

PURSuing WIN-WIN OUTCOMES IN THE SCHOOL SETTING: EDUCATIONAL ADVOCACY

GAL Disabilities Training Conference 2015

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RESOURCES

- **Florida Association of Special Education Attorneys**
<https://www.facebook.com/pages/Florida-Association-of-Special-Education-Attorneys/195577053816539> (E-mail kimberley@ksolawfirm.com for membership information)
- **Council of Parent Attorneys and Advocates (COPAA):**
<http://www.copaa.org/>
- **Wrightslaw:** www.wrightslaw.com
- **Disability Rights Bar Association:**
<http://disabilityrights-law.org/>
- **Special Education Law & Advocacy** pages on spedlaw:
<http://www.flspedlaw.com/ESESubject.html>

Laws Relating to Special Education

- Section 504 of the Rehabilitation Act
- The Americans with Disabilities Act (ADA)
- The Individuals with Disabilities in Education Act (IDEA)
- Family Educational Rights and Privacy Act (FERPA)
- Florida's Section 1108

Section 504 of the Rehabilitation Act and the ADA

- **Section 504** and the **ADA** are closely linked.
- **Section 504** applies to government agencies and federally-funded organizations, including schools.
- **The ADA** applies to private as well as governmental entities, with some restrictions.
 - **Title I of the ADA** applies to employment (employers with <50 employees)
 - **Title II of the ADA** applies to government agencies
 - **Title III of the ADA** applies to public accommodations
 - **The ADA** also protects anyone who advocates on behalf of an individual with a disability from **retaliation**.

Section 504 and the ADA

- Both the ADA and Section 504 prohibit discrimination, ensure full access to services and facilities, and provide for reasonable accommodations that will enable access and inclusion.
- Both utilize the same definitions of who is a qualified individual with a disability who is protected under the law.

WHO IS A QUALIFIED INDIVIDUAL WITH A DISABILITY UNDER THE ADA AND SECTION 504?

- Someone who has a diagnosed health condition that substantially limits a major life activity.
- **Major life activities** include communicating, learning, interacting with others, remembering, and other things that we all do in everyday life.
- **Substantial limitations** are required, not just minor impairments.

504 PLANS

- Documentation of disability by doctor required
 - Can be helpful to have pediatrician adopt report by psychologist
 - Also helpful to get recommendations from doctors regarding accommodations
- Provides accommodations and related services
 - Don't have to stick to preset drop-down menus
- Also identifies student as having a disability who is eligible for protections against discrimination on the basis of that disability

Eligibility Under the IDEA

- **Disability** (as defined by statutory definitions of disability categories) that adversely affects educational performance
 - Academics
 - Non-academics (behavior, socialization, independent living skills, communication, health, etc.)
- **Need for Specially Designed Instruction**
 - Adapting, as appropriate, the content, methodology, or delivery of instruction
 - Does not include related services

IDEA CATEGORIES

- Intellectual Disability
 - Hearing Impairment
 - Speech Impairment
 - Language Impairment
 - Visual Impairment
 - **SERIOUS EMOTIONAL DISTURBANCE**
 - Orthopedic Impairment
 - **Autism**
 - Traumatic Brain Injury
 - **Other Health Impairment**
 - **Specific Learning Disability**
- Exclusions: Maladjusted behavior

CHILD FIND

The district has an obligation to:

- **Identify**
- **Locate**
- **Evaluate**

SURROGATE PARENTS

A requirement under the Individuals with Disabilities Education Act (IDEA)

Reauthorized & signed into law on Dec. 3, 2004, by President George W. Bush.

Each public agency must ensure that the rights of a child are protected by determining the need for, and assigning, a surrogate parent whenever:

- No parent (as newly defined at 34 CFR 300.30) can be identified;
- The public agency, after reasonable efforts, cannot locate a parent;
- The child is a ward of the State under the laws of that State; or
- The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)). [34 CFR 300.519(a) and (b)] [20 U.S.C. 1415(b)(2)(A)]
- ALSO: When it is legally determined the parent is unable due to illness, cognitive deficiencies or mental illness to advocate for the child.

IN THE CASE OF A CHILD WHO IS A WARD OF THE STATE

The surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate meets the requirements in 34 CFR 300.519(d)(2)(i) and (e) (that...

A SURROGATE PARENT MAY NOT BE AN EMPLOYEE OF:

- The State educational agency (SEA),
- The local educational agency (LEA), or
- Any other agency that is involved in the education or care of the child

The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

BUT UNFORTUNATELY...

- This legal requirement has in some Florida school districts not been implemented with fidelity.
- Many school district employees are unaware of this requirement and do not implement this provision of federal statute under the IDEA

RESPONSIBILITY OF THE SURROGATE PARENT

- **ADVOCATE FOR AND PROTECT THE CHILD IN THE SPECIAL EDUCATION PROCESS (Exceptional Student Education ESE) within the schools as mandated under the Federal IDEA**

- **Referral for A COMPREHENSIVE SPECIAL EDUCATION EVALUATION to determine eligibility for Exceptional Student Education and/or Section 504 of the Vocational Rehabilitation Act when the child is experiencing learning problems that may be ADVERSELY IMPACTING THE CHILD'S ABILITY TO FUNCTION IN SCHOOL due to a PHYSICAL, INTELLECTUAL or EMOTIONAL DISABILITY.**

- **ACT AS THE PARENT at all ESE team meetings within the school:**
 - **DETERMINING AND PROVIDING CONSENT for the EVALUATIONS to be completed**
 - **Development of a child's INDIVIDUAL EDUCATION PLAN (IEP)...ensuring that all specialized instruction, necessary related services and supplementary aids and services are provided**
 - **Consent to PLACEMENT into special education**
 - **Consent to the Educational PLACEMENT in the LEAST RESTRICTIVE ENVIRONMENT (LRE)**
 - **Consent to ANY CHANGE IN EDUCATIONAL PLACEMENT from one level of restrictiveness to another**

ANATOMY OF AN INDIVIDUALIZED EDUCATION PLAN (IEP)

- **Eligibilities and Background Information**
- **Present Levels of Performance**
- **Goals and Objectives**
- **Special Education Services**
- **Related Services**
- **Accommodations**
- **ESY**
- **Transition**
- **Training for Staff**

CURRENT LEVELS OF ACADEMIC PERFORMANCE

- Use information obtained from teachers regarding the child's strengths and needs and prioritize them to help guide the discussion of current levels of academic performance.
- Include input from evaluations, which may provide some clarification.
- Produce samples of the child's work illustrating areas of concern when the school's perception of current levels differs from yours.

DRAFTING GOALS AND OBJECTIVES

- Clearly defined
- Measurable
- Realistic and achievable
- Meaningful—will lead to real progress for child
- Set within a specific timeframe (usually one year)
- Make sure they connect back to present levels of performance

Wrightslaw uses SMART (specific, measurable, achievable, relevant/realistic and time-limited)

SELECTING APPROPRIATE SERVICES AND ACCOMMODATIONS

- Use recommendations in evaluations and reports from professionals working with your child to identify appropriate interventions.
- Research services and accommodations that are used for the child's particular disability(ies) and needs and adapt specifically for your child.
- Ensure that appropriate training for staff is addressed.

SERVICES/ACCOMMODATIONS

- Make sure that all services, accommodations and interventions discussed and agreed upon by the team are reflected in the relevant sections of the IEP, including time, frequency and location.
- Consider all things that are needed to help student perform and access the curriculum. For instance, transportation, regular communication between teachers and parents.

SUPPLEMENTARY AIDES & SERVICES

- Regular education teachers through the NEA and AFT had a new section added to the IEP document where the SUPPLEMENTARY AIDES AND SERVICES the TEACHER, other STAFF, & the STUDENT can be provided with the supplementary supports critically necessary such as:
 - Consultation/training for the teacher, para, lunch room personnel, administrators on the
 - nature and need of a child with the disability
 - Implementation of a behavior plan
 - Grading and homework policies
 - 1 on 1 facilitator in the classroom for the teacher & child

INVISIBLE DISABILITIES

- Students who get good grades/test scores or who have less obvious disabilities (ADHD, anxiety, epilepsy, Asperger's, etc.)
- Case law and DOE guidelines state that they are entitled to IEPs if they have need

TRANSITION

- For students about to rise to the next-level school (middle to high school, high school to post-secondary), there needs to be a transition plan.
- It should reflect the student's goals and interests and list services and supports that will be needed for the child to succeed at the next level.

COMMON PITFALLS

- Make sure to review the document carefully to be certain it is complete and accurate.
- If agreement is reached, sign the IEP that day, even if some or all of it is handwritten.
- You have the right to take time to think about the plan that the team has agreed upon before giving your approval.
- The school team may come up with a draft plan that is handed out at the beginning of the meeting. Changes can and should be made.

- Make sure the IEP is tailored to the child. It is an Individualized Education Plan, not a one-size-fits-all-students-with-a-particular-disability plan. Every child is unique.
- Team members may feel hurt or insulted by statements made by the other side. Even if there is a difficult history between the parties, you need to focus on achieving an IEP that will help your child.
- Avoid empty threats. You can stand firm on important principles and requests, but do not threaten to take actions you are not willing to take.
- Remember this is an ongoing relationship, so try to keep it amicable.

Conflict Resolution During Meeting

- Feel free to request breaks to step away if things get emotional or heated. It is better to calm down and proceed rather than taking action based on emotions rather than logic.
- Feel free to insist that school staff treat your side with respect.
- If you disagree with a statement being made, you may ask to have your objection included in the IEP notes.

Compliance with 504 Plan or IEPs

- Schools are legally required to follow 504 plans and IEPs
- Stay vigilant
- Contact team representative, district compliance officer, District ESE staff regarding non-compliance

DISPUTE RESOLUTION

Before resorting to complaint processes

- **Research** and **know your rights** and what the child needs.
- **Write letter** specifically stating what your concerns are and what your child needs. Provide documentation.
- **Request meeting.** In meeting make sure that any comments you make are included in the notes, especially areas where you disagree with a team decision.
- **Request written notice** of any adverse decisions, and insist on Prior Written Notice of any actions taken by team.
- Keep in mind that you have an **ongoing relationship** with the child's school and the District. Even if you disagree, try to focus on issues and problem-solving, not emotion.

Resources

- **Florida Department of Education Website**
<http://www.fldoe.org/ese/ese-home.asp>
- **US Department of Education Office of Special Education Programs**
<http://www2.ed.gov/about/offices/list/osers/osep/index.html>
- **Disability Rights Florida**
<http://www.disabilityrightsflorida.org/>

Advocacy at Meetings

- Parents are entitled to take one or more adults with them to Child Find, School-based Team, 504 or IEP meetings/
- Friends or family: An extra set of ears that is less emotionally involved can be helpful
- Private providers who work with your child can provide expertise to the team
- Non-attorney advocates have expertise on the special education process and can help.
- Attorneys can attend meetings with you if going alone or other options have failed.

Moving up the System

- If you have been unable to reach resolution with school staff at meetings, contact the District's ESE Department and ask that it send staff to the meeting.
- District-level staff generally have more extensive training and more exposure to legal compliance issues.
- If this doesn't work, contacting the ESE Director can help to ensure that the District's full attention has been provided to the matter.
- Be careful about contacting the Superintendent and School Board. They often refer the inquiries back to the District-level ESE staff, so it's best to go there.

State Complaints

The Florida Department of Education's Bureau of Exceptional Student Education (FDOE BESE) has **complaint** and **mediation** processes available to parents.

Instructions and forms can be accessed here:

<http://www.fldoe.org/ese/resolution.asp>

Be sure to fill out the forms completely and provide all facts and details to support your case. Feel free to attach documents.

Mediation

- Sometimes all that is needed is mediation by an outside neutral party.
- Some parents do not feel comfortable with an adversarial process yet need some assistance to get what is needed.
- Mediation is a discussion led by a trained neutral party aimed at resolving problems and finding solutions. The parties make all decisions and the mediator just guides the process.
- What is revealed or stated in mediation is confidential and cannot be used in later proceedings.
- Agreements reached in mediation are legally enforceable.

State (ESE) Complaints

- In a state complaint, an investigator for the FDOE BESE reviews the complaint, obtains documents and interviews from all parties, and issues a written decision.
- During the complaint process, the investigator may offer mediation to the family as an option for issues that might be amenable to resolution that way.
- All of this is at no cost to the family.
- The FDOE BESE must respond to **all** complaints brought by families of ESE/504 students in Florida public schools.
- For those issues that cannot be voluntarily resolved, the investigator will issue a written determination. The district may be ordered to take corrective action.

Important Points

- The FDOE BESE may not accept all issues for investigation through a state complaint. Issues of discrimination and retaliation will be rejected.
- Any issues that do not relate directly to the IEP or 504 plan may be rejected.
- Issues to be investigated should involve violations of the IDEA, Section 504, procedural safeguards, state law, or school district policy.
- The FDOE does not have authority to order monetary damages, although it can order compensatory education.

Why Complain to the State?

- The FDOE addresses problems that are brought to the forefront and will not do anything to address issues that are not highlighted. If we as parents and students want action to be taken on important issues that are negatively impacting our children's education, we need to make ourselves heard.
- The federal government, particularly the US Department of Education's Office of Special Education Programs (OSEP) keeps track of state complaints and focuses its attention on areas that show up as needing attention.
- Unfortunately, filing a complaint is the best way to let the District know you are seriously concerned about an issue and that you demand appropriate action. Just filing a complaint can sometimes resolve the underlying issue.
- Please note: If the case is withdrawn or resolved in mediation, there will be no permanent record of it for the purposes of statewide accounting.

State Complaint Process

- File Complaint Form with District ESE Director and send to Director of FDOE BESE, Monic Verra-Tirado.
- The state will send confirmation of receipt and an investigator will be assigned.
- The investigator will make an initial call to the family ask questions and clarify issues. It will also call the District to ask questions. Mediation may be suggested at this time.
- The investigator will send a letter outlining the issues and requesting additional information from the parties.
- A determination letter will be send within 60 days (90 days for gifted dispute cases).

Other State Complaints

Teacher Complaints:

Sometimes the school and district are doing what they can to comply with the law and to provide for a child's needs, but a teacher refuses to follow a child's plan or is otherwise recalcitrant. Filing a complaint with FDOE directly against the teacher is an option, as teacher licensing rules require teachers to behave ethically and comply with the law and with district policies.

<http://www.fldoe.org/edstandards/pdfs/ethics.pdf>

Bullying Complaints:

If schools do not comply with the State's bullying laws, complaints can be filed with the State.

<http://www.fldoe.org/safeschools/bullying.asp>

OCR Complaints

The **US Department of Education (USDOE)** has an **Office of Civil Rights (OCR)** that handles issues of discrimination and retaliation and systemic issues under Section 504 and the Americans with Disabilities Act.

- The State tends to refer complaints directly involving discrimination and retaliation here.
- Complaints must be filed within **180 days** of the related events.
- OCR has the right to accept or deny complaints. It tends to accept complaints that are systemic in nature or involved hot-button policy issues.
- If an issue can be resolved through a due process complaint, OCR will often reject it.

OCR Complaint Process

- Send a complaint to the school district and OCR providing the facts and documentation.
<http://www2.ed.gov/about/offices/list/ocr/complaintintro.html>
- This process is also free to parents.
- OCR investigators will follow up with a phone call in which it asks follow up information and usually shares its decision whether to take your case.
- OCR investigators will follow up with both parties for interview and additional documentation.
- OCR will issue a decision. If it finds a violation took place, it will try to help the parties negotiate a resolution. If that is not possible, it may litigate on the family's behalf or allow the family to proceed to a federal suit.

US Department of Justice's OCR

- If the US Department of Education's OCR rejects your case, and you feel the issue is truly compelling and involves a systemic issue, you can file a complaint with the US Department of Justice's Office of Civil Rights. It sometimes takes education cases when it feels the issue is important.
- The process is similar to the one for DOE.

Due Process and Litigation

- These are both dispute resolution processes available to parents.
- They are both costly, and due process especially is risky, especially for families without legal counsel. Generally, in order to reach federal court, families must exhaust their administrative remedies by going through due process or an OCR complaint.
- Attorney's fees can be reimbursed for prevailing parties who get a judge's stamp on the outcome, but expert witness fees are not reimbursible.
- Due process decisions are part of the public record, so they can help to change the system.

SCHOOL CHOICE ISSUES

- McKay Public and Private Options
- Charter Schools
- Public Magnet Schools and their special rules
- Caveat emptor!

McKay Scholarships

Process for qualifying for McKay

- Attendance during FTE periods in October and February
- Must have 504 Plan or IEP
- Must register intent on McKay website
<https://www.floridaschoolchoice.org/Information/McKay/>
- Deadlines

McKay

Private scholarships determined by matrix

- Matrix issues should be resolved before withdrawing/registering

Private schools not covered by IDEA, and often not covered by Section 504/ADA

- Read contracts and materials carefully!

Note: Public money may be available for services not provided by private school.

Public McKay assignments are limited to certain available schools.

No transportation is provided.

Charter Schools

- Charter schools are public schools and are required to follow federal and state disability laws.
- Unfortunately, many of them do not know this.
 - Education process
- While not allowed to discriminate, their charter may limit students accepted/what they offer.
- The chartering organization (often the district) is ultimately responsible.

Magnet Schools

- Magnet schools are public schools and are covered by all special education laws.
- However, they are also covered by special rules that often work against students with disabilities.
 - Otherwise qualified issues
 - Student or parent contracts

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Our Powerpoint Presentation is available to download at

<http://www.ksolawfirm.com/#!/blog/c1ghi>