
EDUCATIONAL ADVOCACY UNDER IDEA, 504 AND MCKINNEY-VENTO

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MAJOR SOURCES OF EDUCATION RIGHTS: FEDERAL

- IDEA: Individuals With Disabilities Education Act, 20 U.S.C. § 1400 et seq.; regulations, 34 C.F.R. Part 300.
- 504: Rehabilitation Act, 29 U.S.C. §794; regulations, 34 C.F.R. Part 104.
- ADA: Americans With Disabilities Act, 42 U.S.C. § 12101-12189; regulations, 28 C.F.R. Part 35.
- NCLB: No Child Left Behind, 20 U.S.C. § 6301 et seq.
- McKinney Vento Act, 42 U.S.C. §§ 11301, 11431-11435
- Foster Care Independence Act, 42 U.S.C. § 677
- Due Process Clause of Fourteenth Amendment of U.S. Constitution

MAJOR SOURCES OF EDUCATION RIGHTS: FLORIDA

- Fla. Const.: education is a fundamental right
- § 1003.57, Fla. Stat.: exceptional students instruction
- Fla. Admin. Code Ch. 6A-6: rules for programs for exceptional students
- § 409.1451, Fla. Stat.: independent living transition services for foster teens
- § 411.012, Fla. Stat.: voluntary universal pre-kindergarten

INTRODUCTION

Children and youth who are, or have been in out-of-home care face extra challenges: more than 60% of children or youth in care drop out of school before graduation, a rate that is twice as high as the dropout rate for all students.

Children and youth who are, or have been in out of home care are two or three times more likely than other students to have disabilities that affect their ability to learn. ¹

Numerous studies have confirmed that foster children perform significantly worse in school than do children in the general population. The educational deficits of foster children are reflected in higher rates of grade retention; lower scores on standardized tests; and higher absenteeism, tardiness, truancy and

dropout rates. The poor academic performance of these children affects their lives after foster care and contributes to higher than average rates of homelessness, criminality, drug abuse, and unemployment among foster care "graduates."

What are the causes of such undesirable educational outcomes? First, most of the 500,000 children in foster care bear the scars of physical and emotional trauma, such as prenatal exposure to alcohol, tobacco and other drugs; parental abuse, neglect and abandonment; exposure to violence in their homes and communities; separation from their birth families; and frequent changes in foster placement. These experiences place children at great risk of developing physical, emotional and behavioral disorders that interfere with learning. ²

WHAT IS SPECIAL EDUCATION?

Special Education is

- individually designed instruction
- to meet child's unique educational needs

The first step in determining whether a child qualifies for special education is determining whether the child has a disability under the IDEA. The second step is to show that the child needs special education services or that the disability adversely affects the child's education performance. The following disability categories fall under the IDEA:

Most Common:

- Specific Learning Disability (SLD)
- Speech and Language Impairment (SLI)
- Emotional Handicap (EH & SED)
- Mental Handicap (EMH, TMH & PMH)
- Other Health Impairment (OHI)
- More Disability Categories
- Hearing Impairment (HI)
- Visual Impairment (VI)
- Physical Impairment (PI)
- Traumatic Brain Injury (TBI)
- Homebound/Hospitalized (H/H)
- Another Disability Category

Only in Florida

Less Common:

- Autism
- Gifted
- Specific Learning Disability

EVALUATIONS

If a child has not already been found eligible for special education but you have reason to believe he or she may qualify, you should send a written request to the school for the child to be evaluated for a disability. (see Sample Request Letter in the Practice Aids section of this chapter and fill in with examples of the child's grades, tests, discipline, etc.) A sample request letter is available online at at

www.GuardinadLitem.org. Although anyone, including the guardian ad litem, can request an evaluation, the school must get a parent's informed consent before conducting an evaluation. 20 U.S.C. §1414(a)(1)(D)(iii).

The following are examples of when an evaluation should be requested:

- Bad grades
- Low test scores
- Speech is hard to understand
- Difficulty following directions
- Difficulty paying attention
- Gets frustrated with school work
- Gets in trouble/suspended

Evaluations for Children Aged 0-6

- At risk infants and toddlers (birth to 36 months) should be evaluated for early intervention services through the Early Steps Program. May also request evaluation through FDLRS.
- Pre-school children (3-5) with suspected disability should be evaluated through school district or FDLRS for needed educational services.

Evaluations for School Age Children (5-22)

- School districts are responsible
- Request in writing to Principal
 - Give copy to Guidance Counselor

WHO CAN SIGN AS A PARENT?

If a child is a ward of the state and the parent's whereabouts are unknown or rights are terminated, the following people can also sign for the child to be evaluated:

- Foster parent
- Guardian
- Individual acting in place of parent with whom child lives or has legal responsibility
- Surrogate parent

<p>PRACTICE TIP: The case worker cannot sign as a parent, and guardians ad litem should sign only if appointed as the surrogate parent</p>

What If Foster Parent Does Not Want to Act as Parent?

- Until final regulations are sorted out on this issue, it is advisable to appoint surrogate parents for children whose foster parents are not willing or able to participate in educational process.

What is a Surrogate Parent?

- Acts as a parent and has all of parent's rights in the educational setting
- Anyone over 18 and not employed by school district, Florida Department of Education, or an agency involved with education or care of child, which includes a child welfare agency
- School district must appoint within 30 days

Who Appoints Surrogate Parents?

- School districts have responsibility to appoint.
- For wards of state, state court overseeing child's care may appoint.
- For unaccompanied homeless youth, school district shall appoint.

Parental Consent Form

Make sure boxes are checked for areas of testing that need to be done, and no more.

- Academic achievement
- Vision screening/ evaluation
- Hearing screening/ evaluation
- Medical
- Behavioral observations
- Functional behavioral assessment
- Individual developmental evaluation
- Occupational therapy evaluation
- Social and developmental history
- Speech and language screening/ evaluation
- Individual personality/ behavioral evaluation
- Individual intellectual evaluation
- Learning abilities evaluation
- Assistive technology screening/ evaluation
- Physical therapy evaluation

When Must the Evaluation be Completed?

- IDEA requires that an evaluation be completed within 60 days of parental consent
- School can take longer if parent repeatedly fails to produce child for evaluation
- For transfer students, assessments must be coordinated and conducted as quickly as possible

What if School Wants to Evaluate and Parent Won't Give Consent?

- School may file for due process and ask a Administrative Law Judge (ALJ) to let them evaluate child

What Happens Once Evaluation Is Completed?

- Reports will be written
- Results will be explained in a meeting
- Someone who can answer questions about the reports must be at meeting

When Must School Do a Re-Evaluation?

- At least every 3 years
- School district and parent may agree to waive re-evaluation if both believe it is not necessary. **As a rule, do not agree to this

WHAT HAPPENS ONCE THE CHILD IS FOUND ELIGIBLE?

Each child who is found eligible for special education under the IDEA is required to have an individualized education plan, or IEP.

Who is on the IEP Team?

- Parent or surrogate parent
- Regular education teacher
- Special education teacher
- School district representative
- Evaluation specialist
- Others with knowledge or special expertise about child, including GALs

Does Everyone Have to be at the IEP Meeting?

Parent and school district may agree that a team member does not need to attend if that member's area of curriculum or related services is not being modified or discussed

What Information Goes on the IEP?

- A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum
- A statement of measurable annual goals designed to enable the child to make progress in the general education curriculum and to meet each of the child's other educational needs that result from the child's disability
- A statement of special education and related services and supplementary aids and services to be provided to the child to advance toward meeting goals
- An explanation of the extent, if any, to which the child will not participate with nondisabled children

20 U.S.C. §1414(d)(1)(A)(i).

Transition Plans

- Required for students age 16 and older
- Appropriate measurable postsecondary goals must be identified.
- Appropriate transition assessments related to training, education, employment and independent living skills must be conducted.
- Transition services needed to assist child in reaching those goals must be provided.

DISCIPLINE

The IDEA provides certain protections for children covered under the Act. There are limitations in the way these children can be disciplined when the behaviors in question are a manifestation of their disability.

School May Make Unilateral Change in Placement

- For 10 school days or less for students who violate code of conduct
- For 11 or more school days for violations of code of conduct IF NOT a manifestation
- For 45 days or less for weapons, drugs or infliction of serious bodily injury

Services During Change of Placement

- Setting determined by IEP Team
- Participation in general education curriculum
- Progress to meet IEP goals
- Behavioral services to prevent recurrence

What is a Manifestation Determination?

- Two tests:
 - If conduct was caused by, or had a direct and substantial relationship to, the child's disability
- OR**
- If the conduct was the direct result of the school district's failure to implement the IEP
- What Happens if Behavior IS a Manifestation?
 - Functional Behavioral Assessment (FBA) conducted and Behavioral Implementation Plan (BIP) implemented
 - Child returns to current placement unless parent and school district agree otherwise as part of BIP
- What Happens if Behavior is NOT a Manifestation?
 - Discipline in same manner and same duration as for children without disabilities
 - Educational services still required
- Manifestation Determinations
 - Only need for change of placement for code of conduct violations
 - Relevant members of IEP Team
 - Review relevant information

What If Child is not yet Eligible for IDEA, But Gets into Trouble?

If school district had knowledge that child had disability before behavior occurred, IDEA protections apply

What is Needed to Show that School had Knowledge?

- Parent expressed concern in writing
- Parent requested evaluation
- Teacher or other school personnel expressed specific concerns about a pattern of behavior demonstrated by child to Exceptional Student Education (ESE) Director or other school personnel
- No knowledge if parent did not allow evaluation or has refused services or child was evaluated and found not eligible

What Happens if School Did Not Have Knowledge?

- Request an Initial Evaluation during disciplinary period
 - This evaluation must be expedited, so must be quicker than 60 days

What Happens if Parent Disagrees With a Discipline Decision?

- Hearing before ALJ within 20 school days of request (this is different from school board expulsion hearings)
- Determination within 10 school days after hearing

WHAT CAN BE DONE IF CHILD'S NEEDS ARE NOT BEING MET?

- Ask to meet with teachers, principal, ESE Director, Superintendent
- Ask for a new IEP meeting
- Request Mediation
- Request an Administrative Due Process Hearing

What Else Can Parent Do?

- File complaint with:
 - Florida Department of Education
 - U.S. OCR – Office of Civil Rights
 - U.S. OSERS – Office of Special Education Rehabilitation Services
- Mediation
 - May now be conducted without the filing of a due process complaint
 - Resolutions must be written and are legally binding in state or federal court

DUE PROCESS HEARINGS

Two-year statute of limitations (SOL) from date parent or school district knew or should have known of violation, unless state sets shorter time SOL or information withheld or misrepresented by school district

Due Process Hearings

- Any party that initiates due process must file due process complaint notice and forward copy to Division of Administrative Hearings (DOAH)
- Notice must include:
 - Name and address of child (or contact information for homeless)

- Name of school child attending
- Description and facts of problem
- Proposed resolution to extent known
- May not raise issues in hearing that were not raised in notice
- Timelines after complaint is filed
- Notice is sufficient unless opposing party objects within 15 days
- ALJ must decide if complaint is sufficient within 5 days after objection
- May amend complaint only if parties agree, or ALJ permits not later than 5 days before hearing
- Opposing party must respond to complaint within 10 days

Resolution Session

- Within 15 days after school district receives complaint, a Resolution Session with IEP Team is required
- If no resolution within 30 days, due process hearing may occur and timelines commence
- If resolution is reached, must be written and is enforceable in state or federal court; agreement may be voided within 3 business days

Procedural Safeguards

Parents have the right to:

- Examine records from all files
- Participate in meetings with respect to identification, evaluation and educational placement, and provision of Free Appropriate Public Education (FAPE)
- Independent Educational Evaluation
- Prior Written Notice
- Procedural Safeguards Notice
- Mediation
- Due Process
- Stay Put (except for discipline)

Remedies

- Appropriate education - based on child's unique needs

- Placement
- Program
- Services
- Qualified personnel
- Compensatory education
- Reimbursement for private services
- Damages – rare
- Attorneys' fees

A court may order the school district to pay the parent's attorney's fees if the parent wins a due process hearing or a court action.

Usually, the court cannot order a parent to pay the school district, even if the school wins.

Attorney's Fees

IDEA 2004 now allows a court to order a PARENT'S ATTORNEY to pay the school's attorney's fees, but only if:

- The school wins, AND
- The parent's attorney filed a complaint or subsequent cause of action that is frivolous, unreasonable or without foundation, or continued to litigate after litigation clearly became frivolous, unreasonable or without foundation.

IDEA 2004 allows a court to order a PARENT'S ATTORNEY or the PARENT to pay the school's attorney's fees, but only if:

- The school wins, AND
- The complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

SECTION 504 PLANS

Who is Eligible for 504 Plan?

- Disabilities are not specifically listed.
- Disability is defined as a physical or mental impairment that substantially limits one or more major life activities (e.g., learning).
- Attention Deficit Hyperactive Disorder (ADHD) is example of a disability that is not specified under IDEA but is a disability under 504.

504 Plans

- Identifies accommodations and modifications
- If many services are being provided through 504 Plan, it is advisable to request comprehensive evaluation for IDEA services.

MCKINNEY-VENTO

Who is Eligible?

- Homeless children and youth are individuals who lack a fixed, regular, and adequate nighttime residence.
- Includes children staying in other people's homes, hotels, and shelters.
- Includes those abandoned in hospitals or awaiting foster care placement.

Rights of Homeless Children

- Can stay in home school
- Do not need required documentation
- Services provided: school supplies, case management, transportation, and other services as needed

1 Calvin et al, 2000

2 Educating Children in Foster Care, Steve Christian, National Conference of State Legislatures, <http://www.ncsl.org/programs/cyf/cpieducate.pdf>, last viewed August 9, 2007