

An Overview of Special Education Law—Part I

by Theresa Sidebotham

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Part I of this article provides an overview of special education law, to give the practitioner a working knowledge of the process. It reviews the Individuals with Disabilities Education Improvement Act (IDEA), including “child find” and eligibility, how services are provided, due process, school discipline, and transitions. It also addresses Section 504 of the 1973 Rehabilitation Act.

Many children have special needs that affect their education. Sometimes, the educational system works to meet these needs. Often, it does not. A parent, attorney, or other advocate needs to know what the law pertaining to special education provides and how the system should work for children with special needs, be able to identify where things go wrong, and use the legal process to fix it.

This two-part article provides an overview of the laws governing educational access for children with special needs. Part I describes the statutory and regulatory scheme that covers all children with special needs. Part II, which will be published in a future issue, will discuss areas of special education law relevant to children involved in the juvenile justice system in child welfare and delinquency matters.

Statutory Overview

Several major statutes govern access to education for all children with special needs:

- the Individuals with Disabilities Education Improvement Act (still commonly abbreviated IDEA)¹
- Section 504 of the Rehabilitation Act²
- the Americans With Disabilities Act of 1990 (ADA).³

Depending on the circumstances, the following also may be applicable:

- No Child Left Behind (NCLB)⁴
- the McKinney-Vento Homeless Assistance Act⁵
- the Family Educational Rights and Privacy Act (FERPA)⁶
- the Adoption and Safe Families Act of 2000 (ASFA).⁷

IDEA is by far the most detailed statute pertaining to children with special needs. The Code of Federal Regulations interprets IDEA.⁸ The Colorado Exceptional Children’s Education Act (ECEA) governs the implementation of IDEA in Colorado.⁹ The

Rules for the Administration of the ECEA interpret the ECEA.¹⁰ IDEA and all accompanying rules are reauthorized or revised periodically, so practitioners should always check appropriate resources for updates.

IDEA: A Comprehensive Approach

IDEA sets forth the process for identifying a child with special needs, providing special education, and resolving any disputes that occur along the way. IDEA is driven by the concept of parent advocacy; without parent advocacy, the system may be ineffective. IDEA contemplates the parents and school working together as a team. The first step is to identify whether a child falls under the scope of IDEA.

Purpose of IDEA

The purpose of IDEA is:

to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living . . . [and] to ensure that the rights of children with disabilities and the parents of such children are protected. . . .¹¹

“Special education” is defined in IDEA as: specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—
(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
(B) instruction in physical education.¹²

To qualify for special education services, a child must have one or more of a broad range of disabilities, defined in some detail un-

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der IDEA and the accompanying regulations, and must “by reason thereof, need special education and related services.”¹³ In addition to physical and learning disabilities, IDEA covers emotional and neurological disabilities and developmental delays. If a child has a disability but does not need special education services, the child is not protected under IDEA but is protected under Section 504 of the Rehabilitation Act.¹⁴

Child Find

“Child find” is part of IDEA. It requires school districts to “identify, locate, and evaluate all children with disabilities, including children who are home schooled, homeless, wards of the state, and children who attend private schools.”¹⁵ This includes children suspected of having a disability and needing special education, even though they may be advancing from grade to grade.¹⁶ In Colorado, child identification is the responsibility of the administrative unit in which the child attends school (public or private), or if the child is not in school, the unit where the child resides.¹⁷

Initial Steps

Under IDEA:

a parent of a child, or a State educational agency, another State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.¹⁸

Parents must give informed consent for an evaluation, which is not the same as giving consent for receiving special education and related services.¹⁹ If the parents do not provide consent for the initial evaluation, the district may request a due process hearing.²⁰ Initial evaluations must be completed within sixty days of receiving parental consent.²¹

If the parents disagree with the evaluation, they may obtain an independent educational evaluation.²² Parents may request an independent evaluation at the school district’s expense. The school

district either must grant the request for an evaluation or provide an administrative hearing to review the existing evaluation.²³

After the evaluation, a meeting takes place with a multidisciplinary team to determine if the child is eligible for special education services. Advocates and parents should ask for copies of the evaluation before the eligibility meeting,²⁴ although with the short timeline under IDEA, they may not be available.

A multidisciplinary team determines eligibility. This team must include:

- 1) at least one teacher or other specialist with knowledge in the area of the suspected disability;
- 2) other qualified professionals, as necessary; and
- 3) a parent.²⁵

Other advocates or experts also may be invited,²⁶ at the discretion of parents or school.

After the child is determined eligible under IDEA, an Individualized Education Program (IEP) will be created. Usually, determining eligibility and creating an IEP is a successful collaborative process when the right individuals are present. The eligibility meeting and creation of the IEP may occur at the same or different meetings,²⁷ depending partly on whether evaluations and IEP proposals were available to all parties in advance.

Services Under IDEA: Alphabet Soup

Under IDEA, a child with a disability is entitled to receive a “free appropriate public education” (FAPE) in the least restrictive environment (LRE). The services provided and goals to be achieved are written in the IEP, the most important document in IDEA.

Free Appropriate Public Education

Discussions and legal proceedings have ensued regarding conflicting understandings of what constitutes FAPE. According to IDEA, FAPE means special education and related services that:

- A) have been provided at public expense, under public supervision and direction, and without charge;
- B) meet the standards of the state educational agency;
- C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- D) are provided in conformity with the individualized education program required under Section 1414(d) of this title.²⁸

In Colorado, “special education” is “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.”²⁹ The specific instruction that can be provided is detailed in ECEA Rule 2.43. “Related services” means transportation and developmental, corrective, and other supportive services.³⁰

Under case law, FAPE need not be the best program, or a program designed to

maximize a child's potential.³¹ A parent or child advocate should never ask for what is "best" but for what is "appropriate." Although new language in the statute does mandate educating children with disabilities "to the maximum extent possible," case law has not caught up with the statutory change.³²

Least Restrictive Environment

Children with disabilities are entitled to be educated in the LRE possible—that is, with nondisabled children.³³ "Educating children in the least restrictive environment in which they can receive a free appropriate public education is one of IDEA's most important substantive requirements."³⁴ Before placing students in a separate environment from students without disabilities, such as special classes or separate schools, schools must consider using supplementary aids and services to help them succeed in the regular classroom.³⁵ Children should be provided with special classes, separate schooling, or other removal from the regular educational environment only to the extent that they cannot be educated in regular classes with the use of supplementary aids and services, due to the nature or severity of their disability.³⁶

The Individualized Education Program

An IEP is a written statement for each child with a disability that includes:

- 1) a statement of the child's present level of academic achievement and functional performance;
- 2) a statement of measurable annual goals, including academic and functional goals;
- 3) a description of how the child's progress toward meeting the annual goals will be measured;
- 4) a statement of the special education and related services to be provided to the child;
- 5) an explanation of the extent, if any, to which the child will not participate with children in regular classes and activities;
- 6) a statement of appropriate accommodations;
- 7) an explanation of alternative assessments, if applicable;
- 8) the date for the beginning of services and frequency, location, and duration of those services; and
- 9) transition goals.³⁷

An IEP should be highly specific in terms of present levels of performance, services, and progress to be achieved.³⁸

The IEP team must include:

- 1) the parents of the child;
- 2) at least one regular education teacher;
- 3) at least one special education teacher;
- 4) a representative of the local educational agency;
- 5) someone who can interpret evaluations;
- 6) other individuals at the discretion of the parent or agency; and
- 7) the child, if appropriate.³⁹

Because people who have special knowledge or expertise regarding the child should be present, either the school or the parents should invite anyone involved with the child, such as a foster parent, caseworker, guardian *ad litem*, or therapist to participate on the IEP team.⁴⁰

An IEP should address factors such as limited proficiency in English or behavioral problems.

If the student's behavior impedes the student's learning or the learning of other students, then positive behavioral interventions

and supports and other strategies should be considered to address that student's behavior.⁴¹

Monitoring the IEP. The implementation of the IEP and the student's progress should be monitored. Under IDEA, the IEP is reviewed on an annual basis.⁴² Also, at a minimum, the student must be thoroughly evaluated at a triennial review (cognitive/psychological/social).⁴³ However, it is not necessary to wait for either an annual or a triennial review to address problems.

If there is a problem, such as improper implementation of the IEP, or a need for additions or changes, a parent can request an IEP meeting before the annual review. For example, a child may have additional disabilities, or a disability may have been misdiagnosed.⁴⁴ A change of disability or other eligibility may be made only after reevaluation.⁴⁵

School Transfers

If a child with a disability who has an IEP transfers school districts within the state during the academic year, the school must provide the child with comparable services until the old IEP is adopted or a new IEP is developed and implemented.⁴⁶ Both schools must take reasonable steps to transfer promptly the child's records.⁴⁷

Early Childhood Services

Different sections of IDEA cover services for young children, depending on their age. These are discussed below.

Part C of IDEA

Part C of IDEA governs early intervention services for infants and toddlers under age 3. Congress found an urgent and substantial need for services that would, among other goals:

enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first 3 years of life.⁴⁸

An infant or toddler with a disability is defined as an individual under the age of 3 who needs early intervention services because of:

- 1) developmental delays in one or more of a number of areas;
- 2) a diagnosed physical or mental condition that has a high probability of resulting in developmental delay;
- 3) at a state's discretion, at-risk infants and toddlers, who would be at risk of experiencing a substantial developmental delay if early intervention services are not provided; or
- 4) at a state's discretion, children with disabilities who are eligible for services under preschool grants.⁴⁹

Developmental delays are described in more detail in Rule 2.08(10)(a), as are various "identifiable conditions known to have a high probability of resulting in significant developmental delays."⁵⁰

Under Part C Early Childhood Services, an Individualized Family Service Plan (IFSP) is developed. An IFSP provides services to meet the child's and family's needs, based on an evaluation of the resources, priorities, and concerns of the family. "The IFSP process emphasizes services to meet the child's and family's needs and considers the resources, priorities and concerns of the family."⁵¹ The IFSP addresses the following in writing: (1) a child's strengths and needs; (2) the resources and priorities of the family

related to the child; (3) outcomes to measure the child's progress; and (4) necessary supports and services to achieve the outcomes. The IFSP is reviewed at least every six months.

The IFSP is a written plan that addresses an eligible child's strengths and needs, the resources and priorities of the family related to their child, outcomes to measure the child's progress, and the supports and services necessary to achieve the outcomes. The IFSP is developed as part of the initial evaluation process and is reviewed at least once every six months.⁵²

Early intervention services should be provided in natural environments, such as home and community settings.⁵³

An infant or toddler with a disability must be provided with:

- 1) "a multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs";
- 2) "a family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the needs of the infant or toddler"; and
- 3) "a written individualized family service plan developed by a multidisciplinary team, including the parents."⁵⁴

Parents must give informed written consent before the child can be provided with services.⁵⁵

The IFSP will identify a Service Coordinator, who is responsible for implementing the plan, and who coordinates a variety of local service providers and service agencies.⁵⁶ Part C agencies, providing service coordination and IFSP services, are local Community Centered Boards (CCB) that coordinate efforts among inter-agency groups that cover a county or counties. The plan must be reevaluated and reviewed at certain intervals.

The transition from Part C Early Intervention Services must be planned, including whether the child is eligible for preschool services under Part B, or entitled to a FAPE and an IEP under Part B.⁵⁷ The IFSP can be continued for children age 3 to 5, if appropriate.⁵⁸ Part C also includes certain procedural safeguards.⁵⁹

Part B of IDEA

IDEA funds may be used under Part B for preschool grants, for children with disabilities aged 3 through 5, inclusive, and, at the state's discretion, for 2-year-old children with disabilities who will turn 3 during the school year.⁶⁰ Children with developmental delays or conditions "associated with significant delays in development" are included in Colorado.⁶¹ IDEA funds also may be used for early intervention services, with a particular emphasis on students in kindergarten through grade three, "who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment."⁶²

Due Process

An entire section of IDEA is devoted to procedural safeguards protecting the rights of children with disabilities and their parents. These procedural safeguards must be outlined in an annual notice that the school is required to give parents.⁶³ The school district is required to give "prior written notice" to the parents, covering specific elements, when it proposes to or refuses to initiate or change the identification, evaluation, or educational placement of a student with disabilities.⁶⁴

If parents disagree with a school's decision, such as an evaluation, a change in evaluation, or a denial of services, a good place to start is the informal dispute resolution procedures in the school, such as a conference with the director of special education. IDEA does not require that administrative procedures be exhausted, but if issues can be resolved at a lower and local level, it may serve the child better and preserve relationships.

Parents may file a due process complaint notice, which usually, but not always, would be in response to a prior written notice from the school district.⁶⁵ The due process complaint notice may be filed any time from immediately to within two years of the date the parent knew or should have known of the alleged basis for the complaint. The notice triggers a strict timeline.⁶⁶

Once a due process complaint has been filed, generally either a mediation or a resolution session must take place.⁶⁷ In the rather rare event (in Colorado) that the case goes into due process, the impartial due process hearing is a full-blown administrative hearing in front of an independent hearing officer.⁶⁸ Either side can appeal the decision to the Colorado Department of Education, which will conduct an impartial review under an administrative law judge.⁶⁹ After that, the matter can be appealed to federal or state district court. Parents, or in some cases the school district, may seek attorney fees—certainly in federal court, and possibly in state court.⁷⁰

If the parties disagree on the IEP, it may be worthwhile to begin an interim placement with the services the parties do agree on.⁷¹ In any case, if an IEP already exists, the student would continue to receive services under that IEP until the dispute is resolved under the “stay put” provision.⁷²

The most effective advocacy for a child builds constructive relationships in the system. Resources exist for doing so.⁷³

School Discipline and IDEA

All students have due process rights in a school discipline process. Discipline for a child with disabilities under IDEA is much more complex.

When IDEA Applies to Discipline

When a child with a disability violates a code of student conduct, IDEA provides a special framework for discipline:

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.⁷⁴

Congress added this language to clarify that school officials may use discretion and consider each individual situation, as well as re-

but arguments by administrators who refuse to exercise discretion.⁷⁵ This may “encourage flexibility, rather than a zero tolerance approach, to disciplining students with disabilities.”⁷⁶

IDEA procedures and protections apply to a child who has a disability and is eligible for special education and related services. However, a child who has not been determined eligible and has violated a code of student conduct still may assert these protections if the local educational agency had knowledge that the child has a disability.⁷⁷ A local educational agency shall be deemed to have knowledge that a child has a disability if, before the behavior that precipitated the disciplinary action:

- 1) a parent expressed concern in writing to a teacher or the administration that the child is in need of special education and related services;
- 2) a parent requested an evaluation of the child under IDEA (with some exceptions);
- 3) behavior or performance of the child demonstrated a need for services; or
- 4) a teacher or other personnel expressed concerns about the child to supervisory personnel of the agency.⁷⁸

However, these exceptions do not apply if a parent has not allowed an evaluation of the child, or has refused services.⁷⁹

Even if the local educational agency did not have knowledge that a child has a disability, an evaluation may be requested when the child is subject to disciplinary measures, and “shall be conducted in an expedited manner.” If it is determined that a child has a

disability, that child receives all rights and protections under IDEA.⁸⁰

If parents disagree with decisions regarding placement in the discipline context, they may request a due process hearing. With the exception of certain dangerous behavior, the child has a right to “stay put” in the current educational placement during this process.⁸¹

Disciplining a Child With a Disability

School investigation of misconduct also must accommodate the disabilities of the student. During questioning, for example, provision must be made to accommodate disabilities such as deafness or cognitive impairment.⁸²

School personnel may suspend a child with a disability who violates a code of student conduct, or remove the child from the current placement to an appropriate interim alternative educational setting for not more than ten consecutive school days.⁸³ However, if the disciplinary consequences will result in a change in placement that would exceed ten school days, the school district must determine whether the behavior was a manifestation of the child’s disability.⁸⁴ If there is doubt as to whether the alleged misconduct occurred, it may be necessary to have a prehearing to determine whether the child committed misconduct, before holding a manifestation determination as to whether the misconduct was a manifestation of the disability. Any student has a constitutional right to due process in school discipline.⁸⁵

The manifestation determination is carried out by the local educational agency, the parent, and relevant members of the IEP team. Effectively, it is an IEP meeting where the participants determine the manifestation determination issue.⁸⁶ The team reviews all relevant information in the student’s file, including the IEP and information from teachers and parents.⁸⁷ It determines whether “the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability. . . .”⁸⁸ It also determines whether “the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.”⁸⁹ If either of these is the case, the conduct is a manifestation of the child’s disability.⁹⁰

If the conduct in question was the direct result of the local educational agency’s failure to implement the IEP, the agency must take immediate steps to remedy the deficiencies.⁹¹ If the behavior was not a manifestation of the disability, the agency may discipline in the same manner as it would discipline a student without a disability.⁹²

To prepare for a manifestation determination, a parent or child advocate could obtain a comprehensive psycho-educational evaluation of the child by an expert in the disability (for example, autism or bipolar disorder). The evaluator should analyze the relationship, if any, between the child’s disability and the behavior, and submit a detailed report that describes the disability, the basis for determining that the behavior was a manifestation of the disability, and recommendations for an appropriate program. The evaluator may attend the manifestation determination hearing.⁹³

In determining whether inappropriate behaviors are a manifestation of the disability, the IEP team should consider any medical, psychological, or psychiatric reports available. If needed at this stage, a functional behavioral assessment can provide more information. This assessment collects data on the behavior—such as the setting, timing, environment, interventions attempted or not attempted, and reinforcement—to answer the question of why the

behavior occurred.⁹⁴ A functional behavioral assessment should include interviews and rating scales, and be performed by an expert who directly observes:

the person’s behavior in his or her natural environment and analyze[es] the behavior’s antecedents (environmental events that immediately precede the problem behavior) and consequences (environmental events that immediately follow the problem behavior).⁹⁵

If the behavior was a manifestation of the disability, the IEP team shall:

- 1) conduct a functional behavioral assessment (if not previously performed);
- 2) implement a behavioral intervention plan (BIP);
- 3) review any current BIP and modify it as needed to address the behavior; and
- 4) return the child to the previous placement, unless special circumstances exist, and unless the parents and local educational agency agree to a change of placement.⁹⁶

These special circumstances, which prevent the return of the child to the previous placement, exist when the child, while at school, on school premises, or at a school function:

- 1) carried or possessed a dangerous weapon, capable of causing death or serious bodily injury;⁹⁷ (“serious bodily injury” means “bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty”);⁹⁸
- 2) knowingly possessed or used illegal drugs (a controlled substance that is not legally possessed), or sold or solicited the sale of a controlled substance at school; or
- 3) inflicted serious bodily injury on another person.⁹⁹

Under these circumstances, even if the behavior was a manifestation of the disability, the student may be removed to an interim alternative educational setting (IAES) for not more than forty-five days.¹⁰⁰ The setting is determined by the IEP team.¹⁰¹

Appeal of a Manifestation Determination

A parent may request a hearing to appeal either the result of the manifestation determination or the decision regarding placement in an IAES.¹⁰² The school also can request a hearing if it believes “maintaining the current placement of the child is substantially likely to result in injury to the child or to others.”¹⁰³ During the appeal, the child remains in the IAES.¹⁰⁴ The hearing process is expedited, and shall occur within twenty school days of the date the hearing is requested, with a determination within ten school days after the hearing.¹⁰⁵ More details are provided in the ECEA Rules.¹⁰⁶

Change in Placement

If the student is removed for more than ten days, regardless of whether the misbehavior was a manifestation of the disability and whether the student is being disciplined in the same manner as a student without disabilities, the extended removal is a change in placement. In this situation, the school district must continue providing educational services consistent with the IEP.¹⁰⁷

Preventing Discipline Problems

Children with disabilities often need proactive attention to prevent discipline problems from developing because of their frustra-

tion or inadequate social skills. For many children with disabilities, it is unrealistic that the child “work it out” or “tough it out.” The child may not understand the situation or how to deal with it. Moreover, children with disabilities often are a target for bullying, and sometimes are blamed for “inappropriate” responses. The following steps may be helpful:

- 1) make sure the child understands the school rules and which rules are “zero tolerance” policies;
- 2) monitor the child’s progress and intervene when issues occur that cause the child anxiety, such as bullying or other incidents;
- 3) obtain assistance from an anti-bullying program, such as through a community agency;
- 4) if not a breach of confidentiality, notify the school when something particularly upsetting has happened in the child’s life;
- 5) develop good ongoing relationships with school personnel;
- 6) connect the child with an ongoing outside mentor;
- 7) if there is a pattern of misbehavior, request an evaluation for a disability;¹⁰⁸
- 8) try to identify a teacher or counselor the child can talk to regularly; a child who believes there is a way to solve problems is less likely to experience a disruptive outburst.

Behavioral Intervention Plan

A BIP is designed to manage a student’s behavior and prevent the circumstances that precipitated the behavior. It should include:

- 1) ways to reduce stress—such as, finding a quiet place to go when he or she is overwhelmed, with a prearranged signal that will allow the student to leave the classroom or other stressful setting;
- 2) ways that teachers can recognize a problem is developing—for example, physical manifestations, such as shaking or twitching, bright red ears, or raised voice;
- 3) positive reinforcement for good behaviors;¹⁰⁹
- 4) education for the student on how to manage his or her own behavior by recognizing escalating stress and learning strategies to cope.

Sometimes, when the student knows a highly structured plan exists, including positive steps that the student can control, the incidence of stress-induced inappropriate behavior is drastically reduced. If support staff provide regular training in problem solving and conflict management each time a conflict situation arises, the student not only internalizes the positive strategies, but also approaches life with growing hope that problems may have a solution.

Transition

Colorado’s State Performance Plan for fiscal years 2005–10 reports that 2.1 percent “of youth with disabilities aged 16 were deemed to have an IEP that includes coordinated, measurable, annual IEP goals and transition services that will reasonably enable the student to meet the post-secondary goals.”¹¹⁰ The Colorado Department of Education has provided a number of educa-

tional and training opportunities to improve transition planning.¹¹¹

Transition services are to begin no later than when the child is 15 or the end of the ninth grade.¹¹² The IEP must include “[a]ppropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. . . .”¹¹³ In Colorado, the IEP includes transition services needed to assist the child in reaching the above goals.¹¹⁴ The child also must be informed at least a year before the age of majority of transfer of educational rights.¹¹⁵ A child with a disability who has graduated from high school with a regular high school diploma—as opposed to graduating with a modified diploma—no longer is eligible for FAPE under IDEA.¹¹⁶

Starting around age 14, an IEP team—consisting of the child, parents, school personnel, the child’s guardian *ad litem* if applicable, and representatives from agencies such as vocational rehabilitation or child welfare—convenes to discuss the child’s goals after high school, such as higher education or entering the workforce, and what services are necessary to support this transition. Each year, the IEP team should consider what transition services are needed for that year so the student will be fully prepared by the time he or she leaves high school.¹¹⁷ These services may include additional classes, independent living skills, employment skills, and connections to other agencies.¹¹⁸

Section 504 of 1973 Rehabilitation Act

Section 504 provides broader protections than IDEA, in the sense that it covers more people and extends into adulthood. However, the protections are not as detailed and Section 504 funding is minimal.

Purposes and Eligibility

The key portion of Section 504 of the Rehabilitation Act of 1973 states:

No otherwise qualified individual with a disability in the United States . . . 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. . . .¹¹⁹

Section 504 is a broad civil rights law.¹²⁰ However, it is important to note that it covers only employers, programs, agencies and facilities that receive federal funding.¹²¹ This, of course, would include any public school.

“To be eligible for protection under section 504, an individual must have a physical or mental impairment that substantially limits at least one major life activity,” such as walking, seeing, hearing, breathing, reading, or caring for oneself.¹²² If an individual has a record of having such an impairment, or is regarded as having such an impairment, he or she meets the definition.¹²³

Therefore, a child who is disabled under IDEA also is protected under Section 504. If a child has an impairment that substantially limits one or more major life activities, but does not need special education services, the child is not protected under IDEA but is protected under Section 504.¹²⁴

“Substantially limits” is defined by the school district.¹²⁵ Although Section 504 does not define “substantially limits,” the regulations implementing the Americans with Disabilities Act of 1990 offer the following definitions. A major life activity is substantially limited when a person is:

- 1) [u]nable to perform a major life activity that the average person in the general population can perform;¹²⁶ or
- 2) [s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.¹²⁷

Section 504 Evaluation and Plan

Section 504 requires the school to perform an evaluation and, if needed, develop a 504 plan, which need not be in writing. Under Section 504, FAPE is:

the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met. . . .¹²⁸

Section 504 requires that a child be provided with equal access to an education, and focuses on accommodations. Like IDEA, Section 504 addresses placing students with disabilities in the least restrictive environment.¹²⁹ This includes access to nonacademic and extracurricular activities and services, such as meals, recess, recreational athletics, and transportation.¹³⁰

Impartial hearings also are available under Section 504, but there are fewer procedural safeguards.¹³¹ However, parents can file a

complaint with the Office of Civil Rights, U.S. Department of Education, at the regional office in Denver, which will perform a thorough investigation.¹³²

Discipline Under Section 504

Discipline under Section 504 is similar to but not as closely regulated as under IDEA. Schools may not punish students for misconduct related to their disability.¹³³ Excluding a student from school for more than ten consecutive school days, or a series of suspensions that totals more than ten days in a school year, is likely to be a significant change in placement that requires a reevaluation and a manifestation determination meeting.¹³⁴ If the misconduct is related to the disability, the student may not be continually suspended or expelled, with certain exceptions for emergencies.¹³⁵ The student is protected whether or not the school has identified the disability.¹³⁶

Parents may challenge an evaluation by requesting an impartial due process hearing. However, unlike IDEA, there is no “stay-put” provision while waiting for a due process hearing.¹³⁷ Under Section 504 alone, when IDEA does not apply, if a child’s misbehavior is not a manifestation of a disability, the child can be expelled, and the school is not required to continue providing FAPE.¹³⁸

Disability Under the ADA

The Americans with Disabilities Act (ADA) also protects qualified persons with disabilities, but reaches beyond entities that receive federal funding.¹³⁹ Title II of the ADA prohibits discrimination in access to governmental services, and therefore covers school districts and school boards.¹⁴⁰ Title III of the ADA applies to privately operated public accommodations, such as private schools.¹⁴¹ However, rights under the ADA are not as extensive as those under IDEA.¹⁴² Complaints under the ADA also are filed with the Office of Civil Rights, U.S. Department of Education.¹⁴³

Conclusion

This Part I serves as a brief overview of the statutory scheme for special education in Colorado. For a list of useful resources for future study, check the “Special Education” section of the *Juvenile Law Benchbook* or contact the author. Part II of this article will focus on aspects of special education that apply to child welfare and juvenile justice.

Notes

1. 20 U.S.C. §§ 1400 *et seq.*
2. 29 U.S.C. § 794; 34 C.F.R. §§ 104.31 through 104.39.
3. 42 U.S.C. §§ 12101 *et seq.*
4. 20 U.S.C. §§ 6301 through 6578.
5. 42 U.S.C. §§ 11431 through 11435.
6. 20 U.S.C. § 1232g.
7. Pub. Law No. 105-89.
8. 34 C.F.R. §§ 300 *et seq.*
9. CRS §§ 22-20-101 through -118.
10. State Bd. of Educ. Rule (Rule) 2220-R-1.00 to 12.07, 1 CCR § 301-8 (2007), available at www.cde.state.co.us/cdesped/index.asp.
11. 20 U.S.C. § 1400(d).
12. 20 U.S.C. § 1401(29).
13. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a)(1); Rule 2.08.
14. Wright and Wright, *Special Education Law* 50 (2d ed., Harbor House Law Press Inc., 2007).

15. *Id.* at 72. See 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a); CRS § 22-20-103.
16. 34 C.F.R. § 300.111(c).
17. Rule 4.02(1)(a)(i) and (ii), 1 CCR § 301-8 (2007).
18. 20 U.S.C. § 1414(a)(1)(B).
19. 20 U.S.C. § 1414(a)(1)(D).
20. 20 U.S.C. § 1414(a)(1)(D)(ii).
21. Wright, *supra* note 14 at 93; 20 U.S.C. § 1414(a)(1)(C).
22. 20 U.S.C. § 1415(b)(1).
23. Chapman, *The Everyday Guide to Special Education Law* 27 (The Legal Center for People with Disabilities and Older People, 2005); 20 U.S.C. § 1415.
24. McNaught, *Learning Curves: Education Advocacy for Children in Foster Care* 50 (American Bar Association (ABA) Center on Children and the Law, 2004).
25. Rule 4.02(6)(b)(i).
26. McNaught, *supra* note 24 at 50.
27. Rule 4.02(6).
28. 20 U.S.C. § 1401(9).
29. Rule 2.43(1)(a).
30. Chapman, *supra* note 23 at 5-6; 20 U.S.C. § 1401(26).
31. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); Wright, *supra* note 14 at 51.
32. 20 U.S.C. § 1400(c)(5)(A).
33. 34 C.F.R. § 300.114(a); CRS § 22-20-108.
34. *L.B. and J.B. v. Nebo School Dist.*, 379 F.3d 966, (10th Cir. 2004).
35. 20 U.S.C. § 1412(a)(5); Chapman, *supra* note 23 at 13.
36. 34 C.F.R. § 300.114(a).
37. 20 U.S.C. § 1414(d)(1)(A).
38. See 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320 and 324.
39. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321.
40. McNaught, “Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care” 22 (ABA, 2005), available at www.abanet.org/child/education/other-pub.shtml.
41. Chapman, *supra* note 23 at 34-35.
42. 20 U.S.C. § 1414(d)(4)(A).
43. 20 U.S.C. § 1414(a)(2)(A)(B).
44. McNaught, *supra* note 24 at 24.
45. Rule 4.02(6)(c).
46. 20 U.S.C. § 1414(2)(C)(1).
47. 20 U.S.C. § 1414(2)(C)(ii).
48. 20 U.S.C. § 1431(a).
49. 20 U.S.C. § 1432(5).
50. Rule 2.08(10)(a).
51. Chapman, *supra* note 23 at 93.
52. Department of Human Services, Division of Developmental Disabilities, Colorado State Plan Under Part C of the Individuals with Disabilities Education Act 20-21 (2007).
53. Chapman, *supra* note 23 at 93-96.
54. 20 U.S.C. § 1436(a)(3). See also 20 U.S.C. § 1436(d) (details on the content of an individualized family service plan).
55. 20 U.S.C. § 1436(e).
56. Chapman, *supra* note 23 at 98.
57. *Id.* at 98-99; 20 U.S.C. §§ 1436(d)(8) and 1437(a)(9)(A)(i).
58. McNaught, *supra* note 24 at 79.
59. Chapman, *supra* note 23 at 100-101; 20 U.S.C. § 1439(a).
60. 20 U.S.C. § 1419(a).
61. Rule 2.08(9).
62. 20 U.S.C. § 1413(f)(1).
63. 20 U.S.C. § 1415(d).
64. 20 U.S.C. § 1415(b)(3) and (c).
65. 20 U.S.C. § 1415(c)(2).
66. 20 U.S.C. § 1415(c) and (f).
67. 20 U.S.C. § 1415(e) and (f)(1)(B).
68. 20 U.S.C. § 1415(f) and (h).

69. 20 U.S.C. § 1415(g).
70. 20 U.S.C. § 1415(i); Wright, *supra* note 14 at 117.
71. Tulman and McGee, eds., *Special Education Advocacy for Children in the Juvenile Delinquency System* 9-16 (University of the District of Columbia School of Law Juvenile Law Clinic, 1998).
72. 20 U.S.C. § 1415(j).
73. Wright and Wright, *From Emotions to Advocacy* (Harbor House Law Press Inc., 2008).
74. 20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 300.530(a).
75. Wright, *supra* note 14 at 118.
76. Chapman, *supra* note 23 at 64-65.
77. 20 U.S.C. § 1415(k)(5).
78. 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).
79. 20 U.S.C. § 1415(k)(5)(C); 34 C.F.R. § 300.534(c).
80. 20 U.S.C. § 1415(k)(5)(D); Wright, *supra* note 14 at 122; 34 C.F.R. § 300.534(d).
81. 20 U.S.C. § 1415(j).
82. Tulman, *supra* note 71 at 4-8.
83. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).
84. 20 U.S.C. § 1415(k)(1)(C) and (E).
85. Tulman, *supra* note 71 at 4-15.
86. E-mail correspondence from Brad Bittan, juvenile law attorney (May 22, 2008) (on file with author).
87. 20 U.S.C. § 1415(k)(1)(E)(i).
88. 20 U.S.C. § 1415(k)(1)(E)(i)(I); 34 C.F.R. § 300.530(e).
89. 20 U.S.C. § 1415(k)(1)(E)(i)(II).
90. 20 U.S.C. § 1415(k)(1)(E)(ii).
91. 34 C.F.R. § 300.530(e)(3).
92. Chapman, *supra* note 23 at 63.
93. Wright, *supra* note 14 at 119.
94. Garfinkel *et al.*, *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working With Youth With Disabilities in the Juvenile Justice System* 52 (Pacer Center, Minneapolis, MN, 1997).
95. Starin, "Functional Behavioral Assessments: What, Why, When, Where, and Who?" available at www.wrightslaw.com/info/discipl.fab.starin.htm.
96. 20 U.S.C. § 1415(k)(1)(F)(i) through (iii); 34 C.F.R. § 300.530(f).
97. 18 U.S.C. § 930(g)(2).
98. 18 U.S.C. § 1365(h)(3).
99. 20 U.S.C. § 1415(k)(1)(G) and (k)(7); 34 C.F.R. § 300.530(g) and (i).
100. 20 U.S.C. § 1415(k)(1)(G) .
101. 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.
102. 20 U.S.C. § 1415(k)(3)(A).
103. *Id.*
104. 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.533.
105. 20 U.S.C. § 1415(k)(4).
106. Rule 6.02(7).
107. Chapman, *supra* note 23 at 63.
108. Herrick and Ward, *Advocating for the Educational Needs of Children in Out-of-Home Care* 5-3 (Colorado Department of Human Services).
109. *Id.* at 5-12.
110. Colorado Department of Education Exceptional Student Services Unit, "Colorado FFY 2005-2010 State Performance Plan for Special Education" 84 (2005, updated Feb. 2008), available at www.cde.state.co.us/cdesped/download/pdf/CurrentSPPupdated_090508_posted_090508.pdf.
111. See Exceptional Student Services Unit home page at www.cde.state.co.us/cdesped for contact information.
112. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). This is an example of a state making a more stringent administrative rule. In lieu of 34 C.F.R. § 300.320(b), Rule 4.03(6)(d)(i), 1 CCR § 301-8 (2007) requires the transition plan begin no later than the age of 15, rather than 16.
113. 34 C.F.R. § 300.320(b).
114. Rule 4.03(6)(d)(iii).
115. Rule 4.03(6)(e).
116. 34 C.F.R. § 300.102(a)(3).
117. Tulman, *supra* note 71 at 9-8.
118. National Council on Disability, "Youth with Disabilities in the Foster Care System: Barriers to Success and Proposed Policy Solutions" 35 (2008), available at www.ncd.gov/newsroom/publications/2008/FosterCareSystem_Report.html.
119. 29 U.S.C. § 794(a).
120. Wright, *supra* note 14 at 291.
121. Chapman, *supra* note 23 at 77.
122. Wright, *supra* note 14 at 292.
123. 29 U.S.C. § 794(a); 42 U.S.C. § 12102(2).
124. Wright, *supra* note 14 at 292.
125. National Children's Law Network, "In School, the Right School, Finish School" 24 (Holland & Hart and Rocky Mountain Children's Law Center, 2007), *citing* 23 IDELR 504 (Office of the Child Representative, 1994).
126. 29 C.F.R. § 1630.2(j)(1)(i).
127. 29 C.F.R. § 1630.2(j)(1)(ii).
128. 34 C.F.R. § 104.33(b)(1).
129. Chapman, *supra* note 23 at 79.
130. *Id.* at 79; 34 C.F.R. §§ 104.34(b) and 104.37(a).
131. Wright, *supra* note 14 at 293.
132. See www.ed.gov/about/offices/list/ocr/index.html.
133. Chapman, *supra* note 23 at 83.
134. *Id.*
135. *Id.*
136. Tulman, *supra* note 71 at 4-22.
137. *Id.* at 4-21.
138. Wright, *supra* note 14 at 293.
139. 42 U.S.C. §§ 12101 *et seq.*
140. Chapman, *supra* note 23 at 84-85; 42 U.S.C. § 12132.
141. Chapman, *supra* note 23 at 85-86.
142. *Id.*
143. Burrell and Warboys, "Special Education and the Juvenile Justice System," *Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin* 2 (July 2000). ■