

Paolo Annino J.D., PhD
Glass Professor of
Public Interest Law
Florida State University
College of Law
pannino@law.fsu.edu

June 30, 2015

Video Training on Special Education Law: Outline

Six Part Training:

1. What is the Individuals with Disabilities Education Act (IDEA)?
2. Why are Evaluations Key to Special Education Law?
3. What is an Individual Education Program (IEP)?
4. How to Advocate at an IEP Meeting?
5. What are the Disciplinary Rules for Children in Special Education Programs?
6. What is the Appeal Process for IDEA and what other Federal and State Laws apply to Children with Special Needs?

Part 1: What is the Individuals with Disabilities Education Act (IDEA)?

The goal of Part 1 is to understand the history and goal of IDEA: 20 USC Section 1400.

A. Foster care children with disabilities need your help to advocate for educational services.

- a. Almost half of all children in the foster care system have a disability.
- b. Over half of all children in the foster care system are not functioning in the appropriate grade level.
- c. Over half of all children in foster care change schools at least once in a school year.

B. The history of IDEA:

- a. Prior to 1975, over a million students with disabilities were excluded from the public school systems. 20 USC 1400(c)(2)
- b. Congress passed IDEA to open the school house doors for children with disabilities.

C. The goal of IDEA is to provide each qualified child with a disability a free and appropriate public education (FAPE). 20 USC 1401(9)

- a. No bright line test to determine FAPE.

- b. Minimum requirement: school district must allow a child (ages: 3 through 21) in schoolhouse. FAC 6A-6.03028
- c. Child must receive “some benefit” in the school house.
- d. FAPE is an education in the Least Restrictive Environment. Section 1003.57(1) (e), Fla. Stat.
- e. FAPE: the degree and quality of educational “benefit” the child must receive in school is determined case by case.
- f. FAPE requirement does not mandate a maximum educational benefit.
- g. FAPE provides for the child’s unique needs.

See, Board of Education v. Rowley, 458 U.S. 176 (1982) (FAPE mandates “some benefit” in the schoolhouse.); *Jefferson County Bd. of Educ. V. Lolita S.*, 581 Fed. Appx. 760 (2014) (FAPE is “reasonably calculated to enable the child to receive educational benefits.”); *De Kalb County School Dist. v. MTV*, 164 Fed. Appx. 900 (2006) (“poor academic performance” not required to establish the failure to provide FAPE); *JSK v. Hendry County*, 941 F2d 1563 (11th. Circ. 1991) (No universal measure of FAPE, must be “meaningful”); *M.H. v. Nassau County School Bd.*, 918 So.2d 316 (Fla 1st DCA 2005).

Part 2: Why are Evaluations Key to Special Education Law?

The goal of Part 2 is to understand the many roles evaluations play in the special education process.

A. Evaluations are the motors of the special education process:

- a. Evaluations determine eligibility to IDEA: 1) Must fit into one of the categorical listings of disabilities. E.g. FAC 6A-6.03011 and; 2) The child's disability "adversely affects" his or her educational performance. 34 CFR300.8(c)(9)(ii)
- b. Identify the child's unique needs.
- c. Evaluations are the basis to create the child's IEP and its subparts: Present Level of Performance, Placement/program, Related Services, Goals, Accommodations, etc.
- d. Evaluations justify The Ask at the IEP meeting.

B. There are a myriad of different types of Evaluations:

- a. Speech therapy evaluations.
- b. Occupational therapy.
- c. Physical therapy.
- d. Intellectual evaluations.
 - i. Aptitude tests: measure innate intelligence/talent.
 1. Wechsler Intelligence Scale for Children.

2. Stanford-Binet Intelligence Scale.

3. Test for Nonverbal intelligence (TONI).

ii. Achievement Tests: measure grade levels, how much information the child has mastered.

1. Woodcock Johnson Achievement Test, etc.

iii. Behavior tests:

1. Vineland Adaptive Behavior Scales.

e. No limit on scientifically accepted types of evaluations that can be used to capture the child's unique needs. FAC 6A-6.0331(5)

C. Typical Problems with Evaluations:

- a. School district failed to perform formal evaluation on the child. School based its evaluation solely on the observations of the school personnel.
- b. The school evaluation is outdated: more than 3 years old.
- c. School performed an inadequate evaluation or the wrong evaluation.
- d. Parents erred and failed to consent to evaluation.

D. Timeframe for evaluations:

- a. Initial evaluations within 60 days of parent's consent. FAC 6A-6.0331(3)(g).

- b. At least every three years:
 - i. Never waive the three year evaluation; every child changes and evaluations can capture that change. FAC 6A-6.0331(7) (b).
- c. Re-evaluations: at any time when justified. School district has a reasonable period to complete re-evaluation after parent's consent.

E. Independent Education Evaluation (IEE):

- a. Parents have a right to IEE. FAC 6A-6.0331(6).
- b. Parents have the burden to show that school district's evaluation is inadequate.
- c. Parents notify the school that the school evaluation is inadequate, obtain their own independent evaluation, and send invoice to the school district.
- d. After receiving the invoice for the IEE, the school may either pay for the IEE or file an administrative appeal to DOAH challenging the parent's claim that the school's evaluation is inadequate.

F. Sources of evaluations:

- a. School district orders a particular evaluation.

- b. Collect existing DCF/Foster Care/CBC assessments/evaluations.
- c. Collect existing competency evaluations from juvenile delinquency cases.
- d. Social security evaluations: SSI evaluations.
- e. Construct: parent pays for private evaluation; foster care court or CBC orders an evaluation etc.

See, G.J. v. Muscogee County School Dist., 668 F3d 1258 (11th Cir. 2012) (right to re-evaluation at least every three years, except if waived; parent can't obtain IEE without allowing the school board to obtain a re-evaluation); *M.T.V. v. DeKalb County School Dist.*, 446 F.3d 1153 (11th Cir. 2006)(School District entitled to re-evaluation based on evaluator of its choice); *Jefferson County Bd. of Education v. Lolita S.*, 581 Fed. Appx. 760 (2014) (Parent can obtain IEE if they disagree with school's evaluation).

20 U.S.C. §1415(a)-(b)

20 U.S.C. §1414(a)(2)(B)(ii)

34 CFR 300.531-300.532

34 CFR 300.502

Part 3: What is an Individual Education Program (IEP)?

The goal of Part 3 is to understand the distinct parts of an IEP and the makeup and role of the IEP team.

A. The IEP document embodies a FAPE for a particular child.

B. IEP document consists of five basic parts:

- a. Present Level of Performance: based on the results of evaluations. What grade level is the child performing at? What would you tell a summer counselor about the status of the child? FAC 6A-6.03028(3) (h).
- b. Goals: they should be concrete, measureable, and reliable.
- c. Program/Placement: form/type of instructional services.
- d. Least Restrictive Environment: mainstreaming, inclusion requirement.
- e. Related Services: unlimited, whatever service a child needs to obtain a FAPE, e.g. speech therapy, counseling, tutoring, etc.
- f. IEP Team: Each member is equal, non-hierarchical decision making.
- g. Membership: parent, school administrator, special education teacher, etc. FAC 6A-6.03028(3)(c).

- h. Educational surrogate: must be appointed by Foster Care Court or school district. Section 39.0016(1)(c) and Section 39.0016(3)(b), Fla. Stat.; Rule 8.292, Florida Rules of Juvenile Procedure.
- i. Decision-making based on dialogue, personal experience, and evaluations.
- j. Implicit pledge of good faith that all members of the IEP team focus solely on the needs of the child.

C. IEP Timeframe:

- a. At least once a year. FAC 6A-6.03028(3)(j)(1)
- b. IEP can be amended during the school year.
- c. Parents are provided periodic report cards showing the child's progress in meeting his/her Goals. FAC 6A-6.03028(3)(h)(7)

For discussion of Related Services, see:

DeKalb County School Dist. v. MTV, 164 Fed Appx 900 (2006)(Related services: vision therapy services); *M.M. ex rel. C.M. v. School Bd. of Miami-Dade*, 437 F.3d 1085 (11th Cir. 2006)(Related services: no right to select among alternative related services); *Donald B. v. Board of School*, 117 F.3d 1371 (11th Cir. 1997) (Related services: transportation. Related services must be necessary to benefit from special education); *Cedar Rapids*

Community School Dist. v. Garret et al, 527 U.S. 66 (1999) (Related Services: continuous nursing services is a related service for quadriplegic student).

Related Service: 20 USC §1401(26)

For discussion of IEP amendment process, see:

K.A. ex rel F.A. v. Fulton County School Dist., 741 F3d 1195 (11th Cir. 2013)(amendments within the one year period can happen if the entire IEP team meets or if the parents agree).

For discussion of procedural violations of the IEP process, see:

K.A. ex rel F.A. v. Fulton County School Dist., 741 F3d 1195 (11th Cir. 2013)(violations of any of the procedures of the IDEA is not a per se violation, must show prejudice).

34 CFR 300.505 (a)

34 CFR 300.504 (a)

For discussion of LRE, see:

A.K. v. Gwinnett County School Dist., 556 Fed. Appx. 790 (2014)(LRE and FAPE are linked: whether the IEP was reasonably calculated to enable the child to receive educational benefit in the least restrictive environment?)

20 USC 1412 (a)(5)(A)

For discussion of the process of making an IEP, see:

R.L. v. Miami-Dade School Bd., 757 F.3d 1173 (11th Cir. 2014)(school district cannot come into IEP meeting with closed mind).

For discussion of placement, see:

R.L. v. Miami-Dade School Bd., 757 F.3d 1173 (11th Cir. 2014), n.8. (placement does not mean a particular school, but type of educational setting)

For discussion of transition assessment, services, goals, see:

Jefferson County Bd. of Educ. v. Lolita S., 581 Fed. Appx. 760 (2014)(no later than 16 years old, IEP must provide transition goals, transition assessments, and transition services).

For discussion of IEP Goals, see:

Jefferson County Bd. of Educ. v. Lolita S., 581 Fed. Appx. 760 (2014)(goals must address the child's individual needs).

Part 4: How to advocate at IEP Meeting?

The goal of part 4 is to discuss how to advocate at an IEP Meeting.

- A. Preparation, Preparation, Preparation. The performance at an IEP meeting is like the tip of the iceberg, the bulk of the iceberg is below the water; the preparation is the bulk of the iceberg.

B. The Ask: what are you asking for?

- a. Don't go to an IEP until you know what you are asking for.
- b. Are you asking for:
 - i. A new placement.
 - ii. Related Services.
 - 1. Frequency.
 - 2. Group or individual therapy.
 - iii. New Goals.

C. Draft one page IEP memo: Bullet point format.

- a. Not a legal brief.
- b. It clearly states your Ask.
- c. Make twenty copies, hand out at beginning of IEP meeting.
- d. Make sure to include your name, contact information, and date of the IEP.

D. IEP meeting advocacy tips:

- a. Do not go alone. Otherwise you will be surrounded by school employees.
- b. In most cases, your client, the child, should be present. It will help the team to focus on the concrete child's unique needs.
 - i. Exception: if discussion will be traumatic to the child.

- c. Sit next to child and parent. Give clients legal pads to write notes.
- d. Arrive at IEP meeting early and shake hands. The goal is to reach an agreement, not an impasse.
- e. An advocate is not a potted plant.
- f. Be polite and considerate, but assertive.
- g. A combative attitude won't bring about an agreement.
- h. Ask questions, especially to the teachers. Your natural ally is the child's schoolteacher.
- i. Ask teacher questions that strengthen your argument.
- j. You need to justify everything you ask for: evaluations.
- k. Time-out: IEP is a dynamic process. Go into hallway with client to discuss options or to take a break from unproductive discussions.
- l. IEP document: You should read it slowly and carefully before you sign it.
- m. At the end of IEP meeting, you should sign the IEP, but write that you don't agree it provides a FAPE, if you are not satisfied with any section of the IEP.

- n. If the school proposes a draft IEP or a new evaluation, need to review before the IEP meeting.
- o. If the first time you are seeing a complex evaluation is at an IEP meeting, ask for a continuance.
- p. Always walk out at the end of the IEP meeting with a signed copy.

For discussion of the IEP meeting process, see:

R.L. v. Miami-Dade School Bd., 757 F.3d 1173 (11th Cir. 2014)(state cannot come into the IEP meeting with a closed mind: parents must have meaningful opportunity to fully participate as members of the IEP team).

Part 5: What are the disciplinary rules for children in a special education program?

The goal is Part 5 is to understand the disciplinary rules for children in special education programs.

A. Many foster children enter school with a high level of stressors from:

- a) Backgrounds of abuse, neglect, or abandonment.
- b) New foster homes/group homes.
- c) New schools.
- d) The children miss their families.
- e) Most foster children are behind a grade level.

B. The disciplinary rules are different for students in special education.

a) Before 1975, 1 million students with disabilities were not allowed into the schoolhouses. 20 USC 1400(c)(2)

b) And the students with disabilities who were allowed in the schoolhouse were routinely expelled based on behavior that was a result of their disabilities.

C. Ten day rule: if a child with a disability is expelled for less than ten days, the child is treated no differently than a non-disabled child for the purposes of discipline. FAC 6A-6.03312(2)(a)

i. The ten days can be pattern of short suspensions or a consecutive term of more than ten days. FAC 6A-6.03312(1)(a)(1)

ii. Suspended = less than ten days, expulsion = more than ten days.

D. Manifestation Rule:

i. Expelled more than ten days. FAC 6A-6.03312(1)(a)(1)

ii. Only applies to special education children.

iii. If the behavior at issue is a direct result of the child's disability, then the behavior is a manifestation of the child's disability and the child cannot be expelled.

- iv. If the behavior at issue is a direct result of the school district's failure to implement the IEP, the child cannot be expelled.
- v. If the school district finds that the behavior at issue is not directly caused by the child's disability and that the school district (SD) did not fail to implement the existing IEP, then the SD can expel the child.
- vi. If a special education child is not expelled, the school district must conduct:
 - i. A behavioral assessment. FAC 6A-6.03312(3)(c)
 - ii. A behavioral plan.
- vii. If a special education child is expelled, the child must still receive a FAPE and must be provided educational services to progress towards his/her goals. FAC 6A-6.03312(5)(b)

E. Never consent to expulsion.

- i. Advocates routinely win at Manifestation Team (MT) meeting.
- ii. Many disruptive behaviors are a direct result of the child's disability or are a direct result of the failure of the SD to implement the IEP.
- iii. Even if you lose at MT meeting, SD still required to provide educational services.

F. Exceptions to Manifestation Rule: 45 Day Rule: FAC 6A-6.03312(6)(a)

- i. Weapons at school/school function.
- ii. Drugs, possession or sale at school/school function.
- iii. Commits serious bodily harm at school/school function.

G. Child may be placed in interim, unilateral placement for up to 45 days for weapons, drugs, or causing serious bodily harm. Section 1003.57(1)(h), Fla. Stat.

H. A pocketknife with a blade of less than 2.5 inches is not classified as a “weapon.” FAC 6A-6.03312. *See also*, Section 1003.57(1)(i)(2), Fla. Stat.

I. IDEA overrides a local school district’s blanket “zero tolerance” requirement. 20 USC 1415 (k)(1)(A).

J. Manifestation Team Meeting:

- i. A subset of IEP team members. FAC 6A-6.03312(3)(a)
- ii. Only two issues:
 - i. Binary- yes or no: is the behavior a direct result of child’s disability? FAC 6A-6.03312(3)(a)(2)
 - ii. Binary- yes or no: is behavior at issue direct result of SD’s failure to implement IEP?

K. Stay focused on the two issues:

- i. MT meeting is not an IEP team meeting.
- ii. Draft/hand out manifestation team memo:
 - i. One page.
 - ii. Bullet point format.
 - iii. Points/justifications that establish causal linkage between the behavior at issue and the child's disability or between the behavior and the SD's failure to implement the IEP.

L. Expedited appeal process to DOAH. FAC 6A-6.03312(7)

Part 6: What is the appeal process for IDEA? And what other federal and state laws apply to children with special needs?

The goal of part 6 is to understand the IDEA appeal process, the scope and requirements of Section 504 of the Federal Rehabilitation Act of 1973, and the Florida McKay Scholarship statute.

A. IEP appeal process:

- a. Impasse reached. FAC 6A-6.03311(9)
- b. Appeal to DOAH. Section 1003.57(1)(c), Fla.Stat. *See, A.L. ex rel. P.L.B. v. Jackson County School Board*, 127 So.3d 758 (Fla. 1st DCA 2013) (due process hearings are exempt from Chapter 120)

- c. After filing appeal, first step: Resolution Meeting:
 - i. Super IEP meeting.
 - ii. Within 15 days of filing. FAC 6A-6.03311(9)(l)
- d. Mediation available:
 - i. State DOE provides free mediators. FAC 6A-6.03311(4)
- e. DOAH hearing. Section 1003.57(1)(c) Fla.Stat.
- f. Primary issue: whether the IEP provides the child a FAPE?
 - i. Raise substantive issues: the failure to provide required services.
 - ii. Raise procedural violations. Must show that the procedural violations prejudiced your client from getting a FAPE.
- g. Need expert:
 - i. Your expert will testify that the child's IEP denies the child a FAPE.
 - ii. SD will hire an expert. Battle of experts.
 - iii. Cannot win without an expert.
 - iv. No right to reimbursement of the cost of the expert if you win.
 - v. Attorney's fees. FAC 6A-6.03311(9)(x)

- vi. Stay Put: The IDEA child “stays put” in his/her educational setting throughout the appeal (with exceptions). Section 1003.57(1)(d) Fla. Stat. *See also, Honig v. Doe*, 484 U.S. 305 (1988).
- vii. Appeal final DOAH decision to state circuit court or to federal district court. Section 1003.57(1)(c) Fla. Stat., FAC 6A-6.03311(9)(w)
- viii. Alternative to DOAH appeal process is a complaint with Florida Department of Education. FAC 6A-6.03311(5).

B. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 705 (20)(B); 29 U.S.C. 794.

- a. Recipient must receive federal funds.
- b. Applies to school districts. 34 CFR 104.3
- c. One prong test: child must be disabled.
 - i. Impairment.
 - ii. Substantially limits a life function.
- d. E.g. a child who receives all excellent grades and uses a wheelchair.
- e. Section 504 Plan/accommodation plan:
 - i. lists accommodations.

- ii. e.g. ramps, extra set of books, more time to turn in homework, more time on exams, etc.

f. Section 504 Meeting:

- i. Argue for specific accommodation.
- ii. One page Section 504 meeting memo:

- 1. Specify the requested accommodation.
- 2. Justify your request with evaluations.

g. Impasse: right to administrative hearing.

- i. School district may either conduct the administrative hearing in-house or assign to DOAH.
- ii. No automatic right to use DOAH.

h. Appeal:

- i. Federal district court.
- ii. Must first exhaust state administrative remedies.

C. McKay Scholarship: Section 1002.39, Fla. Stat.

- a. Unique to Florida.
- b. Voucher program for IDEA and Section 504 children.
- c. Allows IDEA and Section 504 children to use a voucher to go to private school or go to another public school.

- d. McKay Scholarship Program run by Florida DOE. See DOE website for application and deadlines to apply.
- e. Matrix number: on the face of the IEP or Section 504 plan, number translates into how much funds the child will receive. *See, Montero v. Duval County School Bd*, 153 So3d 407 (Fla. 1st DCA 2014) (must exhaust administrative remedies before challenging matrix number)
- f. Different disabilities and services translate into different levels of funding. FAC 6A-6.0970(4)
- g. Appeal: must first exhaust administrative remedies.
- h. Prerequisite: child with disability (IDEA or Section 504) must have spent prior year in attendance at a Florida public school, exceptions apply for children from military families. Section 1002.39(2)(a)(2), Fla. Stat.

For a discussion of administrative remedies for IDEA and Section 504, see:

Babicz v. School Bd. of Broward County, 135 F3d 1420 (11th Cir. 1998)(must exhaust state administrative remedies for Section 504 and IDEA).

For a discussion of Stay Put during the appeal process, see:

K.A. ex rel F.A. v. Fulton County School Dist., 741 F3d 1195 (11th Cir.

2013)(with exceptions, the child shall remain in the current educational placement during the pendency of the administrative or judicial litigation)

For a discussion of parental rights, see:

Winkleman et al v. Parma City School Dist., 550 U.S. 516 (2007)(parents entitled to prosecute IDEA claims on their own behalf)

For a discussion of burden of persuasion, see:

Schaffer et al v. Weast, 546 U.S. 49 (2005)(parents have burden of proof)

For a discussion of expert witness fees, see:

Arlington Central School District Bd . of Education v. Murphy, 528 U.S. 291 (2006)(no expert witness fees).

For a discussion of remedies under IDEA, see:

Ortega v. Bibb County School District, 397 F3d 1321 (11th Cir. 2005)(no tort-like damages authorized); *Draper v. Atlanta*, 518 F3d 1275 (11th Cir. 2008)(IDEA authorizes compensatory education prospectively to compensate for a past deficient program); *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009)(“IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private school placement is appropriate”)

For discussion on reimbursement, see:

20 U.S.C. 1415 (i)(2)(c)(iii)

20 USC 1412 (a)(10)(c)(ii)

30 CFR 300.403(c)