Caryl Andrea Oberman
caryl@caryloberman.com
Liliana Yazno-Bartle
lily@caryloberman.com

THE LAW OFFICES OF CARYL ANDREA OBERMAN, LLC

Maureen Stankiewicz, PA Cert. Paralegal
maureen@caryloberman.com
Heike Ross, Legal Assistant
heike@caryloberman.com

HOT TOPICS IN AUTISM AND EDUCATION

by

Caryl Andrea Oberman, Esquire

705 Easton Road
Willow Grove, PA 19090

www.caryloberman

Phone: 215-830-5025
Fax: 215-830-5027
E-Mail: edlaw@caryloberman.com

HOT TOPICS IN AUTISM AND EDUCATION:
The top five legal issues

by

*Caryl Andrea Oberman, Esq.**

As we enter the spring of 2013, there are five issues that most significantly influence the education of students with autism at various points in the education life cycle.

1. The new definition of autism in the DSM 5 (release scheduled for May 2013).

The Diagnostic and Statistical Manual (DSM) is a publication of the American Psychiatric Association that is the standard reference for identifying and diagnosing mental and emotional disorders. It provides a common set of criteria for use by professionals working with affected individuals. Rather than the breakout definitions in the current DSM IV (Aspergers Syndrome, PDD-NOS, etc.), there will be a single diagnostic category of Autism Spectrum Disorder (ASD), broken down by severity of symptoms.

The new DSM 5 definitions will not, at least for now, affect the definition of autism in the IDEA [34 C.F.R. Section 300.8(c)(1)(i)]:

> Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual response to sensory experiences.

There is no category for PDD-NOS or for Aspergers Syndrome in the current IDEA statute or regulations.

Some states have passed or introduced laws to make sure that the education definitions will not change. Pennsylvania is not one of them.

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Any student currently receiving services under the category of autism must continue to receive them unless and until the IEP and NOREP are changed consistent with due process procedures.

2. Early intervention and preschool inclusion

In Pennsylvania, the cases are split on whether there are circumstances under which an early intervention agency must not only provide services to a child with autism in a typical preschool environment, but also pay for the typical preschool.

In the case of *BD, Montgomery County Intermediate Unit*, the Hearing Officer held that the IU, having failed to offer a typical preschool to a student, had to reimburse his parents for the typical preschool of their choice. Special Education Decision 11162-0910AS, 5/8/2010. The Hearing Officer in the case of *J.H., Bucks County Intermediate Unit*, Special Education Decision 01271/09-10KE, 12/13/2010, reached the opposite conclusion, holding as a matter of law that payment for a typical preschool was not required.

On February 29, 2012, the United State Department of Education Office of Special Education and Rehabilitative Services (OSEP) issued a "Dear Colleague" letter to provide guidance on this issue. Although OSEP concludes that preschool kids covered under the IDEA have a right to placement in the least restrictive environment, and that "if a public agency determines that placement in a private preschool program is necessary for a child to receive FAPE [a free, appropriate public education], the public agency must make that program available at no cost to the parent," IU attorneys are still interpreting this to preclude requiring IUs to pay for typical preschool. The federal courts have not yet decided the issue, and it is one to watch.

3. Meaningful Education Benefit

How much is enough? If a child is capable, with appropriate services, of learning fifty new words in a school year, is it enough to give him fewer services and to set and meet a goal of thirty words? If a student makes a year's worth of progress in a year, is that enough, even if with more and better services she could reasonably be expected not only to make a year's worth of progress but to close a part of the gap separating her from grade-level performance?

In 1982, the United States Supreme court decide the case of *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982). Amy Rowley was a student with a hearing impairment, placed primarily in typical classes. Without a sign language interpreter, she was not only moving from grade

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to grade, but also doing better academically than most of the hearing kids in her class. Her parents argued that her grades would improve with interpreter services, and that she had a right to reach her full potential. The Court ruled that her education was "adequate", and that she was not entitled to more. She was entitled only to a "basic floor of opportunity."

Since 1982, some local educational agencies have used *Rowley* to argue that even small amounts of benefit are enough to meet the standard of appropriateness. In *Central Susquehanna Intermediate Unit v. Polk*, 853 F. 2d 171 (3d Cir. 1988), a case involving a far more disabled student than Amy Rowley, the Third Circuit Court of Appeals, whose decisions are binding on Pennsylvania, New Jersey and Delaware, held that "trivial" benefit was not enough, and that the IDEA required the provision of an education that would confer "meaningful benefit."

More recent cases have focused on what meaningful benefit means. In *D.S. v. Bayonne Board of Education*, 602 F. 3d 533 (3d Cir. 2010), the Court held that a student with learning disabilities who was getting good grades in special education settings was still entitled to the more intensive private program sought by his parents because there was a "disconnect" between the District's assessment of the student's ability in the special education setting and his performance on standardized achievement tests.

In *Breanne C. v. Southern York County School District*, 732 F. Supp. 474 (M.D. Pa. 2010), the federal District Court held that in order for there to be meaningful educational benefit, a student's IEP must be designed to address and to offer the student a chance to make reasonable progress in all relevant domains under the IDEA: not only academics, but also behavioral, social and emotional domains. Significantly, the Court also held that a student's IEP must be tailored to his or her unique, individual needs *consistent with the student's potential.*

In *Leighty v. Laurel School District*, 457 F, Supp. 2d 546 (W.D> Pa. 2006), the District Court held that making a year of progress in a year was "meaningful", and that a school district was not required to provide education that would close the gap between the student's progress and grade level.

Every time Congress has reauthorized the IDEA, it has strengthened its statement that the purpose of special education is to provide students with disabilities, not just with access to classrooms, but with the skills to gain access to a full life in the neurotypical world. Congress has increasingly stressed access to typical classes, typical curricula, typical environments and typical jobs. Congress has also stressed the requirement to use research-based interventions, many of which have been shown to enable students to close the gap. Nevertheless, most courts have ignored what appears to me, and to many others, a Congressional mandate to provide services which, while not necessarily "maximizing" a student's

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potential, still sets goals and delivers services in accordance with that potential. Litigation in this area will continue.

4. Behavioral support services in schools

It is well-established that education means more than academics, and that it encompasses a student's emotional and behavioral issues as well. Because services to address those issues may be medically necessary as well as educationally necessary, it is not uncommon for students to receive behavioral services both through their IEPs and through Medical Assistance or private insurance. This dual system raises questions about coordination of services, funding, access, and accountability.

Both the behavioral health system and the education system have responsibility for providing appropriate behavioral support services. Neither can abdicate its responsibility to the other. However, it is often in the interest of a child to have those services provided by a single team, and it is always in the interest of a child to have those services well-coordinated so that messages are not mixed and approaches, expectations, and data collection are consistent.

If a student needs 1:1 behavioral support services in school in order to achieve meaningful educational benefit, it is the school district's responsibility to guarantee that those services are provided. The school district may choose to make them available through its own staff, or through a behavioral health provider agency. In any case, the services must be free to the parents and child (no co-pays, no service caps) and calculated to support the IEP and its goals. School district can ask, but cannot require, that parents allow them to use a child's Medical Assistance benefits to help pay for those services. If a parent does not give permission to use Medical Assistance, the district cannot refuse to provide services on that basis. Moreover, regardless of what agency is scheduled to provide the services, the district is responsible for any failure to provide them as a part of a free, appropriate public education. The need for behavioral services, for a functional behavioral assessment, and well-designed Positive Behavior Support Plan should be clearly reflected on the IEP itself. If there are several agencies involved, the IEP should also reflect how and when services will be coordinated. Counseling services, direct instruction and parent training can also be part of the IEP.

If the district does not agree that the behavioral health services a parent seeks are educationally necessary, the parent may still seek to have the district allow behavioral health professionals to work with the student in school. A district may not be obligated to allow this on an ongoing basis, although there is a small but growing body of case law that does require districts to allow behavioral health agencies reasonable access in order to facilitate appropriate evaluations.

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It is not unusual for behavioral health agencies to recommend more restrictive settings (e.g., partial hospitalization programs) as medically necessary. School districts nevertheless remain responsible for offering services in the least restrictive appropriate setting.

5. Transition to adult life

Starting in the IEP year in which the student turns fourteen, the IEP must include a plan for transition to adult life. The plan must include services geared toward addressing the skills a student will need to succeed in post-secondary education or training, employment, and community living. This IDEA requirement has been strengthened and expanded each time Congress has reauthorized the IDEA. It has broadened out the definition of education to include what happens at home and in the community as well as what happens at school, and is a powerful tool for addressing the needs of the whole student.

Very early on, there was a bad decision in the 9th Circuit Court of Appeals that held that the transition requirement added very little to the other requirements of the IDEA. In my view, that was and continues to be bad law. However, few courts have examined its analysis in a meaningful way.

Attorneys representing kids with special needs continue to press on this issue. The age of twenty-one should be the start of a well-prepared and positive entrance into adulthood, not a step out of the door of high school and over a very steep cliff.

Caryl Andrea Oberman is the principal of the law firm that bears her name. For more than three decades, her practice has concentrated on the legal needs of persons with disabilities and their families, and of gifted students. She has lectured and published extensively in the areas of civil rights, education rights, and estate planning, especially for families of children with disabilities. Formerly law clerk to the Hon. Merna B. Marshall (Philadelphia Court of Common Pleas), director of the Legal Department of Philadelphia Association of Retarded Citizens, senior staff attorney at the Education Law Center and litigation consultant at the Disabilities Law Project, she has served on the boards of numerous agencies advocating for children and adults with disabilities and serves as a hearing officer for the Office of Vocational Rehabilitation. She is the chair of the Special Education Committee of the Pennsylvania Bar Association. Ms. Oberman has been an adjunct professor of School Law in the graduate education programs of Arcadia University, Holy Family University, Cabrini College and Antioch University. She received her B.A. with Honors in Political Philosophy from Syracuse University in 1971 and her J.D. from Villanova University School of Law in 1974. Her firm serves families in the eastern half of Pennsylvania, with offices in Willow Grove (Montgomery County).

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This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA
SPECIAL EDUCATION HEARING OFFICER

DECISION

Student:	BD
Date of Birth:	xx/xx/xxxx
Hearing Dates:	February 4, February 24, and March 18, 2010
ODR File No.:	00062-0910AS / 00561-0910AS Consolidated

CLOSED HEARING

School District:	Montgomery County Intermediate Unit

Parties:	Representatives:
Mr. & Mrs.	Parent Attorney: Caryl Oberman Esquire The Law Offices of Caryl Andrea Oberman Grove Summit Office Park 607A North Easton Road Willow Grove, PA 19090
Montgomery County Intermediate Unit	Intermediate Unit Attorney: Timothy E. Gilsbach Fox Rothchild, LLP 10 Sentry Parkway, Suite 200 P.O.Box 3001 Blue Bell, PA 19422-3001

Date Record Closed:	April 23, 2010
Decision Date:	May 8, 2010
Hearing Officer:	Gloria M. Satriale, Esquire

Pre-School Placement and Reimbursement for Private Pre-School Tuition and Related One on One Support

The early intervention statute defines, at 11 P.S. Section 875-103, early intervention services as, *inter alia,* developmental services provided under public supervision; designed to meet the developmental needs of a eligible young child in physical, cognitive, sensory, language and speech, psychosocial or self-help skill development; are provided to eligible young children in compliance with the provisions of this act and Part B of the IDEA, including procedural safeguards and *free* appropriate public education, related services and IEPs; and are *provided in the least restrictive environment appropriate to the child's needs* (hereinafter referred to as "LRE"). Eligible young children who will be served in a non-home-based setting *must, to the maximum extent consistent with the child's abilities, receive early intervention services in a setting with non-handicapped children.* (emphasis supplied).

Early intervention agencies must adhere to the LRE requirement and must provide a range of services, which they are explicitly empowered to do either directly *or through contracts with community agencies, including preschools.* 22 Pa. Code Section 14.155(a). Early intervention IEP teams must recommend that early intervention services be provided in the least restrictive environment with appropriate and necessary supplemental aids and services, and may elect to provide them in a typical preschool program with non-eligible young children. 22 PA. Code Section 14.155 (b)(1). Adherence to the principals of LRE is not at issue in this case as the parties agree that the student requires a typical preschool.

It is uncontroverted, however that the Intermediate Unit offered no setting in which the student could receive the other services offered restricted or least restrictive (e.g occupational therapy, intenerate teaching)[1]. The Intermediate Unit argues that it was not required to provide a pre-school setting in that:

[1] There are alternative methods to placement in a regular private preschool to met LRE. These methods include providing opportunities for the participation (even part time) of pre-school children with disabilities

a. The Intermediate Unit relied upon an OCDEL policy stating that "[i]f an IEP team determines that without a typical preschool experience at public expense a child cannot make meaningful educational progress on the IEP and be provided FAPE, IU EI program is responsible for making the placement in a typical community setting. However, without the issue of FAPE, IU is not necessarily responsible for honoring parental requests for purchasing slots or reimbursement for typical preschool" in making its decision not to offer any "placement" in which to deliver services to support its failure to offer a pre-school setting or to fund the setting the student currently attended. (NT 425 – 437; P. Ex. 60 at 4).

And;

b. The student was already enrolled in a pre-school setting at the time the team decided that a typical preschool environment[2] was necessary in order to meet identified goals [NT 439].

Analysis of the Intermediate Units first position is swift and easy. The expert reports, IEP and NOREP all support the need for the student to be immersed within an early childhood environment which provides a framework and structure for supports and interventions to facilitate, integrate and generalize appropriate social reciprocity, social navigation, and social participation. [NT 345-372, 386-388, 443-460 464-474; P-10 Report of Baumgartel stating exposure to typically developing peers [Student]eficial; P16 NOREP indicating recommended educational placement

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in other pre-school programs operated by public agencies (such as Head Start); (2) Placing children with disabilities in private school programs for non-disabled pre-school children or private school pre-school programs that integrate children with disabilities in regular elementary schools. 34 C.F.R. 300.552

[2] As the Intermediate Unit agreed to provide services within a pre-school placement in that the student was already enrolled and proceeded to use that setting to push in additional services, they, de facto, agreed to the appropriateness of the setting for the purposes of service provision. The objection to the pre-school lodged by the IU was not that the environment was inappropriate, but that they did not want to pay for it. In fact the record is devoid of any objection lodged to the pre-school setting prior to the institution of due process.

is an Early Childhood environment; P-16 IEP indicating student to participate in typical preschool program). A FAPE required a pre-school placement in this case.

The Intermediate Unit violated its own policy of providing a pre-school setting where "[i]f an IEP determines that without a typical preschool experience at public expense a child cannot make meaningful educational progress on an IEP and be provided a FAPE, the Intermediate Unit Early Intervention Program is responsible for making the placement in a typical community setting [P-60 at 4 NT 424-425][3].

The behavioral, social and communication needs of the student as identified by the evaluations and the team and the interventions and supports engineered to address them are inextricably interwoven with and dependent upon the stimulus, naturally occurring cues and naturalistic teaching opportunities occurring within the environment where services are delivered. Particularly with respect to the pervasive nature of the core deficits common to the diagnosis of autism, and most importantly with respect to the social skills interventions necessary to the future success of young children with this diagnosis, it is not possible to parse the "service" from the framework in which they are provided. The provision of supportive services should not be viewed in a vacuum[4].

The fundamental core of each IEP goal promulgated by the team requires as a necessary component the availability of peers and activities promoting interaction with those peers. The need for adult supervision and facilitation (teachers) and a "place" to conduct these activities (classroom) is obvious. Taken together, these components equal a pre-school setting. Failure to provide the pre-school setting is a failure of FAPE.

When an educational agency fails to offer FAPE, it may be required to pay for services in a proper setting chosen by the parents and require the educational agency to preemptively remedy its' clearly inappropriate offer or, in this case, lack thereof, by funding the eligible young child's placement in his typical pre-school. In

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[3] An OCDEL Policy against funding private pre-school settings without built in exceptions for the provision of FAPE would be in contravention to IDEA. The Intermediate Unit's policy of "not being in the business of funding pre-school placements" [NT 78, 81, 494] flies in the face of IDEA protections.

[4] Although it is certainly reasonable and, in fact, quite common for services for a child to be clinic based only and deemed appropriate (e.g. Physical Therapy) this is not the situation at bar.

re: the Educational Assignment of Jonathan .S., Special Education Opinion No.1181 (2001), rev'd on other ground sub nom. Delaware County Intermediate Unit v. Jonathan S., 809 A. 2d 1051 (Pa. Commonw. Ct 2002). a school district can be required to fund a private pre-school program if necessary to meet a child's needs as defined in the IEP. *Notes* to 34C.F.R.300.522 (1992); *Bd. of Education of LaGrange Sch. Dist. V Illinois State Bd. of Educ.*, 29 IDELR 369 (N.D. III. 1998) (a private pre-school is the LRE where no *10 aspects of the disability of a four old with Downs Syndrome required the "at-risk" program offered by the district which prescreened children for academic or language difficulties); *See, e.g., Office of Special Education Programs* ruling 22 IDELR 630, 663 (1995) (if placement team determines, based on child's IEP, that pre-schooler needs interaction with non-disabled peers, public agency is responsible for making available appropriate program in the least restrict environment at no cost to parents); and *Office of Special Education Programs* ruling 16 EHLR 739 (to meet LRE requirement, each pre-schooler's placement must be consistent with determination of the child's ability to be educated in regular education programs. In the instant case the student's ability to be educated in a typical pre-school program was specific finding of the team).

The Intermediate Unit's second argument that it was not required to fund a preschool placement because the student was currently enrolled in pre-school is equally unpersuasive. The Intermediate Unit argues that even if it can be determined that a pre-school setting is necessary to provide a FAPE, they are not required to provide one since the student was already enrolled and attending a pre-school program prior to any contact with the Intermediate Unit or determination of eligibility. The federally mandated provision of a FAPE does not provide for an analysis of "where the educational agency finds the child" taking into account all resources currently in place and then seek to "fill the gaps" as this argument seems to imply. A FAPE consists of "educational instruction specially designed to meet the unique needs of the handicapped child" supported by services necessary to permit the child to [Student]efit. In *Bd. of Educ. V Rowley, 458 U.S. 176,181,203 (1982)* at 188-89.

The Intermediate Unit's difficulty in reconciling these policies is likely derived from the fact that publically funded pre-school is not widely embraced[5] in the Commonwealth of Pennsylvania (provision of publically funded pre-school services available in connection with Head Start services only.) as well as a perceived confusion regarding placement vs. services (social skills is not a service [NT 74]). In fact, the Pennsylvania Department of Education has explicitly stated "that there is currently no universal preschool in the Commonwealth of Pennsylvania." BEC Early Intervention and Private Schools 11 P.S. 875-304 (Jul. 1, 2003) *also see* *Allyson B. v. Montgomery County Intermediate Unit*, U.S. Dist. LEXIS 32159, *41-*42 (E.D. Pa 2010).

It is expected that with the advent of and concentration on early intervention services and the continued development of these programs and the wealth of positive outcome research now available regarding the indicia of success preschool experiences have for young children, the debate regarding pre-school as a part of public responsibility vs. parent responsibility to elect should diminish and publically available options for pre-school services will increase.

Finally, the traditional analysis regarding reimbursement for unilateral private placements is not warranted here in that the traditional analysis whether public funds may be used to fund private education is based upon the premise that the student cannot be adequately provided for in the district. See *Burlington School Committe vs. Dept of Educ. 471U.S. 359 (1985)*; *Florence County School District vs.Carter 510 U.S.7 (1983.*

This is not a case in which an LEA has offered a placement, and the parents have nevertheless placed their child in a placement they prefer triggering an analysis of the appropriateness of each. This is a case in which IU has offered no placement at all, and Student's parents have filled the gap, thereby allowing the Student's IEP to be delivered as written[6].

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[5] The fact that "pre-school" is currently offered in many forms rather than a uniform adhere to the usually envisioned structure of what constitutes public education complicates this issue – particularly as it may relate to an analysis of appropriateness.

[6] The program at [Redacted Preschool] is appropriate. See footnote 2 regarding the imputed stipulation by the Intermediate Unit regarding the appropriateness of the pre-school program.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

DUE PROCESS HEARING

Name of Child: J.H.
ODR #01271/09-10 KE

Date of Birth:
<redacted>

Date of Hearing:
None Held

CLOSED HEARING

Parties to the Hearing: <parents>	Representative: Stephen Jacobson, Esquire Connolly, Jacobson and John 188 North Main Street Doylestown, Pennsylvania 18901
Bucks County IU 22 EI Program 705 Shady Retreat Road Doylestown, Pennsylvania 18901	Andrew Faust, Esquire Sweet, Stevens, Katz and Williams 331 Butler Avenue PO Box 5069 New Britain, Pennsylvania 18901
Date Record Closed:	December 5, 2010
Date of Decision:	December 13, 2010
Hearing Officer:	Linda M. Valentini, Psy.D., CHO Certified Hearing Official

Background

The parties' having previously settled all other issues in this matter, the sole issue remaining in dispute concerns the Parents' assertion that by law, as part of their child's early intervention program, they are entitled to reimbursement of past and prospective tuition costs they have incurred to place their child in a typical preschool where the child currently receives special education services from the BCIU.

The parties through counsel requested and received permission to submit Joint Stipulated Facts and briefs supporting their positions in lieu of holding an in-person hearing. For the reasons set forth below I find in favor of the Intermediate Unit.

Issue

The parties presented the hearing officer with the following Stipulated Issue:

> Whether the "free appropriate public education" mandate of the IDEA, as defined in subparagraph 1412(a)(1)(A), and as limited by subparagraph 1412(a)(1)(B)(i), of that statute ever requires, under any circumstances, state and local educational agencies in Pennsylvania to provide children with disabilities aged 3 through 5, at no cost to their parents, typical preschool placements where typical, free preschool programming is not provided to similarly-situated nondisabled peers.

However, this hearing officer believes that ruling on the Stipulated Issue as crafted by the parties exceeds her authority, which she believes is limited to addressing issues with regard to individual children, and that the Stipulated Issue as stated is properly before the District Court or Commonwealth Court. Therefore the Issue that will be addressed is as follows:

> Whether the "free appropriate public education" mandate of the IDEA, as defined in subparagraph 1412(a)(1)(A), and as limited by subparagraph 1412(a)(1)(B)(i), of that statute requires the Bucks County Intermediate Unit to provide <student name>, a preschool child with a disability, at no cost to his parents, a typical preschool placement where typical, free preschool programming is not provided to similarly-situated nondisabled peers.

Joint Stipulated Facts

The following comprise the factual stipulations of the parties:

1. <student name> was born on <redacted>.

2. The Bucks County Schools Intermediate Unit No. 22 ["BCIU"] is the local educational agency that serves the geographical region where <student name> resides with his parents.

3. <student name> is eligible for special education services, and is currently identified as a child with autism.

4. Although BCIU agrees that it is obligated to provide "[s]ervices... in a typical preschool program with noneligible young children," in accordance with 22 Pa. Code §14.155(b)(1) ("early childhood environment"), and that it is obligated to provide those services at no cost to the parents, it disagrees that it is obligated to pay for the typical preschool itself. BCIU agrees that it must provide, at no cost to parents, services in and placement at early childhood special education environments or other specialized environments as described in 22 Pa. Code §14.155(b).

5. In the event that the Hearing Officer answers the stipulated issue in the affirmative, the BCIU agrees that it is obligated to pay for the typical preschool placement in which it is implementing special education and related services for <student name>, and that it must reimburse the costs the Parents have incurred for [redacted] tuition from February 4, 2009 through the date of the order and into the future until such time as the parties either agree to a change in placement or such change is upheld by a final order. The BCIU's obligation to pay tuition as described in this paragraph is subject to its right to appeal the Hearing Officer's order, although [redacted] would be considered <student name>'s "then current placement" pending such appeal. [1]

Discussion and Conclusions of Law

The Individuals with Disabilities Education Act ("IDEA") ensures that all children with disabilities have available to them a free appropriate public education ("FAPE"). 20 U.S.C. § 1401(d)(1)(A); 34 C.F.R. § 300.1. See also *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982); *M.C. v. Central Regional School*, 81 F.3d 389 (3d Cir. 1996); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988); *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986).

The obligation to provide FAPE is met by providing, in accord with an IEP, individualized instruction and supportive services that are necessary to allow the child to derive educational benefit. 20 U.S.C. § 1402(9) and (14). *See also Rowley.* The IEP must be likely to produce progress, not regression or trivial educational advancement. *See Diamond.* The IEP must afford the child with special needs an education that would confer meaningful benefit.

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[1] The Parents' Brief explains, "Among other reasons, Stipulated Fact No. 5 was developed to allow this Hearing Officer to decide the matter without having to consider the prongs of a tuition reimbursement analysis".

The question presented to this hearing officer for resolution here is whether local educational agencies ("LEAs") responsible for *providing free appropriate public education services* (special education) to a preschool-aged child also have the obligation to provide a free typical preschool setting *in which to provide the services*, when the parents of similarly-situated nondisabled peers would have to pay for such preschools privately.

The BCIU's brief points out, "Pennsylvania does not provide universal preschool programming, a reality that has led courts to limit Section 504-based discrimination claims in the preschool context, on the ground that preschool services cannot be provided unequally to children with disabilities when they are not provided at all to same-aged children without disabilities. *See Andrew M. v. Delaware County Office of Mental Health and Mental Retardation*, 490 F.3d 397, 350 (3rd Cir. 2007)(failure to provide FAPE, under Part C of the IDEA, cannot constitute discrimination on the basis of disability when the only children of same age entitled to FAPE are those with disabilities); *Allyson B. v. Montgomery County Intermediate Unit*, 2010 WL 1255925 (E.D. Pa. Mar. 31, 2010)(same, but in preschool context under IDEA Part B)."

There is no dispute that as an eligible child served by the BCIU, the child who is the subject of this hearing is entitled to receive special education services *delivered* in the parentally-chosen typical preschool program, and that these special education services be provided at no cost to the Parents. The dispute, however, concerns whether the LEA must *pay for that typical preschool environment* for the child. In this matter, the Parents argue that the child requires the availability of non-disabled peers for the provision of FAPE, and believe that the BCIU must fund the child's typical preschool environment because that environment is a necessary component of and precondition to providing the services required by an appropriate IEP. The BCIU disagrees, arguing that FAPE (program) and LRE (placement) are two related but distinct factors and that an LEA does not have to purchase the LRE in order to provide FAPE.

The Parents suggest that, admittedly "arguably", the question before this hearing officer has already been answered in the affirmative. They point to the U.S. Department of Education's Comments accompanying the current implementing regulations of the IDEA:

> *Comment:* Many commenters suggested requiring a public agency to pay all costs associated with providing FAPE for a child in a private preschool, including paying for tuition, transportation and such special education, related services and supplementary aids and services as the child needs, if an inclusive preschool is the appropriate placement for a child, and there is no inclusive public preschool that can provide all the appropriate services and supports.
>
> *Discussion:* The LRE requirements in §§ 300.114 through 300.118 apply to all children with disabilities, including preschool children who are entitled to FAPE. Public agencies that do not operate programs for preschool children without disabilities are not required to initiate those programs solely to satisfy

> the LRE requirements of the Act. Public agencies that do not have an inclusive public preschool that can provide all the appropriate services and supports must explore alternative methods to ensure that the LRE requirements are met. Examples of such alternative methods might include placement options in private preschool programs or other community-based settings. Paying for the placement of qualified preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to public agencies to meet the LRE requirements. We believe the regulations should allow public agencies to choose an appropriate option to meet the LRE requirements. However, if a public agency determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent of the child.
> *Changes:* None.
>
> Vol. 71, No. 156, 2006, Fed. Reg. 46540 at 46589 (regarding Placements § 300.116)

The guidance offered by the U.S. Department of Education regarding an IDEA regulation, however, is not a regulation itself and therefore is not binding. Even if the guidance were elevated to the level of a policy, it still would not be binding. In *Chevron U.S.S., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984) the court held that:

> A regulation is a governmental agency's exercise of a delegated legislative power to create a mandatory standard of behavior... A regulation is binding on a reviewing court if it conforms to the grant of delegated power, is issued in accordance with proper procedures, and is reasonable. In contrast, a statement of policy is a governmental agency's statutory interpretation, which a court may accept or reject depending upon how accurately the agency's interpretation affects the meaning of the statute.

Providing further support for their position the Parents point to Office of Special Education Programs (OSEP) opinions:

> "that a preschooler's right to obtain FAPE includes, at no cost to parents, placement in a private preschool program if necessary for the provision of an appropriate program (reiterating its response in previous OSEP advisories found at 20 IDELR 181 and 22 IDELR 630, stating if a child must attend a private preschool to receive FAPE, the program must be provided at no cost to the parent). OSEP observed that if an LEA determines that a child must attend a private preschool to receive FAPE, the program must be provided at no cost to the parent. *See* 71 Fed. Reg. 46540 (2006). OSEP also noted that the LEA is responsible not only for tuition expenses, but also for transportation and any other related services a child might require to receive FAPE. *See Letter to Anonymous,* 50 IDELR 229 (OSEP 2008), citing *Letter to Neveldine*, 22 IDELR 630 (OSEP, 1995) and *Letter to Neveldine*, 20 IDELR 181 (OSEP, 1993).

In accord with *Chevron*, guidance regarding the weight which a hearing officer or court is required to give to OSEP positions is explained in straightforward language in The Complete OSEP Handbook[2], quoted as follows:

> "The relevant provisions pertaining to policy letters and statements issued from the Department of Education are located in the IDEA at 20 USC 1406. According to 20 USC 1406(d), the Secretary of Education may not issue policy letters or other statements regarding issues of national significance that: violate or contradict any provision of Part B; or establish a rule that is required for compliance with, and eligibility under, Part B without following the formal rulemaking requirements, applicable to government agencies found in Section 553 of Title 5, United States Code, that contains the Administrative Procedures Act.
>
> Any written response by the Secretary regarding a policy, question or interpretation under Part B of this Act must include an explanation in that written response stating that such response is provided as informal guidance and is not legally binding; when required , such response is issued in compliance with the requirements of Section 553 of Title 5; and such response represents the interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented. ...The IDEA language above clarifies some of the confusion on this point, making clear that response to policy questions are not legally binding on recipients of IDEA funds and should be distinguished from regulations, which do create law."[3]

All eligible children must be educated (receive FAPE) in the "least restrictive environment" ("LRE"), that is, to the maximum extent appropriate, with their typical peers. *See* 20 U.S.C. § 1412(5). The Third Circuit early on recognized and applied the principle of LRE in *Oberti v. Bd. Of Educ. Of the Borough of Clementon Sch. Dist.*, 995 F. 2d 1204; 19 IDELR 908 (3d Cir. 1993). Federal and State law also provide that both concepts, FAPE and LRE, extend to preschool-aged eligible children. In addition to 20 U.S.C. § 1402(9) referenced above, the federal IDEA regulations pertaining to "placements" states in relevant part that "In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that . . . [t]he placement decision . . .[i]s made in conformity with the LRE provisions of this subpart . . . See 34 C.F.R. 300.116 Likewise, in Pennsylvania , "[e]arly intervention services" are defined at 11 P.S. Section 875-103 as, among other things, "... provided to eligible young children in compliance with the provisions of this act and Part B [of the IDEA] . . . [c]ompliance includes procedural

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[2] The Complete OSEP Handbook, 2nd Edition, LRP (2007) at Page 1:5.

[3] The Pennsylvania Department of Education is situated in the same position with regard to its own advisory BECs: a "BEC is not a regulation, and that, as a policy statement is advisory only and not enforceable as a legal obligation against a non-conforming school district." *Pennsylvania School Boards Assn. V. Commonwealth of Pennsylvania*, EHLR 559:104 (Pa. Commw. Ct. 1987)

safeguards and free appropriate public education, related services and IEPs...provided in the least restrictive environment appropriate to the child's needs". Pennsylvania's general and early intervention regulations provide that LEAs are required to provide access to "a full continuum of placement options". 22 Pa. Code Section 14.102 (a)(1)(iv). The purpose of early intervention services is to promote students' success in the general education environment. 22 Pa. Code Section 14.102(a)(vi). Early intervention IEP teams must also recommend that early intervention services be provided in the least restrictive environment with appropriate and necessary supplemental aids and services, and may elect to provide them in a typical preschool program with noneligible young children. 22 PA. Code Section 14.155 (b)(1).*(emphasis added)*

At 20 U.S.C. § 1401(9) Congress defined a FAPE independent of the place in which it is located:

> The term *free appropriate public education* 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.

When a regulation is unambiguous, the plain words of the regulation should control. *See Chevron.* This hearing officer agrees with the BCIU that the plain words of this definition mean that the "at public expense" and "without charge" requirements of the Act apply to "special education and related services," and not to the place in which such education and services are provided. The definition of the component term "special education," further emphasizes the independence of the "special education and related services" that are to be provided "without charge" from the setting in which those services are provided, to which no "free" condition is applied. Congress defines "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with disabilities, including ... instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings," *id.* at 1401(29). Thus, the instruction and services that the IDEA requires be provided "free," or "at no cost to parents," or "without charge," are those that are "specially designed" to meet the "unique needs" of the disabled learner and are to be provided in the setting where the disabled learner is located.

This hearing officer agrees with the BCIU that the LRE, in contrast to FAPE, is not programs and services but rather a *setting that is common to all learners* of the same age or grade level. It is the "regular classes" in which "children who are not disabled" are educated from kindergarten on up and from which the child with disabilities cannot suffer "removal" to "special classes" or "separate schooling," unless his or her needs cannot be addressed "satisfactorily" therein. *Id.* at § 1412(a)(5)(A). *Oberti* established a "presumption in favor of mainstreaming". The child with a disability does not have to

establish a "need" for the LRE, and the appropriateness of the LRE does not hinge upon whether it is "specially designed" to address the child's "unique needs," although the child might be entitled, without cost to his or her parents, to "special education and related services"—in the form of "supplementary aids and services"—that would enable him or her to *access* the LRE. *Id.* The needs-based special education and related services, which expressly must be provided at no cost to the child or his or her parents, are thus distinct from the presumptive setting in which those services must be provided.

On point with the above analysis is the fact that neither the IDEA, nor Pennsylvania special education regulations, *prohibit* a disabled preschool-age child's parents from selecting the most restrictive environment, their own home, as the setting in which FAPE (special education and related services) is delivered. The range of settings (early childhood environments) in which typical preschoolers spend their time and in which disabled preschoolers receive FAPE is wide. As regards disabled preschoolers, a family may choose to have their preschool child's "special education and related services" delivered, among other possibilities alone or in combination, in places such as their own home, in a relative's or a neighbor's home, in a small private home-based daycare, in a private daycare center, or in a private preschool. Parents may decide to access these options for their typical or disabled preschoolers for a few hours a day a few days a week, up to daily full day placement including pre-care and after-care hours to accommodate their work schedules. The LRE is distinctly separate from FAPE; a preschool child is entitled to receive FAPE in a highly restrictive environment if the parents so choose, or in environment(s) of lesser restriction, but the LEA does not have to fund that environment itself. This hearing officer holds that if the parents of a preschooler freely choose a typical preschool environment, there is no statutory obligation on the part of the LEA to purchase that environment with public funds. The LEA's sole obligation is to provide FAPE in that environment.

This hearing officer cites the BCIU's arguments regarding the IDEA's Statutes' deriving their authority from the "spending clause" of the United States Constitution, *see* U.S. Const., art. I, § 8, cl. 1, ("contracts" between Congress and State or local recipients of federal funding that the recipients must enter into "voluntarily and knowingly" and that cannot impose responsibilities and liabilities that Congress has not clearly defined. *See Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 16-17, 101 S. Ct. 1531, 1539 (1981)) and incorporates that position into this decision by reference, but will neither repeat nor rephrase that well-crafted argument here.

This hearing officer holds that the BCIU has the obligation to provide publicly funded special education and related services to the disabled child who is the subject of this decision, and that it must provide the services in the environment that the Parents have chosen for their child. This hearing officer rejects the proposition that the BCIU must purchase the environment chosen by the Parents in addition to providing FAPE in that environment. By providing special education and related services to the child in the regular preschool setting that the Parents chose and paid for—as did the parents of the nondisabled peers with whom the child is educated—BCIU fulfilled its responsibilities under the IDEA to the child.

Order

It is hereby ordered that:

The "free appropriate public education" mandate of the IDEA, as defined in subparagraph 1412(a)(1)(A), and as limited by subparagraph 1412(a)(1)(B)(i), of that statute does not require the Bucks County Intermediate Unit to provide <student name>, a preschool child with a disability, at no cost to his parents, a typical preschool placement where typical, free preschool programming is not provided to similarly-situated nondisabled peers.

The Parents' claim for payment of past and future tuition incurred by them for their child's placement at the Rainbow Academy is denied.

Any claims not specifically addressed by this decision and order are denied and dismissed.

December 13, 2010
Date

Linda M. Valentini, Psy.D., CHO
Linda M. Valentini, Psy.D., CHO
PA Special Education Hearing Officer
NAHO Certified Hearing Official

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

FEB 29 2012

Dear Colleague:

The purpose of this letter is to reiterate that the least restrictive environment (LRE) requirements in section 612(a)(5) of the Individuals with Disabilities Education Act (IDEA) apply to the placement of preschool children with disabilities.[1] The LRE requirements have existed since passage of the Education for all Handicapped Children Act (EHA) in 1975 and are a fundamental element of our nation's policy for educating students with disabilities (the EHA was renamed the IDEA in 1990). These requirements state the IDEA's strong preference for educating students with disabilities in regular classes with appropriate aids and supports. Under section 612(a)(5) of the IDEA, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, must be educated with children who are not disabled. Further, special classes, separate schooling, or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The LRE requirements in section 612(a)(5) of the IDEA apply to all children with disabilities who are served under Part B of the IDEA, including preschool children with disabilities aged three through five, and at a State's discretion, two-year old children who will turn three during the school year.[2] The statutory provision on LRE does not distinguish between school-aged and

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[1] Although not discussed here, other Federal laws apply to preschool-aged children with disabilities as well. These laws include section 504 of the Rehabilitation Act of 1973, as amended (Section 504) and Title II of the Americans with Disabilities Act of 1990 (ADA). The Department's Office for Civil Rights (OCR) enforces Section 504 and pursuant to a delegation by the Attorney General of the United States, OCR shares (with the U.S. Department of Justice) in the enforcement of Title II of the ADA. Section 504 is designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the Department. 29 U.S.C. § 794, 34 CFR §104.4(a). Section 34 CFR 104.38 of the Section 504 regulations specify that recipients of Federal financial assistance from the Department who provide preschool education may not on the basis of disability exclude qualified persons with disabilities, and must take into account the needs of these persons in determining the aid, benefits, or services to be provided. Title II prohibits discrimination on the basis of disability by public entities, including public schools regardless of whether they receive Federal financial assistance. 42 U.S.C. §§ 12131-12134, 28 CFR Part 35 (Title II). Additionally, as applicable, entities providing preschool education must comply with the nondiscrimination requirements set forth in Title III of the ADA that prohibit discrimination on the basis of disability in places of public accommodation, including businesses and nonprofit agencies that serve the public. The U. S. Department of Justice enforces Title III of the ADA. 42 U.S.C. §§ 12181-12189, 28 CFR Part 36 (Title III).

[2] Under section 612(a)(1) of the IDEA, a State must make a free appropriate public education (FAPE) available to all children with disabilities residing in the State within the State's mandated age range. If a State's mandated age range includes children with disabilities aged three through five and two-year-old children who will turn three during the school year, all requirements in Part B of the IDEA, including the LRE requirements in section 612(a)(5), apply to those children.

preschool-aged children and therefore, applies equally to all preschool children with disabilities. Despite this long-standing LRE requirement and prior policy guidance[3], the U.S. Department of Education (Department) continues to receive inquiries regarding the applicability of the LRE requirements under Part B of the IDEA to preschool children with disabilities.

Statutory and Regulatory Requirements

A preschool child with a disability who is eligible to receive special education and related services is entitled to all the rights and protections guaranteed under Part B of the IDEA and its implementing regulations in 34 CFR Part 300. One of these guaranteed rights is the right to be educated in the LRE in accordance with section 612(a)(5) of the IDEA and 34 CFR §§300.114 through 300.118. The LRE requirements under Part B of the IDEA state a strong preference for educating children with disabilities in regular classes alongside their peers without disabilities. The term "regular class" includes a preschool setting with typically developing peers.[4] In determining the educational placement of a child with a disability, including a preschool child with a disability, the public agency[5] must ensure that each child's placement decision is made in conformity with the LRE provisions in 34 CFR §§300.114 through 300.118. 34 CFR §300.116(a)(2). The child's placement must be based on the child's individualized education program (IEP). 34 CFR §300.116(b)(2). In addition, the IEP must include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. 34 CFR §300.320(a)(5).

Before a child with a disability can be placed outside the regular educational environment, the group of persons making the placement decision must consider whether supplementary aids and services could be provided that would enable the education of the child, including a preschool child with a disability, in the regular educational setting to be achieved satisfactorily. 34 CFR §300.114(a)(2). If a determination is made that a particular child with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that child then could be placed in a setting other

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[3] See OSEP Memorandum 87-17, OSEP – Division of Assistance to States Policy Regarding Educating Preschool Aged Children with Handicaps in the Least Restrictive Environment (June 2, 1987); Letter to Neveldine, 16 LRP 842 (March 23, 1990); Letter to Wessels, 19 LRP 2074 (November 27, 1992); Letter to Neveldine, 20 LRP 2355 (May 28, 1993); Letter to Neveldine, 22 LRP 3101 (January 25, 1995); Letter to Neveldine, 24 LRP 3821 (April 17, 1996); Letter to Hirsh, 105 LRP 57671 (August 9, 2005); Letter to Anonymous, 108 LRP 33626 (March 17, 2008).

[4] See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46666 (August 14, 2006).

[5] The term "public agency" includes the State educational agency, local educational agencies (LEAs), educational service agencies (ESAs), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. See 34 CFR §300.33.

than the regular educational setting. The public agency responsible for providing a free appropriate public education (FAPE) to a preschool child with a disability must make available the full continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, to meet the needs of all preschool children with disabilities for special education and related services. 34 CFR §300.115.

Preschool Placement Options

The public agency responsible for providing FAPE to a preschool child with a disability must ensure that FAPE is provided in the LRE where the child's unique needs (as described in the child's IEP) can be met, regardless of whether the local educational agency (LEA) operates public preschool programs for children without disabilities. An LEA may provide special education and related services to a preschool child with a disability in a variety of settings, including a regular kindergarten class, public or private preschool program, community-based child care facility, or in the child's home.

For data collection purposes, the Department defines a Regular Early Childhood Program as a program that includes a majority (at least 50 percent) of nondisabled children (i.e., children who do not have IEPs) and that may include, but is not limited to:

- Head Start;
- Kindergartens;
- Preschool classes offered to an eligible pre-kindergarten population by the public school system;
- Private kindergartens or preschools; and
- Group child development centers or child care. [6]

If there is a public preschool program available, the LEA may choose to make FAPE available to a preschool child with a disability in the public preschool program. However, many LEAs do not offer, or offer only a limited range of, public preschool programs, particularly for three- and four-year-olds. LEAs that do not have a public preschool program that can provide all the appropriate services and supports for a particular child with a disability must explore alternative methods to ensure that the LRE requirements are met for that child. These methods may include: (1) providing opportunities for the participation of preschool children with disabilities in preschool programs operated by public agencies other than LEAs (such as Head Start or

[6] This is the definition that the Department uses in its annual data collection under section 618 of the IDEA on the number of children with disabilities aged three through five served under the IDEA Part B program according to their educational environments.

community based child care); (2) enrolling preschool children with disabilities in private preschool programs for nondisabled preschool children; (3) locating classes for preschool children with disabilities in regular elementary schools; or (4) providing home-based services. If a public agency determines that placement in a private preschool program is necessary for a child to receive FAPE, the public agency must make that program available at no cost to the parent.[7]

Conclusion

Placement decisions regarding a preschool child with a disability who is served under Part B of the IDEA must be individually determined based on the child's abilities and needs as described in the child's IEP. 34 CFR §300.116(b)(2). State educational agencies and LEAs should engage in ongoing short- and long-term planning to ensure that a full continuum of placements is available for preschool children with disabilities. To achieve this goal, a variety of strategies, including staffing configurations, community collaboration models, and professional development activities that promote expanded preschool options are available. See

http://www.nectac.org/ for further information regarding the IDEA and services for preschool children with disabilities.

We hope this information is helpful in clarifying the applicability of LRE requirements to preschool children with disabilities who receive special education and related services under Part B of the IDEA. Thank you for your continued interest in improving results for children with disabilities.

Sincerely,

Melody Musgrove, Ed.D.
Director
Office of Special Education Programs

[7] See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46540, 46589 (August 14, 2006); and Letter to Anonymous, 108 LRP 33626 (March 17, 2008).

Transition Services and The Broadening of The Special Education Mandate

By Caryl Andrea Oberman, Esquire*

The 1990 amendments to the Individuals with Disabilities Education Act clarified the obligation of school districts to provide "transition services." Although one purpose of the transition mandate is to require school districts to provide services designed to help students with disabilities secure productive post-school employment, the legislation is far broader. Essentially, the Act creates an entitlement for all older students with disabilities to receive services while they are in school to help them achieve their objectives in a variety of post-school settings, including not only employment and vocational training but also post-secondary academic education for those who are able and community and family living skills for those who are more severely disabled.

Prior to the 1990 amendments, the precise parameters of a school district's obligations under the IDEA to assist in the transition of students with disabilities were unclear, particularly when the required services were ones traditionally provided by other state agencies. Too often, no governmental agency would assume responsibility to provide services acknowledged by all concerned as needed to assist in the student's transitio from school to post-school life. *E.g., Gorski v. Lynchburg School Board*, 1988-89 EHLR 441:415 (4th Cir. 1989).

The transition mandate has broadened traditional school district special education responsibilities in three ways.

- The question of whether an undesirable behavior is exhibited at home or at school is irrelevant in the face of a goal of community living and competitive employment.
- School districts become the guarantors of all needed transition services, regardless of the governmental agencies that usually provide them.
- Services and programs not typically part of a school district's repertoire for most special education students (community-based services, job coaching, mobility training, psychiatric counseling, etc.) are more frequently appropriate elements of transition plans.

Transition services are defined as "a coordinated set of activities for a student with a disability" and must meet three specific criteria. 20 U.S.C.§ 1401(30) and implementing regulations at 34 CFR §300.29(a).

- Transition services must promote movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living and community participation. 20 U.S.C. §30(A).
- Transition services must be designed within an outcome-oriented process based upon the individual student's needs, taking into account the student's preferences and interests. 20 U.S.C. §1401(30)(A) and (B).
- Transition services must includeinstruction, related services, community experiences, the development of employment and post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. 20 U.S.C. §1401(30)(C).

School systems must be prepared to offer a range of programs and services, in each instance tailoring the specific services offered to the individual needs of the particular student. The IDEA extends entitlement to transition services to all students with disabilities in the mandated age range who have been determined by their IEP teams to be in need of such services in order to receive a free, appropriate public education. 34 C.F.R. §300.346(b)(2).

The range of required transition services is as broad as the range of students who are eligible under the IDEA. Obligations may include:

- On-site job training or coaching. *Urban by Urban v. Jefferson County School District R-1*, 89 F. 3d 720, 24 IDELR 465 (10th Cir, 1996). *See also Bonita Unified School District,* 27 IDELR 248 (SEA CA 1997); *Arlington Central School District,* 28 IDELR 1130 (SEA NY 1998) ; *Blaine (WA) School District No. 503,* 22 IDELR 515 (OCR 1995).
- Provision of community college courses. *Chuhran v. Walled Lake Consolidated School*, 22 IDELR 450 (6th Cir. 1995).
- Assistance finding competitive employment. *Coldspring-Oakhurst (TX) Consolidated Independent School District*, 33 IDELR ¶ 250 (OCR 2000).
- Provision of career information and evaluation and counseling for depression. *Lancaster Independent School District*, 29 IDELR 281 (SEA TX 1998).
- Enrollment in sheltered workshop**s**. *Tuscaloosa County Board of Education,* 29 IDELR 435 (SEA AL 1998) .
- Assistance in pursuing higher education. *Yankton School District v. Shram*, 900 F. Supp. 1182, 23 IDELR 42 (DSD 1995); *Cinnaminson Township Board of Education,* 26 IDELR 1378 (SEA NJ 1997); *San FranciscoUnified School District,* 29 IDELR 153 (SEA CA 1998); *Houston Independent School District*, 32 IDELR ¶ 79 (SEA TX 1999) ; *Bret Harte Union High School*, 29 IDELR 1014 (SEA CA 1999).
- College preparation. *Caribou School Department*, 35 IDELR ¶ 118 (SEA ME 2001); *But see Fort Bend Independent School District*, 34 IDELR ¶ 111 (SEA TX 2000); Elmhurst School District 205, 34 IDELR ¶ 112 (SEA IL 2000).

- Daily living skills. *Tuscaloosa County Board of Education*, 29 IDELR 435 (SEA AL 1998); *Arlington Central School District*, 28 IDELR 1130 (SEA NY 1998).
- Living in the community. *Coldspring-Oakhurst (TX) Consolidated Independent School District*, 33 IDELR ¶ 250 (OCR 2000) (voter registration); *Portland School District*, 30 IDELR 836 (SEA OR 1999)(use of city bus system); *Novato Unified School District*, 22 IDELR 1056 (SEA CA 1995) (residential placement in the community with on-site therapy and services of a one-to-one aide).
- Assistance in transition of supportive services obligation from school district/education agency to other governmental agencies. *Board of Education of City School District of the City of NY*, 32 IDELR ¶ 24 (SEA NY 1999); *Coldspring-Oakhurst (TX) Consolidated Independent School District*, 33 IDELR ¶ 250 (OCR 2000).

Transition services must be provided in accordance with an IEP developed after a solid and comprehensive evaluation of the student's individual needs and desires. A flawed assessment implies a flawed IEP and an inappropriate program.(# ftn4) *In Re: the Educational Assignment of Jason L.* Pennsylvania Special Education Opinion 944 (1999); *Lancaster Independent School District*, 31 IDELR ¶ 24 (SEA TX 1998); *Pasadena Independent School District*, 21 IDELR 482 (SEA TX 1994); *Fulton County School System*, 29 IDELR 1031 (SEA TX 1999).

Good transition plans are like any other element of a good IEP, except for their subject matter. They contain outcome-oriented programs and services with measurable results based on solid evaluations that include serious consideration of the students' desires and preferences. They describe the transition curriculum and the specially designed instruction necessary to achieve the outcomes and list those responsible for providing services and programs. Most importantly, they are implemented by school districts actually to deliver the services required.

A school district must do more than merely provide a checklist of other agencies that may have an obligation to the student, and remains ultimately responsible if the other agencies do not fulfill their responsibilities in the transition process. 20 U.S.C. 1414(d)(1)(A)(vii); *Letter to Bereuter, 20 IDELR 536 (OSERS 1993); Mason City Community School District*, 21 IDELR 248 (SEA IA 1994). *Yankton*, 900 F. Supp. 1182, 23 IDELR 42 (D.S.D. 1995).

Remedies for a school district's failure to provide timely and substantively appropriate transition services may include extensive compensatory education, even if its provision would extend a student's eligibility for special education services past the age of twenty-one. *Urban by Urban v. Jefferson County School District R-1*, 89 F. 3d 720, 24 IDELR 465 (10th Cir., 1996) (compensatory education is the preferred remedy for substantive denial of appropriate transition services).

- Compensatory education awarded: *East Penn School District v. Scott B.*, 29 IDELR 1058 (E.D. PA 1999); *In Re: the Education Assignment of Alfred M.*, Pennsylvania Special Education Opinion 999 (2000) (2400 hours awarded); *T.F. v. North Penn School District*, 31 IDELR ¶ 101 (SEA PA 1999); *J.B. v. Killingly Board of Education*, 27 IDELR 324 (D CT 1997); *San Francisco Unified School District*, 29 IDELR 153 (SEA CA 1998);*Novato Unified School District*, 22 IDELR 1056 (SEA CA 1995); *Livermore Valley Joint Unified School District*, 33 IDELR ¶ 288 (SEA CA 2000).
- Compensatory education denied:*In Re: the Educational Assignment of Christine H.*, Pennsylvania Special Education Opinion 1139 (2001);*Pace v. Bogolusa City School Board*, 137 F. Supp. 2d 711, 34 IDELR ¶ 116 (ED LA 2001);*Chuhran v. Walled Lake Consolidated School*, 22 IDELR 450 (6th Cir. 1995); *School Administrative Dist, # 1*, 25 IDELR 1256 (SEA ME 1997); *Novato Unified School District*, 22 IDELR 1056 (SEA CA 1995); *Wisconsin Dells School District*, 35 IDELR Section 145 (SEA WI 2001).

Transition after Graduation: Complying with the "Last-Minute" Mandate

by Liliana Yazno-Bartle, Esquire*

I. Business as Usual – Simply Not Enough

The time is ripe to question "business as usual" regarding transition to adult life planning for students with disabilities. The convergence of several factors have intensified public awareness of the crucial (and costly) responsibility that local school district shoulder – all but independently – to prepare all students for independent adult life and success in the workforce. Some of these factors include the heighten accountability fueled by th *No Child Left Behind* initiatives and mandates, the recent promulgation of Pennsylvania's *Academic Standards for Career Education and Work;* the less-than-stellar statistics regarding post-secondary success for students with disabilities; the US-economy-driven- reality that highly developed work skills are essential for employment with decent pay and benefits; the current disincentive for high school students to join the military – which traditionally provided under-skilled individuals with employment and training easily transferable to the larger workforce; the decrease in federal anc state-level funding for job training and support for disabled adults; and the all too pervasively held sentiment of the local tax payer as school distric taxes increase every year – "why are we paying so much money to educate children when they are not learning what is necessary to transition int the adult world?"

With this current reality, it is not unreasonable to assume that failure to provide students with disabilities with appropriate transition services will soon become a regularly litigated issue for school districts within the Commonwealth of Pennsylvania. Judicial and administrative guidance regarding a standard for transition planning for districts within the Commonwealth, in actuality, is quite limited – especially when one recognizes the dire outcome of having a child with disabilities age-out of education-based services with no employable skills and no mandated-programs for accessing such skills.

II. What Constitutes An Appropriate Transition Service?

The expansive definition of "transition services" contained in the Individuals with Disabilities Education Improvement Act (hereinafter referred to as "IDEA 2004"), 20 U.S.C. § 1402(34) and its implementing regulations at 34 C.F.R. § 300.43 create an almost limitless range of services a district might be required to provide for a student with disabilities. Review of judicial and administrative decisions from multiple jurisdictions as well as policy guidance from different offices within the US Department of Education suggest that districts are obliged to provide, *as is appropriate*, the following range of services:

A. Some things you may have to do:

- On-site job training or coaching. *Urban by Urban v. Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996); *Bonita Unified School District*, 27 IDELR 248 (SEA CA 1997); *Arlington Central School District*, 20 IDELR 1130 (SEA NY 1996).
- Provision of counseling for depression, career information and vocational evaluation. *Lancaster Ind. Sch. Dist.,* 29 IDELR 281 (SEA TX 1998).
- Assistance in finding competitive employment; *Coldspring-Oakhurst (TX) Consolidated Ind. Sch. Dist.*, 33 IDELR 250 (OCR 2000).
- Enrollment in sheltered workshops. *Tuscaloosa County Bd. of Educ.,* 29 IDELR 435 (SEA AL 1998).
- Assistance in pursuing higher education. *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996); *Cinnaminson Twp. Bd. of Educ.*, 26 IDELR 1378 (SEA NJ 1997); *San Francisco Unified. Sch. Dist.,* 29 IDELR 153 (SEA CA 1998); *Houston Ind. Sch. Dist.,* 32 IDELR 79 (SEA TX 1999); *Bret Harte Union High School*, 29 IDELR 1014 (SEA CA 1999).
- College preparation. *Caribou Sch. Dept.*, 35 IDELR 118 (SEA ME 2001); *but see Fort Bend Ind. Sch. Dist.*, 34 IDELR 111 (SEA TX 2000); *Elmhurst Sch. Distr. 205*, 34 IDELR 112 (SEA IL 2000).
- Activities of daily living skills. *Tuscaloosa County Bd. of Educ.,* 29 IDELR 435 (SEA AL 1998); *Arlington Central School District*, 20 IDELR 1130 (SEA NY 1996).
- Community-living skills. *Coldspring-Oakhurst (TX) Consolidated Ind. Sch. Dist.*, 33 IDELR 250 (OCR 2000) (voter registration); *Portland Sch. Dist.*, 3(IDELR 250 (OCR 2000) (instruction in city bus system); *Novato Unified School District*, 22 IDELR 1056 (SEA CA 1995) (residential placement in the community with on-site therapy and one-to-one aide).
- Assistance in accessing services from other governmental agencies prior to aging out of school age services. *Bd. of Educ. of City School District of NY*, 32 IDELR 24 (SEA NY 1999); *Coldspring-Oakhurst (TX) Consolidated Ind. Sch. Dist.*, 33 IDELR 250 (OCR 2000).
- Transition services can stand alone as a special education program in the IEP. *Yankton School District v. Schramm*, 93 F.3d 1369 (8th Cir. 1996) (an acknowledged orthopedically impaired child who required specially designed instruction solely to develop skills for transition to adult life).

B. Some Things You Don't Have to Do

- Admissions Testing for College or College-Sponsored Programming: The Office of Special Education and Rehabilitative Services states that "there is no specific requirement under the IDEA that high schools must arrange for all students with disabilities to be tested to determine their eligibility to be considered students with disabilities in college." *See Letter to Moore* (OSERS November 21, 2002) (available http://www.ed.gov/policy/speced/guid/idea/letters/2002-4/moore112102transition4q2002.pdf), at 4.
- Continue services after graduation or aging-out: The LEA's responsibilities for transition services ceases once a student graduates or ages out of programming. *Neshaminy Sch. Dist. v. Karla B.*, 25 IDELR 725, 727 (E.D. Pa. 1997).

- Post-secondary services: LEAs are not responsible for related services for students in college – even if the services student's transition plan. *See Chuhran v. Walled Lake Consolidated Schools*, 839 F. Supp 465 (E.D. Mich. 1993), *aff'd* 51 F.3d 271 (6th Cir. 1995) (unpublished table decision); not even if the service is compensatory in nature *see In re: the Educational Assignment of A.B., A Student of the Lower Merion School District*, Spec. Ed. Op. No. 1644 (PDE 2005), at 13; *see Letter to Riffel*, 34 IDELR 292 (OSEP 2000) ("Part B does not authorize a school district to provide a student with compensatory education, through the provision of instruction or services, at the post-secondary level. See 34 CFR '300.25." The type of relief that is to be awarded for compensatory education to cure the denial of FAPE during the period when the student was entitled to FAPE, must be the type of educational and related services that are part of elementary and secondary school education offered by the state." A district is not required to provide compensatory services to a graduated student once the student enters college or junior college, unless such a level of education is considered "elementary and secondary education" under state law).

III. Standard for Transition in Pennsylvania

The state-level appeals panel has spoken – but with two voices

In re: the Educational Assignment of A.B., A Student of the Lower Merion School District, Spec. Ed. Op. No. 1644 (PDE 2005), the state-level appeals panel provides a lengthy discussion of the "murky" standard for transition planning contained in the IDEA and its implementing regulations. Therein the panel described the "relevant regulations" as limited and "rather vague," *id.* at 10; and stressed the fact that the required contents are "rather soft stuff" since each comes with qualifiers for the provision of services, such as "if appropriate," "if required," or "needed." *Id.* The panel in *A.B.* further recognized that the case law interpreting transition mandates "is not particularly pertinent or persuasive, much less precedential." *Id.* It characterized prior transition –related appeals panel decisions as "without more specific standards." *Id.* The Panel noted that the only Pennsylvania court transition-related decisions were based upon mandates arising from state regulations that have been replaced and procedural violations that were found to be prejudicial. *Id.* at 10-11. The *A.B.* panel was, however, able to glean some limited guidance from the relevant regulations and available interpretations thereof; specifically, (1) if a district provides services to a student with a disability that "mirrors" postsecondary education activities that all the other students get, the district is not tailoring its program to the disabled students' unique needs and (2) providing "other customized services for a college or university's disabilities office is beyond the IDEA's transition obligation." *Id.* at 11-12.

On the other hand, the state-level appeals panel in *In re: the Educational Assignment of E.C., A Student in the Philadelphia City School District*, Spec. Educ. Op. No. 1641 (PDE 2005), at 10-12 suggests that numerous jurisdictions have clearly developed some type of nationwide mandate – "to som degree axiomatic"- , *id.* at 10, through interpretation of the same case law that the *A.B.* panel has characterized as "not particularly pertinent or persuasive, much less precedential." *A.B.* at 10.

IV. Practical Guidance

In light of what some consider "murky" and others consider "clearly established nationwide mandate," what should districts be doing to comply with the transition planning mandate?

1. Engage in a multi-year planning process.

Traditionally, IEP teams have conceptualized IEPs as annual documents. Perpetuating this practice is going to prevent appropriate transition programming because of the multi-year planning process mandated by the IDEA. Review of the *Annotated Individualized Education Program (IEP) – School Age* (PDE March 2006) suggests the following regarding IEP development for purposes of Student Transition Services:

> ANNOTATION:
> Transition is a results-oriented process that must begin with the IEP that will be in place when the student turns 16 years of age. However, transition can begin at any age as determined by the IEP team. Although the grid below represents the current year of planning, IEP teams should also document a multi-year planning process. This step-by-step plan that leads the student from high school to their post-school outcomes is called the coordinated set of activities. One way to document the coordinated set of activities might be to keep the grids from year to year. Upon graduation, the IEP team would then have a coordinated set of activities in the student's file. Another way might be to add to the grid each year so that the record of the coordinated set of activities is documented yearly – resulting in the final IEP containing all activities completed during the student's school career. This would also provide the LEA with information to complete the Summary of Performance as the student exits their educational program upon receiving a diploma or aging out.

Annotated Individualized Education Program (IEP) – School Age, at 11.

2. Involve the right people and agencies and monitor compliance with plan.

1. Transition Coordinator
   At a basic level, the district must designate an individual who is both knowledgeable and available to fulfill the wide-ranging responsibility to coordinate transition activities. Optimally, this person should be someone who knows (or who is willing to learn) the district's curriculum, the AVTS requirements, the players from other agencies and has sufficient clout to get the right people at meetings. This person should be detail-oriented enough to make sure the documentation regarding transition planning is maintained as well as evidence of who was invited to meetings – whether or not they showed up.
2. 100% District Guarantee
   Districts are the guarantors of all necessary transition services – regardless of whether another agency "is supposed to" provide them. *See* Section 612(a)(12) of the Individuals with Disabilities Education Improvement Act ("IDEA 2004"), 20 U.S.C. § 1412(a)(12) and its implementing regulation, 34 C.F.R. § 324(c). If another agency drops the ball, the district must convene an IEP meeting to see how to get the ball back in play. Like its immediate predecessor, IDEA 2004 provides that the state must develop a reimbursement mechanism for those instances in which the local educational agency has had to provide a service that another agency – with the responsibility to do so, failed to provide. In 1999, the Commonwealth of Pennsylvania entered into an agreement with all of the state agencies with some hand in career training and vocational

rehabilitation, referred to as *Memorandum of Understanding related to Interagency Cooperation* (PDE, DPW, DLI, DHS 1999) (hereinafter "*MOU*"). Unfortunately, this *Memorandum of Understanding* (1999) coupled with guidance from the Office of Special Education and Rehabilitative Services, pretty well concludes that when an individual is of school age in Pennsylvania, the burden almost completely rests on the district to provide direct transition services without any enforceable reimbursement mechanism. Notwithstanding the fact that the IDEA implementing regulations provide that "Nothing in this part relieves any participating agency, including a state vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency," *see* 34 C.F.R. § 324(c)(2), the MOU provides that the only two entitlements that students with disabilities have are special education and medically necessary services covered by Title XIX of the Social Security Act. All the agencies explicitly agreed that "students with disabilities may be eligible for, but are not otherwise entitled under State and Federal law, to other services, including but not limited to mental health and mental retardation services, vocational rehabilitation services, employment and training services, drug and alcohol services and other Department of Health services [listed in the MOU]." *Id.* at 2-3. No attempt is made within the document to provide legal authority to explain why these are not entitlements or why an age limitation is being placed on access to these services.

The U.S. Department of Education, Office of Special Education and Rehabilitative Services has provided policy guidance which similarly provides for a limited role for a state vocational rehabilitation office in providing services to school age students. Basing its decision on the legislative history for the Rehabilitation Act, OSERS finds that a "state vocational rehabilitation role is 'primarily one of planning for the student's years after leaving school.' The intention of the Congress was that the transition service provisions are not to 'shift the responsibility from education to rehabilitation during the transition years.'" *See Letter to McMurdo* (OSERS December 27, 2000), at 4.

Available at
http://www.ed.gov/policy/speced/guid/idea/letters/2000-4/mcmurdo122700coordination.4q2000.doc
(http://www.ed.gov/policy/speced/guid/idea/letters/2000-4/mcmurdo122700coordination.4q2000.doc)
).

3. **Regularly assess progress toward post-secondary goals.**

4. **Do not create a transition program based upon post-school objectives unsupported by assessment.**

5. **Keep the student and parents involved.**

6. **Reassess the student as necessary.**

7. **Document, Document, Document.**

8. **Offer services tailored to meet the student's needs.**

9. **Don't rely on parent or student initiated activities to form the basis of a transition program.**

Don't treat transition planning as the thing you think about when you get to at the end of the IEP meeting.

V. What Doesn't Cut It

- Checklists are not adequate to meet transition plan requirements. *Novato Unified School District*, 22 IDELR 1056 (SEA CA 1995); *Mason City Sch. Dist.*, 21 IDELR 248 (SEA IA 1994), *Pasadena Ind. Sch. Dist.*, 21 IDELR 482 (SEA TX 1994).
- IEPs that fail to specify a post school environment. *Urban v. Jefferson County*, 89 F.3d 720 (10th Cir. 1996).
- Too late too little. *Mason City Sch. Dist.*, 21 IDELR 248 (SEA IA 1994) (starting transition planning two years before a severely impaired student is scheduled to graduate found inadequate).
- Lack of specificity of other agencies' obligations. *Mason City Sch. Dist.*, 21 IDELR 248 (SEA IA 1994).
- Failure to consider independent education evaluation. *Lancaster Ind. Sch. Dist.*, 29 IDELR 281 (SEA TX 1998).
- Failure to supply specially designed instruction and related services to achieve transition goals. *Lancaster Ind. Sch. Dist.*, 29 IDELR 281 (SEA TX 1998).
- Failure to specify a timeline of how progress in transition goals will be achieved prior to graduation. *Puffer v. Ravnolds*, 19 IDELR 408 (SEA MI 1992).
- Provision of only suggested parent and student initiated and directed experiences. *In re: the Educational Placement of E.C.*, Spec. Educ. Op. No. 1641 (PDE 2005), at 12-13.
- Failure to consider student's transportation, personal or recreational needs. *East Penn Sch. Dist. v. Scott B.*, 29 IDELR 1058 (E.D. Pa. 1999); *but see* analysis contained in *Sinan L. v. School District of Philadelphia*, 2007 U.S. Dist. LEXIS 47665(C.V.06-1342 (June 29, 2007) (E.D. Pa. 2007), at 13 ("[Judge Padova's] decision was premised on the District's violation of several specific Commonwealth regulations on transition planning that were later repealed in 2001, see 22 Pa. Code §§ 14.37, 342.37")..
- Failure to involve student or parents. *Caribou Sch. Dist.*, 35 IDELR 118, (SEA ME 2001).
- Failure to provide advice or assistance to insure coursework is appropriate for future plans. *Caribou Sch. Dist.*, 35 IDELR 118, (SEA ME 2001).
- Transition plans with no community component and no opportunities for non-handicapped peers to model appropriate behaviors. *In re the Educational Assignment of R.N.*, Spec. Educ. Op. No. 1785 (PDE) 2006, at 8
- Transition plans that have no articulated resulting outcome. *In re the Educational Assignment of R.N.*, Spec. Educ. Op. No. 1785 (PDE 2006, at 8. ("A plan to unspecified living and working environments based upon some general notion of services in which the Student may participate rather

than what Student needs to achieve outcome").

- Programs that fail to guide a student toward post-education independence and that do not offer educational opportunities which significantly advance them toward the end of self-sufficiency. *J.L. v. Mercer Island S.D., 2006 U.S. Dist. LEXIS 89492 (W.D. WA. 2006).*

VI. No Harm No Foul – An Extremely Fact-Based Analysis

Although an IEP lacked explicit statement of transition services and did not designate a specific outcome for the student when he reached 21 or a specific set of activities for meeting that outcome, the procedural defect did not deny the student a FAPE where the child was not denied transitional services and benefited from the program with which he was provided and the IEP completely complied with other IDEA requirements. See e.g., *Urban by Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996) *See also Chuhran v. Walled Lake Consolidated Schools*, 839 F. Supp. 465 (E.D. Mich. 1993), aff'd 51 F.3d 271. Failure to include a transition plan in an IEP is a mere procedural flaw and does not violate any substantive rights. *Bd. of Educ. v. Ross*, 486 F.3d 267, 2007 WL 1374919, at 7-8 (7th Cir. 2007).

Districts do not have an affirmative duty to provide for vocational and practical training in all transition plans, without regard to a student's individual needs and preferences. *Sinan L. et al, v. Sch Dist. of Philadelphia*, 2007 U.S. Dist. LEXIS 47665 (CV 06-1342 June 29, 2007)(E.D. Pa. 2007), at 13 ("The Third Circuit has not offered definitive guidance on whether a transition plan must provide for vocational and practical education"). In this scenario, the court found that the transition plan was developed based upon the parents' insistence on limiting it to college preparation and excluding vocational goals. *Id., at 12.*

Don't count on these arguments working all the time.

AT-A-GLANCE TRANSITION MANDATES

A. DEFINITION OF TRANSITION SERVICES

STATUTE

20 U.S.C. § 1402(34)
Transition services
The term "transition services" means a coordinated set of activities for a child with a disability that–

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post- school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and when appropriate, acquisition of daily living skills and functional vocational evaluation.

REGULATION

34 C.F.R. § 300.34(c)(12)
Rehabilitation counseling
Rehabilitation counseling services means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.

34 C.F.R. § 300.39(b)(5)
Vocational Education
Vocational education means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

34 C.F.R. § 300.43
Transition Services

(a) Transition services means a coordinated set of activities for a child with a disability that-

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes–

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

B. IEP CONTENT

STATUTE

20 U.S.C. § 1414(d)(1)(A)(VIII)
Individualized education program.
Beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter–

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this title, if any, that will transfer to the child on reaching the age of majority under section 615(m).

REGULATION

34 C.F.R. § 300.320(b)(1)-(2)
Definition of individualized education program.
Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, hereafter, the IEP must include–

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

C. TRANSITION IEP PARTICIPANTS

REGULATION

34 C.F.R. § 300.321(b)
IEP Team - Transition services participants.
(1) In accordance with paragraph (a)(7) of this section, the public agency must invite a child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child i reaching those goals under Sec. 300.320(b).

(2) If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered.

(3) To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.

34 C.F.R. §300.322 (b)(2)
Parent Participation
For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must–

(i) Indicate–

(A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with Sec. 300.320(b); and

(B) That the agency will invite the student; and

(ii) Identify any other agency that will be invited to send a representative.

D. COORDINATION OF TRANSITION ACTIVITIES

REGULATION

22 Pa Code § 14.131(b)
IEP
In addition to the requirements incorporated by reference in 34 C.F.R. 300.29, 300.344(b) and 300.347 (b)(relating to transition services; IEP team; and content of IEP), each school district shall designate persons responsible to coordinate transition activities.

E. AGENCY RESPONSIBILITY

STATUTE

20 U.S.C. § 1414(a) (6)
Failure to Meet Transition Objectives
If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)((A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

20 U.S.C. § 1412(a) (12)(B)
Obligations related to and methods of ensuring services
If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services described in section 602(1), 602(2), 602(26), 602(33), and 602(34) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement..

(ii) Reimbursement for services by public agency.-If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shal provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to the terms of the interagency agreement or other mechanism described in subpara. (A)(1).

REGULATION

34 C.F.R. § 324(c)
Failure to Meet Transition Objectives

(1) Participating agency failure. If a participating agency, other than the public agency district, fails to provide the transition services described in th IEP in accordance with Sec. 300.320(b), the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(2) Construction. Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.

TRUE OR FALSE
(Answers provided below)

1. If a purpose for an IEP meeting will be consideration of transition services, the team may not make any final decisions regarding transition unless the student attends the meeting.
2. Transition services can be anything short of the care and treatment by a physician if such services are necessary to promote movement from school to post-school activities.
3. District responsibility related to transition goals is limit to post-secondary education and employment; it is the responsibility of other agencies to plan for independent living and community participation.
4. Districts only need to worry about transition planning for students who are not receiving instruction in the regular education environment.
5. If the transition services that a student with disabilities needs are available to all students in the district - he or she need only take the initiative to access them - these services do not need to be included in the IEP.
6. Districts may need to begin transition planning prior to a student turning sixteen years old.
7. If a student is not significantly impaired, the District does not have to assess him or her for post-school adult living objectives.
8. It is the obligation of the parent and the student to find out about necessary test accommodations for college admissions testing.
9. Districts need only evaluate a student's transition needs and preferences once.
10. If a student is in an IU, AVTS, or APS placement, it is no longer the District's responsibility for assessing, developing and implementing a transition plan.
11. Appropriate transition planning should guarantee the outcome of employment or admission to a post-secondary educational or training institution.

12. Districts are ultimately responsible to provide and pay for all transition services.
13. An effective system exists for Districts in Pennsylvania to recoup the cost of transition services it was forced to provide when another agency refused to or failed to provide these services.
14. Districts have no responsibility concerning post-school outcomes for disabled students who are not IDEA eligible.

Answers

1. **False.** While you must invite the student at age 16 or younger if appropriate, *see* 34 C.F.R. § 300.322 (b)(2), if the student does not attend the IEP meeting, the District must take other steps to ensure that the student's preferences and interests are considered. See 34 C.F.R. § 300.322 (1)(B).
2. **True**; *see* 20 U.S.C. § 1402(34) and *Cedar Rapids Comm. School District v. Garret F.*, 526 U.S. 66 (1999).
3. **False**; the *Memorandum of Understanding related to Interagency Cooperation* PDE, DPW, DLI, DHS 1999) jointly promulgated by the Pennsylvania Departments of Education, Public Welfare, Labor and Industry, and Health, specifically states that while "students with disabilities are entitled tc special education and related services which are necessary for the student to receive a free appropriate public education; and medically necessary services covered by the Social Security Act... "the parties agree that students with disabilities may be eligible for, but are not otherwise entitled under State and Federal law, to other services, including but not limited to mental health and mental retardation services, vocational rehabilitation services, employment and training services, drug and alcohol services and other Department of Health service."
4. **False**; *see* 20 U.S.C. § 1414(d)(1)(A)(VIII)(aa)-(bb) "for each child with a disability...beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter appropriate measurable postsecondary goals... and transition services needed to assist the child in reaching those goals."
5. **True**; 34 C.F.R. § 300.43 (a)(2) defines transition services as including "instruction; related services; community experiences; the development of employment and other post-school adult living objectives; and if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation."
6. **True**; *see* 20 U.S.C. § 1414(d)(1)(A)(VIII) and 34 C.F.R. § 320(b).
7. **False**; *see* Response to number 4.
8. **False**; *see* Response to number 6.
9. **False**; no limitations regarding transition assessments are contained in the statute or regulations. Assessment must occur as frequently as is necessary to provide an appropriate transition program.
10. **False,** *see In re: the Educational Assignment of Alfred M.*, Special Educ. Op. No. 999 (PDE 2000) (district order to provide multiple years of compensatory education for inappropriate transition planning notwithstanding the fact that the district has paid for the student to attend an AVTS and a residential approved private school in which the student participated in a sheltered workshop program).
11. **False;** 20 U.S.C. 1402(34) defines transition services as "a coordinated set of activities for a child with a disability that is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to pose school activities...,"
12. **True;** see 20 U.S.C. §1414(a)(6) and 34 C.F.R. § 300.324(c).
13. **False;** see response to number 3 regarding Memorandum of Understanding notwithstanding 34 C.F.R. § 300.324(c).
14. **False;** in light of promulgation of the Academic Standards for Career Education and Work, districts must make the curriculum tied to these standards accessible to students protected by Section 504.

Transition: A Multi-Year Process

Assessment to Clarify Interests
And Strengths or Aptitudes
Use vocational and career interest and aptitude surveys and assessments when possible; follow up with counseling.

v

Identification of Post-Secondary Outcome

v

Identification of Education, Training and Experience Required to Attain Identified Outcome

v

Identification of Academic and Non-Academic Skill Prerequisites for Required Education, Training, and Experience

v

Assessment of Child's Present Academic and Non-Academic Skill Levels and Rates of Acquisition of New Skills in Each Prerequisite Skill Area

v

Sample Measurable Post-Secondary Goals

Measurable Goal	Outcome
Julia will maintain postural stability and develop fine and gross motor control, digital fluency, hand-grip, and ability to follow independently verbal directions consisting of one-step or clusters of closely related steps	at levels sufficient to participate in a sheltered workshop program.
Geoff will demonstrate the ability to lift sixty pounds and run one mile in less than eight minutes, and will acquire independent reading, written language and math calculations skills	sufficient to meet the admissions requirements for a two-year, community college police academy program
Tom will acquire functional reading skills, sight word vocabulary, written language, and money and time calculation skills	sufficient to meet social service agency's requirements to live in supported housing
Mary Kate will draft a resume that conforms to conventional business standards, will draft a cover letter to at least three different potential employers containing information about herself specific to the position for which she is applying; and will participate in three mock job interviews	in which she sufficiently maintains voice level and articulation to be understood b an unfamiliar listener, shares information that is responsive to job-specific questions, and asks questions that demonstrate comprehension of information already shared during the interview.
Edward will acquire the independent reading, written language, and math calculation and problem solving skills	necessary to meet the admissions requirements for an adapted four-year public college program of study.

Experience. Empathy. Empowerment.

Transition to Adult Life: A Guide for Parents

*by Liliana Yazno-Bartle, Esquire**

Parents must be proactive in planning for the future of a disabled student. This is particularly important when we have a student with severe developmental delays. It is important to also ask questions, demand appropriate on-site job exploration and support services, follow-up to assure registrations are in order, and stay informed of state guidelines on transitioning. In essence, become an active participant in the transition planning It is the Parents' responsibility to register the student with agencies serving adults. To assure a smooth school-to-work transition, consider the following steps:

1. **Two (2) years prior to graduation:** Although referrals can be made earlier *when appropriate*, students should be referred to the Office of Vocational Rehabilitation ("OVR") two years prior to graduation by the Office of Mental Retardation ("OMR") case manager or supports coordinator of the family. A referral to OVR can be made by anyone, including the student, a family member or school personnel. However, for students under the age of 18, permission from a parent or guardian must be obtained before information about a student can be released to OVR.
2. **Initial referral to OVR:** At the time of referral, OVR will need the following information about the student:
   a. Student's name, address, telephone number, date of birth and social security number.
   b. Brief statement of student's disability.
   c. Name of student's teacher, school and (if applicable) student's special program or placement.
   d. Student's anticipated graduation date.
   e. Description of student's employment goals.
3. **After OVR referral:** After a referral is made, OVR will need the following information from school records:
   a. Documentation of student's disability, which should include available medical and psychological information.
   b. Current IEP, including the Transition Plan, Multidisciplinary Evaluation ("MDE") and Evaluation Report ("ER").
   c. Vocational tests and reports that are available, both formal and informal.
   d. Information about student's employment strengths and needs, such as teacher and classroom observations and description of student's involvement in school to work activities.
4. **Initial OVR Interview:** Following the referral, an OVR counselor will contact the student and parents to schedule an initial interview. During the interview, the student and parents should expect to discuss the student's disability and how it may affect student's ability to work. The student and parents will be required to provide the following information to OVR during this initial interview:
   a. Medical history related to student's disability (e.g., names and addresses of doctors and specialists, hospital admissions, names of medications, etc.)
   b. Educational history.
   c. Job history, including volunteer and paid work experience, if applicable.
5. **Determining OVR eligibility:** Since OVR's program is based on an *eligibility* for services and not an *entitlement* to services, a student must be certified by an OVR counselor as being eligible. The assigned counselor must first determine the student has a disability. The counselor must further determine that the student's disability substantially interferes with his or her ability to prepare for, get or keep a job.
6. **Register with the Office of Mental Retardation ("OMR"):** OMR is the gatekeeper of services for adults with mental retardation. Call your county's main office to be sure that the student's case file is open and active. Your case manager will assist you in contacting other agencies such as OVR, Social Security Administration ("SSA") and Medical Assistance ("MA"), transportation services, and local provider agencies that will support the student's post-high school plans.
7. **Register with your local SSA Office:** Request an MA card (or ACCESS card) to assure that student has healthcare insurance. Parents' income is not considered when applying for MA for a child with a medically diagnosed disability.
8. Work closely with your case manager or supports coordinator from OMR in coordinating services from OVR.
9. Choose a provider agency to provide on-site job coaching, usually funding through OVR. Then, contact that provider agency's liaison with OVR to expedite the initial OVR intake meeting.
10. Make a written request for a community-based work assessment from OVR.
11. **Convene an IEP Transition Meeting:** The school transition coordinator should attend and assist in writing transition IEP's. The following individuals should attend every IEP meeting:
    a. Student
    b. Parents
    c. Regular and special education teacher
    d. Vocational education staff
    e. OMR case manager or supports coordinator
12. **IEP Transition Meeting**:
    a. Confirm student's year of graduation.

b. Develop specific writing goals for employment.

c. Discuss and plan for transportation needs and services, including public transportation training goals. Coordinate transportation training and home-to-work transportation services through your case manager or supports coordinator at OMR.

d. Request several on-site community based job explorations provided through the LEA. This will help assess the student's work preferences and abilities.

e. Request career exploration and job-coaching services from local provider agencies.

f. Explore post-high school education options, such as community colleges and vocational schools. What supports are available from their office of disability services?

g. Request information about provider agencies and their programs' compatibility with the student's needs and interests.

13. **Transition questions to consider:**
    - Does the Transition IEP include specially designed instruction and related services based upon the student's individual needs or the development of adult living objectives?
    - How will student get around in the community?
    - How will student meet personal needs?
    - What recreation opportunities should student strive for?
    - Are there available services such as using the city bus system?
    - Is the student able to access other community services?
    - What are the student's daily living skills?
    - What are the specific responsibilities of the District and OVR agency?

For more information:

For additional information about school to work transitioning, visit **www.transitionmap.org (http://www.transitionmap.org/)** and . . .

- **The ARC at www.thearc.org (http://www.thearc.org/)**
- **The National Transition Alliance for Youth with Disabilities**, www.ed.uiuc.edu/sped/tri/internetsites.html (http://www.ed.uiuc.edu/sped/tri/internetsites.html) This web site contains information on promising transition practices and programs and provides transition resource state sheets listing relevant agencies.
- **Office of Mental Retardation at www.dpw.state.pa.us/ (http://www.dpw.state.pa.us/)**
- **Office of Vocational Rehabilitation (OVR) www.dli.state.pa.us (http://www.dli.state.pa.us/)**
- **PaTTAN (PA Training and Technical Assistance Network) at www.pattan.k12.pa.us (http://www.pattan.k12.pa.us/)**
- **PA Depart. Of Public Welfare at www.dpw.state.pa.us (http://www.dpw.state.pa.us/)/ (to download forms required by OMR)**
- **Social Security Administration www.ssa.gov (http://www.ssa.gov/)**

Lily Yazno-Bartle is an associate attorney at The Law Offices of Caryl Andrea Oberman in Willow Grove, PA. For 14 years, Lily has concentrated her practice on the legal rights of children with disabilities and their families, especially in the area of education and estate planning.