision now found at 20 U.S.C. § 1415(i)(3)(B): "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child with a disability who is the prevailing party." See § 13.10, Attorney Fees, below.

§ 13.1

§ 13.9 DISCIPLINE OF STUDENTS WITH SPECIAL NEEDS

School officials have broad authority to control the behavior of students in school as a means of maintaining a safe and productive learning environment. The public mood is plainly supportive of the efforts of school officials to control the disruptive behavior of a few students who make it difficult for the rest to benefit from school. This authority has been reinforced by provisions of federal and state law. Improving Schools Act of 1994, Pub. L. No. 103-282, 108 Stat. 3518 (enacted October 20, 1994), which amends the Gun Free Schools Act of 1994, Pub. L. No. 103-227, 108 Stat. 270 (1994) (Title X, Part B of Goals 2000: Educate America Act, 108 Stat. 225). In Massachusetts, a section of the Education Reform Act gave school principals and superintendents broad new disciplinary authority. 1994 Mass. Acts 380, codified as G.L. c. 71, § 37H.

If the behavior at issue involves a student with special needs, the question of discipline is enormously complicated by the variety of legal as well as pedagogical interests added to the decision-making process. As previously discussed, a student with special needs is entitled to a free and appropriate public education (FAPE) under provisions of federal and state law. FAPE and exclusion from school cannot coexist. So what happens when a student with special needs engages in an aggressive or otherwise inappropriate behavior that would ordinarily warrant suspension or even expulsion under generally applicable laws and school policies?

Specifics of state and federal education law differ on these issues, and a full presentation of law, practice and procedure is not feasible in this contextSee **Exhibit 13E,** which contains excerpts from an "Advisory Opinion on Student Discipline" issued by the Massachusetts Department of Education, dated January 27, 1994, and **Exhibit 13F,** which contains OSEP Memorandum 95-16, "Questions and Answers on Disciplining Students with Disabilities," for

perspectives on federal law and procedure.

Of course, not all sanctioning of school misbehavior is the subject of state regulatory control and extensive due process safeguards. The deprivation of a child's recess is generally at the unbridled discretion of his or her teacher. The threshold of regulatory control is suspension for more than 10 cumulative days in a school year. The term "suspension" is defined very broadly as an action that results in the removal of a student from a program described in his or her IEP. At one extreme, it includes expulsion, but also includes in-school suspension and exclusion from transportation. It should be noted, however, that sanctions not meeting this threshold may nonetheless be challenged by parents as a violation of FAPE, nonimplementation of an IEP, or otherwise discriminatory, in the same way that any action or inaction by an LEA may be challenged. However, the special standards and procedures applicable to more serious sanctions would not apply. Also, under Section 504, a student whose misconduct is a manifestation of his or her disability may be protected even from short-term suspensions.

Another inherent limitation in the application of these disciplinary regulations is that they apply only to students with special needs. What of a student not officially recognized as having special needs at the time of the misconduct? If the parents or school personnel request an evaluation for the determination of special needs, the procedures should apply, at least pending the results of the evaluation and a formal determination that the child has or does not have special educational needs under state law.

When it is known that the suspension of a special needs student will exceed 10 days, the LEA must convene a team meeting to review the IEP. Whether the sanction can be implemented depends on the conclusions of the team. The sanction cannot be enforced if the team concludes either

that the misconduct is related to the student's special needs; or

that the misconduct results from an inappropriate special education program or placement, or from an IEP that was not fully implemented.

Instead, the LEA is required to implement the IEP, if it is appropriate, or modify it if it is not.

If the team concludes that the misconduct is not related to the student's special needs, that it is not the result of an inappropriate placement or program, and that the current IEP was fully implemented, the school may suspend the student. However, the school must provide an alternative plan for the delivery of special education services during the suspension.

The Department of Education must be notified of and approve the alternative plan. Also, the plan is itself subject to parental rights to a hearing before the BSEA. If the Department approves the plan and the parents request a hearing, the student has the right to continue in his or her placement (at the time of the misconduct) pending the hearing, unless the parties agree to another placement or a court permits the LEA to change the student's placement. The only legal ground to support a court order is a showing that the student's continued presence in school presents a substantial likelihood of injury to the student or to others.

In summary, while Congress and state legislatures are strengthening the power of education officials to deal vigorously with students whose behavior is seriously disruptive in school, with increased access to more severe sanctions including long-term suspension or even permanent expulsion from school, the law has taken the position that children with disabilities cannot be altogether excluded from school. The fear of advocates is that education agencies may use school disciplinary proceedings as a vehicle of exclusion and segregation, deflecting public attention from the agencies' patent inadequacies.

§ 13.1

§ 13.10 ATTORNEY FEES

One of the most significant enforcement mechanisms in the federal act is the provision whereby parents can recover attorney fees and costs. In 1984, the Supreme Court rejected a parent's claims for attorney fees under the federal act. *Smith v. Robinson*, 468 U.S. 992 (1984). Congress responded by adopting the Handicapped Children's Protection Act of 1986, inserting an attorney fees provision for the benefit of parents who are prevailing parties. "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party." 20 U.S.C. § 1415(e)(4)(B).

The fees awarded under this Act must be based on the rates prevailing in the community in which the services were furnished. 20 U.S.C. § 1415(e)(4)(C). This statute is routinely applied to provide parents with a remedy for the costs that they have incurred in enforcing their children's rights to an appropriate special education program. *See Arunim D. v. Foxborough Pub. Sch.*, 26 IDELR 993 (D.Mass. 1997) (parents of autistic child entitled to recover attorney fees and costs in the amount of $60,550.91).

The starting point for any claim for attorney fees is establishing that the parents are "prevailing parties." In making this determination, the courts have adopted the conceptual framework that has been developed in analyzing attorney fees' claims under the civil rights attorney fees' statute, 42 U.S.C. § 1988. Thus, a party can be considered to be a prevailing party even when it vindicates its rights without

formally obtaining relief. *See Nadeau v. Helgemoe,* 581 F.2d 275, 279 (1st Cir. 1978). It can also be deemed to have prevailed if its conduct in pursuing an administrative remedy was a "catalyst" prompting the local school officials to provide the child with appropriate services. "To be a catalyst the party must demonstrate (1) a causal connection between the litigation and the relief sought and (2) that the success was not obtained by a gratuitous gesture of the fee target." *Paris v. U.S. Dep't of Hous. and Urban Dev.*, 988 F.2d 236, 241 (1st Cir. 1993).

The prevailing party is entitled to recover attorney fees and costs for work at the administrative agency level as well as for work performed in a judicial proceeding. Once it is established that the parents are prevailing parties, the next inquiry is whether the requested attorney fees and costs are reasonable. Again, the framework developed under 42 U.S.C. § 1988 is followed. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Litigation to recover reasonable attorney fees and costs can be initiated in federal court whenever parents have obtained an appropriate placement for their child after rejecting an IEP and filing a request for a hearing with the BSEA. It is not necessary that there be a complaint for judicial review of the ruling of the BSEA; rather, parents who are prevailing parties can file an action solely for the purpose of recovering attorney fees and costs. Thus, whenever parents obtain a meaningful remedy for their child by virtue of a settlement—a ruling of the BSEA or otherwise—they can pursue the claim to recover attorney fees and costs.

As a practical matter, the issue of attorney fees and costs will arise in any serious discussion of the potential settlement of a disputed case. The school system will be seeking a waiver of the claim for attorney fees and costs from the parents in return for some agreement as to the child's future placement. The parents will seek reimbursement for the costs they have incurred to the date of the settlement. If the case is resolved by a final decision of the BSEA in favor of the parents, another opportunity will arise to resolve the claim for attorney fees and costs before

litigation is initiated. At that time, the incentive for the school system to resolve the matter is substantial since the parents have already established their status as a "prevailing party" and that the school system will be liable for the additional attorney fees incurred by the parents in pursuing litigation in federal court to recover attorney fees for the administrative hearing. *See, e.g., Doe v. Watertown Sch. Comm.*, 701 F.Supp. 264 (D.Mass. 1988).

Practice Note

See **Exhibit 13A** for cases of interest regarding special education.

EXHIBIT 13A—Cases of Interest

Amherst-Pelham Regional Sch. Comm. v. Dep't of Educ., 376 Mass. 480, 381 N.E.2d 922 (1978).

Arunim D. v. Foxborough Pub. Sch., 26 IDELR 993 (D.Mass. 1997).

Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

Burlington v. Department of Educ. (Burlington II), 736 F.2d 773 (1st Cir. 1984).

Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983).

David D. v. Dartmouth Sch. Comm., 615 F.Supp. 639 (D.Mass. 1984), 775 F.2d 411 (1st Cir. 1985).

Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983).

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

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

Kelly K. v. Framingham, 36 Mass.App.Ct. 483, 633 N.E.2d 414 (1984).

School Comm. of Burlington v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985).

Smith v. Robinson, 468 U.S. 992 (1984).

Stock v. Massachusetts Hosp. Sch., 392 Mass. 205, 467 N.E.2d 448 (1984).

Walker v. District of Columbia, 26 IDELR 996 (D.C. Cir. 1997).

W.B. v. Matula, 23 IDELR 411 (3rd Cir. 1995).

EXHIBIT 13B—766 Program Prototypes

The 766 Regulations contain a description of various program prototypes, based primarily on the amount of time that a student with special needs spends in the regular classroom. 603 C.M.R. § 28.502. The different program prototypes can be summarized as follows:

Prototype 502.1. A regular classroom placement, in which any special services are provided in the classroom by the regular program teacher, although outside staff may provide consultation or support services.

Prototype 502.2. The child is in the regular classroom but is removed from that classroom to receive special services for up to 25 percent of the class time of each school day.

Prototype 502.3. The child spends up to 60 percent of the class time of each school day outside of the regular classroom setting, receiving special education services.

Prototype 502.4 or 502.4(i). The child is placed in a "substantially separate program" within the public school, but receives more than 60 percent of his/her instruction in the separate special education setting. Under the 502.4(i) prototype, the "substantially separate program" is a facility other than a "public school regular education facility." The setting may be a collaborative program or another setting that is outside of the regular education facility.

Prototype 502.5. The child is placed in a "day school program" outside of the public school system—this is a private day school placement for the provision of special education services.

Prototype 502.6. The child is placed in a "residential school program." The child is required to live at the program.

Prototype 502.7. The child is placed in a "home or hospital program." This placement is provided if the child is required to remain at home or in a hospital for a period of not less than 14 days.

Prototype 502.8. If a child is age three or four, and requires special education services, a preschool program is to be provided under Prototype 502.8. These programs can include a home program where school personnel make visits and provide instruction, an integrated program where up to 50 percent of the children may have special needs or a separate program where more than 50 percent of the children have special needs.

Prototype 502.9. This prototype calls for a "diagnostic evaluation." A diagnostic evaluation is deemed necessary whenever "the assessments which team members make of the child are so inconclusive that the team is unable to set objectives for the child which he then is consequently unable to write an I.E.P. for the child."

Prototype 502.10. Children who reside in facilities under control of the Massachusetts Departments of Mental Health, Mental Retardation, Public Health and Youth Services are to be provided with appropriate special education services under Prototype 502.10.

Prototype 502.11. If a child is between 14 and 22 years and none of the other prototypes provide programs that are suitable for him or her, the team and the special education administrator shall identify designated suitable program for the child.

EXHIBIT 13C—Reference Materials

Annotation, *Construction of "Stay-Put" Provision of Education of the Handicapped Act (20 U.S.C. § 1415[e][5]) That Handicapped Child Shall Remain in Current Educational Placement Pending Proceedings Conducted Under Section*, 103 A.L.R. Fed. 120 (1991).

Annotation, *Award of Attorneys' Fees Pursuant to § 615(e)(4) of the Education of the Handicapped Act (20 U.S.C. § 1415[e][4]) As Amended by the Handicapped Children's Protection Act of 1986*, 87 A.L.R. Fed. 501 (1988).

E. Janos & T. Seligman, *Litigating a Special Education Appeal*, 71 Mass. L. Rev. 37 (Spring 1986).

Massachusetts Department of Education Publications:

Special Education Regulations, 603 C.M.R. §§ 28.00 et seq.

Hearing Rules for Special Education Appeals (June 1996).

Massachusetts Chapter 766 Approved In-State and Out-of-State Schools and Programs that Serve Publicly Funded Special Education Students (Sept. 1996).

A Parent's Guide to the Special Education Appeals Process.

A Guidebook for Parents: When Parents and Educators Do Not Agree—Using Mediation to Resolve Conflicts About Special Education, Center for Law and

Education (1995).

Individuals with Disabilities Education Law Reporter (IDELR), published monthly by LRP Publications, Pennsylvania (containing administrative and judicial decisions from throughout the United States).

Massachusetts Special Education Reporter, published by Landlaw, Inc., 374 Boylston Street, Brookline, MA 02445 (containing all decisions issued by the Massachusetts Bureau of Special Education Appeals, state and federal court decisions from Massachusetts and commentary analyzing recent decisions).

EXHIBIT 13D—Resources

Bureau of Special Education Appeals
Massachusetts Department of Education
350 Main Street
Malden, MA 02148-5023
(781) 388-3300 x510

Massachusetts Advocacy Center
100 Boylston Street, Suite 200
Boston, MA 02116
(617) 357-8431
fax: (617) 357-8438

Federation for Children with Special Needs
95 Berkeley Street
Boston, MA 02116
(617) 482-2915

Disability Law Center
11 Beacon Street, Suite 925
Boston, MA 02108
(617) 723-8455
fax: (617) 723-9125

Center for Law and Education
195 Friend Street

Boston, MA 02114
(617) 371-1166

Massachusetts Association of Private Schools
15 Lakeside Office Park
607 North Avenue
Wakefield, MA 01880
(781) 245-1220
fax: (781) 245-5294

EXHIBIT 13E—Department of Education Advisory Opinion on Student Discipline (Excerpt)

ADVISORY OPINION ON STUDENT DISCIPLINE

TO: School Superintendents and Principals
Other Interested Parties

FROM: Robert V. Antonucci
Commissioner of Education

DATE: January 27, 1994

Since the enactment of the Education Reform Act in June 1993, the Department of Education has received many inquiries from school superintendents, principals, parents and others about the provisions of the Act dealing with student suspension, expulsion and school safety. Those provisions were further amended by Chapter 380 of the Acts of 1993, which takes effect on April 4, 1994. The Department has prepared this advisory, with the assistance of the Officer of the Attorney General, to provide guidance on the new state statutes in relation to federal special education and student records laws as well as state and federal court decisions that govern student discipline in our schools.

The Education Reform Act and Chapter 380 give school principals new authority over student discipline in serious situations. That authority will be effective, and will advance education reform, if it is used wisely. As educators, we must continually seek to balance the need to provide a safe school environment with the

needs of the individual student and the community. We hope this advisory will assist you in your efforts to provide all students with a high quality public education, in a safe, supportive school environment that is conducive to serious learning.

The Department of Education will be seeking information from school districts about implementation of these new state laws on suspension and expulsion, as well as your recommendations on effective programs and strategies. Suspension and expulsion from school are tools to be used sparingly, when we have no other way to protect the school community and deal with the student's problems. We must continue to work together, in partnership with other agencies and our communities, to address the issue of violence prevention, within the context of education reform.

. . . .

C. Rules Applicable to Students with Special Needs

19. Does the principal have authority under Section 37H or Section 37H½ to expel students with special needs?

No. Sections 37H and 37H½ must be read and applied in conjunction with the federal special education law (the Individuals with Disabilities Education Act, or IDEA), as it has been interpreted by the U.S. Supreme Court in Honig v. Doe, 484 U.S. 305 (1988), as well as Section 504 of the Rehabilitation Act of 1973 and other applicable laws. Under the IDEA and Honig, exclusion of a disabled student from school for more than ten days constitutes a change in placement, which requires either a TEAM evaluation and parent consent to an interim placement, or a court order approving the exclusion based on the

school's showing that the student's continued presence in school is substantially likely to result in injury. Section 504 provides similar protections for students with disabilities.

20. What procedures must be followed in order to discipline a student with special needs through a long-term suspension or expulsion?

Section 338.0 of the Chapter 766 Regulations sets out a step-by-step process that meets the requirements of the IDEA and the *Honig* decision. (A copy of the regulation is enclosed as Attachment 5.) A student with special needs may be suspended from school for up to ten school days (cumulative) during a school year (or during the life of a new or amended Individualized Educational Plan), following regular student discipline procedures. (Under Section 504, a student whose misconduct is a manifestation of his or her disability may be protected even from short-term suspensions except in emergency situations.) If a suspension of more than ten days is proposed, the school must convene an emergency TEAM meeting immediately, during the period of the short-term suspension.

The TEAM determines whether the student's misconduct is related to the student's special needs, or results from an inappropriate special education program/placement or an IEP that was not fully implemented. If any of those circumstances are found, long-term suspension or expulsion may not be imposed. If the TEAM concludes that the misconduct is not related to the student's special needs, and it does not result from an inappropriate special education program/placement or an IEP that was not fully implemented, then the long-term suspension or expulsion may be imposed, following the procedures listed in Section 338.5. Among other things, the school is required

to offer an alternative plan to deliver special education services during the period the student is excluded. The parents have the right to request a hearing before the Bureau of Special Education Appeals to challenge the proposed suspension and alternative program, and should be informed of that right.

If the parent requests a hearing, the "stay put" provision of the IDEA (incorporated in Section 338.5(b) of the Chapter 766 Regulations) entitles the student to remain in the last agreed-upon educational placement while the proceedings are pending before the Bureau of Special Education Appeals. A school district that believes a student presents a danger by remaining in the current placement may seek a preliminary injunction in state or federal court to change the student's placement during the pendency of the hearing. The school district has the burden of persuading the court that the student's continued presence in school creates a substantial likelihood of injury to the student or others. Courts that have granted injunctions in such cases have also required the school district to provide a temporary alternative program, such as home tutoring or an outside placement, during the period that the appeal is pending and the student is excluded from school.

21. What educational services must the school district provide to a student with special needs who has been excluded from school?

The standard that the U.S. Department of Education uses under the IDEA is that the student is entitled to continue receiving a "free appropriate public education." In a July 1993 policy letter, the U.S. Department of Education stated:

> Under Part B [of the IDEA] even during a disciplinary removal that exceeds 10 school days, schools may not cease educational services to students with disabilities. This is so, regardless of whether the student's misconduct is determined to be a manifestation of the student's disability. Thus, all students with disabilities—including those who have been suspended or expelled—must be provided a free appropriate public education, and educational services may not cease for such students. *Letter to Boggus* from U.S. Dept. of Education, Office of Special Education Programs, July 14, 1993.

The IDEA defines a "free appropriate public education" to mean special education and related services that meet state education agency standards, and are provided at no cost to the parent. The free appropriate public education for a student who has been evaluated under the special education law typically is defined by the student's Individualized Educational Plan.

22. Does the right to receive continued educational services under the federal special education law apply in Massachusetts, in light of the *Quincy* decision?

Yes. The *Quincy* decision held that under the state compulsory attendance law, school districts are not required to provide alternative education to students who have been properly excluded from school. However, the decision applies to regular education students only. Federal law (the IDEA) defines specific rights and requirements for students with special needs, and it is binding on

schools in Massachusetts and every other state.

23. Doesn't the state special education law say that students who commit disciplinary infractions are special needs students?

No. General Laws Chapter 71B, Section 1 states that a student may not be found to be a student with special needs "solely because the child's behavior violates the school's disciplinary code." In other words, student misconduct in and of itself is not necessarily evidence of disability. In order for a student to be eligible for special education, a multi-disciplinary evaluation TEAM must determine that the student has a disability that adversely affects the student's educational performance. However, a student with special needs who has violated the school discipline code is still entitled to the protections of the special education laws.

24. Is a school district required to provide a Chapter 766 special education evaluation upon request, to a regular education student who is about to be or has been expelled from school for disciplinary reasons?

Yes. Under federal and state law, the student is entitled to receive a special education evaluation from the school district as long as s/he is not yet 22 years old and does not yet have a high school diploma or its equivalent. If the evaluation TEAM determines that the student has special needs, then the procedures required by the special education laws apply. If the evaluation TEAM determines that the student does not have special needs, the parent may appeal the finding to the Bureau of Special Education Appeals. While the matter is pending before the Bureau or a court, the "stay put" rule of the IDEA

applies; the student is entitled to remain in his/her educational placement unless the school district seeks and is granted a court injunction to exclude the student on grounds of dangerousness. *See Hacienda La Puente Unified School Dist. v. Honig,* 976 F.2d 487 (9th Cir. 1992).

This reasoning has been followed by the U.S. District Court for Massachusetts. In *Deborah V. v. Lynn Public Schools,* C.A. No. 93-111984-A (Sept. 24, 1993), the federal district court held that the "stay put" rule of the IDEA applied to a high school student who was expelled for a weapons violation, even though at the time of his exclusion from school he had no previously identified special needs. The court ruled that while his parents were appealing the finding of no special needs to the Bureau of Special Education Appeals, the student was entitled to remain in an educational program provided by the school district.

EXHIBIT 13F—United States Department of Education Officer of Special Education and Rehabilitative Services (OSEP) Memorandum

UNITED STATES DEPARTMENT OF EDUCATION OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

April 26, 1995

OSEP-95-16

OSEP MEMORANDUM

TO: Chief State School Officers

FROM: Judith E. Heumann
Assistant Secretary
Office of Special Education and Rehabilitative Services

Thomas Hehir
Director
Office of Special Education Programs

SUBJECT: Questions and Answers on Disciplining Students with Disabilities

The purpose of this memorandum is to provide guidance about the current legal requirements of the Individuals with Disabilities Education Act (IDEA) for addressing misconduct of students with disabilities and to correct the

misunderstanding that students with disabilities are exempt from discipline under current law. This memorandum also includes a discussion of the recent amendments made to IDEA by the Improving America's Schools Act and the recently enacted Gun-Free Schools Act as they apply to students with disabilities who bring firearms to school. If changes are made to current law in the reauthorization of the IDEA, further guidance will be issued to reflect them.

Two other federal laws that are enforced by the Department's Office for Civil Rights (OCR)—Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA), Title II—also govern school districts' obligations to provide educational services to disabled students. Unless otherwise noted, compliance with the IDEA requirements as set forth in this memorandum would satisfy the requirements of Section 504 and Title II of the ADA.

Public Law 94-142, the Education for All Handicapped Children Act of 1975 (now Part B of IDEA) was enacted to address concerns that disabled students, particularly those whose disabilities had behavioral components, were excluded from any public education or were not provided an education appropriate to their unique learning needs. Thus, IDEA recognizes the right of each disabled student to a free appropriate public education (FAPE), which includes an array of rights and procedural protections for eligible students and their parents. One of the central tenets of IDEA is the requirement that each disabled student's program and placement must be individually designed to meet his or her unique learning needs. Today, as school safety takes on increasing importance for all of us, we want to underscore the compatibility of guaranteeing the rights of students with disabilities with the goal of school safety.

Clearly, school safety starts with the commitment of every student to take full responsibility for his or her own safety and the safety of others both in and out of school. This commitment to personal responsibility is essential to ensuring that the goal of safe schools is realized. For any student who misbehaves, a school should decide what action is most likely to correct the misconduct. For a disabled student, this decision may need to take into account the student's disability.

As we travel through the country, we have met with parents and school officials, who have underscored the importance of working cooperatively to address concerns when signs of misconduct by students with disabilities first appear before more drastic measures are considered. We also have visited schools that have implemented models for behavior management so effectively that, in many instances, the need for subsequent interventions has been greatly reduced, or even eliminated entirely. The Department encourages and supports the development and dissemination, at the local, state, and national levels, of effective classroom and behavioral management practices. We also believe that there are a number of positive steps that educators can take to address misconduct as soon as it appears to prevent the need for more drastic measures. For students whose disabilities have behavioral aspects, preventive measures, such as behavior management plans, should be considered and can be facilitated through the individualized education program (IEP) and placement processes required by IDEA. Teacher training initiatives in conflict management and behavior management strategies also should be considered as these strategies are implemented.

If the steps described above are not successful, the appropriate use of measures such as study carrels, time-outs, or other restrictions in privileges could also be considered, so long as they are not inconsistent with a student's IEP. In addition, a disabled student may be suspended from school for up to ten school days. No prior

determination of whether the misconduct was a manifestation of the student's disability is required before any of the above measures can be implemented. If the misconduct is such that more drastic measures would be called for, educators should review the student's current educational program and placement and consider whether a change in placement would be an appropriate measure to address the misconduct.

Where educators believe that more drastic measures are called for, a disabled student may be removed from school for more than ten school days only if the following steps are taken. First, a group of persons knowledgeable about the student must determine whether the student's misconduct was a manifestation of his or her disability. If this group determines that the misconduct was not a manifestation of the student's disability, the student may be expelled or suspended from school for more than ten school days, provided applicable procedural safeguards are followed and educational services continue during the period of disciplinary removal.

However, if the group determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days. Educators still can address the misconduct through appropriate instructional and/or related services, including conflict management and/or behavioral management strategies, student and teacher training initiatives, measures such as study carrels, time-outs, or their restrictions in privileges, so long as they are not inconsistent with a student's IEP, and as a last resort, through change of placement procedures in accordance with IDEA. Moreover, the school district has the option of seeking a court order at any time to remove the student from school or to change the student's placement if it believes

that maintaining the student in the current educational placement is substantially likely to cause injury.

In addition, recent amendments to IDEA made by the Improving America's Schools Act permit educators to make immediate interim changes of placement for students with disabilities who bring firearms to school for up to 45 calendar days. If the student's parents request a due process hearing, the student must remain in the interim placement until the completion of all proceedings, unless the parents and school district can agree on another placement.

The questions and answers with this memorandum provide a description of the options outlined above in greater detail. We hope that this information will be helpful as we all strive to promote safe and effective schools. We urge you and your staff to review this information carefully and to disseminate it to interested individuals and organizations throughout your state. For easy reference a table of contents, setting forth all sixteen questions and their corresponding page numbers, immediately follows.

Further questions can be directed to the Office of Special Education Programs by contacting Ms. Rhonda Weiss at (202) 205-8824 or Dr. JoLeta Reynolds at (202) 205-5507.

Attachment

cc: State Directors of Special Education
RSA Regional Commissioners Regional Resource Centers
Federal Resource Center
Special Interest Groups

Parent Training Centers
Independent Living Centers
Protection and Advocacy Agencies

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QUESTIONS AND ANSWERS ON DISCIPLINING STUDENTS WITH DISABILITIES

Question 1: Under IDEA, what steps should school districts take to address misconduct when it first appears?

ANSWER

School districts should take prompt steps to address misconduct when it first appears. Such steps could, in many instances, eliminate the need to take more drastic measures. These measures could be facilitated through the individualized education program (IEP) and placement processes required by IDEA. For example, when misconduct appears, determinations could be made as to whether the student's current program is appropriate and whether the student could benefit from the provision of more specialized instructional and/or related services, such as counseling and psychological services or social-work services in schools. In addition, training of the teacher in effective use of conflict management and/or behavior management strategies also could be extremely effective. In-service training for all personnel who work with the student, and when appropriate, other students, also can be essential in ensuring the successful implementation of the above interventions.

Question 2: Are there additional measures that educators may use in addressing misconduct of students with disabilities, and if so, under what circumstances may such measures be used?

ANSWER

The use of measures such as study carrels, time-outs, or other restrictions in privileges is permissible so long as such measures are not inconsistent with a student's IEP. While there is no requirement that such measures be specified in a student's IEP, IEP teams could determine that it would be appropriate to address their use in individual situations. Another possibility is an in-school change in a student's current educational program or placement, or even a removal of a student with a disability from school.

Where these changes are long-term (more than ten school days), they are considered a change in placement. IDEA requires that parents be given written notice before a change in placement can be implemented. (See Question 7.) However, where in-school discipline or short-term suspension (ten school days or less) is involved, this would not be considered a change in placement, and IDEA's parent-notification provisions would not apply. Also, there is no requirement for a prior determination of whether the student's misconduct was a manifestation of the student's disability. (See Question 6.)

Question 3: Is a series of short-term suspensions considered a change in placement?

ANSWER

A series of short-term suspensions in the same school year could constitute a change in placement. Factors such as the length of each suspension, the total amount of time that the student is excluded from school, the proximity of the suspensions to each other, should be considered in determining whether the student has been excluded from school to such an extent that there has been a change in placement. This determination must be made on a case-by-case basis.

Question 4: Are there specific actions that a school district is required to take during a suspension of ten school days or less?

ANSWER

There are no specific actions under federal law that school districts are required to take during this time period. If the school district believes that further action to address the misconduct and prevent future misconduct is warranted, it is advisable to use the period of suspension for preparatory steps. For example, school officials may convene a meeting to initiate review of the student's current IEP to determine whether implementation of a behavior management plan would be appropriate. If long-term disciplinary measures are being considered, this time also could be used to convene an appropriate group to determine whether the misconduct was a manifestation of the student's disability.

If the student's IEP or placement needs to be revised, the school district should propose the modification. If the student's parents request a due process hearing on the proposal to change the student's IEP or placement, the school district may seek to persuade the parents to agree to an interim placement for the student while due process proceedings are pending. If the school district and parents cannot agree on an interim placement for the student while the due process hearing is pending, and the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others, the school district could seek a court order to remove the student from school. (See Question 5.)

Question 5: Under what circumstances may a school district seek to obtain a court

order to remove a student with a disability from school or otherwise change the student's placement?

ANSWER

A school district may seek a court order at any time to remove any student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others. *Honig v. Doe*, 108 S.Ct. at 606. Prior to reaching the point where there is a need to seek a court order, a school district should make every effort to reduce the risk that the student will cause injury. Efforts to minimize the risk of injury should, if appropriate, include the training of teachers and other affected personnel, the use of behavior intervention strategies and the provision of appropriate special education and related services. *See Light v. Parkway C-2 Sch. Dist*., 41 F.3d 1223 (8th Cir. 1994), where the Court of Appeals for the Eighth Circuit (Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota, and South Dakota), held that in addition to showing that a student is substantially likely to cause injury, the school district must show that it had made reasonable efforts to accommodate the student's disabilities so as to minimize the likelihood that the student will injure himself or herself or others. In a judicial proceeding to secure a court order, the burden is on the school district to demonstrate to the court that such a removal or change in placement should occur to avoid injury.

Question 6: What is the first step that school districts must take before considering whether a student with a disability may be expelled or suspended from school for more than ten school days?

ANSWER

The first step is for the school district to determine whether the student's misconduct was a manifestation of the student's disability. This determination must be made by a group of persons knowledgeable about the student, and may not be made unilaterally by one individual. *See*, 34 C.F.R. § 300.533 (a) (3) (composition of the placement team); 34 C.F.R. § 300.344 (a) (1)-(5) (participants on the IEP team). If the group determines that the student's misconduct was not a manifestation of his or her disability, the school district may expel or suspend the student from school for more than ten school days, subject to the conditions described below. If an appropriate group of persons determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days for the misconduct. However, educators may use other procedures to address the student's misconduct, as described in Question 10 below.

Question 7: If an appropriate group determines that a student's misconduct was not a manifestation of his or her disability, what is the next step that school districts must take before expelling or suspending the student from school for more than ten school days?

ANSWER

A long-term suspension or expulsion is a change in placement. Before any change in placement can be implemented, the school district must give the student's parents written notice a reasonable time before the proposed change in placement takes effect. 34 C.F.R. §§ 300.504 (a) and 300.505 (requirements for prior written notice to parents and content of notice). This written notice to parents must include, among other matters, the determination that the student's misconduct was not a manifestation of the student's disability and the basis for that determination, and an explanation of applicable procedural safeguards, including the right of the student's parents to initiate an impartial due process hearing to challenge the manifestation determination and to seek administrative or judicial review of an adverse decision.

If the student's parents initiate an impartial due process hearing in connection with a proposed disciplinary exclusion or other change in placement, and the misconduct does not involve the bringing of a firearm to school (see Question 11), the "pendency" provision of IDEA requires that the student must remain in his or her current educational placement until the completion of all proceedings. For a student not previously identified by the school district as a student potentially in need of special education, a parental request for evaluation or a request for a due process hearing or other appeal *after* a disciplinary suspension or expulsion has commenced does *not* obligate the school district to reinstate the student's prior in-

school status. This is because in accordance with the "stay-put" provision of IDEA, the student's "then current placement" is the out-of-school placement. After the disciplinary sanction is completed, if the resolution of the due process hearing is still pending, the student must be returned to school as would a nondisabled student in similar circumstances. It should be noted that, pending the resolution of the due process hearing or other appeal, a court could enjoin the suspension or expulsion and direct the school district to reinstate the student if the court determines that the school district knew or reasonably should have known that the student is a student in need of special education. If the parents and school district can agree on an interim placement, as is frequently the case, the student would be entitled to remain in that placement until the completion of all proceedings. During authorized review proceedings, school districts may use measures, in accordance with Question 2 above, to address the misconduct.

Question 8: Under IDEA, where a student is suspended for more than ten school days or expelled for misconduct that was not a manifestation of his or her disability, does the school have any continuing obligations to the student?

ANSWER

Under IDEA, as a condition for receipt of funds, states must ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities in mandated age ranges. Therefore, in order to meet the FAPE requirements of IDEA, educational services must continue for students with disabilities who are excluded for misconduct that was not a manifestation of their disability during periods of disciplinary removal that exceed ten school days. Thus, a state that receives IDEA funds must continue educational services for these

students. However, IDEA does not specify the particular setting in which continued educational services must be provided to these students. During the period of disciplinary exclusion from school, each disabled student must continue to be offered a program of appropriate educational services that is individually designed to meet his or her unique learning needs. Such services may be provided in the home, in an alternative school, or in another setting.

Question 9: Under Section 504 and Title II of the ADA, where a student is expelled or suspended for more than ten school days for misconduct that was not a manifestation of his or her disability, does the school have any continuing obligation to the student?

ANSWER

Two related federal laws, which are enforced by the Department's Office for Civil Rights (OCR), also contain requirements relating to disabled students in public elementary or secondary education programs. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination on the basis of disability by recipients of federal financial assistance, including IDEA funds. The Section 504 regulation at 34 C.F.R. Part 104, §§ 104.33–104.36, contains free appropriate public education requirements that are similar to the IDEA FAPE requirements. The Americans with Disabilities Act of 1990 (ADA), Title II, extends Section 504's prohibition of discrimination on the basis of disability to all activities of state and local governments, whether or not they receive federal funds. This includes all public school districts. The Department interprets the requirements of Title II of the ADA as consistent with those of Section 504. Throughout the remainder of this document, references to Section 504 also encompass Title II of the ADA.

As in the case under IDEA, under Section 504, students with identified disabilities may be expelled or suspended from school for more than ten school days only for misconduct that was not a manifestation of the student's disability. However, the Department has interpreted the nondiscrimination provisions of Section 504 to permit school districts to cease educational services during periods of disciplinary exclusion from school that exceed ten school days if nondisabled students in similar circumstances do not continue to receive educational services.

In implementing their student-discipline policies, school districts must comply with the requirements of IDEA and Section 504. Further questions about the application of the requirements of Section 504 and Title II of the ADA should be directed to your OCR regional office.

Question 10: What options are available to school districts in addressing the misconduct of students with disabilities whose misconduct was a manifestation of his or her disability?

ANSWER

If a group of persons knowledgeable about the student determines that the student's misconduct was a manifestation of his or her disability, the student may not be expelled or suspended from school for more than ten school days. However, it is recommended that school officials review the student's current educational placement to determine whether the student is receiving appropriate instructional and related services in the current placement and whether conflict management and/or behavior management strategies should be implemented for the student as well as for teachers and all personnel who work with the student, and for other

students if appropriate. A change in placement, if determined appropriate, could be implemented subject to applicable procedural safeguards (see Question 7). For example, the school district could propose to place the student in another class in the same school or in an alternative setting, in light of the student's particular learning needs.

The school district also would have the option of suspending the student from school for ten school days or less. The school district also has the option of seeking a court order at any time to remove the student from school or to change the student's placement if it believes that maintaining the student in the current placement is substantially likely to result in injury to the student or to others. (See Question 5.)

Question 11: Are there any special provisions of IDEA that are applicable to students with disabilities who bring firearms to school?

ANSWER

Recent amendments to IDEA made by the Improving America's Schools Act give school authorities additional flexibility in protecting the safety of other students when any student with a disability has brought a firearm. This amendment to IDEA uses the term "weapon" and states that "weapon" means a firearm as such term is defined in Section 921(a) (3) of Title 18, United States Code. The Gun-Free Schools Act also uses the term "weapon." to school under a local school district's jurisdiction. These amendments to IDEA took effect as of October 20, 1994.

Even before defining whether the behavior of bringing a firearm to school was a manifestation of the student's disability, the school district may place the student in

an interim alternative educational setting, in accordance with state law, for up to 45 calendar days. The interim alternative educational setting must be decided by the participants on the student's IEP team described at 34 C.F.R. §§ 300.344(a)(1)–(a)(5), which include the student's teacher, an agency representative who is qualified to provide or supervise the provision of special education, the student's parents, and the student, if appropriate. However, the student's placement cannot be changed until the IEP team has been convened and determined the interim alternative educational placement that the team believes would be appropriate for the student. Under IDEA, a student with a disability who has brought a firearm to school may be removed from school or subjected to in-school discipline that removes the student from the current placement for ten school days or less. Therefore, before the student is placed in the interim alternative educational setting in accordance with the IEP team's decision, the school district has the option of removing the student from school, using other in-school discipline, or placing the student in an alternative setting for ten school days or less. (See Questions 2 and 3.) If the parents disagree with the alternative educational placement or the placement that the school district proposes to follow the alternative placement and the parents initiate a due process hearing, then the student must remain in the alternative educational setting during authorized review proceedings, unless the parents and the school district can agree on another placement.

Question 12: Under the provision described in Question 11 above, how long can a student be placed in an interim alternative educational setting?

ANSWER

A student with a disability who has brought a firearm to a school under a local

school district's jurisdiction may be placed in an interim alternative educational setting, in accordance with state law, for up to 45 calendar days. However, if the student's parents initiate a due process hearing and if the parties cannot agree on another placement, the student must remain in that interim placement during authorized review proceeding. In this situation, the student could remain in the interim alternative educational setting for more than 45 calendar days.

Question 13: Does the Gun-Free Schools Act apply to students with disabilities?

ANSWER

The Gun-Free Schools Act applies to students with disabilities. The Act must be implemented consistent with IDEA and Section 504. The Gun-Free Schools Act states, among other requirements, that each state receiving federal funds under the Elementary and Secondary Education Act shall have in effect a state law requiring local educational agencies to expel from school for not less that one year a student who brings a firearm to school under the jurisdiction of local educational agencies in that state, except that the state law must allow the local educational agency's chief administering officer to modify the expulsion requirement for a student on a case-by-case basis. The Gun-Free Schools Act explicitly states that the Act must be construed in a manner consistent with the IDEA.

Question 14: How can school districts implement policies under the Gun-Free Schools Act in a manner that is consistent with the requirements of IDEA and Section 504?

ANSWER

Compliance with the Gun-Free Schools Act can be achieved consistent with the

requirements that apply to students with disabilities as long as discipline of such students is determined on a case-by-case basis in accordance with IDEA and Section 504. Under the provision that permits modification of the expulsion requirement on a case-by-case basis, the requirements of IDEA and Section 504 can be met. IDEA and Section 504 require a determination by a group of persons knowledgeable about the student on whether the bringing of the firearm to school was manifestation of the student's disability. Under IDEA and Section 504, a student with a disability may be expelled only if this group of persons determines that the bringing of a firearm to school was not a manifestation of the student's disability, and after applicable procedural safeguards have been followed.

For students with disabilities eligible under IDEA who are expelled in accordance with these conditions, educational services must continue during the expulsion period. The Gun-Free Schools Act also states that nothing in that Act shall be construed to prevent a state from allowing a school district that has expelled a student from such a student's regular school setting from providing educational services to that student in an alternative educational setting. For students with disabilities who are not eligible for services under IDEA, but who are covered by Section 504 and are expelled in accordance with the above conditions, educational services may be discontinued during the expulsion period if nondisabled students in similar circumstances do not receive continued educational services.

Question 15: Does the authority of the school district's chief administering officer, under the Gun-Free Schools Act, to modify the expulsion requirement on a case-by-case basis mean that the decision regarding whether the student's bringing a firearm to school was a manifestation of the student's disability and placement decisions can be made by the chief administering officer?

ANSWER

No. As discussed above, all of the procedural safeguards and other protections of IDEA and Section 504 must be followed. Once it is determined by an appropriate group of persons that the student's bringing a firearm to school was not a manifestation of the student's disability, the school district's chief administering officer may exercise his or her decision-making authority under the Gun-Free Schools Act in the same manner as with nondisabled students in similar circumstances. However, for students with disabilities who are eligible under IDEA and who are subject to the expulsion provision of the Gun-Free Schools Act, educational services must continue during the expulsion period. By contrast, if it is determined that the student's behavior of bringing a firearm to school was a manifestation of the student's disability, the chief administering officer must exercise his or her authority under the Gun-Free Schools Act to determine that the student may not be expelled for the behavior. However, there are immediate steps that may be taken, including removal. (See Question 16.)

Question 16: What immediate steps can school districts take to remove a student with a disability who brings a firearm to school?

ANSWER

A student with a disability who brings a firearm to school may be removed from school for ten school days or less, and placed in an interim alternative educational setting for up to 45 calendar days. (See Questions 2 and 11.) However, if the parents initiate due process, the student must remain in the interim alternative placement during authorized review proceedings, unless the parents and school district can agree on a different placement. (See Questions 11 and 12.) In addition,

school districts may initiate change in placement procedures for such a student, subject to the parent's right to due process. A school district also could seek a court order if the school district believes that the student's continued presence in the classroom is substantially likely to result in injury to the student or to others. (See Question 5.)

EXHIBIT 13G—Administrative Advisory SPED 2001-3: Guidance on Using a Sliding Fee Scale for Public Payment of Independent Education Evaluations (IEEs) in Special Education

To: Special Education Administrators, Directors of Charter Schools, Other Interested Parties

From: Marcia Mittnacht
State Director for Special Education

Date: October 2, 2000

On September 26, 2000, the Board of Education promulgated emergency regulations in several areas of special education in response to outside sections of the FY2001 Budget that required such changes. One of the areas now in regulation is the use of a sliding fee scale for parents requesting public funding of Independent Education Evaluations (IEEs). The new regulatory language may be found at 603 CMR 28.04(5)(c). The Section 28.00 regulations are available by request from the Department at 781-338-6203.

Key provisions of the sliding scale requirements related to publicly funded IEEs

1. **General:** All IEEs that are publicly funded, in whole or in part, must meet state requirements using qualified evaluators who abide by the requirements detailed in 603 CMR 28.04(5)(a). The publicly funded IEE described in #1-9 of this section is an "equivalent" IEE, that is, equivalent to the types of assessments done by the school district.

2. **Funding based on eligibility for free or reduced cost lunch:** Any student eligible for free or reduced cost lunch is entitled to receive an equivalent IEE at public expense. No additional financial information is required.

3. **Sliding fee program information:** School districts must offer parents seeking public funding for IEEs information about the sliding fee program.

1. Provision of financial documentation: **Participation in the sliding fee program other than for students who are eligible for free or reduced** cost lunch requires the parents to provide financial documentation. Providing financial documentation to the school district is **completely voluntary** on the part of the parents. If, however, the parents do not agree to provide such documentation, participation in the sliding fee program will not be available to such students.

2. **Federal Poverty Guidelines:** Current Federal Poverty Guidelines are listed below. On or before February of each year, school districts must update the Federal Poverty Guideline figures that they are using. Federal Poverty

Guidelines are updated each year, published in the Federal Register in their entirety, and may be found on the internet at http://aspe.hhs.gov/poverty/00fedreg.htm

3. **400% of Federal Poverty Guidelines:** Any student whose family income is 400% or less of the federal poverty guidelines is entitled to receive an equivalent IEE. Parents must provide financial documentation to show eligibility.

4. **400-500% of Federal Poverty Guidelines:** Any student whose family income is more than 400% and equal to or less than 500% of federal poverty guidelines is entitled to have the district pay for 75% of the costs of an equivalent IEE. Parents must provide financial documentation to show eligibility.

5. **500-600% of Federal Poverty Guidelines:** Any student whose family income is more than 500% and equal to or less than 600% of federal poverty guidelines is entitled to have the district pay for 50% of the costs of an equivalent IEE. Parents must provide financial documentation to show eligibility.

6. **Over 600% of Federal Poverty Guidelines:** Any student whose family income is more than 600% of federal poverty guidelines is not eligible for public funding under the sliding fee program.

7. **Other options:** Students who are not income-eligible, whose parents do not wish to provide financial documentation, or who are requesting an evaluation in an area not assessed by the school district may still request public funding

of an IEE. Upon such request, the school district can either agree to pay for the IEE or must proceed within five school days to the Bureau of Special Education Appeals (BSEA) to show that the evaluation done by the school district is appropriate.

Federal Poverty Guidelines—Current Figures

2000 Poverty Guidelines for the 48 Contiguous States and the District of Columbia

Family Size	Poverty Guideline Base Amount	= /< 400% = full public funding of IEE	= />400% & = /<500% = 75% public funding of IEE	= />500% & = /< 600% = 50% public funding of IEE
1	8,350	33,400	41,750	50,100
2	11,250	45,000	56,250	67,500
3	14,150	56,600	70,750	84,900
4	17,050	68,200	85,250	102,300
5	19,950	79,800	99,750	119,700
6	22,850	91,400	114,250	137,100
7	25,750	103,000	128,750	154,500
8	28,650	114,600	143,250	171,900

For family units with more than 8 members, add $2,900 for each additional member for the base amount.

What the school district should do

1. Whenever a parent seeks public funding for an IEE, if the student is eligible for free or reduced cost lunch, the school district must inform the parent(s) of the right to an equivalent evaluation at full public expense. If no information is available on the status of the student in relation to the free or reduced cost lunch program, the school district must inform the parent(s) of the option to participate in the sliding fee program.

2. The school district must show the parent(s) the poverty guidelines and explain the requirement for public funding at each level and must describe financial documentation that could be used to demonstrate income eligibility. Appropriate documentation includes tax returns, pay stubs, or other reasonable documentation.

3. The school district must ensure that the parent(s) understands that providing documentation of family financial status is **totally voluntary** on the part of the family.

4. If the parent(s) elects to participate, the district must promptly evaluate provided documents and inform the parent(s) of their status in relation to the sliding fee program and, if appropriate, work with the parent(s) to arrange an IEE that meets state requirements. If the financial documentation indicates the parent(s) is eligible for the sliding fee program, the district must note in the student's record that financial documentation was received, reviewed, and found eligible; the level of eligibility; the date of the review; and the signature of the person who reviewed the documents. No copies should be made of the financial documents and the district should return the financial documents

immediately to the parent(s).

5. If the parent(s) does not participate in the sliding fee program, or requests an evaluation in an area not assessed by the school district, the school district must inform the parent(s) promptly either

that either the district will pay for the requested evaluation; or

that the district believes it has done an appropriate evaluation.

If the district declines to pay for the requested evaluation, it must further inform the parent:;

that the district intends to proceed within the next five school days to the BSEA to show that the district evaluation is appropriate;

that if the BSEA agrees that the evaluation done by the district was appropriate, the district will not be obligated to publicly fund the IEE; and

that the parent will be offered the option to provide information to the BSEA and, regardless of whether or not the parent participates at the BSEA hearing, will be informed of the results of the district's appeal.

The Bureau of Special Education Appeals has indicated that the request for a hearing to show that a district evaluation is appropriate will be conducted in the same manner as any other hearing. However, both parties may agree to accept an advisory process conducted by a hearing officer in an expedited manner as long as both parties agree in advance to accept the final written decision of the hearing

officer as binding.

We hope this guidance is helpful. If you have any questions or require additional information, please call Program Quality Assurance Services at the Department of Education (781-338-3700) for assistance.