TWELVE THINGS EVERY JAG SHOULD KNOW:

Legal Issues Facing Military Families with Special Needs Children

A PRIMER AND INTRODUCTION

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Over 17,000 Air Force families have a member with a disability; many of whom have a child with a disability or a "special needs child."[1] Moving once every three years, these families face unique financial, medical and legal issues; particularly during deployment or a PCS. Parents of children with a disability will need the assistance of the newly appointed Exceptional Family Member Program service coordinators[2], Air Force school liaison officers, as well as JAG Corps members in navigating these challenges.

Parents also need to understand their legal rights under the *Individuals with Disabilities Education Improvement Act (20 U.S.C. 1400), Section 504 of the Rehabilitation Act of 1973* and the Interstate Compact on Educational Opportunity for Military Children.[3] They may require advice on estate planning, wills, powers of attorney and other legal assistance topics. Finally, they need coaching on advocacy skills. Parents are their child's best advocate—and will be

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[1] Per AF/A1SA, there are 1,549 Air Force EFMP children in San Antonio. There are 1,216 in the NCR and over 1,000 in the Langley AFB area.

[2] Military parents are required to enroll in the EFMP program if they have a child with a qualifying medical issue or with a disability. *See* AFI 40-701, *Special Needs Identification and Assignment Coordination*, para. 1.1. As an EFMP family, every effort will be made to ensure a new assignment location has suitable medical and educational services available. In addition, the family can seek help from one of 35 EFMP family service coordinators linking them to needed services in the military and civilian community. Installations without a dedicated EFMP family service coordinator will have a civilian or military member who is taking on this role as an extra duty.

[3] You can view the model language of the compact at http://www.mic3.net/.

in that role for years. The following are the twelve things that every judge advocate and paralegal should keep in mind when working with families with a child with a disability.

1. Children with a disability are legally entitled to special education or accommodation as needed to help them progress toward educational goals. Under the *Individuals with Disabilities Education Improvement Act of 2004* (referred to as IDEA), children with a disability[4] who need specially designed instruction to meet their needs[5] have the right to a free appropriate public education between the ages of 3 and 21.[6] These children are, to the maximum extent appropriate, to be educated with children who are <u>not</u> disabled.[7]

Qualifying children also must receive an individually tailored educational program based on peer-reviewed research, called an Individual Education Program (IEP)[8] that sets forth a program and services needed for the child to progress. In determining the IEP goals, placement of the child in school, and related services, parents have the right to "meaningful participation" in the decision-making process.[9]

Section 504 of the Rehabilitation Act of 1973 provides rights to children with a disability who do not need specially designed instruction, or special education, but do need accommodations to progress or attend public schools.[10] Section 504 plans usually outline accommodations like extra time, between classes, to get from class to class, or additional time on tests. Children with a disability covered under this act, but not covered under IDEA, are still entitled to a free appropriate public education (FAPE) in the least restrictive environment (LRE).[11]

2. Children, under age 3, with a suspected disability are also entitled to assistance (but parents should check state law before PCS-ing). Under federal law, children who are suspected of having a disability are entitled to be evaluated at no expense.[12] Often, this state-run program is called "Child Find." Further, under IDEA, a child determined to have a qualifying disability can be provided services as part of an early intervention program before the age of three.

However, this same part of IDEA, called Part C, allows states great flexibility in how each offers services. Consequently, programs differ from state to state. For example, in Alabama, a child with a "developmental delay" receives services if he or she is delayed by 25 percent or more.[13] But, in Arizona,

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[4] Child with a disability means one with mental retardation; hearing impairments to include deafness, speech or language impairments; visual impairments including blindness; serious emotional disturbance; orthopedic impairments; autism (added in 1997); traumatic brain injury, other health impairments, or specific learning disabilities and needs special education and related services. *See* 20 USC 1401(3) and 34 CFR 300.8. Other health impairments are defined as something that limits the strength, vitality or alertness of the child (ADHD, cancer, etc.).

[5] 20 USC 1401(29).

[6] 20 USC 1400. IDEA applies to all schools that receive federal funding.

[7] This concept is referred to in the law as "least restrictive environment" or LRE.

[8] Parents should be given written notice of an IEP meeting. An IEP must be reviewed at least annually per 20 USC 1414(d)(4). Further, an IEP must be in effect at the beginning of each school year per 34 CFR 300.323(a). Peer-reviewed research was added by Congress in 2004. *See* 20 USC 1414.

[9] Meaningful participation includes being part of the team that meets and decides all of these issues. If a meeting is set at a time that the parents cannot attend, they should request that the meeting be changed to another time. Meetings usually take place at a school, but do not have to. Further, with the consent of both the parents and the school, meetings can be held over the telephone or over VTC. Parents also have the right to request a meeting with the school, testing for their child, independent evaluations conducted at school expense, and even the right to decline services on behalf of a child. Part of meaningful participation includes having access to information. Parents have the right to review their child's school record under the Family Educational Rights and Privacy Act (FERPA) and, arguably, under IDEA 2004. *See* 20 USC 1232g; 34 CFR Part 99. FERPA also provides parents with the right to request a correction of records that are inaccurate or misleading. FERPA applies to all schools that receive federal funding. Finally, parents should request regular progress reports on their child at least one per report card period.

[10] The act says that no otherwise qualified individual with a disability shall "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." *See* 29 USC 794(a).

[11] A child with a disability under IDEA means a child with a qualifying disability and needs special education and related services. *See* 20 USC 1401(3) and 34 CFR 300.8. The right to a free appropriate public education is more often associated with IDEA than with Section 504. The right under Section 504 is spelled out in 34 CFR 104.33. This right is often said to be stronger in Section 504 than in IDEA because of its wording: "the provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual education needs of handicapped person *as adequately as the needs of non-handicapped persons are met*. . . . [emphasis added]"

[12] The request for testing should be in writing. Schools are required to conduct the evaluation within 60 days of receiving the parent's written consent. However, federal law allows states to further define what "60 days" is. For example, this is 60 calendar days in Texas, 60 business days in Louisiana, and 60 school days in Florida. Once the evaluation is complete, if the parent disagrees with the evaluation, the parent can request an independent educational evaluation at school district cost. *See* 20 USC 1415(b)(1) & 34 CFR 300.502. If the parents request is denied, the school must either (1) request a due process hearing to show that its evaluation is appropriate or (2) ensure a IEE is provided at public expense [34 CFR 300.502(b)]. The school must act "without unnecessary delay" and even if the parent loses this request, the parent retains the ability to privately pay for an IEE and have it considered by the school.

[13] Alabama information at www.rehab.state.al.us/Home/default.aspx?url=/Home/Services/AEIS/General+Information#1.

a child must be developmentally delayed 50 percent or more to qualify for services.[14] If a military child moves from Alabama to Arizona, the change in definition may change the child's eligibility for services before age three.[15] States also differ in who pays for these services; with Alabama and Maryland paying for services, while Virginia and Arizona require some to all of the costs to be paid by the parent.[16]

> ***States differ in who pays for services; with some paying for services, while others require some to all of the costs to be paid by the parent.***

3. Parents have the right to school records. Parents have the right to review their child's school record under the *Family Educational Rights and Privacy Act* (FERPA) and, arguably, under IDEA.[17] The law states that the school must provide a parent with an opportunity to inspect and review his or her child's education records within 45 days following receipt of a written request. FERPA also provides parents with the right to request a correction of records that are inaccurate or misleading.[18] If the school does not amend the record, the parent can request a hearing. If the hearing does not resolve the issue, the parent has the right to insert a statement in the educational records to explain his or her view on the contested information. Parents can also file an appeal, within 180 days of the date that they knew or reasonably should have known, of the alleged violation, with the Family Policy Compliance Office in the United States Department of Education.[19] FERPA applies to all schools that receive federal funding.

4. Military parents changing public schools should receive "comparable services" at the child's new school. According to IDEA, a child who transfers school districts and has an IEP in effect shall be provided "with a free appropriate public education, including services comparable to those described in the previously held IEP."[20] Similarly, the *Interstate Compact on Educational Opportunities for Military Children* states that the new state "shall initially provide comparable services to a student with disabilities based on his or her current IEP and…shall make reasonable accommodations and modifications to address the needs of incoming students with disabilities, subject to an existing 504 or Title II Plan, to provide the student with equal access to education."[21]

While new IEPs are normally redrafted at the end of a school year, military parents should request a new IEP be created and enforced <u>before</u> the end of the school year. It is better to transfer with an IEP *in effect* rather than only an agreed to IEP.[22] Further, if the new school district wants to change or reduce services, the parents can point out that progress was

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[14] *See* ARS §15-761(3) . AZ information at https://www.azdes.gov/main.aspx?menu=98&id=5741. Virginia information at www.infantva.org/documents/forms/3028eEI.pdf. Maryland information at www.marylandpublicschools.org/MSDE/divisions/earlyinterv/.

[15] Services like these are available at some overseas facilities. These services are part of the Educational and Developmental Intervention Service (EDIS) and can provide early childhood special education, occupational therapy, physical therapy, social work, speech-language pathology, audiology, psychology, child psychiatry and access to a developmental pediatrician. *See* https://www/afspecial needs.af.mil for more information

[16] Overseas, DoD provides "Child Find" services at no cost to the parent; defining developmental delay as being 25 percent or more delayed in one or more areas. DoDI 1342.12, section E2.1.18.1., defines a child with a developmental delay as "as measured by diagnostic instruments and procedures of 2 standard deviations below the mean in at least one area, or by a 25 percent delay in at least one area on assessment instruments that yield scores in months, or a developmental delay of 1.5 standard deviations below the mean in two or more areas, or by a 20 percent delay on assessment instruments that yield scores in months in two or more of the following areas of development: cognitive, physical, communication, social or emotional, or adaptive." Child Find-like services overseas, called Educational and Developmental Intervention Service (EDIS), can include early childhood special education, occupational therapy, physical therapy, etc. *See* https://www.afspecialneeds.af.mil.

[17] *See* 20 USC 1232g; 34 CFR Part 99.

[18] This process may be used to challenge facts that are inaccurately recorded, but it may not be used to challenge a grade, an opinion, or a substantive decision made by a school about a student.

[19] A parent may obtain a complaint form by calling (202) 260-3887. The address for the office is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202-8520. http://www2.ed.gov/policy/gen/guid/fpco/index.html.

[20] 20 USC 1414(d)(2)(C)(i). The Commentary to Regulation 300.323(f) explains that "the Department interprets 'comparable' to have the plain meaning of the word, which is 'similar' or 'equivalent.'" [*See* Commentary in the Federal Register, page 46681.]

[21] Article V, part C of the Compact. You can view the model language of the compact at http://www.mic3.net/. Thirty-six states including Texas, California, Virginia, and Florida have adopted the compact. The compact provides for uniform treatment of military children transferring between school districts and states. It applies to children of active duty members, National Guard and Reserve on active duty orders, members or veterans who are medically discharged or retired (but only for a year) and members who die on active duty. It addresses issues like enrollment, absences related to deployment, eligibility for extracurricular activities, and graduation requirements.

[22] *A.M v. Monrovia Unified Sch. Dist*., 2010 U.S. App. LEXIS 25503 (2d Cir.)(unpublished); In this case, the Court of Appeals held that a school was not obligated to implement a prior school's IEP (agreed to) as it had not yet been implemented.

being made on the IEP during that last portion of the school year.

Even with an *in effect* IEP and armed with the law, many military parents find that school districts reduce or alter IEP services shortly after their arrival. It is within the rights of the receiving school district to re-evaluate an incoming child, draft a new IEP and propose its own placement and services solution. Parents have the right to challenge these recommendations and decisions. Anecdotally, military parents have often encountered the most extreme reductions in school services when moving to a short-stay assignment like attending Air War College.[23]

If possible, parents should always attempt to live in a school district that provides programs and services that are comparable to their old school district.[24] While a parent can legally fight for services at a new duty location, they may avoid a protracted battle if the services are available within the district. Finally, awaiting resolution in a protracted legal battle with a school district can outlast their time on station, making the subject often moot and the battle not worth the cost.[25]

5. Parents should know how discipline is applied to children with disabilities. Generally, children with disabilities are subject to the same disciplinary standards as other children. In fact, a child with a disability can be removed from the classroom, placed in an alternative school, or even suspended for violations of the school code of conduct.[26] However, children with a disability should not be disciplined for “manifestations of their disability.”[27]

Generally, children with disabilities are subject to the same disciplinary standards as other children.

If a child with a disability is placed in an alternative school or suspended from school for ten or more days (cumulative) during a school year, then it is a “change in placement” and triggers a “manifestation of disability” hearing. This hearing determines whether conduct was a result of the disability.[28] If yes, the committee must determine what steps are needed, to include changes in the IEP, behavior intervention plan or even a change in placement to address the conduct.[29] Then the punishment can stand and further discussion should be held on the educational placement. Any decision made at the manifestation of disability hearing is subject to appeal by the parents.[30]

School districts may recommend the use of restraints or seclusion to address behavior problems.[31] Parents

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[23] This is likely because appealing reductions in services or placements takes time and may not be resolved prior to PCS.

[24] Military families cannot control when and where they move. However, unless the military member is required to live in military housing, they can control where they live in a new area. Often, duty locations will have more than one school district in the area. Parents should work with the installation school liaison officer to find out everything they can about services in those school districts. They should join local community website list servs and find out what parents who have a child with a disability are saying about that school district. Finally, they should make an appointment and go visit the Office of Special Education at each school district. They should use this visit to learn about the entire continuum of services offered in a school district.

[25] Attorney fees can be awarded to the prevailing party for due process hearings and court proceeding. IEP meetings, mediation, and reconciliation hearings are not covered by provisions that would allow the awarding on attorneys fee. Many legal practitioners argue that parents may be the best advocates in these forums. IDEA will not reimburse parents for expert assistance even though in many cases, due process and court hearings are a “war of the experts.” On March 17, 2011, the IDEA Fairness Restoration Act was introduced in Congress to allow parents to recover expert witness fees when they prevail in due process hearings and court actions under the IDEA. This bill will overturn the Supreme Court decision in *Arlington Central School District v. Murphy*, 548 U.S. 291 (USSC 2006) that ruled that parents could not recover such expert fees when they prevail.

[26] 20 USC 1412(a)(1) and 20 USC 1415(k). Services may be provided in the alternative setting or even at home during the 10 days or less. However, the school is only required to provide services if they would provide them to a similarly-situated non-disabled child. *See* 34 CFR 300.530(d)(3).

[27] 20 USC 1415(k)(E)(i). This is defined as conduct that was “caused by or had a direct and substantial relationship to the child’s disability or was the direct result of the school’s failure to implement the IEP.”

[28] 20 USC 1415(k). School day means any day to include a partial day per 34 CFR 300.11. There are also exceptions that allow the school to enforce a suspension for up to 45 days if the violation included guns, drugs or serious bodily harm. Also, there is no right to “stay put” where a disciplinary issue triggers the change in placement per 34 CFR 300.533.

[29] Parents may also request that the suspension be removed from the child’s school records. *See* FERPA (FN 9).

[30] 34 CFR 300.532 on appeals.

[31] This can include placing a child with a disability in physical restraints in a sitting or lying down position or placing the child in a private or semi-private room with no contact with or without physical restraints. It also can include the use of chemical restraints, like the administration of prescription medication in response to certain behavior. In 2009, a GAO report stated that abusive restraint and seclusion were widespread in schools. They were being used as a routine disciplinary tactic rather than in response to an emergency. They also explained that it was not uncommon to see ropes, duct tape, chairs with straps and bungee cords being used to retrain and isolate young children. Finally, per a recent change to IDEA, schools cannot require a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving services. *See* 20 USC

should exercise caution in agreeing to an IEP with restraint or seclusion as a method to address behavior issues. First, there is very little peer-reviewed research to support that these techniques improve behavior.[32] Second, if these methods are in the IEP, the parents may have little recourse against the school if restraints and/or seclusion is used inappropriately; even if the school uses them to demean, belittle or hurt the child.[33] Federal legislation has been introduced that would place minimum safety standards to prevent abusive restraint and seclusion in schools.[34] Some states, like Maryland, already place limits on these practices.[35]

Junior enlisted parents of a child with a disability can receive financial aid to provide needed support for their child through SSI payments.

6. Supplemental Security Income (SSI) and military pay—know the rules and how moving can change things for a military family. Junior enlisted parents of a child with a disability can receive financial aid to provide needed support for their child through SSI payments.[36] Entitlement to these payments, between $1.00 and $674.00 per month, is often the gateway to enter other federal programs like Medicaid that can provide greater support for the disabled.[37]

Parents of a disabled child will have to meet a "means test" to qualify for SSI. Part of their income and property will be tallied in a process called "deeming." Per the *Heroes Earning Assistance and Relief Tax Act of 2008* (called the HEART Act), military base pay, BAH and BAS are counted by the Social Security Administration as "earned" income while housing on base (where the military member does not receive BAH) is considered in-kind support and maintenance.[38] This is important because, in qualifying, parents are able to have more "earned" income than "unearned" income; helping junior enlisted families qualify for this benefit.

However, qualifying for this benefit in one state does not guarantee that a military family will qualify in another state. BAH payments can vary greatly from state to state. So, if a family qualifies at Moody AFB then moves to a high-BAH area like Los Angeles or Washington DC, their eligibility for SSI payments and any other related assistance may cease.[39] If a military family receiving SSI is moving, they should consider the impact on SSI benefits and remember to notify their local Social Security Office before leaving (or risk repayment and penalties).[40] On a positive note, military families can receive SSI while overseas and can apply for SSI while serving overseas.[41]

1412(a)(25)

[32] *See* GAO Report, entitled, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* at http://gao.gov/new.items/d09719t.pdf

[33] *See C.N. v. Willmar Public Schools, Indep. Sch. Dist. No. 347*, 591 F. 3d 624 (8th Cir. 2010). In this case, the parents and a psychologist disagreed with the use of restraint and/or seclusion against a primary school child. However, the parents never appealed the inclusion in the IEP. A teacher mistreated the child with a disability by using both excessively, demeaning and belittling the child, denying her use of the bathroom and choking and hurting the child. The Court of Appeals hearing an complaint filed under the 4th amendment stated that even if the restraint and seclusion met seizure under the 4th Amendment, it was not unconstitutional because the IEP authorized it and the teacher, even if overzealous it is use, can rely on the IEP.

[34] On 6 Apr 2011, the Keeping All Students Safe Act was introduced by Congressman George Miller of California. If passed, the law would limit physical restraint and locked seclusion, outlaw mechanical restraints and prohibits restraints that restrict breathing and require schools to notify parents after incidents when restraint and seclusion is used.

[35] Links to all state's policy can be found at http://www2.ed.gov/policy/seclusion/seclusion-state-summary.html.

[36] SSI is a program for low income people 65 or older, the blind and those with a disability. See http://www.ssa.gov/ssi/.

[37] Some states offer additional financial supplements in addition to this amount.

[38] 122 Stat 1624 (2008). Also see 20 CFR 416.1130(b) and 20 CFR 416.1110(a)(2). If a military member lives in on-base housing or lives in privatized housing provided through a contract where BAH is not received by the member, but is paid directly to the housing provider, it is considered "in-kind support and maintenance." As such, it may reduce the SSI benefit for a family by up to 1/3 of the federal benefit. So, the decision to live on or off base will affect this benefit. Combat pay is not going to count for SSI [37 USC 310 and 20 CFR 416.1130(b)(19)].

[39] This example is based on an E-3 with a spouse and two children; one of which has a disability. The spouse does not work. At Moody AFB, the BAH is $894.00. At Los Angeles AFB, the BAH is $1932.00. This example presumes that the family already has little in savings. Additional children, additional income and/or additional savings can easily change eligibility. In-kind support and maintenance

[40] Military families can also call 1-800-772-1213 to get more information about moving between states with SSI benefits. If the family is overpaid because of an unreported change in status or income, they can be subject to recoupment and, in some cases, a penalty can be assessed against future payments. *Also see* 20 CFR 416.216.

[41] Contact nearest U.S. Embassy or Consular Office or write: Social Security Administration, Attn: SSI Military Children Overseas Coordinator, 1 Frederick Street, Suite 100, Cumberland, Maryland 21502.

7. DoDEA Schools play by their own rules. About 8% of military connected children attend one of the 194 DoDEA schools world-wide. Of the children attending DoDEA schools, 11% of children are receiving special education services. While DoDEA schools are like their civilian counterparts in many ways, they follow different guidelines and timelines for providing special education services. First, while public schools in the United States are required to comply with IDEA, DoDEA schools comply with DoDI 1342.12, *Provision of Early Intervention and Special Education Services to Eligible DoD Dependants*. This instruction does incorporate by reference the substantive and procedural due process requirements found in IDEA part B and C.[42]

Both IDEA and DoDI 1342.12 guarantee a FAPE in the least restrictive environment, but DoDI 1342.12 makes no guarantees that timelines and rules it sets for itself will be followed. Instead, it states "[this instruction]…does not create any rights or remedies and many not be relied upon by any person, organization or other entity to allege a denial of such rights or remedies."[43] This section of the DoDI will likely make a case regarding a procedural violation of rights more difficult in a DoDEA school.

Parents can challenge the decision to not classify a child as a "child with a disability".

8. Parents can disagree with and challenge any decision made by the school about their child. Parents do not have to sign the IEP. Further, parents can agree to consent to some services offered by a school district and not to others. Parents can refuse to consent to an evaluation or even services.[44] Finally, parents can challenge the decision to not classify a child as a "child with a disability," any change in placement and/or services, and anything they believe violates their right to either procedural or substantive due process.[45]

When a school proposes to initiate or change, or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, the school must give the parents written notice. This document, called "Prior Written Notice" (PWN), is the key to a parent's right to appeal. With this notice in hand, the parent can contest the decision by requesting mediation or a due process hearing before an administrative law judge.[46] If the parent loses at the due process hearing, the parent can appeal to federal court. Generally, appeals must be filed within 90 days unless state law provides another deadline.[47]

Any court ordered or agreed to remedy given to military parents through mediation, a due process hearing, or any other proceeding should consider the transient nature of the family. For example, suppose the hearing officer orders a school district to fund 30 hours a week of private tutoring for 18 months as a form of compensatory education (as remedy for not providing FAPE in the past). An order that requires payment only while the family remains in the school district may be useless if the family is due to PCS.[48]

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[42] 10 USC 2164(f) and 20 USC 927(c).

[43] DoDI 1342.12, para. 2.5 (11 Apr 2005).

[44] If the parent refused to consent to the initial evaluation, and the child is in a private school or home school, then the school district cannot demand a "due process hearing" to try and force an evaluation [34 CFR 300.300(d)(4)(i)]. Even if parents consent to the evaluation, parents still have the right to refuse consent for special education services. However, if parents refuse offered services, then the school is no longer legally required to provide a free appropriate public education and they are not required to draft an IEP for the child [20 USC 1414(a)(D)(ii)].

[45] Some states may provide parents greater rights than under federal law. For example, in Virginia, parent consent is required for change in placement. *See* 8 VAC 20-81-170.

[46] *See* 34 CFR 300.506 on mediation and 34 CFR 300.57 on due process complaints and hearings. Generally, the statute of limitations for due process hearings is two years from the alleged violation of procedural or substantive due process rights. See 34 CFR 300.57(a)(2).

[47] 20 CFR 300.516.

[48] The IDEA does not explicitly authorize the award of compensatory education. However, the IDEA "…authorizes the court to 'grant such relief as the court determines appropriate.'" *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Todd* A., 79 F.3d 654, 656 (7th Cir. 1996)(quoting 20 U.S.C. Section 1415(3)(2)(now at 20 U.S.C. Section 1415(i)(2)(c)(iii)). Compensatory educational services can include an award of additional time at an appropriate residential or day placement, *Sanford School Dept*, 47 IDELR 176 at 16 (Maine State Educational Agency, Oct. 31, 2006) (ordering payment of 1 year of residential placement for a child with learning disabilities); *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (March 6, 2008) (11th Cir. 2008) (ordering 3 years of private school for a student with learning disabilities); *Carbondale Elementary School District 95*, 23 IDELR 766 (Illinois State Educational Agency, Jan. 12, 1996)(ordering two years of private day school for failing to address dyslexia); *Chicago Public School*, 108 LRP 35213 (Illinois State Educational Agency, Apr. 17, 2008) (awarding two additional years at Hyde Park Day School as compensatory education). Awards can also include reimbursement for the costs of private educational tutoring. *Heather D. v. Northampton Area School District,* 48 IDELR 67 (E.D. Penn, June 19, 2007) (awarding 2,428 hours of compensatory education at $75 an hour, creating a $182,100 compensatory education fund).

9. Parents have some powerful tools they can use (with caution) under the law. If parents disagree with a change in services or placement for their child and choose to challenge the decision, they can send the school a written demand for "stay put."[49] Per federal law, during the pendency of any proceeding, unless agreed to otherwise, "the child shall remain in the then-current educational placement of the child." This does not apply in disciplinary situations that result in a change in placement.[50]

If a parent believes that the school is failing to provide FAPE for a child with a disability, they can, with a 10-business day written notice to the school district, remove the child from the public school and place the child, at their own expense, in a private school.[51] Then, the parents can file for reimbursement of the cost of private school with the public school. In these cases, it is likely the demand for payment will be denied by the public school and the case will be heard at a due process hearing. Parents must be aware, should they lose the hearing or the subsequent civil court case, they will have to pay the costs of private education.[52]

10. The law will not reimburse parents for experts, but military parents may have an expert. TRICARE/ECHO, a supplement to TRICARE, provides up to $36,000 in funds for additional therapy and services for military children with a disability.[53] Often this money is used by parents to fund therapy prescribed by a doctor, but not provided by the school district. Professionals providing routine services through the ECHO benefit may have insights into what additional support and resources a child with a disability needs—and can be a great ally in advocating to the school district for appropriate services for a child. They can be invited by a parent to an IEP meeting or even serve as a factual witness in an administrative hearing.[54]

If the child with a disability will need assistance through programs like SSI and Medicaid into the future, parents should start planning now.

11. Estate planning is important—and not all military benefits will work for military parents. If the child with a disability will need assistance through programs like SSI and Medicaid[55] into the future, parents should start planning now. Many benefit programs require the recipients to not exceed specific income limits. These income limits can be easily exceeded if the child inherits money or property through a will or becomes the beneficiary of military benefits like Servicemembers Group Life Insurance (SGLI) or Survivor Benefits Plans (SBP) payments. The military child's inheritance may disqualify him or her from federal and state assistance programs while not providing sufficient income to replace the loss of these benefits. To protect the child with a disability from losing needed eligibility, parents should consider creating a special needs or supplemental needs trust to receive assets for the child with a disability.[56] Funds placed in a special

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[49] *See* 20 USC 1415(j) and 34 CFR 300.518.

[50] See 34 CFR 300.533.

[51] *See Burlington v. Massachusetts*, 471 US 359 (USSC 1985). In this case, parents did not believe that the IEP was providing FAPE to their child. After repeated evaluations and discussions with school officials and experts, they moved their child to a private school that could provide the specialized education their son needed while requesting payment of private school fees from the school. USSC ruled in favor of the parents. Also see 34 CFR 300.518(d) on payments during a school district appeal. *Read* 34 CFR 300.148 and 20 USC 1412. There are specific procedural steps that a parent must follow to even be eligible for reimbursement by the school district. This includes not only notice, but also making the child available for evaluations.

[52] *See J.W. V. Fresno Unified Sch. Dist.*, 626 F.3d 431 (9th Cir. 2010) and Bd. of Education v. Rowley, 458 U.S. 176 (USSC 1982) where parents did not win reimbursement.

[53] *See* http://www.tricare.mil/mybenefit/home/overview/SpecialPrograms/ECHO; The family must be enrolled in EFMP before applying for the ECHO program. The $36,000 is per person, per fiscal year. There are a wide range of services covered by the ECHO program.

[54] This group is composed of a general education teacher, a special education teacher, school specialists who work with the child, a school administrator and the parents. *See* 20 USC 1414(d)(1)(B)(vi). If a member of the IEP team required to be at the meeting cannot attend, then the member can submit their input in writing and the meeting can be held with consent of the parents and the school. Parents consent must be in writing. *See* 20 USC 1414(d)(1)(C)(ii). The parents have the right to bring along others to the meeting. This can include the ABA therapy provider. Parents may have to pay for this time. However, as the therapist already spends time with the child, they will not have to pay for an expert to learn about the child. It has already occurred through normal covered services. Also, often the therapist will have credentials in working with children with a disability that are equal to or exceed those of school representatives. This can be very persuasive if a dispute arises.

[55] 42 U.S.C. § 1396d(a) (2000) (listing approximately 30 different services covered by Medicaid, including inpatient and outpatient services, dental, physical therapy, nurse, hospice, and community care).

[56] *See* 42 USC 1396p(d)(4)(A) or (C). Sterling L. Ross, *The Special Needs Trust: A New Wrinkle No More*, 36 U. MIAMI INST. ON EST.PLAN. 16, para. 1601 (2002). Also Major

needs or supplemental needs trusts do not count as assets or income for receipt of federal benefits.[57]

Parents can have assets pour into the trust, protecting the child's eligibility; knowing that trust funds can be used to provide comfort items for the child.[58] Unfortunately, SBP and another benefit called Dependency and Indemnification Compensation (DIC) payments[59] cannot be routed *directly* into a trust.[60] While a statutory solution is being devised, parent may chose to redirect SBP benefits away from the child with a disability and direct a future caregiver of a child/adult with a disability[61] to consider impact of DIC payments before applying for them.[62]

12. Parents of a child with a disability need to do additional legal preparation before deployment. Military parents of a child with a disability must carefully catalogue the doctors, service providers and others that they interface with on behalf of their child. Who will attend IEP meetings? Who will handle SSI issues? Does a representative or protective payee need to be appointed? Who will take the child to medical appointments and will they have access to the child's medical information? How will the caregiver get on base for medical appointments? Can the caregiver get respite care from the Air Force? Will the caregiver be able to pick up Easter Seals donations of diapers for the child? These issues, and more, may need the help of a notary or special power of attorney. In addition, if the caregiver is not a parent, a *Health Insurance Portability and Accountability Act* (HIPAA) waiver may need to be signed for each provider and for the EFMP office. Finally, if the caregiver will need to file TRICARE claims paperwork, talk with TRICARE about how they would like to handle this. The caregiver may need a special power of attorney.

CONCLUSION

Special needs and EFMP families are part of the Air Force family and we need to reach out to them. The JAG Corps, working with EFMP family service coordinators and SLOs, can make a significant different in the lives of these families by educating them on the specific challenges they will face as they navigate the often unique medical, financial and legal issues.

We can't solve every problem faced by a military family with a special needs child. However, being attuned to their unique legal issues will help us help them and, as needed, provide the best legal advice and guidance possible. In the end, educating military parents about these issues will help them as they continue to advocate for their children in assignment after assignment. For some, this role of advocate will be a lifelong occupation.

Check out the CAPSIL learning center for further information on Special Needs Families at https://aflsa.jag.af.mil/apps/jade/collaborative/course/view.php?id=1096

Michael R. Renz, USMC, *The Special Needs Trust and the Military Client: The Critical Issue-Spotting Role of the Legal Assistance Attorney*, Naval Law Review, Volume 59, 2010, 45.

[57] How special needs trust work and the differences between first party, third party, pay back and pooled trusts is beyond the scope of this article. Income limits and other related rules for receipt of a benefit like SSI can vary from state to state and from year to year. For this reason, these trusts are very complex and should only be drafted by an attorney with expertise in this area.

[58] A properly drafted SNT can provide for such luxuries as field trips or vacations, tickets to a movie or sporting event, or entertainment options. It can also provide for over-the-counter medicines, experimental treatments, and even the employment of a companion for the disabled dependent. *See* Major Michael R. Renz, USMC, *The Special Needs Trust and the Military Client: The Critical Issue-Spotting Role of the Legal Assistance Attorney*, Naval Law Review, Volume 59, 2010, 45.

[59] DIC is a monthly tax-free cash payment to survivors and dependent of service members killed while on active duty and for survivors and dependants of certain veterans. DIC payments can be made to the guardian of child (under 18) or, in the case of what the VA calls a "helpless child," then payments can be made after the age of 18. To be a "helpless child," the child must be permanently incapable of self-support by reason of mental or physical defect and it must be shown that such incapacity existed prior to the date the child attained age 18. For a sole surviving "helpless child" over the age of 18, the DIC payment can be over $700 per month. Current DIC rates can be found at http://www.vba.va.gov/bln/21/rates/comp03.htm#BM07. DIC is paid to a surviving spouse, child or even parents of the member (limited circumstances) by law and is not a benefit that can be redirected at will by the member. If receipt of this payment will disqualify a disabled child/adult from other benefits without providing enough money to pay for lost benefits, the person may not chose to apply for DIC. The best solution may be to alter the law for DIC to allow it to be redirected into a special needs trust. *See* 38 USC 1314 and 1314.

[60] SBP was enacted into law in 1972 by PL 92-425 and is codified at 10 U.S.C. Sec. 1447 et.seq. Under SBP, active duty military are provided the SBP benefit without cost. Military retirees must pay for the cost of the SBP benefit through a reduction in retirement pay, with the cost determined by rank at retirement and years of active service. The SBP benefit provides an annuity for the surviving spouse and/or dependent children of the retiree or active military member of up to 55% of the military member's retirement pay.

[61] This article did not discuss guardianship and alternatives to guardianship that a military family may need to know about if the child with a disability will not be able to live an independent adult life.

[62] For SBP, parents can draft a letter of intent to the person and ask that the money from a program SBP be placed in the trust. This letter is not binding and any addition to the trust should be discussed with the attorney who drafted the trust. There are two general types of special needs trust: first party trusts and third party trusts. The rules vary on who can add money to them and what happens to any funds left in the trust upon the death of the person with a disability.