

Children and the Law

Legal considerations when advocating for children with special education needs

by William B. Reichhardt

Lawyers practicing in diverse legal areas related to children's issues often encounter problems understanding and implementing advocacy strategies for children who are eligible for special education services. Familiarity with the basic principles of eligibility determination, due process rights and provision of services or placements for special needs children can be extremely useful for lawyers and judges dealing with children's issues. After defining these basic considerations, this article will focus on common problems and issues for special needs children in family law, personal injury and criminal law cases.

General provisions of special education law

Children with disabilities may be eligible for special education accommodations and services under the provisions of State and Federal laws. The Individuals with Disabilities Education Improvement Act of 2004 (IDEA),¹ defines special education as "specially designed instruction, at no cost to the parents, intended to meet the unique needs of a child with a disability." Virginia's Administrative Code governs the law of special education consistent with the federal statutes and regulations.² Under federal law a "child with a disability" is defined as "having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services."³ Special education includes instruction

conducted in the classroom, the home, in hospitals and institutions, and in other settings, as well as instruction in physical education."⁴ In conjunction with the child's parents or guardians, school staff develops a written Individual Education Plan (IEP) which describes the child's disability, the present level of performance, educational services, school placement and the specific measurable goals and objectives.⁵

Children with special needs may be eligible for accommodations under Section 504 of the Rehabilitation Act of 1973 to assist access to school and the classroom. An example of such accommodations under a 504 Plan could be additional time for completing school tests. There are differences between an IEP and a 504 Plan. The IEP is a contractual document requiring the school to provide services in a least restrictive environment to allow the child to make meaningful educational progress. The 504 Plan is a mechanism to help access the learning environment through specific accommodations.

Attorneys working with cases involving children with disabilities should determine whether a child qualifies for services (an IEP) under IDEA or access accommodations under a 504 Plan. If the child has not already been evaluated for eligibility by the school staff, this process is easily started by a written request to the local school. The school district will often conduct comprehensive psychological and educational testing to determine a child's eligibility initially and then periodically during the child's school experience. Parents participate in the determination of eligibility by providing additional information or private psychological or medical evaluations.

Once an IEP or 504 Plan is developed for a child, it may be reviewed at any time, but must be done

at least once per year. Once the determination has been made that a child needs services or educational placement, the school district is required to pay all necessary expenses, tuition and transportation to implement the IEP in the least restrictive educational environment. The school district may not deny eligibility or necessary funding because a child's disability is too severe. Disputes about eligibility, enforcement or modification of IEP provisions, placement and services are resolved by specifically defined due process procedures.

The requirement for school districts to determine eligibility, to implement valid IEPs and to provide a free appropriate public education (FAPE) is enforceable. When a school district fails to provide a valid IEP, parents may be eligible to compel the school district to reimburse the parents' costs for private school placement or services. When parents substantially prevail in administrative due process or court actions against school districts in special education cases, they are eligible to recover reasonable attorney fees and costs.

The laws and regulations governing special education disputes are often complex and require some specialized knowledge. An understanding of the basic principles of special education law can help the practitioner identify needs for eligibility determination, protection and enforcement of rights, and appropriate placement and services for children.

Considerations for Family Law Cases

Courts determining the best interests of children in contested custody and visitation cases must consider the physical and mental condition of the child with due consideration to the child's changing developmental needs.⁶ Further, the court must evaluate each parent's ability to accurately assess and meet the emotional, intellectual and physical needs of the child.⁷ An understanding of a child's potential special education needs is essential for attorneys and judges in these cases.

When preparing family law cases involving children with disabilities, attorneys should first gather all relevant material needed to assess the nature and scope of the child's specific disability. A parent has the ability to review and copy all school records related to testing, eligibility, IEPs and services for his or her child.⁸ Under the IDEA, a parent has the authority to inspect and review records relating to his child, unless the school has been advised otherwise under applicable state law governing such matters as guardianship, separation and divorce.⁹ Since all significant special education decisions require a parent's participation and consent, these records can demonstrate a parent's level of collaboration with the school on behalf of his or her child. Records will also show the level of a child's progress in school as well as specific problems that may have been communicated from the school to a parent.

A serious problem can arise when separated or divorced parents do not act in a mutually supportive or collaborative manner regarding the special education needs of a child. All parental rights under the IDEA apply to both parents unless a court order or state law specified otherwise.¹⁰ Although a noncustodial parent will have the right to access school records and participate in school IEP meetings, absent a court order or written agreement granting educational decision making, the noncustodial parent cannot control consent for special education decisions. This dilemma can be particularly acute in cases where conflicted parents have joint legal custody, but education decision making for a disabled child is not addressed in the custody order or property settlement agreement. When necessary, the court should be requested to specify the authority for each parent to make special education decisions for the child.

The Circuit Court or the Juvenile Court must appoint a lawyer to serve as a guardian *ad litem* (GAL) in any case involving a child who is alleged to be abused or neglected, or who is the subject of an entrustment agreement or a petition seeking termination of residual parental rights or who is alleged to be a child in need of services.¹¹ The Court also retains broad discretion to appoint a guardian *ad litem* in cases where the court determines that the best interests of a child are not otherwise protected.¹² A GAL is required to perform an independent investigation into the best interests of a child and has the obligation to report to the court regarding his findings and recommendations. Lawyers serving in the role of the GAL for children with disabilities are well advised to review all available school records and independent evaluations for the child in order to give a complete recommendation to the court.

Although school districts are required to fund the placements and services identified in the IEP, in many cases children require supplemental services such as mental health therapy or in home services that are not always paid through education funding sources. Children who are eligible for special education services may also receive assistance from Medicaid or through the Virginia Comprehensive Services Act.¹³ At the local level, the Comprehensive Services Act is administered through the collaboration of Community Policy and Management Teams (CPMTs) and Family Assessment and Planning Teams (FAPTs). These multi-discipline agency teams review specific case eligibility and funding for services. Family law practitioners should also review the requirements for children with special needs in child support cases. In some cases, the facts may warrant a deviation from guideline child support determinations.¹⁴

Personal injury advocacy and special education

Medical and neuropsychological injuries that impair learning in children, are a basis for special

education eligibility. If not yet initiated by the school district, a parent should request a determination of eligibility and educational services through an IEP. Children are eligible to receive such educational services when in a hospital setting and also upon transition to home, school, community based services and vocational programs.

In 1990, Congress added traumatic brain injury (TBI) to the IDEA list of disability categories.¹⁵ This designation is not considered a distinct disability but it is a condition that may cause one or more educational disabilities. It is the only special education disability category that is related to a specific event. With this condition, there are often post traumatic psychological stress issues for both the student and the family.

In formulating a workable IEP for children with TBI, educators will often employ an approach called Responses to Intervention (RTI). In its simplest form, RTI techniques are the application of research based education methodologies with measurable objectives to determine a child's best responses. The IEP may then be modified and adjusted as the child shows educational progress.

Children who are challenged from TBI or severe disabilities, often require significant individualized services in the school setting. An IEP should address the need for 1:1 assistance, supervision of certain medical needs and training of school staff regarding a child's accommodations. In addition, the IDEA requires school districts to provide specific transition services for education, vocational and independent living skills. Transportation is to be provided to access all services mandated by the IEP. Disputes with a school district regarding eligibility or the appropriateness of educational services under IDEA are resolved initially by options for mediation or contested due process hearings. Federal courts have uniformly held that money damages are not available for claims under the IDEA. However, such damages may be available for claims based on violations of Section 504 of the Rehabilitation Act. Claims asserted under both statutes must be brought within a two year statute of limitations.

In cases where a student demonstrates a regression in skills due to failure by the school to provide educational services, federal courts have recognized actions for compensatory services. In certain circumstances, parents can seek reimbursement for private expenditures for services that should have been provided by the school.

Advocacy for children who have medical, psychological and educational disabilities caused by a traumatic event is often complex and challenging for parents and attorneys. The Virginia Department of Education maintains a comprehensive list of special education resources on its website that can help to parents and advocates. The assessment of a child's current and future educational needs is often complicated in cases where the manifestation of disabilities

resulting from injury is delayed over a significant time frame. In such cases, parents and advocates should seek expert help to make sure all educational entitlements are provided for the child on a continuing basis.

Special education issues in juvenile criminal cases

Understanding the basic principles of special education law is essential for effective advocacy for juvenile court cases involving children with learning disabilities. A significant percentage of children involved with the juvenile courts for law violations exhibit learning deficits. At the time of admission, approximately 67 percent of children in Virginia's juvenile correctional facilities have diagnosed mental health conditions and 58 percent of all children admitted to these facilities have a history of prescription psychotropic medication use.¹⁶ Children with special education needs are more prone to drop-out of school, display in-school discipline problems and they have a greater risk of low employment options after graduation.

When representing children for delinquency offenses in the juvenile court, lawyers should obtain and thoroughly review all current school records for the child. Recent testing may reveal learning deficits and skills deficiencies that could have influenced how the child responded to arrest and police interrogation. Knowing a child's ability to function in school is a critical factor in determining realistic alternatives to pre-trial detention. If a child is detained pending trial or after disposition, special education services must be afforded pursuant to the child's IEP.¹⁷ Understanding a child's eligibility and need for special education services is an essential element to any meaningful court disposition in delinquency cases.¹⁸

The nexus between the schools and the juvenile justice system has become more defined over the years as laws have been expanded to address the safety of schools and the community. School Board candidates run on political platforms promising "zero tolerance" and schools often employ police-trained security staff. Virginia law requires that certain instances of school misconduct, such as assaults resulting in injury, sexual assaults and any bomb threat or drug related offenses must be reported to local law enforcement.¹⁹ When a child is charged with certain serious crimes in the community, juvenile court intake officers are required to notify the local school district of the filing of charges regardless of whether or not the offense related to a school.²⁰ Upon receipt of this information, school officials may suspend or remove a child from school pending the outcome of the delinquency case.

When special education students are suspended for more than 10 days, or their educational placement is changed for disciplinary reasons, the school



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must conduct a manifestation determination review (MDR) to examine the relationship between the child's disability and his misconduct.²¹ Within 10 days of a change of placement (including suspensions for over 10 days), the school must convene an IEP team with the parent to review 1) If the misconduct was caused by, or had a direct or substantial relationship to the child's disability, or, 2) was a direct result of the school's failure to implement the child's IEP. If the team determines that the misconduct was "causal," then the IEP must take steps to remedy the behavior and return the child to the previous educational placement. If there is no causal connection between the disability and the misconduct, then the student may be disciplined in the same manner as non-disabled students, except that special education services must continue under an IEP. The findings of the team in a manifestation determination are part of a student's file; these records can provide counsel with valuable insight into a child's school based behavior.

When children with learning disabilities are involved in school based delinquency proceedings there is a complex intersection between the school suspension or expulsion actions, manifestation determination reviews by the IEP team and the due process procedures in the Juvenile Court. Managing these three forums can be challenging but is essential for good advocacy. Lawyers representing children with special education disabilities should assist the parents and the child to obtain an appropriate education program in the least restrictive environment consistent with the child's and the community's safety. The child's statements given during school investigations of misconduct should be scrutinized for admissibility in pending criminal proceedings. Educational and psychological testing should be reviewed to examine issues of competency, criminal intent and disposition alternatives for juvenile offenders.

Cases involving juveniles who face potential jurisdictional transfer proceedings to allow adult penalties in the Circuit Court demand careful consideration by prosecutors and defense attorneys. The latest information regarding transfer cases in Virginia between 2001-2008 reveals that nearly half (48 percent) of all juveniles transferred to Circuit Court committed the offenses of robbery or non-sexual assault. Youth transferred to Circuit Court for non-violent drug offenses (9 percent) outnumbered youth transferred for homicide (6 percent) or sexual assault (8 percent).²² Further, 20 percent of youths convicted as adults in Circuit Courts between 2001-2008 received no incarceration in adult facilities and were released on probation supervision.²³

Information about a juvenile offender's school history and potential eligibility for special education and mental health services is necessary for good decision making when there is a question of transfer of jurisdiction from the Juvenile Court to the Circuit Court.

One of the most challenging problems for defense attorneys, prosecutors and judges is to safely keep juvenile offenders in the community while being meaningfully engaged in school. Children with significant emotional and behavioral disabilities are more likely to be involved with the Juvenile Courts. A number of these cases are brought to court on petitions filed by school administrators. The problems are compounded when these children have significant learning deficits and are alienated from the classroom. They are further excluded from school through long term suspensions or expulsions. Having a working knowledge about the mandates for the education of children with learning and emotional disabilities is the first step in addressing this critical problem.

Endnotes

1. Individuals with Disabilities Education Improvement Act of 2004; 20 USC 1400 *et. seq.* In this article, references to the application of specific provisions will be to the Code of Federal Regulations (CFR).
2. Virginia Special Education Regulations, 8-VAC-20-81 *et. seq.*
3. 34 CFR 300.8
4. 34 CFR 300.39
5. 34 CFR 300.323 (c)(2)
6. Va. Code §20-124.3(1)
7. Va. Code §20-124.3(3)
8. Va. Code §20-124.6(A)
9. 34 CFR 300.613
10. 34 CFR 300.30
11. Va. Code §16.1-266(A)
12. Va. Code §16.1-266(F)
13. Va. Code §2.2-5200 *et. seq.*
14. Va. Code §§20-108.1(B), 20-108.1(B)(7)
15. 34 CFR 300.8(c) (12)
16. Virginia Department of Juvenile Justice, Data Resource Guide FY 2008.
17. 8 VAC 20-81-160
18. See Chapter 17, *Juvenile Law and Practice in Virginia*, Virginia CLE, Virginia Law Foundation 2009, "Using Educational Law to Create Better Outcomes in Juvenile Cases," Reichhardt, Block and Ciolfi.
19. Va. Code §22.1 - 279.3:1(D)
20. Va. Code §16.1-260(G)
21. 34 CFR 300.530(E)
22. Source: Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, Juveniles Convicted in Circuit Court FY2001-FY2008, Presentation to the Virginia State Crime Commission (June 25, 2009).
23. *Id.*