

# **Procedural Safeguards: It's Not Just Paperwork**

Amy Goetz and Tara Ford



# WHY BOTHER?

- Procedural safeguards are required by the IDEA to secure constitutional rights
  - 20 U.S.C. § 1415(a) (2011)

# DUE PROCESS

- Rooted in the 14<sup>th</sup> Amendment
- Protects life, liberty and property from the government
  - U.S. Const. amend. XIV, § 1

- If protected interest, then process is due
- Protected property interest in education in under state laws

# PROCESS

- Process = notice and an opportunity to be heard

# EQUAL PROTECTION

- Also rooted in the 14<sup>th</sup> Amendment
- Protects consistent application of laws
  - U.S. Const. amend. XIV, § 1

# HISTORICAL PROBLEMS

- State laws allowed schools to refuse admission if:
  - A child was deemed unable to benefit
  - A child was deemed disruptive



- North Carolina statute permitted criminal charges against parents returning a child to school after exclusion

- Phillip T.K. Daniel and Karen Bond Coriell, *Traversing the Sisyphean Trails of Education for all Handicapped Children's Act: An Overview*, 18 Ohio N.U. L. Rev. 571, 572 (1992)



- Wisconsin Supreme Court in 1919 held that a child who drooled, had a speech impediment, and facial contortions could be excluded from school even though he could participate and benefit from school

- *Beattie v. Board of Educ.*, 172 N.W. 153 (Wis. 1919)

- Illinois Supreme Court in 1958 ruled that compulsory education state law did not apply to a mentally impaired student
  - *Dept. of Pub. Welfare v. Haas*, 154 N.E.2d 265 (Ill. 1958)

# ***BROWN v. BD OF EDUCATION***

- U.S. Supreme Court case held racial segregation in education violates Equal Protection clause of the Constitution
  - *Oliver Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954)

# GENESIS OF IDEA

- *PARC*: Pennsylvania case (1971)
  - State law allowed public schools to deny services to children "who have not attained a mental age of five years" at time of enrollment
  - Legal challenge on Equal Protection grounds, resulted in a consent decree with the right to a FAPE and due process procedures
    - *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972)
- *Mills*: D.C. case (1972)
  - DC schools expelled and refused to enroll over 12,000 students with disabilities
  - Court held this violated Equal Protection clause of 14<sup>th</sup> Amendment, and extended holding in *PARC* to **all** children with disabilities
    - *Mills v. Board of Educ. of the District of Columbia*, 348 F. Supp. 866 (D. DC 1972)

# PARENTAL INVOLVEMENT

- Basic tenet of IDEA: students with disabilities will be best served by a team of parents and educators
  - 20 U.S.C. § 1400(c)(5) (2011)
- The heart of procedural safeguards
  - 20 U.S.C. § 1415(a) (2011)

# CONGRESSIONAL FINDINGS

- EAHCA enacted in 1975
  - 20 U.S.C. § 1400(c)(3) (2011)
- IDEA enacted in 1990
  - Reauthorized in 1997 and 2004
  - 20 U.S.C. § 1400, *et seq.* (2011)

- Research and experience demonstrate that special education can be made *more effective by “strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home”*

- 20 U.S.C. § 1400(c)(5)(B) (2011)

# DUE PROCESS IN IDEA

- Right to consent or object to any proposal for evaluation, program or placement
  - 20 U.S.C. § 1415(b)(1) (2011)
- Right to challenge any proposal or refusal to provide appropriate evaluation, program, placement or benefit
  - 20 U.S.C. § 1415(b)(6) (2011)



- Right to prior written notice of all proposals or refusals
  - 20 U.S.C. § 1415(b)(3) (2011)
- Right to “stay put” automatically preserves status quo
  - 20 U.S.C. § 1415(j) (2011)



- **Right to protections in discipline**

- 20 U.S.C. § 1415(k) (2011)
- **Limits on exclusions**
  - 20 U.S.C. § 1415(k)(1)(B) (2011)
- **Manifestation determinations**
  - 20 U.S.C. § 1415(k)(1)(E) (2011)
- **FBAAs and BIPs**
  - 20 U.S.C. § 1415(k)(1)(F) (2011)

- **Right to participate in meetings**
  - 20 U.S.C. § 1415(b)(1) (2011)
- **Right to participate in placement decisions**
  - 20 U.S.C. § 1415(b)(1) (2011)



- **Right to examine records**

- 20 U.S.C. § 1415(b)(1) (2011)

- **Right to an independent educational evaluation**

- 20 U.S.C. § 1415(b)(1) (2011)

# PROCEDURAL SAFEGUARDS NOTICE

- Must be given:
  - Once a year
  - On initial referral or parent request for evaluation
  - On receipt of first State complaint or first due process complaint in a school year
    - 20 U.S.C. § 1415(d)(1)(A) (2011)

- And

- When a disciplinary change of placement decision is made

- More than ten consecutive days

- More than ten cumulative days depending on pattern of behavior and removals

- 20 U.S.C. § 1415(k)(1)(E) (2011)

- When parents request

- 20 U.S.C. § 1415(d)(1)(A) (2011)

**Bd. Of Education of Hendrick Hudson  
Central Sch. Dist. v. Rowley,  
485 U.S. 176, 205 (1982)**

- When the elaborate and highly specific procedural safeguards . . . are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid.

# Why Are Procedural Safeguards Important?

- Parent input
- Focus on individual student
- Requires planning



# Working with Families

Families have to learn about their child's disability.

Families have to learn about the many professionals that may be involved in their lives.

Families may start with prejudices about having their child in special education.

Families are often blamed for school problems.

# Honig v. Doe

## 484 U.S. 305,308 (1988)

- As a condition of federal financial assistance, the EHA requires States to ensure a “free appropriate public education” for all disabled children within their jurisdictions. In aid of this goal, the Act establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree.

# Focus on Individual Student

- Variable impact of disability
- Low incidence of disability
- High resource demand

## **Bd. Of Education of Hendrick Hudson Central Sch. Dist. v. Rowley, 485 U.S. 176, 206(1982)**

- The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom.

# Irving Independent School Dist. v. Tatro, 468 U.S. 883, 893 (1984)

- Congress plainly required schools to hire various specially trained personnel to help [students with disabilities], such as “trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.”

## Cedar Rapids community Sch. Dist. v. Garret F, 526 U.S. 66 (1999)

- [T]he District raises broader concerns about the financial burden that it must bear to provide the services that Garret needs to stay in school. The problem for the District in providing these services is not that its staff cannot be trained to deliver them; the problem, the District contends, is that the existing school health staff cannot meet all of their responsibilities and provide for Garret at the same time . . . But Congress intended to ‘open the door of public education’ to all qualified children and ‘require[d] participating states to educate [students with disabilities] with [students without disabilities] whenever possible.’”

# Planning

- Accurate identification of disabilities is necessary to guide instructional and other supports needed for student to succeed.
- Problem-solving is often necessary to ensure access to general curriculum and extra-curricular activities.
- Student needs must be clearly identified and communicated to staff responsible for implementing the IEP.
- Successful post-secondary transitions take years of sequential academic coursework.
- Professional development needs to be identified and provided before teachers are responsible for provision of FAPE.

## **Bd. Of Education of Hendrick Hudson Central Sch. Dist. v. Rowley, 485 U.S. 176, 206(1982)**

- We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.



## Sch. Com. Of the Town of Burlington v. Dep. Of Educ., 471 U.S. 359,368 (1985)

- The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places, the Act emphasizes the participation of the parents in developing the child's educational program **and assessing its effectiveness.**

# Winkleman v. Parma City Sch. Dist. 127 S.Ct. 1994 (2007)

- [IDEA], through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made . . . .
- We conclude IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a FAPE for the parents' child.

# Definition of Parent

## 20 U.S.C. 1401(23)

- Parent. The term 'parent' means-
  - A natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);
  - A guardian (but not the State if the child is a ward of the State)
  - An individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
  - Except as used in sections 1415(B)(2) and 1439(a)(5) an individual assigned under either of those sections to be a surrogate parent.

# What the Regulations Add to the Definition of Parent

- [T]he biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified . . . to act as a parent, must be presumed to be the parent . . . unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.
- 34 C.F.R. 300.30

# Regulatory Guidance Cont'd

- If a judicial decree or order identifies a specific person or persons ... to act as the “parent” of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the “parent” [.]
- 34 C.F.R. 300.30

# Who is the Parent Cheat Sheet

- 1) is there a court order that sets out who is empowered to make educational decisions? If so, follow that order.
- 2) is a biological or adoptive parent attempting to act? If so, they are empowered unless specifically limited by court order.
- 3) is the child in foster care? If so, does the state law allow foster parent to act as parent? If so, what is the status of the abuse and neglect case? Is the foster parent willing to act as a parent?
- 4) is the child living with someone who acts as a parent? If so, is anyone challenging the person's authority? If not, they can act as a parent.
- 5) if there is no one available to act as a parent, the school has the duty to appoint a surrogate parent.

# Consent

## 34 C.F.R. 300.9

- Consent means that
  - The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language or other mode of communication;
  - The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
  - The parent understands that the granting of consent is voluntary on the part of the parent and can be revoked at any time.
  - If the parent revokes consent, that revocation is not retroactive[.]

# Commentary

- Whenever consent is used in the regulations, it means that the consent is both informed and in writing.
- The meaning of the terms “agree” or “agreement” is not the same as consent. “Agree” or “agreement” refers to an understanding between the parent and the public agency about a particular question or issue, which may be in writing, depending on the context.
- Vol. 71 Fed. Reg. No. 156 @ 46551



# Examples of Consent vs. Agreement

- Parents must consent to evaluations. (Public agency can utilize due process procedures if the parent will not consent.) 20 U.S.C. 1414(d)
- Parents must give consent before a public agency provides special education and related services to the child. (Public agency can not utilize due process procedures.) 20 U.S.C. 1414(d)
- After the annual IEP, parents can agree to change an IEP without an IEP meeting. (Agreed upon changes are documented in writing and the child's IEP Team is informed.) 34 C.F.R. 300.324(a)(4)

# Evaluation issues

- Public agencies are to evaluate in all areas of suspected disability. 34 C.F.R. 304.(c)(4)
  - Medical evaluations (e.g. autism, attention deficit disorder) 20 U.S.C. 1401(26)(A)
  - Information from family providers (do not require consent to release private information as condition for evaluation) 20 USC 1412(a)(3)
  - Parents often do not understand distinction between medical diagnosis and special education eligibility.

# Purpose of Evaluation

- A good evaluation is a roadmap for understanding student need and for determining proper intervention.
- “The IDEA is not designed to ensure that students are appropriately labeled but that they are appropriately educated . . . Labels are not determinative. They are, however, often important.” *Bell v. APS*, No. CIV 06-1137 JB/ACT [Doc. 205]

## INDEPENDENT EDUCATIONAL EVALUATION *Shaffer v. Weast*, 546 U.S. 49, 61 (2005)

- IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.



# THE IEP



- Developed, reviewed and revised by IEP Team process

# TEAMWORK IS EVERYTHING

- Parents are members of IEP Teams
- *Teams* plan any evaluation
- *Teams* determine eligibility



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- *Teams* develop the IEP
  - *Teams* decide on services
  - *Teams* review and revise the IEP

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- *Teams* decide placement
  - *Teams* decide whether progress is adequate
  - *Teams* make any significant change to the program or placement



# IEP TEAM

- Must include:
  - Parents
    - 34 C.F.R. § 300.321(a)(1) (2011)
  - Regular education teacher if in regular ed
    - 34 C.F.R. § 300.321(a)(2) (2011)
  - Special education teacher or provider
    - 34 C.F.R. § 300.321(a)(3) (2011)

- LEA representative

- Qualified to provide or supervise special education
- Knows about general education curriculum and
- Knows about available resources of LEA
  - 34 C.F.R. § 300.321(a)(4) (2011)

- Must also include:

- Someone who can interpret instructional implications of evaluation results
  - 34 C.F.R. § 300.321(a)(5) (2011)
- When appropriate, the child
  - 34 C.F.R. § 300.321(a)(7) (2011)

- May include:
  - Others with knowledge or special expertise, including related services personnel
  - At the discretion of parent or agency
    - 34 C.F.R. § 300.321(a)(6) (2011)

# IEP MUST INCLUDE

- A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects his or her involvement and progress in the general education curriculum
  - 34 C.F.R. § 300.320(a)(1) (2011)

- A statement of measurable annual goals, including academic and functional goals to meet the child's needs, and to enable involvement and progress in the general education curriculum
  - 34 C.F.R. § 300.320(a)(2) (2011)

- A statement of the special education, related services and supplementary aids and services (based on peer-reviewed research) to be provided, and a statement of program modifications or supports for school staff
  - 34 C.F.R. § 300.320(a)(4) (2011)

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- A description of how the child's progress will be measured and when progress reports will be provided
    - 34 C.F.R. § 300.320(a)(3) (2011)

- A statement of accommodations to state and district assessments
  - 34 C.F.R. § 300.320(a)(6) (2011)
- An explanation of the extent to which the child will not participate with non-disabled children in the regular class and activities
  - 34 C.F.R. § 300.320(a)(5) (2011)



- Date to begin services, frequency, location and duration
  - 34 C.F.R. § 300.320(a)(7) (2011)
- At age 16 appropriate measurable post-secondary goals based on transition assessments related to training, education, employment and independent living skills, and services to assist the child to reach those goals
  - 34 C.F.R. § 300.320(b)(1) (2011)

# SPECIAL CONSIDERATIONS

- If behavior impedes learning of child or others, consider use of positive behavioral interventions and supports and other strategies

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- If limited English proficiency, consider child's language needs related to IEP

- If blind or VI, provide instruction in Braille and use of Braille unless Team determines, after evaluation of skills, needs and appropriate media, that instruction and use is *not* appropriate for child

- Consider communication needs, and **if deaf or HH**, consider language and communication needs, opportunities for direct peer communications and professionals in child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in child's language and communication mode

- Consider whether child needs assistive technology devices and services

# PRIOR WRITTEN NOTICE

- Means to fully inform parents and obtain informed consent
- Means to crystallize disputes
- Embodies due process notice
  - 34 C.F.R. § 300.612(a) (2011)

# WHEN?

- Must be provided whenever LEA:
  - Proposes to initiate or change identification, evaluation or placement, or provision of a FAPE
    - 34 C.F.R. § 300.503(a)(1) (2011)
  - Refuses to initiate or change identification, evaluation or placement, or provision of a FAPE
    - 34 C.F.R. § 300.503(a)(2) (2011)



# WHAT?

- Notice must be:
  - In native language of parents unless clearly not feasible
    - 34 C.F.R. § 300.503(c)(1) (2011)

- Notice must include:

- Description of action proposed or refused

- 34 C.F.R. § 300.503(b)(1) (2011)

- Explanation of why

- 34 C.F.R. § 300.503(b)(2) (2011)

- Description of each evaluation, assessment, record or report used as basis

- 34 C.F.R. § 300.503(b)(3) (2011)

- Statement of procedural safeguards and means to obtain a copy (except if initial referral for evaluation)

- 34 C.F.R. § 300.503(b)(4) (2011)

- Sources for parents to get help to understand
  - 34 C.F.R. § 300.503(b)(5) (2011)
  
- Description of other options considered and the reason why they were rejected and
  - 34 C.F.R. § 300.503(b)(6) (2011)
  
- A description of the factors relevant to the proposal or refusal
  - 34 C.F.R. § 300.503(b)(7) (2011)

# RECORDS

- Procedures must be established and maintained to give parents an opportunity to examine all records relating to their child
  - 34 C.F.R. § 300.613(a) (2011)
- Education records includes all records collected, maintained or used by the agency
  - 34 C.F.R. § 300.611(b) (2011)

- Agencies must comply with a request to inspect and review education records:
  - Without unnecessary delay
  - Before any IEP Team meeting
  - Before any due process hearing
  - Before any resolution session
  - Never more than 45 days after request
    - 34 C.F.R. § 300.613(a) (2011)

- Right to inspect and review records includes:
  - Right to reasonable request to explain and interpret records
    - 34 C.F.R. § 300.613(b)(1) (2011)
  - Right to copies if failure to provide them would effectively prevent parent from right to inspect and review
    - 34 C.F.R. § 300.613(b)(2) (2011)
  - Right to have a parent representative inspect and review
    - 34 C.F.R. § 300.613(b)(3) (2011)

- Agencies can presume any parent has the authority to inspect and review records *unless* advised that parent does not have authority pursuant to guardianship, separation or divorce
  - 34 C.F.R. § 300.613(c) (2011)

# RECORD AMENDMENT

- If parent believes information is
  - Inaccurate
  - Misleading
  - Violates the privacy or other rights of the child
    - 34 C.F.R. § 300.618(a) (2011)



- Parent may request amendment of record
  - 34 C.F.R. § 300.618(a) (2011)
- Agency must decide within reasonable time
  - 34 C.F.R. § 300.618(b) (2011)
- If refuses must inform parent and advise of right to hearing
  - 34 C.F.R. § 300.618(c) (2011)

- Agency must provide a hearing
  - 34 C.F.R. § 300.619 (2011)
- If, after hearing, agency agrees with parent, must amend record and inform parent
  - 34 C.F.R. § 300.620(a) (2011)
- If, after hearing, agency disagrees with parent, must inform parent of right to place statement commenting on information or stating reasons for disagreement
  - 34 C.F.R. § 300.620(b) (2011)

- Any explanation must be maintained in the record
  - 34 C.F.R. § 300.620(c)(1) (2011)
- Any explanation must be disclosed with contested record
  - 34 C.F.R. § 300.620(c)(2) (2011)

# Stay-put

## 20 U.S.C. 1415j

- Maintenance of Current Educational Placement.
- [D]uring the pendency of any administrative due process or judicial review proceedings, the child remains in the then-current educational placement , unless the parents and the school agree otherwise.\*\*\*
- \*\*\*Except for disciplinary removals under 20 U.S.C. 1415(k)(4).

# Additional Stay-Put Considerations

- If the complaint involves initial admission to the public school, the child, with the consent of the parents, must be placed in the public school until completion of proceedings.
- If the complaint involves transfer to Part B and the child is no longer eligible for Part C services, the public agency is not required to provide Part C services. If there are services that are not in dispute, those services should be provided.
- If the due process hearing officer agrees with the Parent that a change of placement is appropriate, that placement must be treated as an agreement between the State and parents.
- 34 C.F.R. 300.518

# Stay-put Questions

- What is the then-current educational placement?

“An educational placement is changed when a fundamental change in, or elimination of, a basic element of the educational program has occurred.” Erickson v. APS, 199 F.3d 1116, 1122 (1999)

- What are implications of possibility of “agreement” between the parties?

Can the school stand behind “stay-put” to insulate doing business as usual pending a due process decision?

If the school suggests an agreed upon placement that is later found appropriate, will there be later impact on Parent request for fees?

# Functional Behavior Assessment

- Behavior is communication.
- For kids in school, unwillingness is often synonymous with (some level) of inability.
- A good FBA starts with an open question and looks carefully at what the child is communicating in words and behavior as basis for hypothesis of function of behavior.

# FBA/BIP

- IDEA requires FBA/BIP when the child's behavior is a result of the child's disability and results in a change of placement. See 34 C.F.R. 300.530.
- DOE commentary: FBA/BIP may be needed to comply with requirement to use positive behavioral interventions and other strategies when a child's behaviors interfere with learning. Vol. 71 Fed. Reg. No. 156 @ 46721.



# Behavior Intervention Plan

- Focus on strengths of child
- Identify replacement behaviors
- Ensure focus is on positive support
- Avoid “sequential consequences”
- Question any use of restraint/seclusion and recognize that it is not an educational intervention
- Question use of police as police intervention is not an educational intervention.

# PRIOR WRITTEN NOTICE

## Shaffer v. Weast at 61

- Additionally, in 2004, Congress added provisions requiring school districts to answer the subject matter of a complaint in writing and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations reports and other factors that the school used in coming to its decision.

# FAPE is a civil right.

“The deprivation of a FAPE [free appropriate public education] is an actual injury suffered by a student and his or her parents.


Congress recognized this when it declared the rights of all qualifying children to receive a FAPE and acknowledged the civil rights aspects of the IDEA.”

- ***Bitsilly v. BIA***, 253 F.Supp.2d 1257, 1262 (D.N.M. 2003)

# DISCIPLINE

- School personnel can remove students who violate codes of conduct for no more than ten school days
  - To an interim alternative educational setting
  - To another setting
  - To suspension
    - 34 C.F.R. § 300.530(b)(1) (2011)

- School personnel can change the placement of students who violate codes of conduct for more than ten school days
  - If the behavior is *not* a manifestation of the disability
  - If the same rules for removal apply to students without disabilities and
  - So long as the student receives a FAPE
    - 34 C.F.R. § 300.530(c) (2011)

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- A decorative graphic on the left side of the slide, consisting of a light green vertical bar and a dark blue horizontal bar with rounded ends.
- The right to a FAPE includes
    - Participation in the general education curriculum
    - Progress towards meeting IEP goals
    - As appropriate, an FBA and BIP to address the behavior so it does not recur

# Special Removals

- Schools can remove students to an interim alternative educational setting
  - For no more than 45 days
  - Regardless of manifestation determination
  - For weapons, drugs or infliction of bodily injury at school or a school function
    - 34 C.F.R. § 300.530(g) (2011)

- The IAES shall be determined by the IEP Team
  - 34 C.F.R. § 300.531 (2011)
- A parent can go to an expedited hearing to challenge the placement
  - 34 C.F.R. § 300.532(c)(1) (2011)



# MANIFESTATION DETERMINATION

- Within 10 days of any decision to change placement for *more than ten days* for violation of a code of conduct
- LEA, parent and relevant Team members
- Review all relevant information
- Determine whether behavior was manifestation of disability
  - 34 C.F.R. § 300.530(e)(1) (2011)

- Behavior *is* a manifestation of the disability if:
  - The conduct was caused by, or had a direct and substantial relationship to, the disability or
    - 34 C.F.R. § 300.530(e)(1)(i) (2011)
  - The conduct was the direct result of the failure to implement the IEP
    - 34 C.F.R. § 300.530(e)(1)(ii) (2011)



- If so, the Team must

- Conduct an FBA

- Implement a BIP

- 34 C.F.R. § 300.530(f)(1)(i) (2011)

- If BIP exists, review and modify as necessary to address the behavior

- 34 C.F.R. § 300.530(f)(1)(ii) (2011)

- Except where weapons, drugs or serious bodily injury, return child to prior placement

- 34 C.F.R. § 300.530(f)(2) (2011)

# PRE-IDENTIFIED STUDENTS

- Children not yet eligible for special education
- Engage in behavior that violate a code of conduct
- May assert any protection from disciplinary exclusions *if* LEA had knowledge of disability before violation
  - 34 C.F.R. § 300.534(a) (2011)

- School is deemed to have knowledge *if*
  - Parent wrote to supervisor, administrator or teacher of concern that child needed special education
    - 34 C.F.R. § 300.534(b)(1) (2011)
  - Parent requested evaluation or
    - 34 C.F.R. § 300.534(b)(2) (2011)
  - Teacher or other staff expressed specific concerns about child's pattern of behavior to special education director or other supervisor
    - 34 C.F.R. § 300.534(b)(3) (2011)

- School will *not* be deemed to have knowledge if
  - Parent refused evaluation
    - 34 C.F.R. § 300.534(c)(1)(i) (2011)
  - Parent refused special education services
    - 34 C.F.R. § 300.534(c)(1)(ii) (2011)
  - Child was evaluated and found ineligible
    - 34 C.F.R. § 300.534(c)(2) (2011)

- If evaluation requested during discipline, must be expedited
  - 34 C.F.R. § 300.534(d)(2)(i) (2011)
- Pending results the child remains in disciplinary setting
  - 34 C.F.R. § 300.534(d)(2)(ii) (2011)

# State Complaint

**34 C.F.R. 300.151-300.153**

- Every state has to have procedures allowing for complaints filed by individuals and organizations.
- Complaint procedures are to be widely distributed.
- 60 day time line for investigation.
- Remedies can include compensatory services or monetary reimbursement.



# Due Process Claims

- IDEA claims may be brought any time the public agency proposes to initiate or change or refused to initiation or change the:
  - Identification
  - Evaluation or
  - Educational placement of the child, or
  - Provision of FAPE to the child.

20 U.S.C. 1415(b)(6).

# Statute of Limitations

- IDEA claims are to be filed within 2 years of the events about which the complaint is brought; 20 U.S.C. 1415(f)(3)(C).
  - 2 years is counted from the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint.

# Due Process Hearing Request

## 20 U.S.C. 1415(b)(7)

- IDEA Claims should include all information required by statute:
  - Name, residential address, attendance school;
  - In case of homeless child or youth, available contact information for child and attendance school;
  - A description of the nature of the problem relating to proposed or refused initiation or change, including facts relating to such problem;
  - Proposed resolution of the problem to the extent known and available to the party at the time.

# Early Resolution Options

- PWN/Response to Complaint -20 U.S.C. 1415(c)(2)(B)
  - w/in 10 days of receipt of due process request.
- Resolution Session – 20 U.S.C. 1415(f)(1)(B)
  - w/in 15 days of receipt of due process request
    - Mandatory, unless waived or parties chose mediation
- Mediation – 20 U.S.C. 1415(e)
  - Voluntary and not used to deny or delay right to hearing and results in legally binding agreement enforceable in court. 20 U.S.C. 1415(e)

# Remedies

- IDEA remedies

DPHOs have “equitable” powers meaning that they may create remedy to fit the circumstances.

No power to award monetary damages or attorneys fees. (Courts can later award attorney fees but not damages under IDEA.)

No power to award remedies against individuals; award of remedies against school districts.

# Remedies

- IDEA continued
  - DPHOs can award “reimbursement” of educational expense to family.
  - DPHO can award compensatory educational services which can include additional hours of service, additional levels of training, or additional oversight of staff providing education.

# Exhaustion of Administrative Remedies

- IDEA due process claims are initially filed with the State Dept. of Education.
- Any “appeal” to be filed as a “civil action” directly with state or federal court.

# Exceptions to Exhaustion Requirement

- Exhaustion is not required, however, where it would be futile or fail to provide adequate relief. In addition, the IDEA's legislative history contains a third exception to the exhaustion requirement where "an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law." [quotations not included]
- Association for Community Living in Colorado v. Romer, 992 F.2d 1040, 1044 (1993)



# PROCEDURAL VIOLATIONS

- The first part of the *Rowley* two-part test to determine the denial of a FAPE
- Procedural violations = denial of a FAPE
  - If they impeded the right to a FAPE
  - If they significantly impeded parents' opportunity to participate in decisions or
  - If they caused a deprivation of educational benefits
    - *Hendrick Hudson Dist. Board of Educ., v. Rowley*, 458 U.S. 176 (1982)