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***A REVIEW OF FEDERAL LAW
ADDRESSING THE EDUCATION OF CHILDREN WITH DISABILITIES***

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December 1994

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A Review Of Federal Law Addressing The Education Of Children With Disabilities

ISSUES PRESENTED

- I. What is the historical development of federal legislation addressing the education of children with disabilities?
- II. Under the federal constitution, current federal statutes, regulations, and selected court cases, what requirements must the state meet in delivering and funding special education?

BRIEF FINDINGS

- I. Federal legislation has generally established federal financial assistance programs to assist states in educating children with disabilities. At first Congress did not establish specific eligibility or use guidelines for the states receiving grant money. Subsequently, Congress has established requirements that must be met in order for states to be eligible to receive federal funds for special education programs.
- II. The duty to provide educational opportunities to children with disabilities originates in the due process and equal protection clauses of the United States Constitution. Congress has enacted the Individuals with Disabilities Education Act (IDEA) of 1990--formerly the Education for All Handicapped Children Act of 1975--which provides federal financial assistance to states that choose to provide a special education program for children with disabilities that complies with federal requirements. There are additional federal statutes [The Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act (ADA), and the Civil Rights Act of 1871 (Section 1983)] that may impose additional duties on school districts to provide further rights for special education students, and for students who do not qualify for special education but who have disabilities.

In general, the federal law requires the state to assure that school districts provide appropriate special education services to children with disabilities, establish procedures to help parents and students get the appropriate special education services, and perform some administrative functions for special education programs.

INTRODUCTION

This review presents the historical development of federal legislation that addresses the education of children with disabilities. Additionally, it presents the federal requirements the state must meet when delivering and funding special education programs under the federal constitution, current federal statutes, regulations and selected court cases.

I. THE HISTORICAL DEVELOPMENT OF FEDERAL LEGISLATION ADDRESSING THE EDUCATION OF CHILDREN WITH DISABILITIES

Congress did not address the issue of education for children with disabilities until 1966 when it amended the Elementary and Secondary Education Act (ESEA) of 1965.¹ The amendments established a grant program to assist states in educating children with disabilities.² In 1970, Congress repealed the 1966 amendments and passed the Education of the Handicapped Act (EHA).³ This Act established another grant program for the purpose of assisting the states in initiating, expanding and improving programs for the education of children with disabilities.⁴ Neither the 1966, nor the 1970 legislation established eligibility or use guidelines for the states receiving grant money.

In 1973, Section 504 of the Rehabilitation Act was passed.⁵ Section 504 was meant to guarantee persons with a mental or physical disability the right to participate in programs receiving federal financial assistance.⁶ Mandatory compliance with the anti-discrimination principles of Section 504 was directly tied to receipt of any federal funds, not simply to specific educational grants.⁷

Several lawsuits in many states seeking educational opportunities for children with disabilities spurred Congress to pass legislation in 1974 with the intent to increase federal funding for educating children with disabilities.⁸ The level of funding originally intended has never been appropriated. The 1974 legislation also introduced the requirement that states receiving the

¹. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191 (codified as amended at 20 U.S.C. § 2416 (1990 & Supp. 1994)).

². Id.

³. Education of the Handicapped Act (EHA) of 1970, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1401 et. seq. 1990 & Supp. 1994)).

⁴. Id.

⁵. Titles VI and VII of the Civil Rights Act of 1964 Amendments, and Title IX of the Education Amendments of 1972 Amendments, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended in scattered sections of 7 U.S.C., 16 U.S.C., 20 U.S.C., 29 U.S.C., 42 U.S.C. (1990 & Supp. 1994)).

⁶. Id. Also see, 118 Cong. Rec. S15,947 (daily ed. Sept. 26, 1972).

⁷. Id.

⁸. The two most notable cases were Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) and Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F.Supp. 1257 (E.D.Pa. 1971), 343 F.Supp. 279 (E.D.Pa. 1972). These courts held that children with disabilities were entitled to free, publicly supported education regardless of the degree of the child's disability or impairment. The courts based the decisions on state law but also found that federal due process and equal protection claims were colorable. Also see, Education of the Handicapped Act Amendments (EHA) of 1974, Pub. L. No. 93-380, 88 Stat. 579 (codified as amended at 20 U.S.C. § 1400 et. seq. (1990 & Supp. 1994)).

federal funds must adopt a goal of providing full educational opportunities to all children with disabilities.⁹

Congress added additional eligibility requirements in 1975 for the states seeking to receive funds.¹⁰ States are required to develop a comprehensive state plan to assure appropriate educational opportunities to children with disabilities within the state.¹¹ The state plan has to be approved by the United States Office of Education before the state can receive federal dollars.¹² In 1977 and 1983, Congress passed minor amendments extending and revising the previous legislation.¹³

In 1986, Congress authorized federal grants for the development of statewide systems to provide services to infants and toddlers with disabilities (birth to two years of age).¹⁴ Also in 1986, congressional amendments included the provision for the recovery of attorney's fees by parents who prevailed in lawsuits brought under the Act.¹⁵ Congress made technical amendments in 1988.¹⁶

In 1990 Congress passed amendments that changed the name of the Act to the "Individuals with Disabilities Education Act" (IDEA) and replaced the term "handicapped children" with the term "children with disabilities".¹⁷ The IDEA also expanded the eligibility categories, expanded the definition of related services, and formally defined and required transition services to post-school activities for children with disabilities.¹⁸ In 1991, Congress passed amendments that require

⁹. Id.

¹⁰. Education for All Handicapped Children Act (EAHC) of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400 et. seq. (1990 & Supp. 1994)).

¹¹. Id.

¹². Id.

¹³. Education of the Handicapped Act Amendments (EHA) of 1977, Pub. L. No. 95-49, 91 Stat. 230 (codified as amended at 20 U.S.C. § 1401 et. seq. (1990 & Supp. 1994)); Education of the Handicapped Act Amendments (EHA) of 1983, Pub. L. No. 99-199, 97 Stat. 1357 (codified as amended at 20 U.S.C. § 1401 et. seq. (1990 & Supp. 1994)).

¹⁴. Education of the Handicapped Act Amendments (EHA) of 1986, Pub. L. 99-457, 100 Stat. 1145 (codified as amended at 20 U.S.C. § 1401 et. seq. (1990 & Supp. 1994)).

¹⁵. This action reversed the U.S. Supreme Court's holding in Smith v. Robinson, 464 U.S. 932 (1983) that the Act did not provide for the award of attorney fees. Also see, Handicapped Children's Protection Act (HCPA) of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415 (1990 & Supp. 1994)).

¹⁶. Handicapped Programs Technical Amendments Act of 1988, Pub. L. No. 100-630, 102 Stat. 3289 (codified as amended at 20 U.S.C. § 1400 et. seq. (1990 & Supp. 1994)).

¹⁷. Education of the Handicapped Act Amendments (EHA) of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. § 1400 et. seq. (1990 & Supp. 1994)).

¹⁸. Id.

transition services to the programs in the K-12 education system for the infants and toddlers participating in the early intervention program.¹⁹

II. SUMMARY OF THE FEDERAL CONSTITUTION, CURRENT FEDERAL STATUTES, REGULATIONS AND SELECTED COURT CASES ADDRESSING THE EDUCATION OF CHILDREN WITH DISABILITIES

The duty to provide educational opportunities to children with disabilities originates in the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.²⁰ Congress has enacted a statute, the Individuals with Disabilities Education Act (IDEA), which provides federal financial assistance to states that choose to provide a special education program for children with disabilities that complies with federal requirements.²¹ There are additional federal statutes [the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act (ADA), and the Civil Rights Act of 1871 (Section 1983)] that may provide additional rights for special education students, and for students who do not qualify for special education but who have disabilities.²² These other federal statutes may impose additional duties on school districts.

A. FEDERAL CONSTITUTION

Although the United States Supreme Court has declared that education is perhaps the most important function of state and local governments, it has also held that education is not a fundamental right guaranteed by the federal constitution.²³ However, the Court has found that under the Due Process Clause, when a state creates and maintains the public school system and compels children to attend, a property interest in public education is created and cannot be denied children without due process.²⁴ Additionally, the Court has found that when a state has provided an opportunity for a public education to school aged children, that opportunity must be made

¹⁹. Individuals with Disabilities Education Act (IDEA) Amendments of 1991, Pub.L. 102-119, 105 Stat. 587 (codified as amended at 20 U.S.C. § 1413(a)(15) (1990 & Supp. 1994)).

²⁰. U.S. Const. amend. XIV, § 1, which provides in pertinent part:

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

²¹. 20 U.S.C. §§ 1400 *et. seq.* (1990 & Supp. 1994).

²². Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (1990 & Supp. 1994); The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et. seq.* (Supp. 1994); and Section 1983 of the Civil Rights Act of 1871 (Section 1983), 42 U.S.C. § 1983 (1990 & Supp. 1994).

²³. Brown v. Board of Educ., 347 U.S. 483, 493 (1954); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1973).

²⁴. Goss v. Lopez, 419 U.S. 565 (1975).

available to all school aged children.²⁵ Equal educational opportunity has also been applied in school financing cases as an approach to equalize imbalances in the educational benefits provided by various school districts.²⁶

B. INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)²⁷

Congress enacted the Individuals with Disabilities Education Act (IDEA) in 1990, which provides federal financial assistance to states that choose to provide a special education program for children with disabilities that complies with federal requirements.²⁸ Participation in the program is voluntary, not mandatory.²⁹ However, if a state desires to participate and avail itself of the federal funds provided under this program, the state must assure compliance with the IDEA requirements.³⁰ Under IDEA, the state acts in a supervisory capacity and the local school districts or regional educational consortiums implement the requirements of the IDEA.³¹ The local districts and regional consortiums receive the bulk of the federal funding along with the delegated responsibility.³²

States seeking to qualify for federal funds must develop policies assuring the right to free appropriate public education for all children with disabilities within the state.³³ The state, acting through a single State Educational Agency must submit for federal approval a detailed plan to implement those policies.³⁴ The state must hold public hearings prior to adopting the state plan, and before submitting the plan for federal approval.³⁵ If the state amends the plan the amendment

²⁵. Brown v. Board of Education, 347 U.S. 483, 493 (1954).

²⁶. See, Edgewood Indep. School Dist. v. Kirby, 761 S.W.2d 859 (1988), 777 S.W.2d 391 (1989). School finance system held unconstitutional because districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort; Alma School Dist. No. 3 v. Dupree, 279 Ark. 340, 651 S.W.2d 90 (1983). Education clause requiring general, suitable and efficient system of free public schools reinforces the application of equal protection clause to the school finance system.

²⁷. 20 U.S.C. §§ 1400 et. seq. (1990 & Supp. 1994); The Department of Education regulations that correlate with IDEA are found in 34 C.F.R. § 300 (1993).

²⁸. 20 U.S.C. §§ 1400 et. seq. (1990 & Supp. 1994).

²⁹. "Any state meeting the eligibility requirements . . . and desiring to participate in the program . . ." 20 U.S.C. § 1413(a) (Supp. 1994).

³⁰. 20 U.S.C. § 1413(a) (Supp. 1994).

³¹. 20 U.S.C. §§ 1413, 1414 (1990 & Supp. 1994).

³². The IDEA limits the state to the greater amount of either \$450,00 or five percent of the total state allotment for administrative costs, etc. 20 U.S.C. § 1411(c)(2)(A) (Supp. 1994); 34 C.F.R. § 300.620 (1993).

³³. 20 U.S.C. §§ 1412(2), 1413 (1990 & Supp. 1994); 34 C.F.R. § 300.600 (1993).

³⁴. Id. In Washington State the SEA is the Office of the Superintendent of Public Instruction.

³⁵. 20 U.S.C. § 1412(7) (Supp. 1994); 34 C.F.R. §§ 300.280 - 300.283 (1993).

must be available to members of the general public at least 30 days prior to submitting the amendment for federal approval.³⁶

The state must develop policies and procedures in the following areas:

1. Full educational opportunity

The state must have a goal of providing full educational opportunity to all children with disabilities aged birth through 21.³⁷ Additionally, the state must provide a description of the resources necessary to accomplish the goal.³⁸

2. Identification and evaluation

The state must have a plan to identify, locate, and evaluate all children who have a disability aged birth through 21.³⁹ The IDEA defines "children with disabilities" as children who have a disability **and** who by reason of the disability need special education and related services.⁴⁰ School districts implement the plan and actually identify and evaluate the children.⁴¹

³⁶. 20 U.S.C. § 1412(E) (1990 & Supp. 1994).

³⁷. 20 U.S.C. §§ 1412(2)(A), 1414(a)(1)(C) (Supp. 1994); 34 C.F.R. §§ 300.123, 300.304 (1993).

³⁸. Id.

³⁹. 20 U.S.C. §§ 1412(2)(B)-(C), (Supp. 1994); 34 C.F.R. §§ 300.128 (1993).

⁴⁰. "Disabilities" under IDEA means mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities (such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia). The term does not include children who have learning problems that are primarily the result of environmental, cultural, or economic disadvantaged. 20 U.S.C. § 1401(a)(1)(A)(i), (a)(15) (Supp. 1994). The regulations add to this list, deaf-blindness, and multiple disabilities. 34 C.F.R. § 300.7 (1993). The regulations also provide a broad definition of each of the disability categories. 34 C.F.R. § 300.7 (1993). **The federal statutes and rules DO NOT provide specific eligibility criteria for determining a disability.**

"Special education" under IDEA means specially designed instruction to meet the unique needs of a child with a disability. 20 U.S.C. § 1401(a)(16) (Supp. 1994). Also see, 34 C.F.R. § 300.17 (1993).

"Related services" under IDEA includes transportation and supportive services such as physical and occupational therapy, counseling, etc., that help a child benefit from special education. 20 U.S.C. § 1401(a)(17) (Supp. 1994). Also see, 34 C.F.R. § 300.16 (1993).

⁴¹. 20 U.S.C. § 1414(a)(1)(A) (Supp. 1994); 34 C.F.R. § 300.220 (1993).

The IDEA does not require that the child be labeled with the specific disability the child has, but instead requires the state to identify the special education and related services the child requires to meet the child's unique educational needs. However, the state must report, by the federal disability categories, the number of children identified as having a disability, and the number of children with disabilities receiving special education services.⁴²

To find out whether the child has a disability and the nature and extent of the special education and related services needed, an individual evaluation of a child must be done.⁴³ The evaluation must be conducted by an evaluation team.⁴⁴ The IDEA does not specify the number of individuals that make up a team, but one of the persons must be knowledgeable in the area of the suspected disability.⁴⁵ When the child is suspected of having a specific learning disability the team must also include a regular education teacher and at least one person qualified to conduct individual diagnostic examinations of children.⁴⁶

The evaluation of each child who may have a disability that creates the need for special education and related services must consist of procedures used selectively with an individual child and cannot consist of tests administered to all children in a class, grade, or school.⁴⁷ The individual tests administered must accurately reflect the child's aptitude or achievement level and not simply a lack of skill in speaking, motor, or sensory skills.⁴⁸ The evaluation must include observation of the child in the regular classroom.⁴⁹ The school district may be required to pay for an independent evaluation, if the district's evaluation is found to be inappropriate.⁵⁰ Reevaluations must be conducted at least every three years, or more frequently if requested by a parent or teacher.⁵¹

⁴². 20 U.S.C. § 1418(b) (Supp. 1994); 34 C.F.R. §§ 300.128(5)(i), 300.750(a)(3) (1993).

⁴³. 20 U.S.C. § 1412(5)(C) (Supp. 1994); 34 C.F.R. § 300.530 - 543 (1993).

⁴⁴. 20 U.S.C. § 1401(a)(20) (Supp. 1994); 34 C.F.R. §§ 300.344, 300.540 (1993).

⁴⁵. 34 C.F.R. § 300.532(e) (1993).

⁴⁶. 34 C.F.R. § 300.540 (1993).

⁴⁷. 34 C.F.R. § 300.500(b) (1993).

⁴⁸. 34 C.F.R. § 300.532(3) (1993).

⁴⁹. 34 C.F.R. § 300.543 (1993).

⁵⁰. 20 U.S.C. § 1415(b)(1)(A) (Supp. 1994); 34 C.F.R. § 300.503 (1993).

⁵¹. 34 C.F.R. § 300.534 (1993).

3. Individualized education program

If the evaluation shows that a child needs special education and related services, a written individualized education program (IEP) must be developed for the child.⁵² The IEP is a general plan of the appropriate special education and related services to be provided to the child.⁵³ The IEP must be developed in a group meeting by an educator qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, the teacher of the child, the parents or guardians of the child, and when appropriate, the child.⁵⁴

The IEP must indicate the current levels of educational performance of the child; annual goals, including short-term instructional objectives; a timetable delineating the specific special educational services, including transition services, to be provided; the extent to which the child will be able to participate in the regular educational programs; and the criteria and procedures for annually measuring the progress of the child.⁵⁵ An IEP is not intended to be detailed enough to be used as an instructional plan, but is used to set the general direction of the special education services to be provided.⁵⁶ The IEP does **not** constitute a guarantee that a child will progress at a specified rate.⁵⁷ However, the school districts and teachers are required to make good faith efforts to assist the child in achieving the goals and objectives listed in the IEP.⁵⁸ The IEP must be reviewed at least annually, and when appropriate be revised.⁵⁹

The United States Supreme Court has addressed the issue of adequacy of an IEP.⁶⁰ The Court found that when Congress established a process for developing the IEP Congress demonstrated that adequate compliance with the procedures required by the IDEA would in most cases assure the substantive content of an IEP.⁶¹ Therefore, the court must look not at the substantive content of an IEP to determine its adequacy, but

⁵². 20 U.S.C. § 1401(a)(20) (Supp. 1994); 34 C.F.R. §§ 300.340 -.347 (1993).

⁵³. 20 U.S.C. § 1401(a)(20) (Supp. 1994); 34 C.F.R. §§ 300.340, 300.350 (1993).

⁵⁴. 20 U.S.C § 1401(20) (Supp. 1994); 34 C.F.R § 300.344 (1993).

⁵⁵. 20 U.S.C. § 1401(a)(20) (Supp. 1994); 34 C.F.R. § 300.346 (1993).

⁵⁶. 34 C.F.R. § 300, App. C, 41, 45 (1993).

⁵⁷. 34 C.F.R. § 300.350 (1993).

⁵⁸. Id.

⁵⁹. 20 U.S.C. §§ 1412(4), 1414(a)(5) (Supp. 1994); 34 C.F.R. § 300.343 (1993).

⁶⁰. Hendrick Hudson School Dist., Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

⁶¹. Id.

instead must look at whether the state has complied with the IDEA's procedures in developing the IEP.⁶²

4. Free appropriate public education

The state must have a policy that assures an opportunity to a free appropriate public education (FAPE) to all children with disabilities, aged 3 through 21.⁶³ The age range for identification and evaluation of children with disabilities is greater (birth through 21), than the age range for providing a FAPE (3 through 21). One reason for the broader age requirement for the identification and evaluation is to enable states to be aware of and to plan for younger children who will require special education and related services.⁶⁴ The broader age range for identification and evaluation also ties in with the full educational opportunity goal requirement that has the same birth through 21 age range.⁶⁵

The language of the IDEA requires that the education of a child with a disability must be tailored to the unique needs of the child by means of an individualized education program. However, it provides no express standard prescribing the level of education necessary to achieve a FAPE.⁶⁶

The United States Supreme Court defined an appropriate education as one specially designed to meet the unique needs of the child with a disability, reasonably calculated to enable the child to receive educational benefits, and provided at public expense.⁶⁷ The Rowley Court refused to establish any one test for determining the adequacy of educational benefits under the IDEA.⁶⁸ However, the Court specifically rejected the idea that the definition of FAPE requires states to maximize the potential of each child with a disability.⁶⁹ The question of how much benefit is enough has been addressed by lower

⁶². Id.

⁶³. 20 U.S.C. § 1412(1), (2)(B) (Supp. 1994); 34 C.F.R. §§ 300.121 -.122 (1993). The age of eligibility is 3-18 in all states, and 3-21 in states if consistent with state law or practice. The age of eligibility in Washington is 3-21. 20 U.S.C. §§ 1471 et. seq., makes grants available to states to provide early intervention services for infants and toddlers (birth to two years) with disabilities and their families.

⁶⁴. 34 C.F.R. § 300.300, note 3 (1993).

⁶⁵. Id.

⁶⁶. 20 U.S.C. §§ 1412(4), 1413(a)(1) (1990 & Supp. 1994); 34 C.F.R. § 300.130 (1993).

⁶⁷. Hendrick Hudson School Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-207 (1982).

⁶⁸. Rowley, at 202.

⁶⁹. Rowley, at 199.

federal courts which have found that the purpose of the IDEA is to offer to children with disabilities more than a trivial amount of educational benefit.⁷⁰

The Rowley Court cautioned that courts must avoid imposing their view of preferable educational methods upon the states.⁷¹ The Court found that Congress, when fashioning the IDEA, left questions of methodology to the state and local districts in cooperation with the parents or guardians of the child.⁷²

Several federal appellate courts have recognized that when determining a FAPE for a child with a disability, significant cost can be among the factors considered, but cannot be the controlling factor.⁷³ Courts have been consistent in ruling that school districts can select the least expensive program for a child with disabilities when deciding between two or more alternatives that are all considered appropriate placements.⁷⁴ The

⁷⁰. See, Polk v. Central Susquehanna Intermediate Unit 15, 853 F.2d 171 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989). An appropriate education requires more than a trivial educational benefit; JSK by and Through JK v. Hendry County School Bd., 941 F.2d 1563 (Fla. 1991). A trifle might not represent adequate benefits, however, maximum improvement is never required.

⁷¹. Rowley, at 207.

⁷². Id.

⁷³. Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), cert. denied, 464 U.S. 864 (1983). The court held that where there is no educational benefit to be gained by placing a severely disabled child in the regular classroom, the costs of the regular versus segregated settings could be weighed in making placement decisions; A.W. v. Northwest R-1 School Dist., 813 F.2d 158 (8th Cir. 1987). The court held that costs of alternative placements could be considered where the child in question would only benefit marginally from the more expensive placement in the regular classroom; Clevenger v. Oak Ridge School Bd., 744 F.2d 514 (6th Cir. 1984), and Nelson v. Southfield Pub. School, 384 N.W.2d 423 (Mich. App. 1986). Cost cannot be the controlling factor in determining whether a placement is appropriate, the primary consideration must be given to the educational benefits that will accrue to the child.

⁷⁴. Clevenger v. Oak Ridge School Bd., 744 F.2d 514 (Tenn. 1984). Cost considerations can be a legitimate consideration when devising an appropriate program for individual students. Cost considerations when devising appropriate programs for individual handicapped students are only relevant when choosing between several options, all of which offer "appropriate" education; Stacey G. by William and Jane G. v. Pasadena Independent School Dist., 547 F.Supp. 61 (D.C.Tex. 1982). Competing interests of the personal and unique needs of the individual and handicapped child and realities of limited funding and necessity of assisting in education of all handicapped children must be considered by District Court in analyzing what is a FAPE; Barnett by Barnett v. Fairfax County School Bd., 927 F.2d 146 (C.A.4 (Va.) 1991), cert. denied 112 S.Ct. 175 (1991). Although the school board should not make placement decisions on the basis of financial considerations alone, a FAPE does not mean the best possible education that a school could provide if given access to unlimited funds. Congress intended states to balance competing interests of economic necessity on the one hand, and the special needs of the handicapped child, on the other when making education placement decisions.

courts have emphasized, however, that an inappropriate placement cannot be justified simply because the program that addresses the child's needs would be too expensive.⁷⁵

5. Least restrictive environment

The state must assure that, to the maximum extent appropriate, children with disabilities, are educated with children without disabilities.⁷⁶ However, the state must also assure the availability of a continuum of alternative placements.⁷⁷

The general trend of the courts is to first look at whether the child can be satisfactorily educated in regular classes with the use of supplementary aids and services. Lower federal courts have consistently looked at four factors to determine whether a placement outside the regular classroom setting is appropriate under the IDEA: (1) the academic benefits of the alternative placements; (2) the nonacademic benefits (e.g., social, behavioral) to the child of the interaction with children without disabilities; (3) the impact of the presence of the child with a disability on the teacher and the other children in the regular classroom; and (4) the cost of supplementary aids and services necessary to mainstream the child with a disability in a regular classroom setting.⁷⁸ The school district carries the burden of showing that its placement decisions satisfy the requirement of least restrictive environment.⁷⁹

⁷⁵. Kerr Center Parents Assoc. v. Charles, 897 F.2d 1463 (9th Cir. 1990). Insufficient funds were appropriated by the state so that the state could not ensure children received FAPE. The financial responsibility for funding FAPE rests on the state. The state's receipt of federal funds for assistance in educating children with disabilities, pursuant to the IDEA, require the state to provide sufficient funds to cover full cost of their education, and state's budgetary constraints did not excuse the state from its obligations. In fulfilling its obligation to provide adequate funding of its special education programs the state is not forever wedded to their original statutory scheme; Hines v. Pitt County Bd. of Educ., 497 F.Supp. 403 (D.C.N.C. 1980). If sufficient funds were not available to finance all of services and programs needed, available funds must be expended equitably in such manner that no child was entirely excluded from publicly supported education consistent with his needs and ability to benefit therefrom.

⁷⁶. 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv) (1990 & Supp. 1994); 34 C.F.R. § 300.550 (1993).

⁷⁷. 20 U.S.C. § 1412(5)(B) (Supp. 1994); 34 C.F.R. § 300.551 (1993).

⁷⁸. See, Greer v. Rome City School Dist., 950 F.2d 688 (11th Cir. 1991); Board of Educ., Sacramento City Unified School Dist. v. Holland By and Through Holland, 786 F.Supp. 874 (E.D.Cal. 1992); Oberti by Oberti v. Board of Educ. of Borough of Clementon School Dist., 789 F.Supp. 1322 (D.N.J. 1992), 995 F.2d 1204 (C.A.3 (N.J.) 1993).

⁷⁹. See, Oberti by Oberti v. Board of Educ. of Borough of Clementon School Dist., 789 F.Supp. 1322 (D.N.J. 1992). IDEA creates a presumption in favor of including a disabled child in a regular classroom. The presumption requires the school district to offer convincing evidence, using the four factors, to rebut the presumption.

6. Due process

The state must establish specific due process procedures.⁸⁰ These procedures include free access for parents to examine all records relating to their child's identification, evaluation and placement; and written notice to parents before the school either initiates, changes, or refuses to initiate or change the child's identification, evaluation or placement.⁸¹

Additionally, parents have the right to a hearing before a neutral hearing examiner to challenge their child's identification, evaluation, placement or provision of services.⁸² The results of the hearing may be appealed by either party.⁸³ If the original hearing was held at the local level, an aggrieved party may appeal to the state educational agency (SEA).⁸⁴ Following an initial hearing or appellate review by the SEA, an aggrieved party has the right to bring a civil action based on the original complaint in either a state court or federal district court.⁸⁵

7. Confidentiality of information

The state must assure the protection of the confidentiality of any personally identifiable data, information, and records.⁸⁶ The state must provide sanctions to assure compliance by school districts with the confidentiality policies and procedures.⁸⁷

8. Personnel

The state must assure standards for special education and related services personnel.⁸⁸ Additionally, the state must provide for a system of personnel development to assure an adequate supply of qualified regular and special education personnel to meet the needs of children with disabilities.⁸⁹ The state must also make positive efforts to employ and

⁸⁰. 20 U.S.C. §§ 1412(5)(A), 1414(a)(7), 1415 (1990 & Supp. 1994); 34 C.F.R. §§ 300.131, 300.237, 300.501 (1993).

⁸¹. 20 U.S.C. § 1415(b)(1)(A), (C) (1990 & Supp. 1994); 34 C.F.R. § 300.502 (1993).

⁸². 20 U.S.C. § 1415(b) (1990 & Supp. 1994); 34 C.F.R. § 300.506 (1993).

⁸³. 20 U.S.C. § 1415(c),(e)(1990 & Supp. 1994); 34 C.F.R. § 300.509 (1993).

⁸⁴. 20 U.S.C. § 1415(c) (1990 & Supp. 1994); 34 C.F.R. § 300.510 (1993). In Washington State the SEA is the Office of the Superintendent of Public Instruction.

⁸⁵. 20 U.S.C. § 1415(e) (1990 & Supp. 1994); 34 C.F.R. § 300.511 (1993). The Act expressly confers federal jurisdiction without regard to the amount in controversy.

⁸⁶. 20 U.S.C. §§ 1412(2)(D), 1417(c) (1990 & Supp. 1994); 34 C.F.R. § 300.129 (1993).

⁸⁷. 20 U.S.C. §§ 1412(2)(D), 1417(c) (1990 & Supp 1994); 34 C.F.R. § 300.575 (1993).

⁸⁸. 20 U.S.C. §§ 1413(a)(3), (a)(14); 1414(a)(1)(C)(i) (Supp. 1994); 34 C.F.R. §§ 300.224, 300.380 - 300.382 (1993).

⁸⁹. Id.

advance in employment qualified individuals with disabilities in programs assisted under the IDEA.⁹⁰

9. Use of federal funds

The maximum federal funding a state can receive under the IDEA is determined by the actual number of its children receiving special education and related services multiplied by a factor based on the national average per pupil expenditure for public K-12 education (not just special education).⁹¹ However, for the purposes of receiving federal funds, the percentage of the student population that may be categorized as having a disability is capped at twelve percent.⁹² The amount a state receives will be prorated if the amount appropriated by Congress is insufficient to pay the full total that all states are entitled to receive.⁹³ However, there is a hold harmless provision; no state shall receive less than the amount it received under IDEA for children with disabilities aged 3-21 in the year 1977.⁹⁴

The federal dollars received under the IDEA may not be used to supplant other federal, state, or local funds that would have been expended for the education of children with disabilities, unless the state can provide clear and convincing evidence that all children with disabilities within the state have a FAPE available.⁹⁵ To meet the non-supplanting requirement, the same level of expenditures (total amount or average per capita amount) of state and local funds for the education of children with disabilities must be expended as in the preceding fiscal year, with allowances made for decreases in enrollment and major, long-term expenditures.⁹⁶

The IDEA specifically provides a state may not reduce medical and other assistance available, or alter eligibility under titles V (Maternal and Child Health) and XIX (Medicaid) of the Social Security Act (42 U.S.C. 701 et. seq., 1396 et seq.) with respect to the

⁹⁰. 20 U.S.C. § 1405 (Supp. 1994).

⁹¹. 20 U.S.C. § 1411(a)(1) (Supp. 1994); 34 C.F.R. § 300.701 (1993).

⁹². 20 U.S.C. § 1411(a)(5)(A) (Supp. 1994); 34 C.F.R. § 300.702 (1993).

⁹³. 20 U.S.C. § 1411(g)(1) (1990 & Supp. 1994); 34 C.F.R. § 300.703 (1993).

⁹⁴. 20 U.S.C. 1411(a)(1) (Supp. 1994); 34 C.F.R. § 300.704 (1993).

⁹⁵. 20 U.S.C. § 1413(a)(9) (Supp. 1994); 34 C.F.R. §§ 300.150, 300.230 (1993). States may not permit local school districts or regional educational consortiums to use IDEA funds to satisfy a financial commitment for services that would have been paid for by a health or other agency pursuant to policy or practice but for the fact that these services are now included in the IEPs of children with disabilities. 34 C.F.R. § 300.150 note (1993).

⁹⁶. 20 U.S.C. 1414(a)(2)(B) (Supp. 1994); 34 C.F.R. § 300.230 (1993).

provision of a FAPE for children with disabilities within the state.⁹⁷ However, the IDEA does call for cost-sharing between school districts and other social service agencies.⁹⁸

The IDEA prohibits the commingling of state and federal funds and requires that the Secretary of Education must have full access to state accounting records to assure fiscal propriety.⁹⁹

Of the total federal funds received, the state must distribute at least seventy-five percent to the local school districts or regional educational consortiums.¹⁰⁰ The local school districts or regional educational consortiums receive shares of the federal funds proportional to the percentage of the state's handicapped children that they serve.¹⁰¹ To receive such payments, the districts or consortiums must submit an application to the SEA.¹⁰² If a local school district elects not to apply, or fails to submit an application to the state that meets the requisite standards, the IDEA requires the state to use those funds to make a FAPE available to children residing in the area served by that local district.¹⁰³ If the state determines that a local school district is adequately providing a FAPE to all children with disabilities residing in the school district, the state may reallocate all or portions of the district's federal funds to other districts that are not adequately providing FAPE to all children with disabilities.¹⁰⁴

Of the total federal funds received, the state may retain up to twenty-five percent.¹⁰⁵ The state may use this money for administration, monitoring and complaint investigation, and direct services.¹⁰⁶ The state is further limited to five percent of the total amount of federal funds received under the Act, or \$450,000 (whichever is the greater amount) for administrative use.¹⁰⁷ The supplanting prohibition does not apply to funds that the state

⁹⁷. 20 U.S.C. § 1413(e) (Supp. 1994); 34 C.F.R. § 300.601 (1993).

⁹⁸. 20 U.S.C. § 1412(6)(Supp. 1994). Also, the 1988 amendments to the Medicare law prohibit the Health Care Financing Administration from denying Medicaid reimbursement to schools simply because a service is part of a disabled child's IEP. Medicare Catastrophic Coverage Act, Pub. L. 100-360, § 411, amending 42 U.S.C. § 1396b (Supp. 1994).

⁹⁹. 20 U.S.C. §§ 1413(a)(9)(A), 1413(a)(7) (1990 & Supp. 1994); 34 C.F.R. § 300.145 (1993).

¹⁰⁰. 20 U.S.C. § 1411(c)(1)(B) (1990 & Supp. 1994); 34 C.F.R. § 300.706(b) (1993).

¹⁰¹. 20 U.S.C. § 1411(d) (Supp. 1994); 34 C.F.R. § 300.707 (1993).

¹⁰². 20 U.S.C. § 1414(a) (Supp. 1994); 34 C.F.R. § 300.180 (1993). In Washington State the SEA is the Office of the Superintendent of Public Instruction.

¹⁰³. 20 U.S.C. §§ 1411(c)(4), 1414(d), 1412(6) (1990 & Supp. 1994); 34 C.F.R. § 300.145 (1993).

¹⁰⁴. 20 U.S.C. § 1414(e) (Supp. 1994); 34 C.F.R. § 300.708 (1993).

¹⁰⁵. 20 U.S.C. § 1411(c)(1)(A) (1990 & Supp. 1994); 34 C.F.R. § 300.706(a) (1993).

¹⁰⁶. 20 U.S.C. § 1411(b), (c) (1990 & Supp. 1994); 34 C.F.R. §§ 300.620 -621 (1993).

¹⁰⁷. 20 U.S.C. §§ 1411(b)(2)(A), 1411(c)(2)(A) (1990 & Supp. 1994); 34 C.F.R. §§ 300.620 -621 (1993).

retains.¹⁰⁸ When the state uses the retained funds to provide support or direct services the state must match the amount of federal funds expended on a program basis.¹⁰⁹

Federal funds received under the IDEA by the local districts or regional educational consortiums may only be used for the excess costs of providing special education and related services for children with disabilities.¹¹⁰ This means that federal funds can only be used for costs in excess of what the local district normally spends on the education of a child.¹¹¹

10. Private schools

The state must assure that each school district provides children with disabilities in private schools and facilities genuine opportunities to participate in special education and related services consistent with their needs.¹¹² The IDEA provides a by-pass if, in 1983, state law prohibited the state from providing for the participation of private school children with disabilities.¹¹³ When a by-pass is granted, the federal government contracts to provide services to children with disabilities in private schools.¹¹⁴ The cost of implementing a by-pass is deducted from the state's allocation of IDEA funds.¹¹⁵

When a school district or public state agency properly places a child with a disability in a private school for the purposes of providing a FAPE the placement is done at public expense.¹¹⁶ When the parents of a child with a disability place the child in a private school for the purposes of providing a FAPE the placement is not done at public expense, unless it is shown that the state failed to make a FAPE available.¹¹⁷ The IDEA does not require school districts to provide residential or private placement when the reason the child needs the services for non-educational reasons. However, some courts have sometimes found it

¹⁰⁸. 20 U.S.C. § 1411(c)(3) (1990 & Supp. 1994); 34 C.F.R. § 300.372 (1993).

¹⁰⁹. 20 U.S.C. § 1411(c)(2)(B) (1990 & Supp. 1994); 34 C.F.R. § 300.371 (1993).

¹¹⁰. 20 U.S.C. § 1414(a)(1),(a)(2)(B)(i) (Supp. 1994); 34 C.F.R. § 300.182 (1993).

¹¹¹. 20 U.S.C. § 1401(a)(21) (Supp. 1994).

¹¹². 20 U.S.C. §§ 1412(1),(6); 1413(a)(4) (Supp. 1994); 34 C.F.R. §§ 300.2(c), 300.401 (1993).

¹¹³. 20 U.S.C. § 1413(d)(1) (Supp. 1994); 34 C.F.R. § 300.480 (1993).

¹¹⁴. 20 U.S.C. § 1413(d)(2) (Supp. 1994); 34 C.F.R. § 300.481 (1993).

¹¹⁵. 34 C.F.R. § 300.481 (1993).

¹¹⁶. 20 U.S.C. § 1413(a)(4)(B) (1990 & Supp. 1994); 34 C.F.R. § 300.401 (1993).

¹¹⁷. 20 U.S.C. §§ 1412(2)(B), 1415 (1990 & Supp. 1994); 34 C.F.R. § 300.403 (1993). Recently the United States Supreme Court required a South Carolina school district to reimburse the parent of a learning-disabled child for the tuition paid to send the child to a private school, because the public school's proposed individualized educational program was inappropriate. Florence County School Dist. Four v. Carter By and Through Carter 114 S.Ct. 361 (1993).

impossible to separate the educational needs from the non-educational needs of some children with disabilities.¹¹⁸ The Act contains no exclusions for high costs of the placement.

11. Recordkeeping and reporting

The state must provide for keeping records and reporting to the Secretary.¹¹⁹ The data that must be kept includes:

- a. The number and type of personnel employed that provide special education and related services, by profession or discipline.¹²⁰ This count can include regular education teachers who deliver special education and related services.
- b. The number of children with disabilities, by age groups, receiving special education and related services, within each of the disability categories.¹²¹

¹¹⁸. North v. District of Columbia Bd. of Educ., 471 F.Supp. 136 (D. D.C. 1979). Social, emotional, medical and educational problems are so intertwined that realistically it is not possible for the court to separate them. The court found that the district was responsible for the room and board and non-medical expenses of the residential placement; Kruelle v. New Castle County School Dist., 642 F.2d 687 (3rd Cir. 1981). The unseverability of needs provides the basis for holding that residential services are essential prerequisites for learning.

¹¹⁹. 20 U.S.C. § 1413(7)(B) (1009 & Supp. 1994).

¹²⁰. 20 U.S.C. § 1418(b)(1)(D) (Supp. 1994); 34 C.F.R. § 300.383(b)(i) (1993).

¹²¹. 20 U.S.C. §§ 1411(a)(3), (5)(A)(ii), 1418(b) (Supp. 1994); 34 C.F.R. §§ 300.750, 300.751 (1993). The report is solely for the purpose of allocating the federal funds provided under IDEA. The population of children the state may count for allocation purposes may differ from the population of children to whom the state must make FAPE available. For example, while the number of children who may be counted for allocation purposes is limited to twelve percent of the general school population aged 3-21, a state might find that a greater percentage of its children have disabilities. In that case, the state must make FAPE available to all of those children with disabilities, even though the state will receive IDEA funds for only a portion of those children.

12. Advisory panel

The state must provide for an advisory panel appointed by the governor and comprised of individuals with disabilities, parents, educators, and administrators.¹²² This panel advises the state educational agency of needs of children with disabilities within the state and comments publicly on proposed state regulations.¹²³ The advisory panel also provides information and evaluations for the state agency.¹²⁴

13. Transition services

The state must provide the services necessary for a smooth transition for infants and toddlers with disabilities participating in the early intervention program moving to programs in the K-12 education system, and for children with disabilities moving from the K-12 education system to post-school activities.¹²⁵ Transition services to post-school activities must be included in the child's IEP, beginning no later than age 16.¹²⁶

14. Evaluation and assurance of compliance

At least annually, the educational programs must be evaluated for their effectiveness in meeting the needs of children with disabilities.¹²⁷ The state may determine the procedures and standards for the evaluation.¹²⁸ The standard most states use to evaluate the programs is whether the program complies with the federal requirements.¹²⁹

At the federal level, the Office of Special Education and Rehabilitative Services of the United States Department of Education monitors compliance with the IDEA requirements.¹³⁰ At the state level, the Office of Superintendent of Public Instruction monitors compliance of programs, evaluates the effectiveness of programs, and resolves complaints.¹³¹

¹²². 20 U.S.C. § 1413(a)(12) (1990 & Supp. 1994); 34 C.F.R. §§ 300.650 -.651 (1993).

¹²³. 20 U.S.C. § 1413(12)(A),(B) (1990 & Supp. 1994); 34 C.F.R. § 300.652(a)(b) (1993). In Washington State the SEA is the Office of the Superintendent of Public Instruction.

¹²⁴. 20 U.S.C. § 1413(12)(C) (1990 & Supp. 1994); 34 C.F.R. § 300.652(c) (1993).

¹²⁵. 20 U.S.C. §§ 1401(a)(19), 1413(a)(15) (Supp. 1994); 34 C.F.R. §§ 300.18, 300.346 (1993).

¹²⁶. 20 U.S.C. § 1401(a)(20) (Supp. 1994); 34 C.F.R. § 300.346 (1993).

¹²⁷. 20 U.S.C. § 1413(11) (Supp. 1994); 34 C.F.R. § 300.146 (1993).

¹²⁸. Id.

¹²⁹. NSBA publication.

¹³⁰. 20 U.S.C. § 1402 (1990 & Supp. 1994).

¹³¹. 20 U.S.C. § 1412(6) (Supp. 1994); 34 C.F.R. § 300.600 (1993).

The IDEA provides that federal funds may be withheld for non-compliance and provides for judicial review.¹³² The federal funds that may be withheld include not only those funds available under the IDEA, but any federal funds available under other federal programs to the extent that such funds are available for the provision of assistance for the education of children with disabilities.¹³³

The IDEA is silent on the specific remedies available to individuals for violations of the statute, except that the court may award reasonable attorney fees to a prevailing parent.¹³⁴ The IDEA grants broad discretion to the court to award relief it determines appropriate.¹³⁵ The following are some of the remedies that courts have found to be appropriate.

a. Reimbursement

Non-compliance with the IDEA requirements may result in reimbursement of tuition and expenses of alternative placement of a child with a disability.¹³⁶

b. Compensatory education

Non-compliance with the IDEA requirements may result in the provision of compensatory education (e.g. education that the child with a disability did not receive because the requirements of the IDEA were not met).¹³⁷

¹³². 20 U.S.C. §§ 1414(b)(2)(A)(ii), 1416 (1990 & Supp. 1994); 34 C.F.R. § 300.587 (1993).

¹³³. 20 U.S.C. § 1416(a)(2)(B) (Supp. 1994).

¹³⁴. 20 U.S.C. § 1415(e)(4)(B) (Supp. 1994); 34 C.F.R. § 300.515 (1993).

¹³⁵. 20 U.S.C. § 1415(e)(2) (1990 & Supp. 1994).

¹³⁶. See, Florence County School Dist. Four v. Carter By and Through Carter, 114 S.Ct. 361 (1993). The United States Supreme Court required a South Carolina school district to reimburse the parent of a learning-disabled child for the tuition paid to send the child to a private school, because the public school's proposed individualized educational program was inappropriate; W.G. v. Board of Trustees of Target Range School Dist., 789 F.Supp. 1070, aff'd, 960 F.2d 1479 (1991). School district failed to provide free, appropriate education to a child with significant, specific learning disability, and the court required the school district to reimburse the parents for the appropriate education they obtained; Kerr Center Parents Assoc. v. Charles, 897 F.2d 1463 (C.A. 9 (Or. 1990). The Oregon federal court required the state to reimburse the school district for the tuition paid to send mentally retarded children to a private facility; Rapid City School Dist. v. Vahle, 922 F.2d 476 (S.D. 1990). School district had to reimburse parents for the costs of a disabled child's private placement, when the school district had been notified of parent's dissatisfaction with the child's placement provided by the school, but the school failed to promptly address the parent's concerns; Tice By and Through Tice v. Botetourt County School Bd., 908 F.2d 1200 (Va. 1990). Reimbursement of special education expenses is appropriate when the public school's placement is not providing the child with a free appropriate education.

¹³⁷. See, Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3rd. Cir. 1990), cert. denied, 111 S.Ct. 1317 (1991). Court awarded two and one-half years of compensatory education beyond age 21 to a profoundly retarded student to remedy the identical period of inappropriate placement; Murphy By and Through Murphy v. Timberline Regional School Dist., 819 F.Supp. 1127 (D.N.H. 1993). Compensatory education awarded when school district had failed to provide an appropriate education to a disabled student several years previously; Straube v. Florida Union Free School Dist., 801 F.Supp. 1164 (S.D.N.Y. 1992). A dyslexic student who was not provided a free appropriate public education could be awarded compensatory remedial education beyond the age of 21, but not college tuition.

C. REHABILITATION ACT OF 1973 (SECTION 504)¹³⁸

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in all programs or activities of any entity, including school systems, receiving federal financial assistance.¹³⁹ It does not contain a specific education provision, nor does it provide funding for the education of children with disabilities.¹⁴⁰ However, the Office of Civil Rights of the Department of Education has promulgated regulations under Section 504 that specifically addresses the education of children with disabilities.¹⁴¹

Section 504 applies to a broader student population than the population addressed by the IDEA. The IDEA requirements apply only to states receiving financial assistance under the IDEA. Section 504 applies to any program or activity receiving **any** federal financial assistance. Additionally, Section 504 defines "disability" and "free appropriate public education" in broader terms than the IDEA. Therefore, Section 504 may provide additional rights for special education students, and for students who do not qualify as special education students but who have disabilities, and may impose additional duties on school districts.¹⁴²

1. Identification and Evaluation

School districts that receive federal funds must annually identify and locate all children with disabilities who are not receiving a public education, and must notify those children and their parents or guardians of the school district's duty.¹⁴³ Under Section 504 a child with a disability means any child between the ages of three and twenty-one who: (1) has a physical or mental impairment that **substantially** limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.¹⁴⁴ Major life activities include learning.¹⁴⁵ It is not necessary for a child to need special education in order to be considered as having a disability under Section 504.

The school district must evaluate any child with a disability believed to need special education or related services before making an initial placement and before making any significant change in placement.¹⁴⁶ The district must assure that tests and other evaluation

¹³⁸. 29 U.S.C. § 794 (Supp. 1994); The Office of Civil Rights of the Department of Education regulations that correlate with Section 504 are found in 34 C.F.R. § 104 (1993).

¹³⁹. 29 U.S.C. § 794(a) (Supp. 1994); 34 C.F.R. §§ 104.1, 104.(a) (1993).

¹⁴⁰. The regulations contain a specific subpart addressing education. See, 34 C.F.R. § 104.31 -.38 (1993).

¹⁴¹. 34 C.F.R. § 104 (1993).

¹⁴². Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 (Supp. 1994); The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, et. seq. (Supp. 1994); and Section 1983 of the Civil Rights Act of 1871 (Section 1983), 42 U.S.C. § 1983 (1990 & Supp. 1994).

¹⁴³. 34 C.F.R. § 104.32 (1993).

¹⁴⁴. 34 C.F.R. § 104.3(j) (1993).

¹⁴⁵. 34 C.F.R. § 104.3(j)(2)(ii), (k)(2) (1993).

¹⁴⁶. 34 C.F.R. § 104.35(a) (1993).

materials are tailored to assess educational need and are not based solely on IQ scores.¹⁴⁷ The evaluation must reflect aptitude or achievement, and not merely reflect the child's impaired sensory, manual or speaking skills.¹⁴⁸ Section 504 does not specifically require certain persons to participate in the evaluation meetings. Instead it provides a broader standard that placement be determined by a group of persons who are knowledgeable of the child, the meaning of the evaluation data, and the placement options.¹⁴⁹ Reevaluations must be made periodically, but Section 504 does not specify a timeline.¹⁵⁰ Section 504 does not provide the right to an independent evaluation at public expense.

2. Free appropriate public education

The school district must provide students with disabilities a free appropriate education (FAPE).¹⁵¹ The term FAPE has different meanings under the IDEA and Section 504 regulations. Under the IDEA, an appropriate education must be reasonably calculated to confer an educational benefit.¹⁵² Under Section 504 regulations, an appropriate education must be designed to meet the individual educational needs of a child with a disability as adequately as the needs of children without disabilities are met.¹⁵³

3. Individualized education program

Section 504 does not require an IEP, nor does it require the development of long-term goals or short-term objectives. However, Section 504 regulations provide that when an

¹⁴⁷. 34 C.F.R. § 104.35(b) (1993).

¹⁴⁸. 34 C.F.R. § 104.35(b) (1993).

¹⁴⁹. 34 C.F.R. § 104.35(c)(3) (1993).

¹⁵⁰. 34 C.F.R. § 104.35(d) (1993).

¹⁵¹. 34 C.F.R. § 104.33 (1993).

¹⁵². Hendrick Hudson School Dist., Bd. of Educ. v. Rowley, 458 U.S. 176, 206-207 (1982).

¹⁵³. 34 C.F.R. §§ 104.4(b)(2), 104.33(b)(1)(i) (1993).

IEP is implemented, in accordance with the IDEA, the school district has complied with the FAPE requirement.¹⁵⁴

4. Least restrictive environment

School districts must educate a child with a disability with children without disabilities to the maximum extent appropriate to the needs of the child with a disability.¹⁵⁵ In order to remove a child with a disability from the regular educational environment, the district must demonstrate that educating the child in the regular environment with the use of supplementary aids and services cannot be satisfactorily achieved.¹⁵⁶

5. Due process

School districts must implement procedural safeguards for the identification, evaluation, or educational placement of children with disabilities.¹⁵⁷ Parents or guardians must be notified of any evaluation or placement actions, and must be allowed to examine the relevant student records.¹⁵⁸ If parents or guardians disagree with the school's decisions, they must be afforded an impartial hearing with an opportunity for participation and representation by counsel.¹⁵⁹ A review procedure must be available to parents or guardians who disagree with the decision at the first hearing.¹⁶⁰

6. Private schools

Residential placement must be provided at no cost to the parent if necessary to provide a FAPE.¹⁶¹ If the school district has made a FAPE that conforms to the requirements of Section 504 available to a student with a disability, but the parent chooses to place the child elsewhere, the district is not responsible for any costs incurred by such placement.¹⁶²

¹⁵⁴. 34 C.F.R. 104.33(b)(2) (1993).

¹⁵⁵. 34 C.F.R. § 104.34 (1993).

¹⁵⁶. 34 C.F.R. 104.34 (1993).

¹⁵⁷. 34 C.F.R. § 104.36 (1993).

¹⁵⁸. Id.

¹⁵⁹. Id.

¹⁶⁰. Id.

¹⁶¹. 34 C.F.R. § 104.33(c)(3) (1993).

¹⁶². 34 C.F.R. § 104.33(c)(4) (1993).

7. Evaluation and assurance of compliance

The U.S. Department of Education monitors compliance of Section 504 through the Office for Civil Rights (OCR) of the Department of Education, at the federal and the state level.¹⁶³ The Office of Superintendent of Public Instruction has no complaint resolution or monitoring involvement of Section 504.

Section 504 regulations provide that the OCR has broad discretion to take such remedial action as necessary to overcome the effects of the discrimination.¹⁶⁴ Non-compliance with Section 504 requirements has resulted in the withdrawal of federal financial assistance from the entity responsible for the discrimination.¹⁶⁵

The statute authorizes specific remedies available to individuals for violations of the statute. Those remedies are the same as those provided under Title VI of the Civil Rights Act of 1964, including reasonable attorney fees.¹⁶⁶ The following are some of the remedies that some courts have awarded:

a. Reimbursement

Non-compliance with Section 504 requirements may result in reimbursement to parents for tuition and expenses of alternative placement of the student with a disability when a FAPE is not available.¹⁶⁷

b. Money damages

Non-compliance with Section 504 requirements may result in the payment of money damages. The lower federal courts differ on the authorization of such relief. One court has found money damages an appropriate remedy.¹⁶⁸ Other courts have

¹⁶³. 34 C.F.R. § 104.6 (1993).

¹⁶⁴. 34 C.F.R. 104.6(a) (1993).

¹⁶⁵. See, Freeman v. Cavazos, 939 F.2d 1527 (C.A.11 1991). Federal funding of a school district was terminated for failure to cooperate in an investigation into complaints of discrimination in services to disabled students.

¹⁶⁶. 29 U.S.C. 794(a) (1990 & Supp. 1994). Title VI prohibits discrimination based on race, color, or national origin in programs or activities that are federally funded (see, 42 U.S.C. §§ 2000d et. seq.).

¹⁶⁷. David H. v. Spring Branch Indep. School Dist., 569 F.Supp. 1324 (1983). Tuition reimbursement awarded to the parents of a learning disabled child; Hurry v. Jones, 560 F.Supp. 500 (1983), aff'd in part, rev'd in part on other grounds 734 F.2d 879 (1983). Transportation reimbursement awarded to the parents of a physically and mentally disabled child; Gregg B. v. Board of Educ. of Lawrence School Dist., 535 F.Supp. 1333 (1982). Tuition reimbursement awarded to the parents of an emotionally disabled child.

¹⁶⁸. Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982). Money damages awarded to emotionally and learning disabled student for violation of her right to a full and adequate educational opportunities because of her disabilities.

disapproved of such an award.¹⁶⁹ The issue of damages under Section 504 has not been addressed by the United States Supreme Court.

***D. TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1991 (ADA)*¹⁷⁰**

Section 504 of the Rehabilitation Act of 1973 was the precursor to the Americans with Disabilities Act of 1991. The general prohibition on discrimination and the definition of disability is stated in terms essentially similar to those used in Section 504. However, Title II of the ADA differs from Section 504 in that it applies to a broader student population than Section 504. Section 504's prohibition on discrimination applies only to entities receiving federal funds for programs or activities. Title II of the ADA's prohibition on discrimination applies to any state or local government, including all school districts.

Eight designated Federal agencies, including the Office for Civil Rights (OCR) has the authority to investigate the ADA complaints. The ADA provides the same remedies as those provided under Section 504, including reasonable attorney fees.¹⁷¹

***E. CIVIL RIGHTS ACT OF 1871 (SECTION 1983)*¹⁷²**

Section 1983 of the Civil Rights Act of 1871 is neither a special education funding statute nor an anti-discrimination statute. Section 1983 provides a legal cause of action when a state or local government employee, acting in their official capacity, violates a person's constitutional or legal rights.¹⁷³ Both the IDEA and Section 504 could be enforced through a Section 1983 claim.

¹⁶⁹. Carter v. Orleans Parish Public Schools, 725 F.2d. 261 (1984). Parent of children placed in mentally disabled educational programs denied award of general damages for misplacement in special education program; Mark R. v. Board of Educ., Bremen Community High School Dist. No. 228, 546 F.Supp. 1027, affirmed, 705 F.2d 462 (1982). Parents of a severe behavioral disabled student denied award of tort liability damages for alleged willful failure to provide the child with a free appropriate public education; William S. v. Gill, 536 F.Supp. 505 (1982). Student with multiple disabilities denied an award of general damages.

¹⁷⁰. 42 U.S.C. 12101, et. seq. (Supp. 1994); the Department of Education has not promulgated regulations that correlate with the ADA.

¹⁷¹. 42 U.S.C. § 12117 (Supp. 1994).

¹⁷². 42 U.S.C. § 1983 (1990 & Supp. 1994).

¹⁷³. Id.