



ARTICLE 7 ANNOTATED

Title 511 of the Indiana Administrative Code (IAC), Article 7-32 *et seq.*

The following terms and acronyms are used in this annotated version of 511 IAC 7-32 *et seq.*, more commonly referred to as “Article 7.”

A. D. A.	Americans with Disabilities Act of 1990
ASD	Autism Spectrum Disorder
AT	Assistive Technology
BIP	Behavioral Intervention Plan
BSEA	Board of Special Education Appeals
CCC	Case Conference Committee (Indiana term for the IEP Team)
CD	Cognitive Disability
Complaint	Allegation of alleged infractions of special education laws by a public agency.
DD	Developmental Delay (Early Childhood)
ECLPR	Early Childhood Law and Policy Reporter
ED	Emotional Disability
EHLR	Education of the Handicapped Law Reporter (see IDELR)
ESP	Educational Surrogate Parent; Surrogate Parent
ESY	Extended School Year services
FBA	Functional Behavioral Assessment
FERPA	Family Education Rights and Privacy Act.
FPCO	Family Policy and Compliance Office, U.S. Department of Education (USDOE)
IDEA	Individuals with Disabilities Education Act
IDELR	Individuals with Disabilities Education Law Reporter, the successor to EHLR
IEE	Independent Educational Evaluation
IHO	Independent or Impartial Hearing Officer
ISTEP+	Indiana Statewide Testing for Educational Progress
LD	Specific Learning Disability
LEA	Local Educational Agency (publicly funded school)
NCLB	No Child Left Behind Act
OCR	Office for Civil Rights, USDOE
OHI	Other Health Impairment
OI	Orthopedic Impairment
OSEP	Office of Special Education Programs, USDOE
OSERS	Office of Special Education and Rehabilitative Services, USDOE
SEA	State Educational Agency (in Indiana, the Indiana Department of Education)
Sec. 504	Rehabilitation Act of 1973, proscribing discrimination on the basis of disability
SLP	Speech-Language Pathologist
TBI	Traumatic Brain Injury
TOR	Teacher of Record
TOS	Teacher of Service

Article 7 provisions are cross-referenced with the federal or state laws upon which the regulations are based. The author of this document is Kevin C. McDowell, former DOE General Counsel. Any questions about the content or documents referenced herein may be directed to Rebecca Bowman, General Counsel, at (317) 232-6676 or through e-mail at bbowman@doe.in.gov. This document is also available at the web site of the Office of Legal Affairs at <http://www.doe.in.gov/legal/docs/article7.pdf>.

RULE 32. DEFINITIONS

511 IAC 7-32-3 Adaptive behavior

34 CFR § 300.304(c)(4)

Township High School District #211 (IL), EHLR 352:29 (OCR 1986). While Sec. 504 requires recipients of federal financial assistance who operate schools to consider a student's adaptive behavior in the evaluation process, it does not require the use of specific instruments or methodology. A public agency's practice of documenting a student's adaptive behavior with observation, anecdotal record, student interview, or behavior rating scales complies with Sec. 504.

511 IAC 7-32-7 Assistive technology device

34 CFR §300.5

511 IAC 7-32-8 Assistive technology service

34 CFR §300.6

Complaint No. 1575.00. Student's Case Conference Committee (CCC) indicated he was to be considered for assistive technology (AT), with continuing consideration and assessment of a variety of communication strategies. However, an AT evaluation was not conducted, and no specific AT device or service was ever identified in the IEP. An inexpensive child's talking book was provided to the student for home use and in the community to help him with making choices. Although the Teacher of Record (TOR) made some alterations, along with the speech-language pathologist, the AT device was unsuccessful. A subsequent IEP identified the need for an AT device, but one was not provided and an evaluation of specific needs did not occur. The public agency was found in non-compliance.

511 IAC 7-32-9 At no cost

34 CFR §300.39(b)(1)

Complaint No. 2163.05 (Reconsideration). The LEA's schedule of textbook rental fees was in compliance with Indiana law with respect to high school and middle school students with disabilities. However, the fee schedule includes charges for personal care items (such as diapers, paper towels, talcum powder, and rubber gloves) and for student handbooks, which contain various required federal and state notices (e.g., FERPA, student discipline policies, attendance policies, homework policies, non-discrimination assurances, etc.). These latter charges are not authorized by state law and cannot be justified as "textbook rental." In addition, it is inconsistent to require patrons to pay for notices that are required to be communicated under federal and state law.

Complaint No. 2173.05. The student's IEP required ESY services consisting of English and mathematics. The mathematics class was to be taken at an alternative school in a nearby community. The alternative school charged the student \$250 to take two courses there that were required by the student's IEP. By specifying ESY services in the IEP and then requiring the parent to absorb a \$250 tuition charge, the school failed to provide a FAPE "at no cost." The school had to reimburse the parent the \$250.

Complaint No. 2090.04. The student's educational placement consisted of both an early childhood and kindergarten setting. The school district assessed the student a textbook rental fee, while the cooperative assessed a \$10 "early childhood fee" for each semester. The family met income guidelines such that the textbook rental fee was waived. The cooperative refunded the early childhood fee as part of the corrective action.

Complaint No. 1627.00. FAPE has to be "at no cost." Requiring parent to provide stamped, self-addressed envelopes in order to receive progress reports required by the student's IEP violates this provision.

Complaint No. 702.92. The public agency could not assess a surcharge fee on parents to pay for materials used in providing speech/language services. Other students were not assessed such a fee.

Letter to Penitusi, 30 IDELR 54 (OSEP 1998). An activity fee can be charged to a student with a disability so long as the same activity fee is charged to all other students, and the fee is not for something included as a part of the student's IEP.

511 IAC 7-32-10

Behavioral intervention plan

34 CFR §300.324(a)(2)(i)

Complaint No. CP-363-2008. High school student with LD had a BIP developed by the CCC that would allow him to call a counselor at the mental health center, his parent, or the Parent Community Liaison for the alternative school should he become angry or upset. The student was having a difficult time at school and used his cell phone to call his counselor. The student was disciplined for violating the school's ban on the use of cell phones. The school district violated Article 7 by not implementing the student's BIP and by not informing pertinent school personnel of the contents of the student's IEP/BIP.

Complaint No. CP-338-2008. The student is 18 years old and has an emotional disability. The student's former BIP stated the student "should not be physically restrained by security or other school personnel." However, his BIP was revised and did not address physical restraint. The student became embroiled in a confrontation with a security officer that involved some restraint following his being directed to the office for tardiness and being in an unauthorized area in the school. The student was suspended. The parent complained the BIP was not followed. The school was not found to have violated Article 7. The student's current BIP did not address physical restraint.

Complaint No. CP-166-2007. Fourteen-year-old student with an ED had a BIP that, under Emergency Management Procedures, stated that should the student "become a danger to himself or others[,] CPI [Crisis Prevention Intervention] techniques will be used to maintain safety." The BIP also provided that should the student have "physical aggression towards property[,] School Personnel will attempt alternate consequences to out-of-school suspension/sending home." On September 20, the student began slamming his head against a back wall, kicking the table and yelling. The principal and assistant principal attempted to calm the student, but when this was not successful, they contacted law enforcement and had the student removed from school. After the incident, the local special education personnel provided inservice training on CPI techniques for the principal and assistant principal. Although the BIP had not been implemented, the voluntary corrective action was deemed sufficient to address the misunderstandings that occurred.

Complaint No. CP-144-2007. The student was sixteen years old with a primary disability of ASD. The student's IEP has a BIP to address certain behaviors (hitting, kicking, running out of class, screaming). Some of the interventions listed include the use of a time-out area where the student can calm down, use of a weighted blanket, use of sign language as well as verbal and other visual cues, checklists, social stories, simple directions, and calm, simple directions. The student had significant behavioral outbursts on September 1, October 2, and October 11, involving hitting, biting, kicking, throwing objects, and running away. On one occasion, he was restrained by security using handcuffs. On another occasion, two staff members physically restrained the student. On the third occasion, the school contacted law enforcement and had the student removed from the school. The father later picked up the student. There was no documentation that any school personnel attempted any of the interventions in the student's BIP except to use calm voices. The school did not conduct a child-specific training regarding the student until October 26. The training involved teachers and other staff, including administrators, an office assistant, and the School Resource Officer. The school failed to implement the student's BIP and failed to provide timely inservice training.

Complaint No. 2120.04. Kindergarten student with a TBI was placed in a "de-escalation" (time out) room. According to the Time-Out Log, the student was placed there for hitting another student. The student was

not supervised while in the Time-Out Room. The student's IEP did not call for its use. In addition, the school's Time-Out Policy/Procedures permit the use of the time-out room but only once and then with the permission of the principal. Permission had not been sought from the principal. The school violated Article 7 by denying a FAPE to the student.

Complaint No. 2037.03 (reconsideration). Middle school student with an emotional disability had a BIP that was ambiguous (including the use of "and/or" to describe accommodations and interventions). The ambiguities precluded timely implementation. The CCC had to reconvene to clarify what situations will trigger behavioral interventions and accommodations and to describe how these accommodations/interventions will be implemented and by whom.

Complaint No. 1554.00. Student was fifteen years old and attended a day treatment program at a state hospital. His current IEP included an individualized BIP that employed isolated time-out as a strategy. In-school isolation was also to be used, but not to exceed six and one-half hours a day. The time-out room is required to be supervised at all times by an adult. The time-out log indicated that, on several occasions, the student chose to sleep in the time-out room rather than serve his "time" appropriately by sitting in the designated "time out" chair. At no time was the student unsupervised, nor was he isolated for more than the designated time. The time-out logs also indicated the student was routinely prompted to wake up and encouraged to "start his time." No violation was determined.

Complaint No. 1465.99. The student's IEP contained a behavioral intervention plan, which detailed behavioral expectations, interventions and consequences in a variety of settings, including classrooms, locker rooms, hallways, cafeteria, outside areas, and school-sponsored trips. However, the BIP did not address transportation. Transportation had its own rules, including a three-step progressive discipline policy and procedure but without any emergency contingencies. The BIP and the transportation rules were not coordinated and were inconsistent with respect to the student. The student's CCC had to be reconvened to address the inconsistencies and coordinate the BIP with the transportation service in order to rectify the procedural lapse.

Complaint No. 1472.99. Although a BIP was developed with parental input for a ten-year-old child with learning and emotional disabilities, the BIP was not implemented through the CCC process and included in the student's IEP. This constituted a violation of Article 7.

Complaint No. 1434.99. Student was ten years old and had an ED. His CCC discussed numerous behavioral techniques and eventually designed a BIP. It was determined that certain strategies would not work with the student, such as privilege deprivation (recess, specials), use of time-out or chill-out areas, out-of-school suspensions, and punitive essay writing. Recommended strategies included behavior management, token economy, individual/small group discussions on appropriate behaviors, field trips, and telephone contacts with parents. However, the BIP was not communicated to the student's general education teacher or principal. The student was prevented from attending two school-sponsored activities, and was repeatedly sent to the office for escalating behavior in the last month of school. The public agency was required to revise its procedures to ensure that all affected school personnel are aware of the requirements for implementing a behavioral intervention plan.

511 IAC 7-32-12

Case conference committee

34 CFR §§300.23, 300.321

Complaint No. 1512.00. Student is twelve years old and has an OI, LD, and low vision. An AT assessment was conducted and a CCC convened. At the CCC, the parent requested a one-to-one instructional aide. The principal, who was acting as the agency representative with the authority to commit resources, stated she could not commit to the service without first discussing this with the local superintendent. The public

agency was found in non-compliance with Article 7 by not having present an agency representative with the authority to commit agency resources.

Complaint No. 1606.00. Student is ten years old and has multiple disabilities. At the student's CCC, the parent requested a one-to-one paraprofessional for the student. Two agency representatives were present at the CCC. Both disagreed with the need for a paraprofessional, but indicated that the decision to hire additional personnel would have to be decided at a higher administrative level. As a result, they would not commit either way, treating the request as a recommendation. The agency was found in non-compliance. As a part of the corrective action, the agency provided in-service training to agency representatives to advise them that, where a service is not to be provided, resolution is through mediation or due process and not through failure to commit any resources.

511 IAC 7-32-13

Caseload

I.C. 20-35-2-1(b)(6)

Complaint No. 1469.00. Teacher, along with two paraprofessionals, has a classroom with fourteen (14) students with severe disabilities. One student required a significant amount of the teacher's time, estimated by the teacher to be up to 85 percent of the instructional time available. An agency supervisor and behavior consultant observed the classroom and offered suggestions and interventions, which alleviated the problem for awhile. However, the teacher reported that she needed additional personnel in the classroom, which was not forthcoming. During the complaint investigation, she acknowledged that she could not implement the IEPs of the students assigned to her. The agency, as a part of the corrective action, had to determine whether additional personnel were needed or whether the class size should be reduced. In addition, the respective students' CCCs were to be reconvened to determine the necessity, if any, for compensatory educational services.

Letter to Shelby, 21 IDELR 676 (OSEP 1994). IDEA does not establish maximum class sizes or teacher-pupil ratios. States typically develop such standards. Notwithstanding the absence of any standards, a student's IEP must be implemented.

511 IAC 7-32-14

Change of educational placement

34 CFR §300.536

Complaint 2141.04. Student was eight years old and eligible for services under Autism Spectrum Disorder. The student's IEP called for placement in a general education setting with supports. However, after a seven-day suspension, he was not returned to his educational placement. He remained in an isolated room where he served his in-school suspension, receiving his instruction from a substitute teacher. The student remained in this placement, despite parent dissent, from April 19 to the end of the school year. The LEA could not provide documentation to indicate the student received identified related services during this time. The student received instruction during this period from both substitute teachers and paraprofessionals. Each day where the student did not receive instruction from an appropriately licensed teacher constituted another day of suspension. The LEA greatly exceeded the ten school day limitation without ensuring the student's continued education. The use of a long-term substitute teacher not licensed as either an elementary or special education teacher was inappropriate. "A substitute teacher is a teacher when actually substituting for an absent teacher." The student's teacher was not absent. The student had been removed unilaterally from his classroom and segregated. The substitute teacher was acting more as an instructional aide. The substitute teacher could not be the "teacher of service" and, as an instructional aide, she was not providing services under the direct supervision of a licensed teacher. Multiple corrective actions were required, including, *inter alia*, compensatory services, both educational and related; develop a procedurally compliant IEP; provide expanded in-service training on appropriate disciplinary procedures, including the appropriate development and implementation of BIPs; provide specialized in-service training to all

professionals and paraprofessionals who will work with the student; provide written assurances that the LEA understands the appropriate use of substitute teachers.

Complaint No. 2080.04. Student within the autism spectrum moved to Indiana from another State. The school properly and timely convened the CCC to review the student's IEP from the other State. The CCC adopted the other State's IEP with some changes, calling for placement 100 percent in a special education kindergarten class. Some of the services were provided on the first day of school, but others were delayed for a week, including the Picture Exchange Communication System (PECS). The teacher assessed the student within the classroom, developed revised goals and objectives, and sent these to the parents with a proposed initiation date. The assessment was conducted when the student did not have PECS available. The student also exhibited interfering behaviors during this time. The principal asked the parents to remove the student from school until a CCC meeting could convene. No official suspension was levied. It was nearly two weeks before the student could return to school. The interruption in the student's education constituted an impermissible change of placement. Although the student's behavior was a precipitating factor for his removal from school, it was not a disciplinary removal that would, under specified conditions, permitted a unilateral removal of the student.

Complaint No. 694.92. Changes in students' scheduling and class assignments that are incidental and do not affect the implementation of the students' IEPs do not constitute changes of placement requiring reconvention of the students' respective case conference committees.

Newton (MA) Public School, 21 IDELR 811 (OCR 1994). The public agency's relocation of adaptive learning program to a substantially similar classroom with a kitchen did not constitute significant changes of placement. Programs calling for the students to work in the kitchen could be implemented.

Montebello (CA) Unified School Dist., 20 IDELR 388 (OCR 1993). The elimination of team teaching between two classes did not constitute a significant change of placement. Team teaching had not been included as part of the students' IEPs.

511 IAC 7-32-16 Complaint (See 511 IAC 7-45-1) 34 CFR §§300.151-300.153

Olympia (WA). EHLR 213:242 (OSEP 1989). IDEA complaint procedures require the SEA "to resolve" any complaint it receives regardless whether the complaint concerns issues that are hearable under the due process procedures.

Illinois State Board of Education. EHLR 257:573 (OCR 1984). An SEA must have an effective enforcement mechanism for its complaint procedures. Failure to have such a mechanism is a denial of FAPE.

511 IAC 7-32-27 Due process hearing (See 511 IAC 7-45-3) 34 CFR §§300.507-300.518

Letter to McDowell, EHLR 213:162 (OSEP 1988) and Letter to Howey, EHLR 213:147 (OSEP 1988). An SEA lacks authority or discretion to deny or otherwise interfere with a parent's request for a hearing. Whether a hearing request should be dismissed is a function of an impartial/independent hearing officer. An SEA can refer a hearing request to the original IHO for a determination as to whether the issues raised in a subsequent hearing request have already been addressed or could have been addressed in the hearing over which the IHO presided.

511 IAC 7-32-29**Early Intervening Services****34 CFR § 300.226**

Complaint No. CP-291-2008. The school district violated Article 7 by utilizing its student intervention process as a “pre-referral” process required to be utilized before an initial educational evaluation would be conducted. A school district “may not use the [student intervention] process to delay evaluating a student for special education, but [student intervention process] can be used while an evaluation is pending. An educational evaluation cannot be conditioned on the Student first participating in a [student intervention] program.”

511 IAC 7-32-30**Educational Evaluation****34 CFR §§300.15, 300.302**

Letter to Sarzynski, 49 IDELR 228 (OSEP 2007). “A public agency is not required to obtain parental consent before reviewing existing data as part of an evaluation or a reevaluation, or administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.... In addition, the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services, and therefore could occur without obtaining informed parent consent for the screening.” Evaluations of student progress to determine whether a student has mastered certain curricular content would be the same or similar to evaluations for all children studying the same content. Under such circumstances, parental consent would not be required. “If, however, the evaluation [is] specific to an individual child and is...crucial to determining a child’s continuing eligibility for services or changes in those services, OSEP believes such evaluations fall under the provisions [that] require parental consent....”

Letter to Koscielniak, 4 ECLPR 664 (OSEP 2005). New Mexico’s kindergarten literacy skills screening program was a general state assessment, subject to IDEA’s requirements that all kindergarten children with disabilities be included, with accommodations where appropriate. For kindergarten students with disabilities for whom the literacy skills screening program would not be appropriate, the State must develop guidelines for alternative assessments.

Complaint No. 1518.00. A reading screening of kindergarten students for the purpose of determining curriculum placement is not an educational evaluation requiring written parental permission. The test is not diagnostic, nor is it intended or designed to identify disabilities. The parent had verbally consented to the screening, but the failure to have the parent’s written permission did not violate IDEA or Article 7. However, the school’s refusal to permit the parent access to the screening results constituted violations of Art. 7 and IDEA.

511 IAC 7-32-31**Educational records****34 CFR §§ 300.501,****300.610-300.626**

Complaint No. 1019.96. The public agency did not maintain an educational record. It destroyed raw data upon completion of a triennial evaluation. Maintenance of the report containing interpretation of data after the data were destroyed was not sufficient maintenance of an educational record. Also see *Charles (IL) Comm. Sch. Dist. #303*, 17 EHLR 18 (OCR 1990), where OCR found a public agency’s policy of destroying test protocols after completion of the evaluation report effectively denied parents access to educational records used in assessing their child.

Complaint No. 656.92. A social worker’s notes were used in educational planning and were, as a consequence, a part of the student’s educational record and not personal notes in her sole possession.

Mequon-Thiensville (WI) School District, 40 IDELR 22 (OCR 2003). Teacher completed a behavior rating scale. The school provided the parent with an interpretative summary of the teacher's responses but not the teacher's original responses. The school destroyed the teacher's responses. The destruction of the test protocols denied the parent access to "relevant records" of the student and constituted violations of Sec. 504 and Title II of the A.D.A.

Letter to Fonda-Fultonville (NY) Central Schools, 31 IDELR ¶ 149 (FPCO 1998). Special education assessments and protocols specific to an individual student are protected educational records under FERPA. Parents or guardians are permitted to inspect the assessments and protocols, but schools are not required to provide copies "unless a failure to do so would effectively prevent the parent from exercising the right to inspect and review the records."

Letter to Thomas, EHLR 211:420 (OSEP 1986). Test protocols are not covered by the "sole possession" exclusion of the FERPA regulations, and must be made available for parental review as with any other educational record.

511 IAC 7-32-32 Educational surrogate parent 34 CFR §300.30(a)(5), 300.519

Letter to Copenhaver, 29 IDELR 1091 (OSEP 1997). Although IDEA does not address the circumstances under which an educational surrogate parent (ESP) can be removed by a public agency, such removal cannot be based on a disagreement between the ESP and the public agency over what constitutes a "free appropriate public education" (FAPE) for the student. An ESP can be removed where the ESP has a conflict of interest or lacks the requisite knowledge or skills to represent the educational interests of the student.

511 IAC 7-32-34 Eligibility 34 CFR § 300.306

Letter to Brumbaugh, 50 IDELR 107 (OSEP 2008). "A State is not required to use the precise terminology used in Part B in describing children who meet the criteria for 'child with a disability,' provided that all children who are in need of special education and related services who have impairments listed in the Part B definition of 'child with a disability' are identified, located, and evaluated, and appropriate instruction and services are provided to eligible children."

Heather S. v. Wisconsin, 125 F.3d 1045, 1055 (7th Cir. 1997). "The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child.... The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [the student's] multiple disabilities."

Letter to Anonymous, 37 IDELR 126 (OSEP 2002). Special education services are provided to a child based upon the child's unique needs and are not based upon the child's disability classification.

511 IAC 7-32-37 Expedited due process hearing (511 IAC 7-45-10) 34 CFR §300.532(c)

Letter to Gamm, 30 IDELR 711 (OSEP 1998). When a parent challenges a manifestation determination through due process, this would be an expedited due process hearing.

Complaint No. CP-332-2008 (*Reconsideration*). The IEP for a nine-year-old student with ASD identified transportation as a related service. The LEA and the parent agreed the student needed ESY services but disagreed over the need for transportation. A CCC was conducted shortly before the school year ended. The CCC notes indicated that “[t]ransportation is still in question.” The LEA did not provide transportation for the student for ESY services. The LEA was required to reimburse the parent for the transportation provided. Despite the differences over transportation, this was still indicated as a related service on the student’s IEP.

Letter to Copenhagen, 50 IDELR 16 (OSEP 2007). For a public agency, “no distinction is made between the personnel qualifications for special education and related services provided pursuant to a child’s IEP as part of the regular school program and those provided pursuant to an IEP as ESY services. Personnel providing ESY services should meet the same requirements that apply to personnel providing the same types of services as a part of the regular school program.” This would include the requirement that each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school is highly qualified as a special education teacher by the deadline established in the NCLB.

Complaint No. 2173.05. The student’s IEP required ESY services consisting of English and mathematics. The mathematics class was to be taken at an alternative school in a nearby community. The alternative school charged the student \$250 to take two courses there that were required by the student’s IEP. By specifying ESY services in the IEP and then requiring the parent to absorb a \$250 tuition charge, the school failed to provide a FAPE “at no cost.” The school had to reimburse the parent the \$250.

Complaint No. 1601.00. Although the school district has 1,592 students with disabilities in grades K-12 and only eight (8) received extended school year (ESY) services, the school’s documentation indicated that ESY services were discussed at all CCCs and documented in CCC reports and on the respective IEPs. No violation was found.

Board of Education of the Hendrick Hudson Central School District Board of Education et al. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982). The U.S. Supreme Court’s initial foray into special education—the Rowley case—continues to be its most important one. This is the case that initially defined, in a substantive manner, “free appropriate public education” and now drives legal strategies. In Rowley, the court stated that the federal law required that the education to be provided to eligible students with disabilities “confer some educational benefit...” 458 U.S. at 200. This “basic floor of opportunity” must consist “of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Id. at 201. “It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.” Id. To assess whether a student has been afforded a FAPE, the court established a two-fold inquiry: “First, has the State complied with the procedures set forth in the Act [now IDEA]? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefit? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” 458 U.S. at 206-07. In a harbinger of things to come, the court added: “In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to

be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." 458 U.S. at 207. "[O]nce a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." 458 U.S. at 208.

Complaint No. 2152.05. The student was 14 years old and had a moderate mental disability. The parent agreed to an IEP in September that would provide various services and supports, including acclimation to transportation on a regular bus route. The student was hospitalized thereafter, but was discharged on October 24th. The LEA told the parent the student could not return to school until the CCC convened. On November 3rd, the CCC convened. The LEA proposed an IEP that called for five hours of homebound a week after school hours but with the parent present. The parent would also be required to provide transportation. The parent did not consent, objecting to the limited amount of instructional time, the requirement that she attend the homebound instruction, and that she provide the transportation. The LEA and the complainant sought mediation. On December 9th, the parties executed a Mediation Agreement that called for additional evaluations, the reconvention of the CCC once the evaluative results are obtained, and a "waiver" of the compulsory school attendance laws, letting the student stay home till the CCC reconvened. On February 13th, the CCC reconvened, with the LEA proposing another IEP, increasing the homebound instruction per week to 7 ½ hours, either at school (after hours) or at complainant's home, but in either situation, the complainant must be present. The parent did not consent. The LEA provided none of the services agreed to in the September IEP from October 24th till the end of the school year. The LEA provided none of the services proposed in the first and second IEPs. The LEA did not develop a plan for conducting an FBA or review/modify the student's BIP. The LEA did not conduct a CCC for the purpose of conducting a manifestation determination. The LEA did not seek due process to ensure FAPE to the student when the parent refused to consent to services. The LEA was found to have violated multiple provisions of Art. 7, including impermissible change of placement, failure to implement an agreed-upon IEP, denial of FAPE, denial of services at no cost, violation of compulsory school-attendance laws, and overall denial of FAPE and failure to ensure such a FAPE. The LEA had to provide, in part, nearly 650 hours of compensatory services, including 14.5 hours of OT services and 14.5 hours of speech/language services. Extensive in-service training of LEA personnel in Art. 7 procedures was also required.

Complaint No. 2100.04. The student failed the third grade ISTEP+. The complainant alleged the school did not provide the student with a FAPE because the student was not taught the second grade Academic Standards so as to be prepared for the third grade ISTEP+. (See I.C. 20-32-2-2, I.C. 20-32-5 *et seq.*). ISTEP+ is based upon the Academic Standards. Although the student did not pass the third grade ISTEP+, the school maintained it did expose the student to the Academic Standards. The complainant could not identify any Standards the student was not exposed to. "[T]he public agency, teacher, or other person may not be held accountable if a student does not achieve the growth projected in the annual goals, benchmarks, or objectives."

Complaint No. 2098.04. The student suffered from several allergies and required a "clean classroom environment." The student also had medical and dietary restrictions that were included in his IEP. A substitute teacher did not have access to his IEP and was not informed of the necessary classroom modifications/accommodations, and likewise was not aware of the student's dietary and medical restrictions. Failure to ensure the substitute teacher was aware of this necessary information constituted a denial of FAPE.

Complaint No. 2032.03. School created an alternative program known as "Pre-Nine." The program was a transition program from eighth grade to high school for students who are below eighth-grade standards for ISTEP+ in both English/language arts, grades of "F" in both English and mathematics in two of the first three grading periods in eighth grade, at least one previous grade retention, and a referral by a guidance

counselor. Grade placements for students with disabilities are determined by respective case conference committees. There was no evidence that students with disabilities were excluded from consideration for the program.

Complaint No. 1478.99. Student, a seven-year-old first grade student, missed numerous school days between April and October, missing the first six weeks of school during one stretch. However, the school did not attempt to enforce its attendance policy, ensure the student was receiving “equivalent public school education” privately to satisfy the state’s compulsory school attendance act, or report the student’s inordinate number of absences to local child protective services. The student was denied a FAPE.

Complaint No. 1398.99. The public agency violated state compulsory attendance laws by permitting a student under the age of sixteen years to withdraw from school. The public agency was also aware that the student, who had a significant learning disability, had numerous excused and unexcused absences that impeded his educational program, but did not address this behavior in three subsequent case conference committees nor did it develop a behavior intervention plan.

Complaint No. 715.92. A “release of liability” as a precondition to providing FAPE to a student is void as a matter of law and has no legal effect.

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, a student with A disability who requires special education and related services is entitled to such services as are necessary to provide the student with a free appropriate public education (FAPE) in the least restrictive environment (LRE). All aspects of a student’s program, including eligibility, identification, placement, and what constitutes a FAPE, are to be determined by the student’s case conference committee (CCC). The CCC is composed, among others, of school personnel knowledgeable about the student, the student’s needs, and the school’s curriculum. It does not include people whose interest is other than the student’s interest.

The right to bargain collectively in public schools is not a federal right but one granted by a state. Such bargaining rights cannot be used to interfere with an eligible student’s entitlement under IDEA or the student’s rights under Sec. 504 and the ADA.

There has been occasional friction between bargaining units and public school districts in these respects. The following are illustrative.

Complaint No. 1022.96. The public agency violated state and federal law when the school district, in an attempt to resolve a grievance with its bargaining unit, entered into a “memorandum of understanding” (MOU) that prevented preschool children with disabilities from being integrated into general education classes by prohibiting such children from receiving any instruction from general education teachers. This was a direct violation of the school’s assurances for receipt of federal funds and was *prima facie* discrimination against the students. Complaint investigations are conducted pursuant to 34 CFR §§300.151-300.153. Failure to comply can result in the withholding of federal funds. Complaint investigation reports apply throughout the state.

Complaint No. 1229.98. Due to a shortage of speech/language pathologists employed by the school district, a significant number of students (51 in all) did not receive speech/language services required by their IEPs. The parents were not informed of the interruption of services. The school did attempt to hire speech/language pathologists by visiting job fairs and contacting various placement offices. The school was unable to fill the vacancies. Attempts to utilize existing services by expanding the caseload were impractical. Although contracts for educational services are limited to preschool services (see I.C. 20-35-4-9), the Indiana Department of Education through its Division of Special Education, suggested to the school

that, in the interim, it should contract with appropriately licensed speech/language pathologists. However, the local collective bargaining agreement (CBA) prohibits the contracting for educational services. The exclusive representative objected to the proposed contracting for these services. As a consequence, the 51 students' IEPs could not be implemented. The school was found in violation of state and federal law. As a part of the corrective action, it had to submit an assurance statement that the school will not again utilize the terms of a CBA to deny a student a free appropriate public education.

Article 7 Hearing No. 678.93 (BSEA 1993). The Indiana Board of Special Education Appeals found against the school corporation when it attempted to define the date, time, and place for convening a student's case conference committee based upon the "contract hours" in the local collective bargaining agreement. The date, time, and place are to be mutually agreed upon between the school and parents, and cannot be artificially determined by side agreements that interfere with this right.

Davilla 17 EHLR 391, 392 (OSERS 1990). "[I]n designing an appropriate educational program for a particular child through applicable procedures [of IDEA], the provisions of a collective bargaining agreement could be relevant only in determining the specific personnel who are to deliver the specific instructional and support services in the amounts specified in a child's IEP." However, "where the IEP team determines that a particular child with a disability requires speech services or other special education or related services in order to receive FAPE, that service must be provided to the child in an amount that is appropriate and sufficient to address the child's identified educational needs, regardless of any contrary provisions of a collective bargaining agreement that may affect the availability of needed personnel."

Letter to Williams, 21 IDELR 73, 79 (OSEP 1994) (OCR 1994), is a joint letter applying IDEA and nondiscrimination laws. "Neither Part B [IDEA] nor Section 504 confers specific responsibilities on teachers. Rather, specific rights and protections are afforded to children with disabilities and their parents, if the children are eligible under Part B or covered by Section 504.¹ However, the provisions of a collective bargaining agreement cannot authorize a school district's failure to provide the rights and protections guaranteed under Part B to all eligible children with disabilities and their parents and guaranteed under Section 504 to all qualified individuals with disabilities and their parents.

"... Implementation of any collective bargaining agreement... that has the effect of limiting the participation of children with disabilities in the regular educational environment or of imposing other burdens on children with disabilities or of making the aids, benefits, and services provided by the school district less effective than those provided to other students would constitute a violation of Section 504 and its implementing regulation [34 CFR Part 104]. In enforcing Section 504... OCR could... find a school district in violation if it ratified such a collective bargaining agreement and then attempted to use it as a justification for not meeting the LRE requirement or for restricting children with disabilities in obtaining aids, benefits, or services or for providing these children with aids, benefits, and services that are not as effective as those provided to nondisabled children."

Anchorage (AK) School District, 16 EHLR 1031 (OCR 1990) is a "Letter of Finding" (LOF) by the Office for Civil Rights (OCR). An "LOF" is a complaint investigation report. The school district discriminated against students in the multihandicapped class by shortening their school days based upon a negotiated agreement with the teachers rather than upon individualized, child-specific decisions. "Section 504... does not permit a District to provide a different or separate aid, benefit, or service to handicapped persons unless such action is necessary to provide handicapped persons with aid, benefit, or services that is as effective as that provided to others. [Because the decision to shorten the students' instructional day was not

¹All children eligible under Part B, IDEA, are also covered by Sec. 504 and Title II, ADA.

individually determined], OCR found that multihandicapped students are denied and not afforded the opportunity to participate in the same length school day as other students, and the District's reason for such different treatment, compliance with a negotiated contract with teachers, is not a nondiscriminatory reason for such different treatment. OCR concludes that the District is in violation of Section 504...."

Tamalpais (CA) Union High Sch. Dist., EHLR 352:126 (OCR 1988). OCR found the school district in violation of Section 504 by implementing the terms of the local collective bargaining agreement that limited the number of students with disabilities who could be assigned to general academic classes. "OCR policy provides that any implementation of the provisions of a collective bargaining agreement which has the effect of excluding a handicapped child, for whom mainstreaming has been determined to be appropriate, from participation in a regular classroom setting, or limiting his or her participation, would be a violation of Section 504...."

511 IAC 7-32-41 Functional Behavioral Assessment 34 CFR § 300.530(d)(1)(ii)

Letter to Sarzynski, 49 IDELR 228 (OSEP 2007). "[I]f an FBA is being conducted for the purpose of determining whether the positive behavioral interventions and supports set out in the current individualized education program (IEP) for a particular child with a disability would be effective in enabling the child to make progress towards the child's IEP goals/objectives, or to determine whether the behavioral component of the child's IEP would need to be revised, OSEP believes that the FBA would be considered a reevaluation under Part B for which parental consent would be required.... However, if the FBA is intended to assess the effectiveness of behavioral interventions in the school as a whole, the parental consent requirements...generally would not be applicable to such an FBA because it would not be focused on the educational and behavioral needs of an individual child."

Complaint No. 1428.99. Student was seven years old and had an OHI and communication disorder. During the 1998-1999 school year, the student was suspended from school for 14 and one-half days. The public agency was found to have violated IDEA and Article 7 for suspending the student for more than ten (10) cumulative school days, for not ensuring the continuation of educational services during the long-term suspension, and for not conducting an FBA to address the student's behavior.

511 IAC 7-32-43 General Education

Letter to Mancusol, EHLR 211:433 (OSEP 1987). "General Education" is a program where the majority of the students are not receiving a special education.

Letter to Buell, 29 IDELR 902 (OSEP 1997). IDEA "expresses a preference for educating students with disabilities in regular classes alongside their nondisabled peers with supplementary aids and services." However, "regular classes" are not defined. "Also, because [IDEA] does not use the term 'inclusion,' there is no Federal definition of the term." IDEA does "not establish either maximum class size or composition requirements or teacher-pupil ratios," these matters being reserved to the states.

511 IAC 7-32-48 Individualized Education Program 34 CFR §§300.22, 300.320

Complaint No. 2016.03. IEP contained ambiguous language that resulted in misinterpretations and misunderstandings. "Where an ambiguity exists in an IEP, the ambiguity will be construed against the public agency that is responsible for its development and implementation. IEPs and CCC reports must have sufficient clarity so that both the parents and school personnel understand what services a student is to receive."

Letter to Browne, EHLR 211:125 (OSEP 1979); Letter to Beck, EHLR 211:145 (OSEP 1979). An IEP is not a legal document or a legal contract.

Special School Dist. of St. Louis County (MO), 16 EHLR 307 (OCR 1990). Completion of IEP requirements does not guarantee a student will receive a diploma. An LEA must notify the student's parent/guardian when successful completion of the IEP will not result in receipt of a diploma.

511 IAC 7-32-53 Interim alternative educational setting 34 CFR §§300.530-300.532

Complaint No. 1566.00. Middle school student was placed in an alternative educational program because of acting-out and other disruptive behaviors. He started in the program on March 7th and remained there until the end of the school year. The alternative program was with parental consent. The student was not placed in the alternative program due to expulsion. As a result, the 45 school-day time restriction for interim alternative educational settings does not apply.

**511 IAC 7-32-56 Legal settlement I.C. 20-18-2-11,
I.C. 20-26-11-1 to I.C. 20-26-11-4**

Complaint No. CP-364-2008. The school district discovered the high school student did not have legal settlement (which the student and the student's parent acknowledged). Rather than expel the student (see I.C. 20-33-8-17) and because it was late in the school year, the student/parent entered into a "contract" with the school district that would allow the student to remain in the school district for the remainder of the school year. However, the student had to remain a student "in good standing," which was understood to mean one who "maintains passing grades, attends school regularly, and does not exhibit poor behavior at school." The student would also have to withdraw from the school district following the last day of school. The student became involved in a behavioral incident. The school district required the student to withdraw, which he did about one month before the school year ended. The student did not enroll in the school district where he had legal settlement because he believed it was too late in the school year to do so. The former school district then arranged for the student to take his final examinations and get course credit. The school district did not violate Article 7. The student was not expelled from school.

Complaint No. 1821.01. The parents purchased a home in a new school district and enrolled their two children. After four days of school, the district asked for proof of residency. The parents showed school personnel a copy of the sales agreement. The school requested utility bills; however, the parents did not have these as they had not yet moved into the house. The school excluded the students without resort to the expulsion procedures under I.C. 20-33-8-17 (legal settlement) and I.C. 20-33-8-19. Although the students were later re-enrolled, they missed seven weeks of school. The public agency, by not employing the legal settlement expulsion hearing process, violated Article 7. It had to provide compensatory educational services to the students and ensure its expulsion process complied with state law.

Complaint No. 1615.00 (Reconsideration). Student was 18 years old. In the previous school district she attended, she received special education services for a mild mental handicap. Prior to the 2000-2001 school year, she moved in with her older sister. The sister attempted to enroll her in the local school district but was prevented from doing so because the local school asserted she was not "emancipated" and her parents lived in a different school district. The school district informed the sister it would enroll the student if the sister had legal guardianship or if the sister executed the "custodial form" created by I.C. 20-26-11-3. The sister advised the student was not incompetent, did not require a guardian, the custodial forms do not address students over the age of 18, provided the school a copy of the student's voter registration card and State identification card showing the sister's address as the student's address. The school was found to have violated state law with respect to legal settlement and the mechanism developed by statute for the

resolution of same. The school was entitled to request documentation regarding the student's legal settlement, it was without legal justification for denying enrollment to the student once such documentation was presented (in this case, voter registration and State identification card). By statute, a school may contest a student's legal settlement through the expulsion process at I.C. 20-33-8-17, but this follows enrollment. In addition, the legal settlement expulsion process is subject to review by the Indiana State Board of Education under I.C. 20-26-11-15(a)(1). The school also violated special education law by attempting to require a student who was 18 years old but not incompetent to have a legal guardian. By virtue of the student's age and lack of guardianship, the student became the "parent" for special education reasons when she turned 18 years of age and all special education rights transferred to her.

Complaint No. 1750.01 (Reconsideration). Seventeen-year-old student receiving special education services in California came to live with her grandmother in Indiana because her mother could no longer care for her. Grandmother attempted to enroll her granddaughter and offered to execute the Third-Party Custodial Form (see IC 20-26-11-3). However, the school stated she must be declared the child's legal guardian by a court before the school would enroll the granddaughter. The student missed three months of school while the grandmother sought a judicial decree. Legal services informed her that Indiana law does not require establishment of a legal guardianship. The refusal to enroll was not justified and constituted a denial of FAPE. Compensatory educational services were warranted. The school requested reconsideration and was advised that it did not have the authority to condition enrollment on the establishment of a guardianship or the execution of the Third-Party Custodial Form. The grandparent was acting *in loco parentis*, which is specifically recognized under the federal and state definition of "parent." See 34 CFR §300.30 and 511 IAC 7-32-70.

Complaint No. 1462.99. Court appointed guardian for 19-year-old student with multiple disabilities. The public agency prepared and filed with IDOE an application for community-based services, using the court-appointed guardian as the "parent" on the application form. See 511 IAC 7-47-1. Thereafter, a dispute arose over transportation for the student. The public agency denied transportation services, claiming the guardian was not the "parent" and the student did not have legal settlement. The agency was found out of compliance with the law. A court-appointed guardian is a "parent" for special education purposes, and the agency is estopped from denying legal settlement of the student after submitting an application for funding indicating that the student did have legal settlement.

511 IAC 7-32-57 Length and frequency

34 CFR §300.320(a)(7)

Complaint No. 1583.00. Agency violated Article 7 by describing related services to be provided as a range of services (i.e., 10-30 minutes, "as appropriate"), but without describing "as appropriate" or other criteria for determining length and frequency of services to be provided.

Complaint No. 2010.03 (Reconsideration). The student's IEP specified a private speech-language therapist was to provide "auditory verbal communication skills." The school terminated the services at a meeting in December. Over two months later, the school notified the parent it would provide the services through its own personnel "immediately." Also, the IEP described the length of services to be "60-90 minutes a week" but did not contain any evaluative criteria for determining whether the student would receive language therapy for 60 minutes, 90 minutes, or something in between in any given week. "The length of service is stated in such a manner that neither the parent nor the therapist can clearly identify how many minutes of language therapy the Student will actually be receiving each week. Stating the length of service as a 'range' is permissible only when necessary to meet the unique needs of the student. When a range is used, the IEP must also specify the criteria for determining the number of minutes of service that will actually be provided to the student." Compensatory services were ordered for 90 minutes a week for 10 weeks to be provided by the private therapist.

511 IAC 7-32-61 Manifestation determination (See 511 IAC 7-44-5) 34 CFR §300.530(e),(f)

511 IAC 7-32-63 Medical services 34 CFR §300.34(c)(5)

Complaint No. CP-375-2008. High school student with ASD was withdrawn from school for a semester due to anxiety. The student was hospitalized with a diagnosis of schizophrenia. During the second semester, the parent met with school personnel to discuss transition back into the high school. The parent requested a psychiatric or neuropsychological/neuropsychiatric evaluation. The school agreed to a psychological evaluation but would not consider a psychiatric one, asserting that the latter “would be related to mental health/mental illness and would not be the responsibility of the School[.]” The financial responsibility for such an evaluation would have to be borne by the parent or through other third-party resources. The school was reminded that medical services, such as a psychiatric evaluation, can be considered a related service where the evaluation is necessary for diagnostic purposes to determine the nature and extent of the special education and related services the student might require. The school cannot categorically deny recourse to a psychiatric evaluation. As a part of the corrective action, the school and the parent would need to decide whether a psychiatric evaluation was necessary and, should there continue to be disagreement, resolve the matter through either mediation or a due process hearing.

Butler, et al. v. Evans, Indiana Department of Education, et al., 225 F.3d 887 (7th Cir. 2000). A student’s unilateral hospitalization was for medical care and not for educational reasons. As a result, the IDOE was not responsible for the costs of the psychiatric hospitalization. The student’s IEP did not require in-patient psychiatric care.

Complaint No. 2114.04. The school informed the parent the student, who had a learning disability, could not return to school until he had been evaluated by a psychiatrist and cleared to return to school. The school did not suspend the student, did not seek a court order for his removal, did not convene the student’s CCC, and did not consider the requested psychiatric evaluation as a medical service for diagnostic purposes. The parent paid \$165 for a psychiatric evaluation. The psychiatrist cleared the student to return to school after missing five (5) instructional days. The school indicated the absences were “medical” and “excused,” but the student’s absences were not voluntary. The student was denied a FAPE by conditioning his return to school on a medical evaluation. The interruption of services also constituted an impermissible change of placement. If the school required the medical information, it should have paid for it, especially as it made continuing educational services contingent upon this information. The school had to reimburse the parent for the psychiatric evaluation, provide compensatory educational services to the student, and revise its procedures for referrals for mental health evaluations.

511 IAC 7-32-64 Mode of communication 34 CFR §300.29(b)

Ramapo (NY) Central School Dist., 16 EHLR 559 (OCR 1990). The public agency violated Sec. 504 when it failed to provide hearing impaired parents of a nondisabled student with sign language interpreters at parent-teacher conferences and PTA meetings. Also see OCR Staff Memorandum, 16 EHLR 542 (OCR 1990).

511 IAC 7-32-66 Native language 34 CFR §300.29

Complaint No. 2354.07. The student was participating in the LEA’s English as a New Language (ENL) program. The student’s parents speak Spanish. The assistant principal sent a letter in Spanish to the parents advising them the student was failing classes. Two months later, a Notice of Retention letter was sent to the parents but was written in English. The student was to be retained. The LEA did not have a Spanish

version of this form and did not offer to translate it. The student was evaluated for eligibility. The parents requested an IEE. The LEA's director of special education responded to the parents' request in English. The letter did not explain any resources that the parents might access if they did not understand the letter. The school did not offer a means of interpretation. A month later, the students' ENL teacher explained the contents of the letter in Spanish. The LEA failed to provide notice in the parents' native language especially where it was feasible to do so.

Letter to Parkin, EHLR 305:48 (OCR 1988). The public agency must provide free interpretive services or alternate means of rendering school programs accessible to hearing-impaired parents of students, regardless whether the students are hearing students or not enrolled in special education.

511 IAC 7-32-69 Paraprofessional

34 CFR §§300.156(b)

Complaint No. 1613.00. The school's "learning resource room" is staffed by a paraprofessional, during which time she supervises and provides assistance to students assigned to the classroom. A teacher who is suppose to be supervising the paraprofessional does not do so except indirectly. The paraprofessional is in the classroom alone. Although some students come to the resource room just to take tests, others are there for academic assistance, including tutoring. The public agency was found in noncompliance for failing to provide appropriately licensed personnel for instruction and for failing to ensure the services of a paraprofessional in the resource room were provided under the direction and supervision of a licensed teacher.

Complaint No. 1248.98. A paraprofessional cannot be a student's "teacher" in academic subjects. A paraprofessional who is an instructional assistant will be working under the direct supervision of a licensed teacher.

Complaint 1343.98. Although instructional assistants can work under the supervision of a licensed teacher to assist in areas that relate to personal, social, and instructional needs of students with disabilities, such paraprofessionals are not licensed teachers and are not permitted to provide instruction outside the presence and supervision of a licensed teacher.

Complaint 1348.98. Although the "line of sight" teacher supervision requirement is relaxed for paraprofessionals working with students in implementing "functional curricula," there must be direct supervision where the instruction is academic. This would be a requirement of both IDEA/Article 7 and Performance-Based Accreditation. There is no distinction for so-called "pre-academic" instruction. "Pre-academic" instruction is academic instruction.

Complaint 1372.99. The student was denied a FAPE when the school had him assigned for instruction to a paraprofessional for 355 minutes a week. The paraprofessional was neither licensed as a teacher nor was the paraprofessional under the direction or supervision of licensed teachers. The student may be entitled to extended school year services or compensatory educational services, as the case conference committee may determine.

511 IAC 7-32-70 Parent

34 CFR §300.30

Complaint No. CP-230-2007 (*Reconsideration*). Student's mother initiated a due process hearing. As a result of the hearing, the IHO ordered the CCC to reconvene and revise the student's IEP in certain particulars. The LEA convened the CCC to discuss the IHO's orders, but the mother appealed to the BSEA. The BSEA affirmed the IHO's decision. Before the LEA could reconvene the CCC, a judge issued a court order awarding all educational decision-making, including the sole authority to approve an IEP, to the

student's father. The CCC convened. The mother and father both attended. Later, the father provided written consent for the revised IEP. The mother filed a complaint, alleging the revised IEP did not implement the IHO's orders. The LEA did not violate Article 7 in this regard. The subsequent approval of the revised IEP and change of placement, even though not precisely what the IHO ordered, was an agreement between the LEA and the "parent" (in this case, the father). The mother, as the non-custodial parent, no longer qualified as the "parent" for the student, particularly as the court had vested all decision-making authority in the father.

Complaint No. 1813.01. Divorced parents had joint custody. Both parents are entitled to the same procedural safeguards, including prior written notice. The parent without physical custody sought to convene the CCC, but the school declined to do so because the parent with physical custody did not want to do so. The parent with physical custody in joint-custody situations cannot dictate whether the CCC meeting will be conducted. The public agency was obliged to convene the CCC meeting.

Complaint No. 1750.01 (Reconsideration). Seventeen-year-old student receiving special education services in California came to live with her grandmother in Indiana because her mother could no longer care for her. Grandmother attempted to enroll her granddaughter and offered to execute the Third-Party Custodial Form (see IC 20-26-11-3). However, the school stated she must be declared the child's legal guardian by a court before the school would enroll the granddaughter. The student missed three months of school while the grandmother sought a judicial decree. Legal services informed her that Indiana law does not require establishment of a legal guardianship. The refusal to enroll was not justified and constituted a denial of FAPE. Compensatory educational services were warranted. The school requested reconsideration and was advised that it did not have the authority to condition enrollment on the establishment of a guardianship or the execution of the Third-Party Custodial Form. The grandparent was acting *in loco parentis*, which is specifically recognized under the federal and state definition of "parent."

Complaint No. 1462.99. Court appointed guardian for 19-year-old student with multiple disabilities. The public agency prepared and filed with IDOE an application for community-based services, using the court-appointed guardian as the "parent" on the application form. See 511 IAC 7-47-1. Thereafter, a dispute arose over transportation for the student. The public agency denied transportation services, claiming the guardian was not the "parent" and the student did not have legal settlement. The agency was found out of compliance with the law. A court-appointed guardian is a "parent" for special education purposes, and the agency is estopped from denying legal settlement of the student after submitting an application for funding indicating that the student did have legal settlement.

Complaint No. 784.93. A biological parent who has not been awarded custody or joint custody does not have standing as a "parent" to initiate an educational evaluation of the child. Only one who qualifies as a "parent" has this right. Also see Edmonds (WA) School Dist. No. 15, EHLR 257:198 (OCR 1980). A noncustodial parent may not initiate a due process hearing.

Letter to Arnold, EHLR 211:297 (OSEP 1983). Where divorced parents have joint custody of a student with disabilities but one parent objects to the proposed IEP, the parent objecting may request due process hearing while the other parent may approve the proposed program.

Letter to Biondi, 29 IDELR 972 (OSEP 1997). State law governs which school district is required to provide FAPE to a student with disabilities where the parents are divorced, have joint custody, but live in different school districts. IDEA is satisfied so long as the student is provided a FAPE by the district the SEA deems responsible. See, *e.g.*, I.C. 20-26-11-2.5.

511 IAC 7-32-99 Transition planning 34 CFR §300.43

511 IAC 7-32-100 Transition services 34 CFR §§ 300.320(b)

Complaint No. 1494.99. Agency violated IDEA and Article 7 when it failed to ensure that Vocational Rehabilitation Services provided the transition services it stated it would (job placement services), although the agency did provide the services it stated it would and included in the student’s IEP. When the agency learned vocational rehabilitation services were not being provided, it should have reconvened the student’s CCC.

Complaint No. 1482.99 (Reconsideration). An agency is required to *invite* a student to attend a CCC where the student’s transition needs will be discussed, regardless of the student’s age. Should the student not attend, the CCC is to consider the student’s preferences. Although a student’s parent can preclude the student’s attendance at the CCC until the student is 18 years old, the parent cannot preclude the agency from complying with federal and state law by inviting the student to attend. If the parent does not want to the student to attend, the agency must take other steps to ensure the student’s preferences and interests are considered at the meeting in the student’s absence.

511 IAC 7-32-105 Ward of the State 34 CFR § 300.45

A student is a “ward of the state” when the student has been removed from the student’s home for suspected or actual neglect or abuse, and the court has issued an order restricting or terminating the rights of the student’s parent.

Complaint No. 1430.99. A student who is a ward of the county Office of Family and Children (OFC) is a “ward of the state.” The public agency appropriately appointed an educational surrogate parent to exercise the same rights and responsibilities as a parent with regard to making decisions concerning the identification, evaluation, placement, or the provision of a FAPE to the student. The educational surrogate parent was notified of all case conference committee meetings and attended. The public agency did not violate state and federal law by not providing notice to the OFC because it was not required to do so. Local cooperation and communication between school districts and county OFCs are encouraged but not required. The educational surrogate parent—not the OFC— fulfills the educational decision-making role for the student.

RULE 33. GENERAL PROVISIONS

511 IAC 7-33-1 Scope 34 CFR §§300.2, 300.101, 300.149

Evans v. Tuttle, 613 N.E.2d 854 (Ind. App. 1993). The State is enjoined from restricting access to special educational services for students 18-22 years of age who have not completed their high school education.

Complaint No. 1398.99. The public agency violated state compulsory school attendance laws when it permitted a student under 16 years of age to withdraw from school. The school was also aware the student, who had a significant learning disability, had numerous excused and unexcused absences that impeded his educational program but did not address this behavior in three subsequent CCC meetings nor did it develop a BIP.

Article 7 Hearing No. 750.93 (BSEA). Receipt of high school diploma and graduation from high school renders moot hearing issues regarding FAPE.

**511 IAC 7-33-2 Public Schools' Special Education Programs; I.C. 20-35-1 et seq.
Organizational, Administrative Structure**

Complaint No. 1821.01. The parents purchased a home in a new school district and enrolled their two children. After four days of school, the district asked for proof of residency. The parents showed school personnel a copy of the sales agreement. The school requested utility bills; however, the parents did not have these as they had not yet moved into the house. The school excluded the students without resort to the expulsion procedures under I.C. 20-33-8-17 (legal settlement) and I.C. 20-33-8-19. Although the students were later re-enrolled, they missed seven weeks of school. The public agency, by not employing the legal settlement expulsion hearing process, violated Article 7. It had to provide compensatory educational services to the students and ensure its expulsion process complied with state law.

Complaint No. 1750.01 (*Reconsideration*). Seventeen-year-old student receiving special education services in California came to live with her grandmother in Indiana because her mother could no longer care for her. Grandmother attempted to enroll her granddaughter and offered to execute the Third-Party Custodial Form (see IC 20-26-11-3). However, the school stated she must be declared the child's legal guardian by a court before the school would enroll the granddaughter. The student missed three months of school while the grandmother sought a judicial decree. Legal services informed her that Indiana law does not require establishment of a legal guardianship. The refusal to enroll was not justified and constituted a denial of FAPE. Compensatory educational services were warranted. The school requested reconsideration and was advised that it did not have the authority to condition enrollment on the establishment of a guardianship or the execution of the Third-Party Custodial Form. The grandparent was acting *in loco parentis*, which is specifically recognized under the federal and state definition of "parent." See 34 CFR §300.30 and 511 IAC 7-32-70.

Complaint No. 1615.00 (*Reconsideration*). Student was 18 years old. In the previous school district she attended, she received special education services for a mild mental handicap. Prior to the 2000-2001 school year, she moved in with her older sister. The sister attempted to enroll her in the local school district but was prevented from doing so because the local school asserted she was not "emancipated" and her parents lived in a different school district. The school district informed the sister it would enroll the student if the sister had legal guardianship or if the sister executed the "custodial form" created by I.C. 20-26-11-3. The sister advised the student was not incompetent, did not require a guardian, the custodial forms do not address students over the age of 18, provided the school a copy of the student's voter registration card and State identification card showing the sister's address as the student's address. The school was found to have violated state law with respect to legal settlement and the mechanism developed by statute for the resolution of same. The school was entitled to request documentation regarding the student's legal settlement, it was without legal justification for denying enrollment to the student once such documentation was presented (in this case, voter registration and State identification card). By statute, a school may contest a student's legal settlement through the expulsion process at I.C. 20-33-8-17, but this follows enrollment. In addition, the legal settlement expulsion process is subject to review by the Indiana State Board of Education under IC 20-26-11-15(a)(1). The school also violated special education law by attempting to require a student who was 18 years old but not incompetent to have a legal guardian. By virtue of the student's age and lack of guardianship, the student became the "parent" for special education reasons when she turned 18 years of age and all special education rights transferred to her.

511 IAC 7-33-4 Use of public and private insurance proceeds 34 CFR §300.154(d)-(h)

Letter to Anonymous, 30 IDELR 49 (OSEP 1997). Early childhood services for a student eligible for special education and related services are not affected by the student’s SSI status. A student’s FAPE is not contingent upon SSI status.

Letter to Wisconsin Department of Public Instruction, 28 IDELR 497 (FPCO 1997). A public agency is not authorized, absent written parental permission, to disclose the contents of educational records to the state Medicaid agency. Such disclosures are not included within the exceptions to obtaining written parental permission. In addition, schools may not release to Medicaid a list of students with disabilities who are receiving services because a disability is personally identifiable information and not directory information. Medicaid, likewise, does not fall within the “financial aid” exclusion of FERPA. However, nothing prevents a school—or its contracting agency (billing)—to receive a list from Medicaid and compare it to its own list.

RULE 34. NONPUBLIC SCHOOLS OR FACILITIES

**511 IAC 7-34-1 Special education and related services for students in private schools or facilities
34 CFR §§300.129, 300.130-300.144**

511 IAC 7-34-2 Child Find and Nonpublic Schools 34 CFR §300.131

Complaint No. CP-219-2007. Thirteen-year-old student with multiple disabilities was placed in a state-licensed child-care institution by his parent. The facility was not located in the school corporation of legal settlement. The school corporation where the facility was located did not serve the student, asserting the facility was a “private school” and the student had been unilaterally enrolled there by the parent; hence, the student was not entitled to a FAPE. The school district violated both Article 7 and Indiana law. The facility is the type of child-care institution contemplated by I.C. 20-26-11-8, which entitles the student to receive educational services from the school corporation where the facility is located. The facility is not a “private school” under either the IDEA, Article 7, or Indiana law. The student had a current IEP developed by an Indiana school corporation that was not implemented, nor did a CCC convene in a timely manner. Part of the corrective action involved development of a protocol with the facility to identify school-aged children placed therein by the courts or by parents, with means to staff CCCs when appropriate and to provide services.

Complaint No. 2285.06. The LEA’s child-find procedures included advertisements in a local newspaper four (4) times a year with monthly inserts in the daily newspaper. The LEA’s web site also contained the LEA’s child-find procedures. For private school children, such information was provided to the representatives from the private schools. Although the LEA’s procedures satisfy child-find requirements, during the past school year, the LEA failed to use the monthly inserts and failed to conduct any consultation with private school representatives in its area. As a result of these deficiencies, the LEA failed to locate, identify, and evaluate potentially eligible children enrolled in private schools.

Complaint No. 2109.04. The school did not violate Article 7 when considering access to services for a private school student. The student was home-schooled. A CCC meeting was initiated and conducted, with an IEP developed and implemented. The school included the parents in the process. As the student is home-schooled, the parents are the representatives of the private school.

Complaint No. 1515.00. Parent withdrew student from public school to home-school him, but the public school did not advise of the availability of services for students with disabilities being educated privately. Indiana does not define “private schools.” As a result, a home school is considered a private school as would be a typical accredited private school. The school’s voluntary action in convening to address compensatory educational services and extended school year services was adopted as the corrective action. The school was to amend its policies to include home-schooled students in its responsibilities toward students with disabilities in nonpublic schools. (Also see Complaint No. 1902.02 and Complaint No. 2272.06.)

Complaint No. 1340.98. The complaint was initiated by a nonpublic school. The public school had provided services previously in the nonpublic school, but decided to make services available to nonpublic school students at a nearby public school. Although the public school is within walking distance of the nonpublic school, the neighborhood is a dangerous one. The nonpublic school would not permit the students to go unaccompanied, but the public school would not ensure transportation. The public school, although it had the election to provide the services at a site other than the nonpublic school, was nonetheless in noncompliance with state and federal law because the public school, when it elected to change the location of services, would not discuss within the case conference committees of the respective students what transportation, if any, was necessary.

Letter to Sarzynski, 29 IDELR 904 (OSEP 1997). IDEA does not define “private school.” States define what is meant by a “private school.” Whether or not a student with disabilities who is home-schooled would be considered a “private school” student would depend, then, upon state law.

Letter to McKethan, 29 IDELR 907 (OSEP 1998). In a wide-ranging response to a local director of special services in North Carolina, OSEP advised: (1) child-find activities apply to all students irrespective of their enrollment in public or nonpublic schools, although voluntarily enrolled nonpublic school students are not entitled to the same services they would receive if enrolled in the public school; (2) in providing “a genuine opportunity for equitable participation in IDEA programs” for nonpublic school students, there is a required consultative process with the representatives of nonpublic school students in reaching determinations as to what will constitute same; (3) because voluntarily enrolled nonpublic school students do not have individual entitlements to FAPE, a school district does not have to offer a FAPE to every student with a disability who resides within the school district; (4) parents and guardians of nonpublic school students do have due process rights, but they are limited; and (5) IDEA does not prohibit the provision of IDEA services on-site at a nonpublic school. See also Letter to Rothman, 30 IDELR 269 (OSEP 1998).

**511 IAC 7-34-3 Educational Evaluations for Parentally-Placed
Nonpublic School Students Attending Nonpublic Schools
Outside the School Corporation of Legal Settlement
34 CFR § § 300.132, 300.622(b)(3)**

Serving Children with Disabilities Placed in Private Schools, 47 IDELR 197 (OSERS 2007). Although the IDEA does not state specifically how often a service plan must be reviewed and revised, the service plan is associated with the IEP development process. Hence, “generally a services plan should be reviewed annually and revised, as appropriate.” OSERS acknowledged that it is possible that a parent could request an evaluation from the school district where the parent resides as well as from the school district where the child’s private school is located. It is also likely that the two school districts would be unaware of the other’s activities because 34 C.F.R. § 300.622(b)(3) [see **511 IAC 7-34-3(c)**] requires parental consent for the release of information between LEAs. “Therefore, as a practical matter, one LEA may not know that a parent also requested an evaluation from another LEA. However, the Department does not believe that the child’s best interests would be served if parents request evaluations of their child by the resident school

district and the LEA where the private school is located, even though these evaluations are conducted for different purposes. Subjecting a child to repeated testing by separate LEAs in close proximity [sic] in time may not be the most effective or desirable way to ensure that evaluations are meaningful measures of whether a child has a disability or of obtaining an appropriate assessment of the child’s education needs.”

511 IAC 7-34-4 Consultation process **34 CFR §§ 300.134, 300.135**

511 IAC 7-34-5 Decisions regarding services **34 CFR §§ 300.137, 300.138**

**511 IAC 7-34-8 Requirements pertaining to services,
Location of services, transportation** **34 CFR §§ 300.138, 300.139**

Complaint No. CP-340-2008. Administrators from nonpublic schools filed a complaint, alleging the LEAs, through the special education cooperative (the planning district), did not engage in a “meaningful” consultation with private school representatives and representatives of parents of nonpublic school students. The planning district did conduct the meeting. The agenda indicated that Child Find, “proportionate share,” and what types of services would be provided would be discussed. The input on services to be provided was solicited through the use of an “input” form. This information was considered in the determination of services that would be made available. However, soliciting input via written forms does not constitute “meaningful” discussion. “Meaningful consultation requires a thoughtful participation in an exchange of views that goes beyond the simple receipt of information from one party.” The planning district had to revise its format. (The planning district had two previous complaints—**CP-300-2007** and **CP-313-2008**—both of which addressed the planning district’s failure to conduct any consultation process.)

Complaint No. CP-252-2008. The complainants were administrators from private schools. They asserted the school district failed to ensure timely and meaningful consultation with private schools and parents, and failed to provide due consideration to the views of private school officials. The school district sent notices to private school representatives near the beginning of the school year, advising them of a meeting scheduled at the end of August. There was a form—“the Private School Students and Services Inventory”—which permitted the representatives to complete, indicating what services they perceived as being most crucial for their respective students. This form had to be returned before the meeting. No such letters were sent to representatives of parents of parentally placed private school children. As a result, no parent representatives took part in the meeting. The meeting occurred, but there was no meaningful input from the private schools. Rather, the school district wanted the private school representatives to sign an “Affirmation of Consultation” document. The representatives, however, wanted to discuss the expenditure of a proportionate share of federal funds and direct speech therapy services. The school district’s response indicated an intent to continue to move away from direct speech services in favor of “larger group therapy sessions with teacher consultative services[.]” The school district had 96 eligible students placed in private schools by their parents. The amount of federal funds available would be \$128,185.59. The school district did not demonstrate to the representatives how these funds were calculated. The “Affirmation of Consultation” document stated the school district would “annually invite private school and parent representative(s) to consultation regarding the district’s design and development of special education and related services for students with disabilities. Throughout the year, ...the [School] will distribute a survey to parents, school representatives, and administrators of private school(s) seeking feedback to ensure that identified student(s) had meaningfully participated in special education and related services.” Although the “Affirmation of Consultation” document also indicates that decisions will be made by students’ respective case conference committees, the representatives stated—and the school district did not deny—that only speech language services on a consultation basis were offered. The representatives indicated their disagreement, asserting that the “consultative approach” would not serve the needs of their students, especially in the area

of speech. The school district did not respond to these disagreements, which were written on the back of the “Affirmation of Consultation” form.

- The actions of the school district were found to contravene the requirements of special education law:By failing to invite representatives of parents of parentally placed private school children;
- By holding the consultation meeting at the end of August when school had already started, which was not timely for considering the needs of parentally placed private school children;
- By failing to provide a genuine opportunity for all parties to express their views and have these considered by the public school district;
- By failing to explain the calculation of its proportionate share to expend upon such services, and to clarify whether these funds were to be targeted to school-aged students (ages 6 through 22) or early childhood students (ages 3 through 5) or both;
- By failing to discuss how, where, and by whom services would be provided to eligible private school students, including whether such services will include direct or indirect services, how those services will be offered should the federal funds be insufficient for this purpose, and how and when these decisions will be made;
- By dictating that services would be speech consultation services and not discussing any other types of services; and
- By failing to provide a written explanation of the reasons why the school district chose not to accept the views of the private school representatives.

In addition, although the school district’s agenda for the meeting did include the five (5) required subjects for the consultation, meaningful consultation did not occur. The failure to give due consideration to the views of the private school officials violated the IDEA.

In a discussion section, which was based on *Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Privates Schools* (OSEP, March 2006), the Center for Exceptional Learners noted in relevant part:

A unilateral offer of services by an LEA with no opportunity for discussion is not adequate consultation. Only after discussing key issues relating to the provision of special education and related services with all representatives should the LEA make its final decisions with respect to the services to be provided to eligible private school children with disabilities.

...Decisions about the services that will be provided to parentally-placed private school students with disabilities must be made pursuant to 34 C.F.R. § 300.134. The Division reiterates that the consultation meeting (with the private school representatives and representatives of parents of parentally-placed private school children with disabilities) shall discuss the “types” and “[h]ow, where, and by whom special education and related service will be provided for parentally placed private school students...” See 34 C.F.R. § 300.134(d). Thus, the School should use the consultation process to hear the views of [the representatives] before making final decisions regarding the types of services it will provide and how, where and by whom those services will be provided. The School must indicate at the consultation meetings how it will notify private school representatives of the decisions it makes after the meeting takes place.

The Division reminds the School of Indiana’s current rule requiring all parentally-placed private school students eligible for special education to be offered some level of services. Under this rule and IDEA, LEAs must spend a proportionate share of their Part B money on parentally-placed private school students. However, like public school students with disabilities, parentally-placed private school students generate state special education funds

known as additional pupil count (APC) funds. Therefore, it is permissible for LEAs to use a combination of state and federal funds to meet [their] service obligation[s] under this rule.

511 IAC 7-34-10 Reimbursement for parent’s unilateral enrollment of student in a nonpublic school or facility when the public agency’s provision of a free appropriate public education is in dispute 34 CFR §300.148

When Congress reauthorized the IDEA in 1997, it intended to create mechanisms whereby parents and local educational agencies (LEAs) would discuss differences and thus avoid due process procedures and their attendant attorney fees. To this end, Congress required States to implement a mediation process and public agencies involved in the education of children with disabilities to provide parents and guardians with more extensive, detailed notices of procedural safeguards. One of the problem areas Congress directly addressed was the unilateral placement of children in private schools by parents who are dissatisfied with the public school program. Under the 1997 law—and continued in the reauthorization in 2004—a parent can be reimbursed for the cost of a private school placement if the public school “had not made a free appropriate public education [FAPE] available to the child in a timely manner prior to that enrollment.” The amount of reimbursement may be reduced or denied if the parents, at the most recent case conference committee meeting, did not inform the public school of their intent to reject the public school program and enroll the student in a private school, or if the parents fail to give the public school notice of their intentions at least ten (10) business days prior to removal of the student from the public school. Reimbursement can also be reduced or denied if the public school, prior to removal of the student, informs the parent of their intent to evaluate the student but the parents fail to make the student available for the evaluation. The requirement that the parent provide notice to the public school as a precondition for full reimbursement can be excused if the parent is illiterate, there is an emergency requiring immediate placement (more restrictive under the current IDEA), the public school prevented the parent from providing the notice, or the public school failed to inform the parent such notice is required. IDEA does not state that, as a precondition for reimbursement, the private school must provide the FAPE the public school ostensibly could not or would not provide. Administrative and judicial constructions, relying upon two important U.S. Supreme Court decisions (*Burlington v. Dep’t of Ed.*, 471 U.S. 359, 105 S. Ct. 1996 (1985) and *Florence Co. Sch. Dist. Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993)), have held that the private schools are not required to comply with the extensive requirements of IDEA, notably the FAPE and “least restrictive environment” (LRE) requirements. As a consequence, adjudicators are looking more to whether the private school provided some “educational benefit” to the student.

Todd v. Duneland School Corporation, 299 F.3d 899 (7th Cir. 2002). Student with learning disability, specifically in reading and written language, was evaluated by parent’s evaluator who recommended Orton-Gillingham reading program along with ESY. The school had the student evaluated for possible auditory processing deficits and also evaluated him through their own personnel. The student’s CCC met to consider the evaluation results. The CCC noted the student had made gains under his previous IEPs but added additional remedial assistance for reading, written language, and math. The parent agreed with the proposed IEP but later felt the IEP was inadequate and enrolled the student in an out-of-state private school that specializes in teaching students with learning disabilities. The parent then sought retroactive and prospective reimbursement for the private school program through the due process system. The IHO found the school’s IEP was not reasonably calculated to provide a FAPE and ordered reimbursement. The BSEA, however, found the IEP in question was reasonably calculated to provide the student a FAPE and reversed the IHO’s decision. Upon judicial review, the federal district court affirmed the BSEA, and the 7th Circuit affirmed the district court. The court rejected the parent’s claim the school failed to specifically identify the student as “dyslexic,” noting that dyslexia is included within the definition of “learning disabled” and, pursuant to *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997), IDEA does not

specifically require a label in order to provide services; FAPE is dependent upon addressing a student's unique needs. The school was not required to offer the Orton-Gillingham method of instruction because the IDEA does not require a school district to employ a specific methodology. A parent who unilaterally enrolls her child in a private school, the 7th Circuit noted, is entitled to reimbursement "only if a federal court concludes both that the public placement violated the IDEA and that the private school placement was proper under the Act" (emphasis original). The two issues to address in analyzing the school district's program include (1) whether the school has complied with IDEA's administrative requirements; and (2) whether the IEP is reasonably calculated to provide some educational benefit. (This is the Rowley standard from Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034 (1982).) The parent in this case did not argue the school's procedures were non-compliant with IDEA's administrative requirements. Notwithstanding the parent's representations the student did not progress and could not read, the record from the hearing indicates that he progressed from grade to grade, earned adequate grades, scored acceptably on standardized assessments and could, in fact, read.

Butler, et al. v. Indiana Department of Education, 225 F.3d 887 (7th Cir. 2000). A student's unilateral hospitalization was for medical care and not for educational reasons. As a result, the IDOE was not responsible for the costs of the psychiatric hospitalization, upholding the BSEA, which had earlier overturned a decision by the IHO in favor of the student. The student's IEP did not require in-patient care in order to receive special education and related services.

Nein v. Greater Clark Co. Schools, 95 F.Supp.2d 961 (S.D. Ind. 2000). Student had a significant learning disability, especially with respect to reading. Although the parents and the school had attempted several revisions to the student's educational program, his progress was minimal. The CCC was scheduled to reconvene when the parents enrolled the student in a private school specializing in dyslexia and asked the public school to pay for the program, as well as reimburse the parents for past expenditures. The IHO found in favor of the parents, awarding over \$10,000 to the parents for a summer school program and eventual enrollment in the private school (along with transportation costs). Also, the IHO ordered training for school personnel and monitoring by the DSE. The BSEA, by a 2-1 vote, reversed the IHO, noting that the parents had received several copies of their procedural safeguards and were aware that they had to advise the school of their intent to enroll the student unilaterally in a private school. Both the IHO and BSEA noted that failure to provide such notice is not fatal to a claim for reimbursement but can be considered by an adjudicator when determining whether an award should be made and at what amount. Upon judicial review, the federal district court cut a path mid-way between the IHO's and BSEA's decision, awarding the parent some of the reimbursement requested but denying the rest. The IHO's orders directed at prospective training of school personnel, were overturned by the BSEA and not addressed by the district court.

RULE 35. PROGRAM PLANNING AND EVALUATION

511 IAC 7-35-2 Supports for Public Agency Personnel

34 CFR § 300.156

Complaint No. 1791.01 (Reconsideration). Although professional staff working with eight-year-old student in third grade received training in autism and specific training regarding the student's needs, the paraprofessionals received only literature regarding autism spectrum disorder. Providing paraprofessionals with professional literature does not constitute specialized in-service training. "Specialized in-service training means more than providing someone with literature that they may or may not read. In-service training contemplates that questions will be asked, answers will be given, and people will learn something about the condition and the particular needs of the student."

Complaint No. 1309.98. Public agency provided a generalized inservice training in autism for staff. However, it did not provide specific inservice to the teacher and paraprofessional assigned to a six-year-old student with autism in the kindergarten class. The public agency did not have procedures to provide inservice training to personnel hired after the beginning of the year.

RULE 36. GENERAL ADMINISTRATION OF PROGRAMS

511 IAC 7-36-1 Parent and Community Participation

34 CFR § 300. 31

Complaint No. 2127.04. The school had a written visitor policy that was published in the student handbook. The policy requires all visitors to sign in and wear a visitor button or name tag. Parents wishing to observe classrooms needed to make such an arrangement at least 24 hours in advance. Although the parent had previously observed a classroom without resort to the visitor policy, when she attempted to observe a small group speech/language session, the parent was denied access because, in part, she failed to make arrangements beforehand. The school's policy applies to all classrooms and not just special education ones. Neither federal nor state law speaks to a parent's right to observe a classroom. The school's policy did not violate Art. 7 or IDEA.

Letter to Mamas, 42 IDELR 10 (OSEP 2004). IDEA does not provide a general entitlement to a parent or a parent's representative to observe the parent's child in a classroom or to observe potential educational placements. State and local policies determine who may have access to classrooms. School districts and parents are encouraged to cooperate with each other in this regard. There are times when such an observation may be required. "For example, if parents invoke their right to an independent educational evaluation [see 511 IAC 7-40-7] of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement."

511 IAC 7-36-2 Special education program personnel 34 CFR §§ 300.18, 300.156, 300.207

Complaint No. CP-224-2007. The school district provided homebound services to a student with a primary disability of OHI. However, one of the teachers did not currently hold a teacher license. Homebound instruction must be provided by individuals who are appropriately licensed to provide instructional services. The individual was akin to a paraprofessional. "A paraprofessional may only reinforce instruction that has already been directly provided by a licensed teacher and must remain under the direct supervision of the licensed teacher who is responsible for overseeing and supervising the services from the paraprofessional." As a part of the corrective action, the school district had to ensure that only appropriately licensed individuals were employed to provide homebound instruction. The student was also entitled to compensatory educational services.

Letter to Copenhaver, 50 IDELR 16 (OSEP 2007). For a public agency, "no distinction is made between the personnel qualifications for special education and related services provided pursuant to a child's IEP as part of the regular school program and those provided pursuant to an IEP as ESY services. Personnel providing ESY services should meet the same requirements that apply to personnel providing the same types of services as a part of the regular school program." This would include the requirement that each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school is highly qualified as a special education teacher by the deadline established in the NCLB.

Complaint 2141.04. Student is eight years old and eligible for services under Autism Spectrum Disorder. The student's IEP called for placement in a general education setting with supports. However, after a seven-day suspension, he was not returned to his educational placement. He remained in an isolated room where he served his in-school suspension, receiving his instruction from a substitute teacher. The student

remained in this placement, despite parent dissent, from April 19 to the end of the school year. The LEA could not provide documentation to indicate the student received identified related services during this time. The student received instruction during this period from both substitute teachers and paraprofessionals. Each day where the student did not receive instruction from an appropriately licensed teacher constituted another day of suspension. The LEA greatly exceeded the ten school day limitation without ensuring the student's continued education. The use of a long-term substitute teacher not licensed as either an elementary or special education teacher was inappropriate. "A substitute teacher is a teacher when actually substituting for an absent teacher." The student's teacher was not absent. The student had been removed unilaterally from his classroom and segregated. The substitute teacher was acting more as an instructional aide. The substitute teacher could not be the "teacher of service" and, as an instructional aide, she was not providing services under the direct supervision of a licensed teacher. Multiple corrective actions were required, including, *inter alia*, compensatory services, both educational and related; develop a procedurally compliant IEP; provide expanded in-service training on appropriate disciplinary procedures, including the appropriate development and implementation of BIPs; provide specialized in-service training to all professionals and paraprofessionals who will work with the student; provide written assurances that the LEA understands the appropriate use of substitute teachers.

Complaint No. 2170.05. The student had multiple disabilities including an infectious disease. The student was placed temporarily in a separate classroom with only an instructional aide. The room had a video camera so the licensed teacher in another room could observe the classroom through a series of still pictures transmitted to the teacher's computer. There was no audio. Although the parent had provided consent to this placement, the arrangement denied the student a FAPE. Instructional aides are not licensed teachers. An instructional aide is to be under the "direct supervision" of a teacher. The use of a video camera does not constitute "direct supervision" or "line-of-sight" supervision.

Complaint No. 1814.01. A paraprofessional was providing direct academic instruction to the junior high school student in English, health, and history. Although this instruction was provided in the TOR's classroom and was in the "line of sight" of the TOR, the TOR was not involved in instruction and was not "directly supervising" the paraprofessional. This violated Art. 7. (Also see Complaint No. 1794.01, where the paraprofessional was providing homebound instruction in violation of Article 7.)

Complaint No. 1780.01. The student had been placed in an alternative school. One of his teachers did not possess a substitute teacher license issued by the Indiana Department of Education, as required by I.C. 20-28-5-2. The use of unlicensed personnel for instruction violated Art. 7.

Complaint No. 1511.00. School interrupted services to students with learning disabilities by not providing at least a substitute teacher when the classroom teacher was absent for seven (7) consecutive days. Also, school interrupted services by placing one student with the in-school suspension teacher during the administration of the ISTEP+ because all of the other licensed teachers were involved in ensuring accommodations for students with disabilities taking the test where the student's IEP could not be implemented. The school also required the student to receive services through "pull out" programs that removed him from his general education classes. Part of the corrective action required the school to have a procedure to ensure that interruptions of services under these circumstances do not recur.

Complaint No. 1103.96. Public agency violated Article 7 and IDEA by utilizing a substitute teacher as a full-time teacher. The substitute was not appropriately licensed and did not meet the "highest requirements" standard for the profession. See also Letter to Mills, 25 IDELR 1218 (OSEP 1997).

CP-347-2008. Six-year-old student has a hearing impairment and a cochlear implant. The IEP indicated the student would be provided either a certified interpreter or a teacher aide who could use sign language. A teacher aide was hired. The aide knew sign language as a Child of Deaf Adults (CODA). However, in the first eight months of the school year, the aide was absent 15 days. When the aide was absent, the student received no interpreter services and could not follow classroom instruction. By creating an ambiguity in the IEP and by not providing services when the aide was absent, the LEA failed to implement the IEP. The LEA had to reconvene the CCC to determine whether the student would receive interpreter services or services from a qualified aide. In addition, a plan had to be developed to provide the identified service when the service provider is absent. The student was also entitled to compensatory educational services for the 15 days of lost instruction.

Complaint Nos. CP-264-2008, CP-265-2008, and CP-267-2008. Complainant filed complaints against school districts and an Interlocal (see IC 36-1-7 *et seq.*), asserting that the educational interpreters employed by the school districts were not appropriately licensed or certified as required by 460 IAC 2-5-6 (Certificate Requirements for Practicing Interpreters and Translitterators). Under 460 IAC 2-5-6(a), an individual working in Indiana as an educational interpreter must obtain certification from the Indiana Deaf and Hard of Hearing Services (DHHS). The certification must be renewed every two years through DHHS. Prior to issuing certification, DHHS must have verification that the individual is employed as an educational interpreter by a school corporation in the state of Indiana. Most of the educational interpreters did have current employment with a public school district and were eligible to be properly certified by DHHS.

Complaint No. 2161.05. The student is deaf and requires interpreter services. The student's IEP calls for "interpreter services daily." These same words appeared in the student's previous IEP where interpreter services were provided for both academic and extra-curricular activities. The student wanted to try out for the golf team. A disagreement arose over whether the IEP extended to interscholastic athletics. It was resolved through agreement that interpreter services would be provided so that the student could participate on the golf team.

511 IAC 7-36-4 School calendar; elementary/ secondary instructional day, ESY

34 CFR §300.106 (ESY)

I.C. 20-30-2 *et seq.*

Instructional Day

Complaint No. 2069A.04. Elementary school sounded the first bell at 3:18 p.m. daily, indicating to all students to prepare to be dismissed. The dismissal bell sounded at 3:23 p.m. The students in the special education classroom, however, had their instructional day ended at 3:00 p.m. every day. Some students left the classroom because of bus schedule while others simply remained, waiting for the 3:23 p.m. bell. During this time, the teacher completed recording requirements. Some students had individualized CCC determinations for a shortened instructional day, but most of the students did not have such justification. The school violated Art. 7 by failing to provide the students with the same instructional day as all other students. The school discontinued the practice and rescheduled the bus pick-up time.

Complaint No. 1793.01. Student is 15 years old, has a mild mental handicap, and attends 9th grade at a school outside his county of residence. The school bus picks him up at 7:00 a.m.. He arrives at school at 8:30 a.m. He is picked up at 2:10 p.m. and arrives home at 3:30 p.m. However, the school the student attends begins classes at 8:15 a.m. and dismisses at 2:48 p.m. The student's IEP did not contain individual justification for a shortened instructional day. This violated Art. 7.

Complaint No. 1519.00. Ten-year-old student required intensive services in the third grade. She was transported to another elementary school to receive one-to-one instruction. The instructional day for the student had she remained in her “home” school would have been 50 minutes shorter than the elementary school she attended. However, her instructional day remained the same at the school she was assigned as if she had been in her “home” school. The student was entitled to the same instructional day, absent any program justification, as all other students in the school where she attended. Due to the shortened instructional day, the student was entitled to compensatory educational services.

511 IAC 7-36-5 Early childhood

**34 CFR § 300.8(b)
I.C. 20-35-4-9**

Complaint No. 1598.00. The Part C service agency did not refer a student with a possible disability to the local public school until the student was almost three years old. The parent provided written permission for an evaluation one month prior to the student’s third birthday, but the public school did not timely evaluate nor place the student until five weeks past the student’s third birthday. The student was found eligible for services. However, he was entitled to services on this third birthday. The student was entitled to compensatory educational services.

Complaint No. 633.92 and Complaint No. 614.91. A preschool student is entitled to FAPE in the LRE. The fact a public agency does not provide services to nondisabled preschool students does not excuse this requirement. See also Letter to Nevelidine, 16 EHLR 739 (OSEP 1990) and Letter to Grether, 21 IDELR 60 (OSEP 1994).

511 IAC 7-36-6 Facilities

I.C. 20-35-4-2; I.C. 20-34-3-20

Evacuation Plans

Complaint No. 282-2008. The student is six years old and is classified as OHI due to a degenerative medical condition that requires him to use a wheelchair. The student’s IEP contains a “Health Care Plan” that states the student “will follow the classroom plan for fire and storm drills.” The parent did not believe this was sufficient. The school amended the plan to indicate an adult would push the student’s wheelchair to the special services office when the temperature was below 75 degrees and outside when the temperature was above 75 degrees. This is not in concert with Article 7, which not only requires a specific evacuation plan for students with mobility impairments, including wheelchair users, but that such students participate in all drills. The evacuation plan will need to be specific as to the individual needs of the student. It was also discovered that the school did not have the required disaster plan that addressed the evacuation of all students with mobility impairments. A comprehensive plan had to be developed that identified the adult assistance students would receive during evacuations (teachers, aides, other designated staff) and that the students’ respective IEPs indicate specific types of assistance that will be provided each student during such drills or occurrences.

Complaint No. 2271.06. Student is eleven years old, has multiple disabilities, uses a wheelchair, and requires a feeding tube, expanded keyboard, and adapted software. The school has a Disaster Plan that includes an evacuation plan for students with disabilities. The plan describes how students will exit the building and how they will be assisted by teachers, aides, and designated security and custodial staff. There are guidelines for instructors, therapists, or aides using a particular room to review on a regular basis the applicable plans for students with disabilities who may be in the room. The Disaster Plan also instructs that particular IEPs that include specific types of assistance for a particular student would be followed. The school complied with 511 IAC 7-36-6(b).

Complaint No. 2067.04. Four students who were wheelchair users attended a large elementary school. The school did have accessible entrances and exits, but some of them were closed, including the main entrance, while the school was being renovated. There were also four modular buildings. Two of the students had Individualized Education Programs (IEPs) that indicated their educational placements were “full-time inclusion.” However, the students’ actual programs resulted in certain “pull out” activities, either for the provision of certain services, including certain health care services. Paraprofessionals working with the students were not adequately trained in the students’ respective needs. The school’s emergency preparedness plan, especially with regard to fire and tornado drills, did not contain instructions for evacuating students with mobility impairments, including students who were wheelchair users. Because the school did not have such plans in place for these students, nor were there individualized plans so that trained personnel would even know where the students were during the school day should a drill or actual emergency arise, the school was determined to be out of compliance with 511 IAC 7-36-6(b). The school was required to prepare and implement the requisite warning and evacuation plans for the students.

Complaint No. 1691.01. Student was a 17-year-old high school student with an orthopedic impairment. Although the school had a checklist for emergency preparedness for students with disabilities, it was a yes/no list (e.g., inservice staff? clearly marked exits?). There were no written procedures nor was there any student-specific staff training to assist the student should there be an emergency. Corrective action required the development of such an evacuation plan.

Complaint No. 1195.97. Public agency did not develop a student-specific evacuation plan for a six-year-old first grade student who was a wheelchair user. The emergency exit for all other students in the classroom was the exit door closest to the classroom, but this exit contains a step and is not wheelchair accessible. The public agency’s emergency preparedness plan did not address the special evacuation needs of the student.

Instructional Space/Accessibility

Complaint No. 2123.04. The school district had two self-contained classrooms at the junior-senior high school, with one in the junior high school section and the other in the high school. State Department of Health regulations require that “each student shall be provided no less than 30 square feet of classroom area.” 410 IAC 6-5.1-5(d). The high school classroom complied with the regulation, but the junior high school one did not. In addition, the junior high school classroom could not accommodate the equipment needs of one student. The school was required to bring the junior high school classroom into compliance with the State Department of Health’s regulation.

Complaint No. 1737.01. The school building could be reached by a wheelchair ramp, curb cut, and handicapped parking area. The front doors can accommodate a wheelchair. However, there were no automatic door openers. When the student, a seven-year-old child with multiple disabilities and a wheelchair user, wished to enter the building through the front door, school staff would have to meet him at the door to provide assistance. Although the accommodation for the student was an interim measure, it was insufficient as a permanent means of satisfying the requirements of the Americans with Disabilities Act. See 28 CFR §35.150(a).

Complaint No. 1441.99. Public agency violated state law when it purchased a residence and converted it into a separate facility for students with emotional disabilities. The public agency did not seek approval from the Division of Special Education (now CEL), as required by I.C. 20-35-4-2. Also, the instructional materials and space were not comparable to those provided students without disabilities, nor were the

students able to participate to the maximum extent appropriate with their non-disabled peers in general education classes.

Complaint No. 695.92. Facilities for elementary school students with disabilities were inadequate. The room had no windows, did not accommodate necessary adaptive equipment, and did not provide safe, adequate space for seizure-prone student to rest.

511 IAC 7-36-7 Instructional curricula, materials, equipment, and assistive technology devices and services **34 CFR §§300.5, 300.6, 300.105(a)**

Complaint No. 2163.05 (Reconsideration). The LEA's schedule of textbook rental fees was in compliance with Indiana law with respect to high school and middle school students with disabilities. However, the fee schedule includes charges for personal care items (such as diapers, paper towels, talcum powder, and rubber gloves) and for student handbooks, which contain various required federal and state notices (e.g., FERPA, student discipline policies, attendance policies, homework policies, non-discrimination assurances, etc.). These latter charges are not authorized by state law and cannot be justified as "textbook rental." In addition, it is inconsistent to require patrons to pay for notices that are required to be communicated under federal and state law.

Complaint No. 2077.04 (Reconsideration). The student had multiple disabilities. The parent requested the use of a DynaVox, a system for augmenting communication skills. The student's IEP listed objectives, benchmarks, and an annual goal, but these were made dependent upon the availability of a DynaVox. The parent offered to obtain one for use at school but could not get one by the start of school. The parent asked the school to obtain one until the parent could purchase one. The school was able to lease one for the first semester but had to return it at the start of the second semester, leaving the student without a DynaVox. The school was found to violate Article 7 by failing to implement the student's IEP. The IEP cannot be made contingent upon either the parent's purchasing the augmentative communication device or its availability generally. The school is to ensure its availability.

Complaint No. 1575.00. Student's Case Conference Committee (CCC) indicated he was to be considered for assistive technology (AT), with continuing consideration and assessment of a variety of communication strategies. However, an AT evaluation was not conducted, and no specific AT device or service was ever identified in the IEP. An inexpensive child's talking book was provided to the student for home use and in the community to help him with making choices. Although the Teacher of Record (TOR) made some alterations, along with the speech-language pathologist, the AT device was unsuccessful. A subsequent IEP identified the need for an AT device, but one was not provided and an evaluation of specific needs did not occur. The public agency was found in non-compliance.

Complaint No. 1455.99. Six-year-old student's IEP called for an auditory trainer and aide proficient in signing. The aide resigned after the first semester and the auditory trainer was often in need of repair and not available for use. The signing aide was replaced by an aide without this proficiency. The school did not have available a replacement auditory trainer when the other one was unavailable. Corrective action included having a back-up auditory trainer as well as ensuring that qualified personnel are available when required by a student's IEP.

Complaint No. 662.92. "Facilitated Communication" could be an augmentative or assistive device that is to be developed through the case conference committee and included in a student's IEP.

Complaint No. 1016.96. The public agency did not provide comparable instructional materials to students with disabilities. The teacher of the class for students with mild mental handicaps was not provided, for one

semester, teacher editions for the reading series adopted by the public agency, although general education teachers did receive theirs. The students were also charged the same textbook rental fees, but the teacher could not order instructional materials because funds were not available. General education classes received new computers while the special education class had to borrow one and utilized a used one. There was also a lack of computer software available to the class.

511 IAC 7-36-8 Transportation

34 CFR §§300.34(a),(c)(16); 300.107(b)

In General

Complaint No. CP-369-2008. CCC agreed to provide transportation for a student from home to school and then from school to the student's babysitter, who lived outside the school district's boundaries. "[A]lthough the School is not obligated to provide transportation outside of district boundaries based on a matter of convenience or lifestyle preference rather than based strictly on the Student's needs, because the case conference committee agreed to provide the transportation, the School must provide it[.]"

Complaint No. CP-314-2008. The student's IEP requires the student to have a seat belt on the bus "when being transported to and from school." The student was not provided a seat belt for field trips or other school-related excursions. The school instituted corrective action on its own, ensuring the student would have a seat belt for all school-related functions and not just for transportation to and from school.

Reimbursement

Complaint No. CP-241-2007. The student was enrolled in a half-day kindergarten class. The parents requested transportation both to and from school; however, the LEA would provide transportation only one way, indicating that parents of children in half-day kindergarten programs are responsible for transportation when the school buses are not running. Although the IEP listed transportation as a related service, the LEA wrote that transportation would be provided from home to school but the parent would be responsible for transportation from school to the home. The parents indicated their disagreement with this scheme and eventually filed a complaint. The LEA violated Article 7. The IEP identified transportation as a related service. The related service cannot be limited by the LEA in such a fashion. The LEA had to provide two-way transportation and reimburse the parents for the 17 days of transportation they provided.

Complaint No. 2115.04. Kindergarten student was identified within the autism spectrum. Because he was having difficulties transitioning from the school cafeteria (where he was placed unsupervised in the mornings before school started when transported by bus) to his classroom, the school asked the parent to transport the child. Transportation was a related service. The school did not provide a 1:1 aide for the student before the school day began at 8:00 a.m. The parent agreed to transport the child, but the school did not offer to reimburse her or offer an alternative means of transport for the student. The school was ordered to reimburse the parent for two round-trips daily.

Complaint No. 2006.03. Secondary student with multiple disabilities attended separate facility. Parent provided transportation. IEP reflected parent would provide transportation but neither IEP nor CCC report indicated school had offered transportation as a related service even though the need was obvious. School asserts it offered transportation; parent denies this. Because the school was unable to demonstrate it had offered a related service to which the parent declined, the parent was entitled to reimbursement for the transportation provided.

Complaint No. 1981.02. School agreed in IEP to provide special transportation but failed to do so for nearly seven months. The parent provided the transportation but the school did not reimburse her. School

was required to reimburse parent for two-way transportation at the rate per-mile it reimburses its own employees.

Complaint No. 1942.02. Although the elementary school student's IEP identified transportation as a related service, the bus driver would not come to the student's house because the turn-around was too difficult. Transportation required the parent to bring the student to a designated pick-up point, but the parent often had to wait up to a half hour before the bus arrived, making the parent late to work. The parent eventually transported the student to school. The parent had not agreed to transport the student. The school had to reimburse the parent for transportation. The school also had to conduct in-service training for the Director of Transportation and the bus drivers regarding the rights of students with disabilities.

Complaint No. 1163.97. The public agency violated Article 7 when it required parents to provide transportation for students to receive speech/language services at the school after hours. The public agency was required to reimburse the parents for their transportation costs. See also Jackson County (AL) School District, 23 IDELR 1149 (OCR 1995), where OCR found that reimbursing a guardian at the same rate per mile as the public agency reimburses its employees does not violate Sec. 504.

Travel Time

Complaint No. 1793.01. Fifteen-year-old student attending school in another county had a 1 1/2 hour bus ride in the morning and a 1 hour, 20 minute bus ride in the afternoon. This resulted in his having a shortened school day without justification and caused him to miss school activities, including the homecoming parade. The lack of student-specific justification for such excess travel time violated Art. 7.

Complaint No. 1519.00. Ten-year-old student required intensive services in the third grade. She was transported to another elementary school to receive one-to-one instruction. The instructional day for the student had she remained in her "home" school would have been 50 minutes shorter than the elementary school she attended. However, her instructional day remained the same at the school she was assigned as if she had been in her "home" school. The student was entitled to the same instructional day, absent any program justification, as all other students in the school where she attended. Due to the shortened instructional day, the student was entitled to compensatory educational services.

Complaint No. 1590.00. Agency and parent continued to disagree over the transportation of the student. The student is twelve years old, has multiple disabilities, requires suctioning, and attended a junior high school other than her "home school." The student's transit time exceeded the transportation time for all other students. Although various methods were discussed as means of reducing the transit time (parent-provided with reimbursement, special van), resolution of the transportation was not achieved. However, the school did not include in the IEP student-specific justification for the excess transit time. Also, the bus driver and paraprofessional assigned were not trained in the use of the suctioning machine. Training was scheduled for the next school year, although the need was present during the current school year.

511 IAC 7-36-9 Medication administration

I.C. 34-30-14 *et seq.*

I.C. 20-33-8-13

I.C. 20-34-5 *et seq.*

Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984) found that "clean intermittent catheterization" of a student was a "related service" because it came within the ambit of "school health services," which can be "provided by a qualified school nurse or other qualified person."

Cedar Rapids Community School District v. Garret F., 526 U.S. 66, 119 S.Ct. 992 (S. Ct. 1999) involved a student with quadriplegia resulting from a motorcycle accident that severed his spinal column when he was four years old. Although paralyzed from the neck down, he is academically capable. He can control his motorized wheelchair through the use of a “puff and suck straw” and can operate a computer with a device that responds to his head movements. He is ventilator-dependent, which requires a responsible individual to assist with certain physical needs while he is at school. When he first entered kindergarten and for several years thereafter, his family or a licensed practical nurse (LPN) retained using insurance proceeds attended to his needs. When the family requested the school district to assume this cost, the school declined, asserting that it was not responsible for providing continuous nursing services to the student. The dispute was submitted to an Administrative Law Judge (ALJ) under IDEA due process procedures. The ALJ ruled in the student’s favor, rejecting the school district’s arguments that the continual aspects of the care required and attendant costs were relevant factors in determining the supportive services were medical as opposed to related services. The federal district court upheld the ALJ. See Cedar Rapids Comm. Sch. Dist. v. Garret F., 24 IDELR 648 (N.D. Ia. 1996), finding the services the student required (urinary bladder catheterization, suctioning of tracheostomy, ventilator setting checks, ambu bag administrations as a back-up to the ventilator, blood pressure monitoring, and observations to detect respiratory distress or autonomic hyperreflexia) were related services and had to be provided. The court applied the “bright line” analysis, where the question is whether the services need be provided by a licensed physician or a hospital. If not, then the services are related. The 8th Circuit upheld the district court’s decision. See Cedar Rapids Comm. Sch. Dist. v. Garret F., 106 F.3d 822 (8th Cir. 1997). The U.S. Supreme Court granted certiorari, 523 U.S. 1117, 118 S.Ct. 1793 (1998). The U.S. Department of Education sided with the student in the dispute before the Supreme Court.

In a 7-2 decision, the Supreme Court affirmed the 8th Circuit while reaffirming its own decision in Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883, 104 S.Ct. 3371 (1984), which involved an elementary school student with spina bifida who required clean intermittent catheterization (CIC) in order to attend school. The school had refused CIC services, claiming these services were not a related services under IDEA and Sec. 504, but a “medical service” that it did not have to provide except for diagnostic or evaluation purposes. The Supreme Court held that CIC is a “related service.” The federal definition of “related services” includes “school health services,” which are “provided by a qualified school nurse or other qualified person.” “Medical services” are “provided by a licensed physician.” CIC can be provided by a school nurse or a trained layperson. The Supreme Court in Garret F. noted that the U.S. Department of Education had issued opinions regarding Tatro, but did not issue regulations that altered the Supreme Court’s distinction between “medical” and “related” services. Garret F., 119 S.Ct. at 998, footnote 6.²

The Supreme Court held that Tatro created a two-part test for analyzing whether a service is related or medical. First, are the services requested within the phrase “supportive services”? That is, does the student require the services in order to attend school. Second, are the services excluded as medical services? Garret F., at 996. There was no disagreement that the services the student required were “supportive services.” At 997. However, the school district argued that the court should include within the concept of

²See, for example, Letter to Greer, 19 IDELR 348 (OSEP 1992). The Office of Special Education Programs (OSEP) of the U.S. Department of Education reiterated the Tatro holding, applying its three-prong test in determining whether a service is related or medical: (1) Does the child have a disability requiring special education? (2) Is the service necessary to assist the child to benefit from special education? and (3) Can the service be provided by a nurse or other qualified professional? This would apply only where it is necessary to provide these services during school hours. Also see Letter to Johnson, 1 ECLPR ¶315 (OSEP 1993), applying the three-prong Tatro test in advising that training on reversing a child’s pattern of aspirating during feeding could be a related service if it can be provided by a qualified professional other than a licensed physician.

“medical services” those services that are intensive and costly. Specifically, the school district urged a four-part test: (1) Is the service continuous or intermittent; (2) Can existing school personnel provide the service; (3) what is the cost of the service; and (4) what are the potential consequences should the service not be properly performed. At 998.

In rejecting this multi-factored test, the Supreme Court noted there is no basis in statutory or regulatory schemes allowing for such exceptions that are, essentially, cost-based standards. The following are pertinent holdings.

- ▶ “In *Tatro* we concluded that the Secretary of Education had reasonably determined that the term ‘medical services’ referred only to services that must be performed by a physician, and not to school health services. [Citation omitted.] Accordingly, we held that a specific form of health care (clean intermittent catheterization) that is often, though not always performed by a nurse, is not an excluded medical service.” Garret F., 119 S. Ct. at 997.
- ▶ “[M]ost of the requested services are already provided by the District to other students, and the in-school care necessitated by Garret’s ventilator dependency does not demand the training, knowledge, and judgment of a licensed physician. [Citation omitted.] While more extensive, the in-school services Garret needs are no more ‘medical’ than was the care sought in *Tatro*.” Id. at 998.
- ▶ In explicitly adopting the “bright line” analysis, the Court stated: “Whatever its imperfections, a rule that limits the medical services exemption to physician services is unquestionably a reasonable and generally workable interpretation of the statute [IDEA].” Id.
- ▶ “[IDEA] does not employ cost in its definition of ‘related services’ or excluded ‘medical services’...; [thus,] accepting the District’s cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress.” Id. at 999.

The court added that “IDEA requires schools to hire specially trained personnel to meet disabled student needs,” noting further that the school district in this case already employed a one-on-one teacher associate (TA) to assist the student during the school day. Id. at 999, notes 8, 9.

Also See:

1. Complaint No. 1590.00. Agency and parent continued to disagree over the transportation of the student. The student was twelve years old, had multiple disabilities, required suctioning, and attended a junior high school other than her “home school.” The student’s transit time exceeded the transportation time for all other students. Although various methods were discussed as means of reducing the transit time (parent-provided with reimbursement, special van), resolution of the transportation was not achieved. However, the school did not include in the IEP student-specific justification for the excess transit time. Also, the bus driver and paraprofessional assigned were not trained in the use of the suctioning machine.
2. Complaint No. 1573.00. Ten-year-old student had migraine headaches. His parent provided the school with written permission to give him over-the-counter (OTC) medication when the student complained of a headache, and to give him another pill if the headache was not gone in an hour.

The school did not violate medication administration requirement when it declined to provide the student with a second pill only 30 minutes after providing an initial administration. The school had followed its procedures for obtaining written permission, maintaining a medication administration log, and providing the student with the empty pill container so the parent could provide additional OTC medications.

3. Complaint No. 1503.99. Student was seven years old. School personnel observed what appeared to be a mild seizure and informed the parent of this through the home-school notebook. The student had in place a health care plan to address G-tube feeding procedures. The CCC reconvened after the apparent seizure to amend the health care plan, with input from the student's physician, and to address any concerns regarding seizure activity. These procedures were compliant with state law.
4. Complaint No. 1478.99. Student was seven years old and had multiple disabilities, including seizure activities. The parent provided medication and instructions from the physician. The school did develop a medical plan for the student, requiring the parent to provide three vials of the medication for use by the school and the bus driver. The medical plan also contained a "seizure plan" to be followed should the student experience a seizure. The medical plan was provided to pertinent school personnel and the parents. The principal, the student's teacher, and the paraprofessional all received training from the consultant for epilepsy regarding the recognition and treatment of seizures. The student had what may have been a seizure at school, followed by respiratory distress. Rather than following the medical plan, the school contacted emergency medical technicians, who transported the student to the hospital. The student was later released. Although the school did not follow the medical plan, the respiratory distress and emergency nature of the situation excused the failure to do so. Additional information and training regarding the student's specific condition was warranted.
5. Complaint No. 1467.99. Although the school and parent originally agreed to administer the student's medication for severe ADHD at times other than prescribed by the physician to coincide with the medication administrations for other students, the revised IEP called for specific times. However, the student's medications were often administered late or, on eleven occasions in the morning and three times in the afternoon, not administered at all. The student became embroiled with two other students in certain unspecified disruptive behavior. This occurred at a time when his medication had not yet been administered and was already two hours overdue. The student drew a three-day in-school suspension, although the school's guidelines for this behavior required more severe sanctions. The school administrator indicated she considered the student's medical condition when determining the punishment. However, the failure to follow the student's IEP in the administration of medication warranted corrective action.
6. Complaint No. 992-96. The student was in the seventh grade and required medication to control seizure activity. The parent wanted the student to carry and self-administer his medication and did not wish for school personnel to assist him in any way in this respect. The school district medication policy does permit some students to be responsible for the self-administration of medications, but this is based upon the age and maturity of the student and the severity of the medication. Self-administration has to be approved by the student's physician, the parent, and the school official, which could be the school nurse. The investigation results upheld the school district's policy, holding that no student has a right to dictate self-administration of medication while at school. Although the report noted that "[a] long-range goal for any student on medication is self-sufficiency," a school district can place reasonable restrictions based upon such factors as age, maturity, the seriousness of the medication, the medical involvement of the student, and the safety of other students. See I.C. 20-33-8-13.

7. East Helena (MT) Elementary School District #9, 4 ECLPR ¶60 (OCR 1998). The school district did not discriminate against a student with asthma when the school nurse refused to administer “medications” prescribed by a Naturopathic Physician & Acupuncturist (ND) or to observe the student while he “self-administered” the medications. “Naturopathy” and its practitioners believe in natural therapeutic substances and are not authorized to prescribe legend drugs, such as those dispensed by pharmacies. An ND creates the concoctions in the ND’s office. Under Montana law and directions from the Montana State Department of Nursing, a school nurse is not allowed to take orders from ND’s, nor are school nurses to dispense medications unless filled by a pharmacist. The school district did offer to permit family members of the student to come to the school and administer the Naturopathic medications. OCR found the school was abiding by state law, and that its policy was uniformly applied to all students, whether or not there was a disability. OCR also recognized the school’s liability and safety concerns with the use of unregulated alternative medicines.

8. Davis v. Francis Howell Sch. Dist., 104 F.3d 204 (8th Cir. 1997). The 8th Circuit Court of Appeals has determined that a school district in Missouri did not violate the Americans with Disabilities Act when it declined to provide Ritalin in excess of the recommended maximum daily dosage. The student’s physician had prescribed 360 milligrams a day of Ritalin to address the student’s ADHD. The school nurse administered the medication in school for two years before she noticed the prescription exceeded the maximum daily dosage recommended by the *Physician’s Desk Reference*. The school nurse asked the parent to obtain a second physician’s opinion regarding the Ritalin dosage. The second doctor wrote that the dosage was safe. Nevertheless, the school nurse declined to provide Ritalin to the student at the dosage prescribed because of concern for the student’s health. The school permitted the parent to come to school and provide the medication to her son. The 8th Circuit panel ruled that the family had not suffered “irreparable harm” by the school’s actions.

9. In DeBord v. Bd. of Education of the Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997), *cert den.*, 523 U.S. 1073, 118 S. Ct. 1514 (1998), the 8th Circuit revisited its decision in Davis v. Francis Howell, *supra*. In this case, the school district’s nurse refused to administer an afternoon dosage of Ritalin to an eight-year-old student identified as having Attention Deficit Hyperactivity Disorder (ADHD) because the student’s daily intake of Ritalin exceeded by 60 mg the recommended dosage in the PDR. The school declined to accept a waiver of liability from the parents. The court found the school’s policy regarding dosages to be neutral and nondiscriminatory. The court also found that the waiver of liability would “impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case... At this time, no one knows what the long-term effects of high doses of Ritalin might be. A waiver of liability might not be effective, and statutory immunity might not apply.” The school did offer to alter the student’s class schedule so the parents could administer the medication.

511 IAC 7-36-9(c)

Mandatory Medication for School Attendance
34 CFR § 300.174

Complaint No. CP-361-2008. The kindergarten student wrote odd notes, such as “I am fit to die. He had a gun,” and “[t]he baby fell and died.” He also became inconsolable when he saw a flyer entitled “Doughnuts for Dads.” School personnel met with the parent, indicating the parent had to have the child evaluated and obtain a written statement that he was not a threat to himself or others before he would be allowed to return to school. The LEA did not specify what type of evaluation was required. The LEA also did not advise the

parent of any procedural safeguards or parental rights that may be available. The student was excluded from school for six weeks until a physician wrote to the school, indicating the student was not a threat to anyone. The LEA then placed additional conditions on the parent, requiring the following before the student could return: (1) attend individual and family therapy sessions at a community mental health facility; (2) sign a release of information so the LEA could share information with the mental health facility; (3) get a signed statement from a physician or psychiatrist approved by the LEA attesting to the fact the student is not a threat; and (4) agree to homebound services for the student in the amount of two hours a week. No homebound services were ever provided. The student missed 16 weeks of school. After the parent filed the complaint, the LEA convened a CCC meeting and obtained consent for an evaluation. The LEA also offered 36 hours of homebound services during the summer. The LEA violated numerous provisions of Article 7. Although the student exhibited a pattern of behavioral concerns within the school setting, the LEA did not seek to evaluate the student until nearly six months later and after the parent filed a complaint. The LEA had knowledge the student may be a student with a disability and did not provide the protections of Article 7. The LEA also engaged in *de facto* suspension or expulsion of the student without complying with state law, resulting in the student missing 16 weeks of school. The LEA also failed to follow its own Child Find procedures. In addition to revising its procedures and providing training to its personnel, the LEA had to reimburse the parent for all expenses related to the independent evaluations and therapeutic procedures required by the LEA of the parent. The LEA also had to provide compensatory educational services to the student.

Complaint No. CP-141-2007. The student is 11 years old and has ASD. He is educated in a self-contained classroom supervised by one teacher and four aides. The student's IEP indicates he is to receive six hours a day of instruction but also notes that the student will attend school daily until 11:00 a.m. when he is to take his medications. The student, according to the IEP, "is to have meds at home in a.m. or he cannot attend school." In practice, if the student has not taken his medications, the school would dismiss him at 11:00 a.m. This would occur four out of five school days, either because he did not take his medications or he exhibited aggressive behavior. The LEA violated IDEA (this occurred before the 2008 revisions to Article 7) by preventing the student from attending school if he had not been medicated at home. Part of the corrective action required compensatory educational services. The LEA was also required to convene the CCC to discuss whether the student should be on a shortened instructional day.

Letter to Inhofe, 49 IDELR 286 (OSERS 2007). OSERS agreed that congressional intent as expressed at 20 U.S.C. § 1412(a)(25) was not to limit the prohibition against mandatory medication for school attendance solely to children with disabilities. "Regarding your question about the statutory reference to 'child' instead of 'child with a disability,' we agree with the interpretation that this statutory provision applies broadly to all children, not just to those considered 'children with disabilities' under Part B of IDEA. In our view, there is a reason why the term 'child' is used in this statutory provision. The prohibition on mandatory medication would most likely be relevant in situations where a child displays behavior that might suggest the need for special education and related services, and this behavior occurs before school personnel have evaluated the child...to determine whether the child has a disability under Part B of IDEA, and before school personnel have identified the child as needing special education and related services.... The broad application of this statutory provision ensures that States and their public agencies implement the statutory mandate to make a free appropriate public education available to all eligible children with disabilities residing in the State and do not condition a child's consideration for or receipt of benefits and services under Part B of IDEA on a parent's or guardian's decision to medicate their child. Therefore, we interpret the explicit statutory language to mean that school personnel may not require a child to obtain a prescription for substance covered by the Controlled Substances Act (21 U.S.C. 801 *et seq.*) in order for that child to attend school, be evaluated or reevaluated under Part B of IDEA, or receive special education services under Part B of IDEA."

Complaint No. 2284.06. High school student was eligible for services for visual impairment and ED. Student reported to her teacher that she was having auditory hallucinations. The principal and the director of guidance stated the student could not return to school until privately evaluated to determine whether she posed a danger to herself or others. The LEA did not offer to pay for the evaluation. The parent obtained an evaluation, using private and public insurance to pay for it. The student missed three days of school. The LEA was found to have violated Art. 7 by requiring the parent to obtain medical services at the parent's expense as a pre-condition for school attendance. Compensatory services were required. In addition, the LEA had to reimburse the private insurer.

Letter to Hoekstra, 34 IDELR ¶204 (OSERS 2000). Although school personnel may provide valuable input about a student's behavior and academic performance, it is not their role to diagnose ADHD/ADD or recommend treatment. "The decision to prescribe any medication is the responsibility of medical, not educational professionals, after consultation with the family and agreement on the most appropriate treatment plan."

511 IAC 7-36-10

State and local assessments
34 CFR §§300.157,
300.320(a)(2),(6) I.C. 20-32-4 et seq.
(GQE)
I.C. 20-32-5 et seq. (ISTEP+)

Complaint No. CP-142-2007. The school district failed to inform the private school where the student with a disability attended concerning the contents of his IEP, including identified necessary accommodations for participation in the ISTEP+. As a consequence, the student did not receive the identified accommodations (extended time, small group administration, portions read aloud) when he took the ISTEP+. Part of the corrective action required the school district to establish a protocol for informing private schools of the needs of eligible students enrolled therein, including how services will be provided and how the school district will monitor the implementation of the students' respective IEPs.

Complaint No. 2344.07. Nine-year-old student who is eligible for services requires assistive technology due to his very limited motor strength. Part of the assistive technology the student employs is a laptop computer with various software that enables school work to be scanned into the laptop where he can use a "light touch" keyboard to respond. The student's IEP includes certain accommodations for participation in standardized assessment, including the ISTEP+. These include (as needed) extended time, multiple sessions, breaks, one-on-one testing, use of the laptop with grammar, spell check and internet turned off, and access to scanning and scanning software for an electronic format (as the student uses on a daily basis). The complainant alleged the school district would not be able to provide the ISTEP+ in an electronic format. Although there is no electronic version of the ISTEP+, the Department of Education does not prohibit a school district from scanning the test where this is an identified accommodation for a student. "Though scanning of the ISTEP+ is not prohibited by the Department of Education, the ISTEP+ file created for the use of the test must be destroyed immediately after the testing window in accordance with the protocol required by the Department of Education."

Rene et al. v. Reed, 32 IDELR ¶196 (Marion Co. Ct. No. 12, 2000). The plaintiff class sought to enjoin the requirement that members of the graduating class of 2000 successfully pass the Graduation Qualifying Examination (GQE) of the tenth-grade ISTEP+ or successfully seek one of the waivers available. The court denied the injunction, finding the State may establish graduation requirements, the plaintiff class had sufficient notice of these requirements, and the administration of the GQE does not discriminate against students with disabilities, although not all potential accommodations may be available. The Indiana Court

of Appeals affirmed. See Rene et al. v. Reed, 751 N.E.2d 736 (Ind. App. 2001), *transfer denied*, 774 N.E.2d 506 (Ind. 2002).

Complaint No. 2285.06. LEA did not violate Art. 7 and I.C. 20-32-1-1, I.C. 20-32-5 *et seq.* when it failed to ensure a private school student participated in the ISTEP+. The student's IEP did require participation, but the student wasn't enrolled in the public school district and attended full-time a non-accredited, nonpublic school. Such students do not participate in ISTEP+. The student would have to be "dual enrolled" in order to participate.

Letter to Koscielniak, 4 ECLPR 664 (OSEP 2005). New Mexico's kindergarten literacy skills screening program was a general state assessment, subject to IDEA's requirements that all kindergarten children with disabilities be included, with accommodations where appropriate. For kindergarten students with disabilities for whom the literacy skills screening program would not be appropriate, the State must develop guidelines for alternative assessments.

Letter to Davis-Wellington, 40 IDELR 182 (OSEP 2003). IDEA does not address the use of proficiency standards for earning a standard high school diploma. Requiring eligible students to pass a graduation examination is not inconsistent with IDEA. However, such statewide assessments must: (1) allow individual student accommodations where necessary for the student to participate in statewide assessments, consistent with appropriate State guidelines; and (2) employ supplementary aids and services and appropriate supports to allow the student's involvement and progress in the general curriculum. If there is a failure to provide appropriate accommodations, the student is denied a FAPE and must be given the opportunity to retake the assessment with appropriate accommodations. If the student has been denied needed supplementary aids and services, the student may be entitled to appropriate compensatory services that allow for involvement and progress in the general curriculum.

Complaint No. 2155.05. The student was 12 years old, had a learning disability, and was in middle school. The student did poorly on the ISTEP+. The principal notified the parent the student would be retained. IC 20-32-5-16(b)(4) requires that any decisions regarding retention of an eligible student at the same grade level for consecutive school years be determined through the IEP process. The school failed to convene the CCC to discuss and determine whether the student would be retained, thus violating statute. The school had to reconvene the student's CCC to discuss retention.

Complaint No. 2100.04. The student failed the third-grade ISTEP+. The complainant alleged the school did not provide the student with a FAPE because the student was not taught the second grade Academic Standards so as to be prepared for the third grade ISTEP+. (See I.C. 20-31-3 *et seq.*) ISTEP+ is based upon the Academic Standards. Although the student did not pass the third-grade ISTEP+, the school maintained it did expose the student to the Academic Standards. The complainant could not identify any Standards the student was not exposed to. "[T]he public agency, teacher, or other person may not be held accountable if a student does not achieve the growth projected in the annual goals, benchmarks, or objectives."

Fort Wayne Community Schools, 36 IDELR 214 (OCR 2002). Student was unable to pass the GQE. The school initiated the "waiver" process at I.C. 20-32-4-5 through the student's case conference committee. For a student to be waived from negative GQE results and receive a high school diploma, the student must complete remediation opportunities provided, maintain a school attendance rate of at least 95 percent (excused absences not counting in percentage calculation), maintain a "C" average in courses required for graduation, satisfy all other local and state graduation requirements, and demonstrate the requisite 9th grade proficiency in the area of GQE deficiency (in this case, mathematics). The student satisfied all requirements except the last one. He had not taken and passed math courses of sufficient rigor and, as a

result, could not demonstrate adequate mastery. The denial of a diploma to the student did not constitute discrimination on the basis of disability.

Complaint No. 1872.02. The student's IEP prohibited the administration of a "standardized test" to the student. The IDOE defines "standardized test" as a "large scale assessment with consistent procedures for administration and scoring [that] is administered in accordance with explicit directions for uniform administration." This may include norm-referenced and criterion-referenced assessments. The student was administered the "Saxon Replacement Test," which is considered a standardized test. This was contrary to the student's IEP

Complaint No. 1540.00. The CCC for a twelve-year-old student with OHI never identified any need for accommodations for the student in district or statewide assessment. As a consequence, failure to provide requested accommodations on the ISTEP+ did not violate Article 7.

RULE 37. PROCEDURAL SAFEGUARDS

511 IAC 7-37-1

Notice of procedural safeguards 34 CFR §300.504

Complaint No. 1771.01. The font size and type face on the parental rights notice mailed with the notice of CCC meeting was in a 4-point *sans serif* font. The print was unreadable. At the top of the document, in larger type, appeared the following statement: "Please Note: The size of the print has been reduced for mailing purposes. You will receive an original copy at the case conference." The notice was reduced to one page, front and back. Although the copy presented at the case conference was in readable type (and four pages long), the school nevertheless violated Art. 7. All notices of procedural safeguards have to be in a format that is easy to read. (511 IAC 7-37-1(b)(4) now requires that such notices be "printed in a format that is easy to read.")

Complaint No. 1606.00. Parent presented a letter to the school at a CCC requesting a hearing. The letter was addressed to the IDOE. The school advised the parent what had to be done to initiate a hearing, including providing the parent with specific directions on how to initiate such a request. Later, a school administrator wrote a letter to the parent detailing in writing how to initiate a hearing in Indiana. The parent acknowledged receiving the letter. The parent eventually filed a complaint. The school was found to be in compliance with Article 7. When presented with a request for a hearing, a public school needed to do one of two things: (1) send the letter to the IDOE; or (2) inform the parent what needed to be done to initiate a hearing. The school did the latter, which satisfied the rule.

Complaint No. 1579.00. Parent and school disagreed whether the school provided notice of procedural safeguards at times required by federal and state law. Although law does not require public agencies to document provision of such notices, where, as here, there is a dispute and there is no documentation contemporaneous with the discharge of the responsibility, the school could not demonstrate through objective means that it had complied with this requirement. Corrective action included revising CCC notification form to include an area that will indicate whether the notice of procedural safeguards had been provided. Also see Complaint No. 1666.00, where the school could not document the parent had received the requisite *Notice*. School asserted it had done so, the parent disagreed. There was no objective means for determining whether the school had discharged this responsibility.

Maryland Department of Education, 33 IDELR ¶276 (OSEP 2000). Local district could not include “voluntary waiver” language in its *Notice of Procedural Safeguards*, which would have relieved the district of its responsibility to provide the *Notice* at the times required by law.

Complaint No. 1510.00. Mother and father are divorced. Father lived in an Indiana school district, while mother lived in California. Mother wanted to participate in all CCC meetings. The school attempted to accommodate the parents’ various schedules (and time zones) and attempted to include the mother via telephone (although the mother “screened” her telephone calls through an answering machine and prevented several CCC meetings by not answering her telephone). Finally, the school set a date and time in advance in an effort to conduct the CCC. When the CCC was convened, the school called the mother, who did not answer her telephone. The CCC was later reconvened, with the father attending in person and the mother via telephone. The school was found in compliance with state and federal requirements by offering a variety of dates well in advance in order to accommodate the various schedules; the mother was properly notified of all CCC’s and received the requisite notice of procedural safeguards; and the school employed various methods in an effort to ensure parental participation in the CCC meeting.

Complaint No. 1511.00. The public agency violated IDEA and Article 7 when it informed the parent that the parent could not bring an attorney to the CCC meeting for the student. The school stated it wished to avoid legal action, and there was no demonstration of any particular knowledge possessed by the attorney regarding the student or the student’s educational needs. The parent stated the attorney would be there to safeguard the student’s rights. The election to have one’s attorney present is at the discretion of the one inviting the attorney. Attorneys, although discouraged from attending CCCs by IDEA, 34 CFR Part 300, Appendix A, Policy Letter No. 29, are not proscribed from attending such meetings. Also see Letter to Garvin, 30 IDELR 541 (OSEP 1998), discouraging a public agency from inviting its attorney to attend such meetings where no due process hearing is pending because of the potential to create an “adversarial relationship.”

Complaint No. 1492.00. Although a parent has the right to request the participation in a CCC individuals with knowledge or expertise regarding the student or the student’s needs, including certain school personnel, the school did not violate Article 7 when it declined to permit one of the student’s teachers to attend the CCC because she was involved in a personnel matter with the school and was not permitted on the school grounds. The fact that she would be attending as an “advocate” rather than as the student’s “teacher” did not alter the fact the teacher-advocate was not permitted on school grounds.

RULE 38. CONFIDENTIALITY OF INFORMATION

511 IAC 7-38-1 Access to and disclosure of educational records 34 CFR §§300.610-300.626

Letter to Anderson, 50 IDELR 167 (OSEP, FPCO 2008). The IDEA incorporates FERPA by reference but provides additional requirements not found in FERPA, such as a definition for “destruction,” § 300.611(a), as this relates to “destruction of information,” § 300.624; notice to parents in their native language that provides, *inter alia*, a description of the types of personally identifiable information collected regarding children and the use of such information, policies and procedures employed in the storage, disclosure, retention, and destruction of personally identifiable information, § 300.612(a)(1)-(3), (b); certain access rights, § 300.613(b)(3); the maintenance of a record of access, § 300.614; a list of the types and locations of education records collected, maintained, or used by the agency, § 300.616; parental consent, § 300.622, including parental consent with regard to personally identifiable information maintained by an agency on a child who is or will be attending a private school, § 300.622(b)(3); safeguards, including the responsibility of an agency to designate an individual responsible for confidentiality concerns, staff training, and

maintaining a list of those school personnel with access to such records, § 300.623; certain rights of children, § 300.625; SEA enforcement responsibility, § 300.626; and the USDE use of personally identifiable information, § 300.627. Although the IDEA incorporates FERPA it does not merely restate FERPA requirements. “[T]hey address specific issues and concerns that arise in the special education context and that are not addressed adequately under the more general FERPA requirements.” Although a parent with a complaint regarding special education matters could initiate a complaint investigation with the SEA and FPCO, the FPCO and OSEP encourage parent-complainants to utilize the SEA complaint investigation process for this purpose. The “FPCO has not been delegated authority to enforce Part B confidentiality requirements and has no institutional authority or expertise with respect to special education issues.” The SEA, however, has general supervisory responsibility for IDEA programs, which provides the SEA “with a level of expertise on special education issues that the SEA uses in resolving complaints under the Confidentiality of Information regulations, including a complaint that a public agency or a participating agency violated those confidentiality requirements that restate or paraphrase FERPA.”

Complaint No. CP-341-2008. The parent sought access to the student’s educational record. A complete copy of the student’s educational record was prepared for the parent. The parent met with the assistant principal. During the meeting, the parent asked to see the access log to see who had reviewed the file. The assistant’ principal denied the request. The LEA was required to provide the parent with a copy of the Record of Access.

Parental Access to Records. In Complaint No. 1387.98, the LEA required, by school board policy, that all parents seeking access to the educational records of their respective children sign a form entitled “Parental Permission for Release of Information or Request for Review of Student Information.” A parent filed a complaint, alleging this practice violated IDEA and FERPA. The school acknowledged the practice, indicating further that it was a long-standing practice. It also supplied a legal analysis from a national publication encouraging such a practice. However, requiring a parent to sign a form prior to access to the educational records of the parent’s child is not in concert with either IDEA or FERPA. Under 511 IAC 7-38-1 and 34 CFR §99.10, public schools are required to provide access to parents. Sec. 99.31(a)(8) indicates specifically that written permission is not required for a parent to gain access to the records of the parent’s child. Previous OSEP constructions have also indicated public schools may not create unnecessary delays in complying with a parent’s access request. Letter to Rudolph, EHLR 211:288 (OSEP 1982). Requiring a parent to sign a “Request for Review of Student Information” form constitutes an impermissible “unnecessary delay” and violates state and federal law. Also see Letter to Attorney For School District, 40 IDELR 99 (FPCO 2003), indicating that IDEA does not give greater access rights to parents than FERPA where the access sought is to the records of other students, even within the context of an IDEA adjudication. The IHO had ordered the school to release to the parent a copy of unredacted education records that would have revealed the names and personally identifiable information of other students who had charged the parent’s child with “serious or criminal behavior.” The IHO reasoned the identities of the students and the nature of their charges were related to the student such that his due process rights should override the confidentiality protections of his accusers. The IHO stayed the order pending clarification from FPCO. The FPCO, as indicated, determined that such access is not permitted by FERPA.

Costs of Duplicating. In Complaint No. 1269.98, a complainant alleged the school district overcharged her for copies of her child’s educational record. The school charged her ten (10) cents a page. The complainant alleged local print shops charged only six (6) cents a page. 511 IAC 7-38-1(h) provides that a public agency may charge a fee under usual circumstances, but the fee for copies cannot exceed “actual cost of duplication.” This is FERPA language as well. The school arrived at its per-pate charge by surveying local print shops, where fees ranged from six (6) cents a page to fifteen (15) cents a page. The average cost was nine (9) cents a page; the mean cost was ten (10) cents a page. The ten-cent fee was, the school maintained, consistent with the local market. The school was in compliance with Article 7. As one of the Findings of

Fact, the complaint investigator noted that per-page charges for State agencies, such as the Indiana Department of Education, are established through statute. Pursuant to I.C. 5-14-3-8(c), the Indiana Department of Administration sets the rate. The current fee per page, if the complainant sought the same records from IDOE, would have been ten (10) cents a page.

Easily Traceable. Complaint No. 1329.98 The student, who had an orthopedic impairment as well as cardiac concerns and a hearing loss, had been a manager for an athletic team. An incident arose whereby the coach punished the student for failure to pack two uniforms for an away game and leaving a clipboard behind at the opposing school. The punishment involved running laps, which the student was not suppose to do. The parent complained to the school, which investigated. The coach received a reprimand. However, the school issued a press release that, although not identifying the student by name, provided sufficient details such that the student's identity could be easily traced. A newspaper reporter contacted the student's mother for additional information. The parent advised that such information was confidential and wanted to know how the reporter knew whom to contact. Several stories appeared in the newspaper, on the newspaper's internet site, and on local television broadcasts. The school was found to be in non-compliance for releasing information that revealed personally identifiable information regarding the student.

Complaint No. 2184.05 (Reconsideration). Elementary student with an LD sought to participate in an athletic program sponsored by a private, not-for-profit entity affiliated with a national sports organization. The sports organization has an eligibility policy requiring a 2.0 or 70 percent grade-point average (GPA). A student who does not meet the GPA requirement can submit a Scholastic Eligibility Form that could waive the eligibility requirement. The parent submitted the student's report card, but the student's grades did not satisfy the GPA requirement. The parent completed the Scholastic Eligibility Form, but the building principal would not sign the Form. The Form requested a relevant administrator to indicate whether a student's participation in the program would or would not benefit the student. The student's tutor signed the Form instead. The principal later contacted personnel from the sports organization to inquire as to the sufficiency of the tutor signing the Form. Although the principal did not mention the student by name, the principal did indicate the student was in the principal's school and supplied additional information concerning the student, making the student's identity "easily traceable." This constituted a breach of confidentiality by releasing "personally identifiable information" to an unauthorized third-party without first obtaining the written consent of the parent.

In General. Complaint No. 2235.05. Complainant asserted she requested by telephone a copy of the student's entire educational record. The special education department clerk's contemporaneous notes from the telephone conference indicate the complainant requested only the student's latest CCC Report/IEP as well as a psychological evaluation report. The complainant received these in the mail shortly after the telephone conversation. The LEA was found to have complied with Art. 7.

Complaint No. 2111.04. The student was eight years old and within the autism spectrum. The student could not communicate. On two separate occasions, school personnel observed bruises on the child and, in accordance with State law and the school district/county protocol for reporting suspected neglect or abuse, the school reported the information to Child Protective Services. The school's obligation to report was based on State law and was occasioned by personal observation. The school did not violate Art. 7 (or IDEA or FERPA) by initiating such a report.

Complaint No. 1903.02 (Reconsideration). Prior written consent of a parent or eligible student is required prior to providing personally identifiable information from a student's educational record (in this case, his attendance record) to a probation officer. A local court cannot issue a general order entitling court personnel to have access to educational records and requiring public agencies to comply with such a blanket

order. FERPA and IDEA provide exceptions to written consent, but neither law permits the issuance of a general order of this kind. See also Complaint No. 1914.02 (same issue).

Complaint No. 1864.02. The student had an orthopedic impairment and had recently had hip surgery. He wished to participate in wrestling. A sports physical report clearing the student for participation was completed by a physician other than the student's regular physician. The school nurse, without parental consent, contacted the student's regular physician regarding the sports physical. There was not present a health or safety emergency that would have excused the school nurse from first obtaining written parental consent. The contact with the physician was a violation of 511 IAC 7-38-1(p).

Complaint No. 1854.02. A parent has the right to inspect and review educational records of the parent's child. This includes the right for "explanations and interpretations of the record..." 511 IAC 7-38-1(d). The parent and school personnel had marked differences in the past. When the parent requested access to her child's educational records, the school's attorney wrote her, acknowledging the parent's right to review and inspect the records but directing her not to have discussions with school staff because of past conflicts. The attorney later withdrew this restriction and acknowledged the parent did, indeed, have the right to an explanation and interpretation from school staff of the contents of the child's educational record.

Complaint No. 1577.00. School did not violate Art. 7 when one school official informed another school official about a pending charge against the parent. The charge was a matter of public record, and IDEA/Article 7/FERPA safeguard the personally identifiable information of students, not parents.

Complaint No. 1518.00. A reading screening of kindergarten students for the purpose of determining curriculum placement is not an educational evaluation requiring written parental permission. The test is not diagnostic, nor is it intended or designed to identify disabilities. The parent had verbally consented to the screening, but the failure to have the parent's written permission did not violate IDEA or Article 7. However, the school's refusal to permit the parent access to the screening results constituted violations of Art. 7 and IDEA..

Complaint No. 1380.99. Public agency violated IDEA by permitting a teacher union representative to attend case conference committees. The public agency also violated IDEA and FERPA through the same practice by permitting an unauthorized person (the union representative) access to personally identifiable information.

Letter to Garvin, 30 IDELR 541 (OSEP, FPCO 1998). Although school personnel with a "legitimate educational interest" can have access to students' educational records without first obtaining parental permission, this can extend to outside contractors discharging school responsibilities so long as such outside personnel meet the criteria required for such access as published and disseminated in the school's annual FERPA notification of rights, but the same restrictions on re-disclosure of personally identifiable information apply to outside personnel performing the school's work as it would to school personnel.

Letter to Wisconsin Department of Public Instruction, 28 IDELR 497 (FPCO 1997). A public agency is not authorized, absent written parental permission, to disclose the contents of educational records to the state Medicaid agency. Such disclosures are not included within the exceptions to obtaining written parental permission. In addition, schools may not release to Medicaid a list of students with disabilities who are receiving services because a disability is personally identifiable information and not directory information. Medicaid, likewise, does not fall within the "financial aid" exclusion of FERPA. However, nothing prevents a school—or its contracting agency (billing)—to receive a list from Medicaid and compare it to its own list.

Complaint No. 916.95. A parent does not have an automatic right to photocopies of educational records based upon a mere possibility of initiating a due process hearing. The due process hearing would have to be pending, nor merely contemplated. See 511 IAC 7-38-1(d)(4).

511 7-38-2

**Procedures for amending
educational records 34 CFR
§§300.618-300.621**

Complaint No. 1437.99. The public agency violated Article 7 and IDEA when it failed to convene in a timely manner a hearing to amend educational records at parental request. In addition, the public agency violated the same laws when the Hearing Examiner deferred to the local superintendent for the final decision. State and federal law require the hearing examiner to render the decision, not make a recommended decision to another person who then acts ultimately.

511 IAC 7-38-3

**Confidentiality safeguards in the collection, maintenance, and destruction of
educational records 34 CFR §§300.623-300.624**

California Department of Education, 47 IDELR 45 (OCR 2006). OCR, in consultation with OSEP, addressed questions of confidentiality with regard to the report cards and transcripts of students with disabilities. OCR noted that report cards are typically progress reports provided to parents to indicate the progress or level of achievement by their children. As such, report cards are made available to parents and not third parties. The SEA asked whether report cards can have indications the student was receiving special education and related services, such as a box where it could be checked whether the student received speech-language services, received resource room assistance, or had an IEP. Because report cards are provided to parents to indicate the progress of their children in specific classes, course content, or the curriculum, “it would be permissible under Section 504 and Title II [of the ADA] for a report card to indicate a student is receiving special education or related services, to the extent that this information is given as a way of informing parents about their child’s progress or level of achievement in specific classes, course content, or curriculum, consistent with the underlying purpose of a report card.” There would have to be some justification for referencing a student’s disability or eligibility for certain services. “[T]he mere designation that a student has an IEP or is receiving a related service, without any meaningful explanation of the student’s progress, such as a grade or other evaluative standard ... would be inconsistent with IDEA’s periodic reporting requirements, as well as with Section 504 and Title II.” Report cards for students with disabilities must be “as meaningful as the report cards provided to students without disabilities. Without more meaningful information, a report card that indicates only special education status provides a student with a disability with a benefit or service that is different from and not as effective as the benefit or service that is provided through the report card to students without disabilities.” OCR added that “an LEA may, under certain circumstances, distinguish on the report card between students in general education curriculum classes and those taught using a modified or alternate curriculum. The use of asterisks, symbols, or other coding on a report card to designate the use of a modified education curriculum generally would be allowable under those circumstances.”

Transcripts are another matter. [For the required content of an Indiana transcript, see I.C. 20-33-2-13.] A student’s transcript may not indicate the student has been enrolled in a special education program, has received special education and related services, or has a disability. A transcript, OCR noted, “is intended to inform postsecondary institutions or prospective employers of a student’s academic credentials and achievements.” Information regarding the presence of a disability “does not constitute information about the student’s academic achievements.... Notations that are used exclusively to identify programs for students with disabilities unnecessarily provide these students with different educational benefits or services. In addition, identifying programs as being only for students with disabilities singles out students

with disabilities with respect to disclosure of disability and constitutes different treatment on the basis of disability. Therefore, it would be a violation of Section 504 and Title II for a student's transcript to indicate that a student has received special education or a related service or that the student has a disability." Although a transcript may not disclose that a student has received special education and related services or has a disability, "a transcript may indicate that a student took classes with a modified or alternate education curriculum. This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a student's academic achievements. Transcript notations concerning enrollment in different classes, course content, or curriculum by students with disabilities \sect softlinewould be consistent with any similar transcript designation for classes, such as advanced placement, honors, or remedial instruction, in which students without disabilities are enrolled, and thus would not violate Section 504 or Title II. These notations about modified or alternative education curriculum are permissible because they do not disclose that a student has a disability, are not used exclusively to identify programs for students with disabilities, and are consistent with the purpose of a student transcript."

Complaint No. CP-293-2008. High school student with a primary exceptionality area of ASD had a behavioral incident where he struck other students and teachers as well as school property. A part of the complaint alleged the school failed to provide a copy of the student's special education and disciplinary records to law enforcement when the school reported the incident as a crime. However, the school had not reported the incident to law enforcement. The school had a School Resource Officer (SRO) on duty at the time, who was present while school personnel attempted to calm the student. The student was turned over to his father when the father arrived at school following a phone call from school personnel. The presence of the SRO was to maintain order. The school was not obligated to provide relevant special education and disciplinary records to the SRO as the school did not report the incident as a crime and the SRO did not constitute "law enforcement."

Complaint No. 2226.05. The LEA did not maintain for at least three years forms and other documentation with respect to its student-specific intervention procedures, thus violating Art. 7.

Complaint No. 2107.04. Public agency stored IEPs and other educational records on an internet-accessible program. A public agency employee could access the program but would need a password. The agency had in place policies and procedures to ensure the confidentiality of the information, including (1) an Acceptable Use Policy that must be signed by all employees, with any violation resulting in termination of employment; (2) designation of a responsible employee for ensuring compliance with all confidentiality requirements; and (3) training of staff who are identified as having legal access to student files on the procedures for ensuring the confidentiality of personally identifiable information. The public agency's policies and procedures complied with Art. 7 and IDEA.

Complaint No. 2059.04. The school district violated the confidentiality rights of a class of students by including their pictures in the school yearbook and identifying them in the caption as being an a "special services classroom." The presence of a disability is "personally identifiable information." The parents of the students had not provided written consent for the district to disclose personally identifiable information regarding the students.

The confidentiality requirements of 511 IAC 7-23 are based principally upon the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, 34 C.F.R. Part 99, as incorporated into the Individuals with Disabilities Education Act through 20 U.S.C. § 1417(c). Federal agency constructions have assisted in the understanding of these requirements. Federal and state confidentiality requirements prohibit the unauthorized disclosure of "personally identifiable information" regarding a student. "Personally identifiable information" includes "disability designation" as well as information that

would make it possible to identify a student's disability with reasonable certainty. 511 IAC 7-32-73. "Disclosure" is defined, in relevant part, as a "communication of personally identifiable information," including by "written...means." 511 IAC 7-32-26. The Family Policy Compliance Office, charged by Congress with the implementation and enforcement of FERPA, see 20 U.S.C. § 1232g(f), 34 C.F.R. §§ 99.60-99.67, has long held that information indicating a student is receiving special education services is "personally identifiable information" that is subject to adherence to FERPA's disclosure requirements. See, for example, Letter of Finding to Henry County (KY) Public Schools (FPCO 1999), which can be read and downloaded at <http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/henrycoky.html>

. In this instance, it is not the inclusion of the photograph of the student in the yearbook that is not in concert with 511 IAC 7-38 and applicable federal law. It is the use of the title "Special Services" and the identification of students as being in a special service class that constitute the impermissible disclosure of personally identifiable information.

Letter to Benton Area School District, 32 IDELR ¶ 270 (FPCO 1999). A school official's statement that a student was "a special education student" violated FERPA because it disclosed personally identifiable information without prior parental consent. The presence of a disability is "personally identifiable information." The school official's disclosure to third parties of this information was not excused by one of the exceptions to prior parental consent.

Complaint No. 1903.02 (Reconsideration). Prior written consent of a parent or eligible student is required prior to providing personally identifiable information from a student's educational record (in this case, his attendance record) to a probation officer. A local court cannot issue a general order entitling court personnel to have access to educational records and for public agencies to comply. FERPA and IDEA provide exception to written consent, but neither law permits the issuance of a general order of this kind. See also Complaint No. 1914.02.

Complaint No. 1899.02 involved an 18-year-old student eligible for special education and related services who allegedly sent threatening e-mails to fellow students. He was suspended from school, pending expulsion. Later, his case conference committee determined that his behaviors were a manifestation of his disability, which precluded expulsion proceedings. The county sheriff's department provided a deputy sheriff to the school to serve as a school resource officer (SRO). The school reported the incident to the SRO. The assistant principal also sent personally identifiable information regarding the student to the county circuit court. Under FERPA at 34 CFR §§ 99.31(a)(5), 99.38, a public school can provide information to juvenile justice officials so long as a state has a law to that effect and the information is provided in advance of adjudication. Indiana does have such an enabling law. See I.C. 20-33-7-3. However, before such information can be provided, the juvenile justice agency—in this case, the circuit court—must certify in writing that it will not disclose the personally identifiable information to a third party without first obtaining the written consent of the parent or guardian, or the student, if the student is 18 years of age and does not require a guardian. I.C. 20-33-7-3(b)(3). The school did not violate 511 IAC 7-44-10 when it reported the alleged threats to the SRO as the SRO is considered local law enforcement. However, the school did violate 511 IAC 7-38-1, which incorporates IDEA's and FERPA's confidentiality and privacy requirements, when it provided personally identifiable information regarding the student to the circuit court without first obtaining a written certification from the circuit court that it would not disclose the information to any third party without first obtaining the requisite written consent.

Complaint No. 1395.99B. Four-year-old student with disabilities was enrolled in the local Head Start program. Head Start requested from the public agency a copy of the student's IEP, but the public agency refused to do so without written parental consent. Public agency violated I.C. 20-33-2-10(d), which

requires a school receiving a request for educational records to promptly send the records to the requesting school.

Complaint No. 544.90. A student's disabling condition and educational placement are not matters of public record. Such personally identifiable information is not to be discussed in school board meetings open to the public, nor should such information appear in the official minutes of the school board. See also Complaint No. 739.93.

Complaint No. 1036.96. Teacher and assistant principal videotaped a student without notifying the parent or receiving consent. Videotaping was not included in the student's IEP as a means of evaluating the efficacy of the IEP. The videotape was being used to evaluate the student's program. The videotape was not maintained in a secure place but was available to other school personnel and students. See also Complaint No. 579.91, where the public agency followed a student around the school, videotaping him as a means of showing the parent the unsuitability of the student to be in the general population. The videotape in these instances constituted a part of the students' educational records.

Complaint No. 1157.97. A public agency may employ an outside contractor to assist in evaluating a student. However, the contractor is held to the same requirements to ensure the confidentiality of personally identifiable information regarding the student.

Mequon-Thiensville (WI) School District, 40 IDELR 22 (OCR 2003). Teacher completed a behavior rating scale. The school provided the parent with an interpretative summary of the teacher's responses but not the teacher's original responses. The school destroyed the teacher's responses. The destruction of the test protocols denied the parent access to "relevant records" of the student and constituted violations of Sec. 504 and Title II of the A.D.A.

Letter to Hertzler, 30 IDELR 713 (OSEP 1998). Personal notes or teacher records are not educational records. Records required to demonstrate compliance with federal program requirements, including those records necessary to demonstrate a FAPE was provided to an eligible student under IDEA, must be maintained for three years after the last activity.

RULE 39. EDUCATIONAL SURROGATE PARENTS

511 IAC 7-39-2 Method for Assigning an Educational Surrogate Parent 34 CFR §300.519

Complaint No. 1430.99. A student who is a ward of the county Office of Family and Children (OFC) is a "ward of the state." The public agency appropriately appointed an educational surrogate parent to exercise the same rights and responsibilities as a parent with regard to making decisions concerning the identification, evaluation, placement, or the provision of a FAPE to the student. The educational surrogate parent (ESP) was notified of all case conference committee meetings and was in attendance. The public agency did not violate state and federal law by not providing notice to the OFC because it was not required to do so. Local cooperation and communication between school districts and county OFCs are encouraged but not required. The ESP—not the OFC— fulfills the educational decision-making role for the student.

Letter to Copenhaver, 29 IDELR 1091 (OSEP 1997). Although IDEA does not address the circumstances under which an ESP can be removed by a public agency, such removal cannot be based on a disagreement between the ESP and the public agency over what constitutes a "free appropriate public education" (FAPE) for the student. An ESP can be removed where the ESP has a conflict of interest or lacks the requisite knowledge or skills to represent the educational interests of the student.

RULE 40. IDENTIFICATION AND EVALUATION

511 IAC 7-40-1 Child Find

34 CFR §§300.111, 300.131

Complaint No. CP-361-2008. The kindergarten student wrote odd notes, such as “I am fit to die. He had a gun,” and “[t]he baby fell and died.” He also became inconsolable when he saw a flyer entitled “Doughnuts for Dads.” School personnel met with the parent, indicating the parent had to have the child evaluated and obtain a written statement that he was not a threat to himself or others before he would be allowed to return to school. The LEA did not specify what type of evaluation was required. The LEA also did not advise the parent of any procedural safeguards or parental rights that may be available. The student was excluded from school for six weeks until a physician wrote to the school, indicating the student was not a threat to anyone. The LEA then placed additional conditions on the parent, requiring the following before the student could return: (1) attend individual and family therapy sessions at a community mental health facility; (2) sign a release of information so the LEA could share information with the mental health facility; (3) get a signed statement from a physician or psychiatrist approved by the LEA attesting to the fact the student is not a threat; and (4) agree to homebound services for the student in the amount of two hours a week. No homebound services were ever provided. The student missed 16 weeks of school. After the parent filed the complaint, the LEA convened a CCC meeting and obtained consent for an evaluation. The LEA also offered 36 hours of homebound services during the summer. The LEA violated numerous provisions of Article 7. Although the student exhibited a pattern of behavioral concerns within the school setting, the LEA did not seek to evaluate the student until nearly six months later and after the parent filed a complaint. The LEA had knowledge the student may be a student with a disability and did not provide the protections of Article 7. The LEA also engaged in *de facto* suspension or expulsion of the student without complying with state law, resulting in the student missing 16 weeks of school. The LEA also failed to follow its own Child Find procedures. In addition to revising its procedures and providing training to its personnel, the LEA had to reimburse the parent for all expenses related to the independent evaluations and therapeutic procedures required by the LEA of the parent. The LEA also had to provide compensatory educational services to the student.

Complaint No. 288-2008. A private residential facility, which has school-aged children but does not provide educational services, complained that the school district where the facility is located did not provide any services to the students placed there by the courts. While all students at the facility may not require special education and related services, Indiana law does provide them the right to attend school in the school corporation where the facility is located. See I.C. 20-26-11-8. The school district violated Article 7 by not having in place a mechanism to locate and identify students in the facility who might require special education and related services. Part of the corrective action required the school district to develop a formal, organized method “to track the arrival of residents and to determine their educational status and need for a case conference committee meeting.”

Complaint No. 2221.05. Each June, the LEA sends a notice to local newspapers, advising of its child-find responsibilities to coordinate the collection of information regarding students with disabilities birth through twenty-two years of age, for the purpose of determining present and future program placement needs. Contact information was provided. In addition, brochures were provided to 23 pertinent local organizations and professionals. The brochures explained the referral process. The LEA’s child-find procedures were reasonably calculated to locate, identify, and evaluate students who may require special education and related services.

Complaint 2285.06. The LEA's written procedures satisfied child-find requirements. However, the LEA failed to follow its written procedures. It did not contact any private schools during the program year. This constituted a violation of Art. 7.

Complaint No. 2170.05. A student with multiple disabilities moved from another State to Indiana where the student's parent sought to enroll the student in school. School staff met, but not as a CCC, to review information on the student. It was evident the student was eligible for Art. 7 services, but the records from the other State had not been received. The records did not arrive until over a month later. Services to the student were, nevertheless, delayed another six months. The school denied the student a FAPE by not convening a CCC within 10 instructional days from the date of enrollment. The school was required to provide compensatory educational services. Lack of records was not a justification for delay. See 511 IAC 7-45-5(a)(4).

Complaint No. 2087.04. The student moved to Indiana from another state where he had been receiving special education and related services for a specific learning disability. The student enrolled in the Indiana school district on September 29. The parent completed a Student Enrollment Form but did not check the box to indicate whether the student had ever received special services. The school did not ask the parent if the student had received such services, and the school did not seek to obtain the student's educational records from his previous school. In October, during a parent-teacher conference, the parent asked about the availability of special services. The teacher did not inform the parent how she could initiate a referral (the teacher did not know herself). The teacher, after this meeting, began to complete a referral to the school's Special Education Department (SED). In December, the parent and teacher met again. The parent inquired whether she needed to sign any referral form. The teacher informed the parent that her written consent would be obtained once the referral package was completed and sent to the SED. The parent was not informed she could initiate the referral process by submitting a written request to licensed personnel (i.e., the teacher). Local procedures did not provide a timeline for completion of a referral package and did not require school personnel to notify administration or the SED when a parent made an oral request for an educational evaluation. The parent filed a complaint on January 26. As of that date, the referral package had not yet been forwarded to the SED. After the complaint was filed, the school principal looked at the few educational records the school did possess and noted the student had received special services. The principal confirmed this with the former school. On January 29, the Indiana school formally requested the student's educational records from the student's previous school. The school received the records on February 2. The school wrote to the parent on February 5, and asked her to contact the SED to discuss placement. No CCC dates were offered. The student's CCC was not convened within ten (10) instructional days of the student's enrollment date. The student's CCC was not convened within ten (10) instructional days when the school finally confirmed the student had been receiving special services in another state. The school's child find procedures were defective.

Complaint No. 2086.04. The students moved from one Indiana public school district to another. Although eligible for special services, the current school district delayed convening the students' CCC until November 10, even though the students enrolled in the school district and began attending school on August 27. The school failed to convene the students' CCC within ten (10) instructional days after the students moved into the school district from another Indiana school district. 511 IAC 7-42-5(a)(4).

Complaint No. 1983.02. Elementary school student with a learning disability transferred from one Indiana school to another Indiana school. The parent notified the new school that the student had been receiving special education and related services. The educational records were requested from the previous school, but no special education records were provided. The student did not receive special education services for over four months. The student was entitled to compensatory educational services.

Complaint No. 1978.02. Middle-school student previously received speech therapy but was declassified in elementary school. He had a continuing history of poor school performance, including failure of the grade 3 and grade 6 ISTEP+. Complainant alleged the school did not advise her of “child find” procedures, including how to initiate an educational evaluation. The school demonstrated its child-find procedures were reasonably calculated to notify the public of such options. These documents were made available through newspaper articles, school publications, and other pamphlets; in addition, the child-find procedures were sent to individuals and facilities that had contact with children, including physicians, therapists, social service agencies, and day care centers. The complainant completed a referral for an educational evaluation.

Complaint No. 1568.00. The student was a fourteen-year-old middle school student. Her classroom performance and scores on standardized assessment put her at or above grade level. She had friends at school, and although she occasionally reported being somewhat anxious, her behavior was not out of the ordinary. The agency was not found to be on notice that the student might have a disability.

Complaint No. 1516.00. The public agency was found to have deficient child-find procedures. The student was ten years old. From the beginning of the school year, he had exhibited aggressive and disruptive behaviors in the classroom setting, failed nearly all of his classes, and had numerous discipline referrals and sanctions. Although referred to the school’s Student Assistance Program (SAP) to discuss intervention strategies, this team did not meet until five (5) weeks later. At this meeting, the student’s teacher signed a referral form for a special education evaluation. Internal procedures required the principal to “sign off” on such a referral, but this didn’t occur until nearly eight (8) weeks after the teacher initiated the referral, significantly delaying the referral and evaluation process.

Complaint No. 1092.96. The public agency did not have procedures in place to ensure special education and related services were available to eligible three-year-old children on their third birthdays. The public agency cannot delay services because it has not conducted its evaluation.

511 IAC 7-40-2

**Early Intervening Services
34 CFR § 300.226**

Complaint No. CP-291-2008. The school district violated Article 7 by utilizing its student intervention process as a “pre-referral” process required to be utilized before an initial educational evaluation would be conducted. A school district “may not use the [student intervention] process to delay evaluating a student for special education, but [student intervention process] can be used while an evaluation is pending. An educational evaluation cannot be conditioned on the Student first participating in a [student intervention] program.”

511 IAC 7-40-3 Educational evaluations — in general

34 CFR §§300.15, 300.122, 300.301, 300.303-300.306

Complaint No. CP-291-2008. The school district violated Article 7 by utilizing its student intervention process as a “pre-referral” process required to be utilized before an initial educational evaluation would be conducted. A school district “may not use the [student intervention] process to delay evaluating a student for special education, but [student intervention process] can be used while an evaluation is pending. An educational evaluation cannot be conditioned on the Student first participating in a [student intervention] program.”

Complaint No. CP-283-2008. The student was 13 years old and not identified as eligible for Article 7 services. The SLP administered to the student, without parental consent, the Kaufman Brief Intelligence Test (Second Edition). The school’s student assistance team had discussed concerns about the student, but

concluded that he was not working to his potential due to lack of effort. He had not been referred for intervention. The school district undertook voluntary corrective action, including the development of procedures that would ensure the administration of an intelligence test without informed parental consent would not recur.

Complaint No. 1580.00. The school nurse conducted a vision screening of the student, which revealed a need for further evaluation and possible correction. A referral for a special education evaluation was pending. However, the school would not complete the educational evaluation until the parent obtained an eye examination for the student. The school was found in non-compliance for conditioning the evaluation on the parent obtaining an outside evaluation and for not including in the school's comprehensive evaluation the need for further vision screening arising from information already generated by the school.

Complaint No. 1518.00. A reading screening of kindergarten students for the purpose of determining curriculum placement is not an educational evaluation requiring written parental permission. The test is not diagnostic, nor is it intended or designed to identify disabilities. The parent verbally consented to the screening, but the failure to have the parent's written permission did not violate IDEA or Article 7. However, the school's refusal to permit the parent access to the screening results constituted violations of Art. 7 and IDEA.

511 IAC 7-40-4

**Initial Educational Evaluation; Public Agency
Written Notice; Parental Consent
34 CFR §§ 300.122, 300.301**

Complaint No. 2287.06. Parents met with the assistant principal in March, during which time the parents verbally requested an evaluation for their child. The assistant principal did not inform the parents of the LEA's procedures. When the parents inquired two months later as to the progress of the evaluation, they learned the process had not begun. At that time they learned of the LEA's procedures and provided written consent. By this time, the school year was nearly over. The evaluation was completed in October. The CCC met and determined the student eligible for services. Had the parents been advised in March of the appropriate procedures for initiating an evaluation, the process would have been completed in August. Compensatory services were warranted.

Complaint No. 622.91. Use of a psychiatric consultant to observe a student in classroom in preparation to testify in a due process hearing is an evaluation process requiring prior notice to the parent/guardian. See also Little Rock (AR) Sch. Dist., EHLR 352:214 (OCR 1986).

511 IAC 7-40-7

Independent Educational Evaluation

34 CFR §§300.502

Complaint No. CP-348-2008 (Reconsideration). The parent requested an IEE. The need for an IEE had been included in the student's IEP but did not specify who would be financially responsible for the IEE. The school district wanted the parent to use an evaluator located over 100 miles from the school district. The parent, however, obtained the IEE from a local evaluator. The school district did not include this evaluator on its list of qualified evaluators because of past experiences and not because of ability. "Although it is permissible for a school to publish a list of names and addresses of evaluators who meet agency criteria, the list would have to be exhaustive of the availability of qualified people in the geographic area specified, and indicate that parents have the opportunity to demonstrate that unique circumstances justify the selection of an evaluator [who] does not meet agency criteria. Therefore, the School's list for IEEs is not exhaustive of the qualified evaluators in the geographic area, and parents are not limited to the list in choosing an IEE." See also *Letter to Young*, 39 IDELR 98 (OSEP 2003) and *Letter to Parker*, 41 IDELR 155 (OSEP 2004). The LEA was financially responsible for the cost of the IEE.

Complaint No. CP-263-2008. The student is 14 years old and has OHI. The parent obtained an IEE. The parent also agreed the LEA could obtain a private evaluation of the student's needs. Thereafter, the LEA incorporated some of the IEE results into a draft IEP that was presented at subsequent CCC meetings. The parent filed a complaint, asserting the LEA had to incorporate all the recommendations of the IEE into the IEP. The LEA was found not to have violated Article 7. The LEA was required to *consider* the results of an IEE obtained by the parent. "As a matter of clarification, Article 7 does not require that specific recommendations made in an Independent Educational Evaluation be accepted and included verbatim in an IEP."

Letter to LoDolce, 50 IDELR 106 (OSEP 2007). When an IEE is at public expense, the criteria under which the evaluation is obtained must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. A public agency cannot place conditions on an independent evaluator that it does not place on its own evaluators. "[I]t may be necessary for an evaluator to conduct an assessment that includes age and grade-level scores in order to gather relevant information about the child that may assist in determining the content of the child's IEP, including information related to enabling the child to participate in the general education curriculum." Evaluators would be utilizing a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. In most cases, "a public agency must permit its own evaluators to use age and grade-level scores in its evaluation reports. Because a public agency cannot prohibit its own evaluators from including age and grade-level scores in evaluation reports, it cannot prohibit independent evaluators from doing so." The IDEA's evaluation procedures do not include the requirement that an evaluator provide recommendations as to specific methodologies or the use of specific materials. "If a public agency precludes its own evaluators from making recommendations, it may preclude an independent evaluator from making a recommendation. The converse is also true."

Complaint No. 2153.05. The parent referred the student for an evaluation but later withdrew the request. The student turned 18 years of age, at which time the school informed the parent and the student of the Transfer of Rights (see 511 IAC 7-43-5). When another request for an evaluation was received, school personnel met with the student to explain the procedures. The student was given a permission form, but he declined to sign it. He took the form home. Three days later, he wrote the school, requesting an IEE. The school declined. The school did not violate Article 7 by not requesting a hearing or agreeing to an IEE at public expense. The school had not conducted an initial educational evaluation with which the parent or the student could disagree with, a condition precedent to a request for an IEE.

Complaint No. 2142.04. An elementary school student had a visual impairment. The parent sought an IEE at the parent's expense, but the school would not permit the independent evaluator to observe the student within the school setting. The school violated 511 IAC 7-40-7(f) by preventing the parent from obtaining an IEE at the parent's expense. The school cannot have policies that limit a parent's access to a procedural safeguard.

Complaint No. 2142.04. A second issue in this complaint involved the list of potential independent evaluators. The school is located in a large metropolitan area. It maintained a list of only eight (8) professional sources from which parents may obtain an IEE. The school's policy further stated that no IEE may "take place in the student's school setting." The school's policy violated Art. 7. Given the school's location, it could not justify its restrictive list of potential evaluators. "In order to require parents to select from this list, the list must be exhaustive within the School's geographic area." The school had to revise its policies, submit them for approval, and then conduct in-service training regarding the revised, approved policies.

Complaint No. 2116.04. A high school student had a hearing impairment. The parent requested an IEE. Although the school initially indicated by telephone that it would agree to an IEE at public expense, it failed to follow through. The parent reiterated her IEE request. The school did not respond in writing, either agreeing to an IEE at public expense or requesting a due process hearing. The school also did not provide any information to the parent regarding where to obtain an IEE or what criteria were applicable to an IEE. The school then unilaterally selected an independent evaluator and had the student assessed without the parent's knowledge. The school indicated that it routinely uses "one or two trusted evaluators." The evaluators were selected at the school's discretion. The school committed multiple violations of Art. 7, including failure to respond in writing within ten business days of receipt of a request for an IEE, not informing the parent of the availability of an IEE or the criteria to be applied, and unilaterally selecting the independent evaluator. The following from the Discussion from the report is instructive:

When a parent makes a request for an independent educational evaluation, the school may require, as a condition of paying for the independent evaluation, that the parent choose one of the individuals on the list [of qualified evaluators]. According to the U.S. Department of Education's Office of Special Education Programs, the school may do this, but only if the School's list is exhaustive of the available qualified evaluators in the geographic area. See Letter to Young, 39 IDELR 98 (OSEP 2003). The School may also inquire into the parent's concerns about the School's evaluation, but cannot delay its response to the parent's request if the parent declines to provide the information. Similarly, the School may not delay its response while waiting for or otherwise make its response contingent upon receipt of additional information from the parent.

The school may not choose the independent evaluator. In this case, the School not only unilaterally determined who would conduct the parent-requested independent evaluation, but had the evaluation conducted in the absence of the parent's knowledge. Neither of these practices is in accordance with the intent or requirements of an independent educational evaluation.

Letter to Parker, 41 IDELR 155 (OSEP 2004). A school district must set criteria under which an IEE can be obtained at public expense, including the location of the evaluation and the qualifications of the examiner, which must be the same as the criteria the public agency uses when it initiates an evaluation, "to the extent those criteria are consistent with the parent's right to an IEE." Although a school district can publish a list of names and addresses of evaluators who meet the school's criteria, including reasonable cost criteria, "it is the parent, not the district, who has the right to choose which evaluator on the list will conduct the IEE." OSEP acknowledged that schools in metropolitan areas will have difficulties listing every qualified evaluator. For such school districts, "the district must allow the parents the opportunity to select an evaluator who is not on the list but who meets the criteria set by the public agency." In addition, a school district must allow a parent the opportunity to demonstrate that "unique circumstances justify the selection of an evaluator that [sic] does not meet agency criteria."

Letter to Young, 39 IDELR 98 (OSEP 2003). A parent has the right to an IEE at public expense when there is a disagreement over a school district's evaluation. The school must either show why its evaluation was sufficient and there is no need for an IEE or pay for the outside evaluation. IDEA regulations do not prohibit a school district from listing *all* qualified IEE evaluators in its geographic location and requiring a parent to use someone from the list.

Letter to Petska, 35 IDELR 191 (OSEP 2001). A public agency cannot establish cost-containment measures as criteria for parent-requested IEEs. A public agency "cannot in its sole judgment determine that it will pay only the maximum allowable cost and no further." Also, the public agency cannot deny cross-

the board transportation costs associated with the IEE. Such costs may be reasonable where the IEE is obtained out of the public agency's area. In addition, the IDEA does not address whether an IEE is paid up-front or reimbursed.

Complaint No. 2097.04. An IHO ordered an IEE to be conducted and the Case Conference Committee (CCC) to convene within then (10) days after the results are obtained, although the IHO did recognize that scheduling may prevent absolute adherence to this timeline. The independent evaluator was to participate at the public agency's expense, either in person or by telephone. The CCC did not meet with the ten-day time frame principally because of the parents' unavailability. The CCC was conducted at the earliest possible date that was mutually agreeable. The CCC discussed the results of the IEE, with the evaluator participating. Some revisions were made to the IEP. Not all of the IEE's recommendations were incorporated. The IHO did not order the CCC to incorporate all recommendations that may be made by the independent evaluator, nor did the independent evaluator disagree with the CCC's ultimate decisions. "A public agency need only consider the results [of an IEE]. There is no obligation to incorporate any suggestions or recommendations from the independent evaluation." See 511 IAC 7-40-7(g).

Complaint No. 2093.04. The parents requested an IEE on November 22. The school sent a letter to the parents on November 24, acknowledging receipt of the request but not indicating whether the IEE would be provided at public expense. The school later informed the parents the parents must disagree with the school's evaluation and provide specifics regarding such disagreement before an IEE could proceed. The school violated 511 IAC 7-40-7(b), (c) by creating a pre-condition. "[Article 7] requires a public agency to act affirmatively within ten business days of receiving a request for an IEE: Either request a due process hearing to justify the denial of the IEE request or notify the parents in writing that ht IEE will be at the public expense. Acknowledging receipt of the request without indicating whether the IEE would be at the public expense is an insufficient response under Article 7.... A public agency may inquire of a parent the reasons for requesting an IEE, but the parent is under no obligation to respond or otherwise detail the nature of the parent's disagreement with the public agency's evaluation.... The public agency violated Article 7 by creating an unauthorized precondition. Where a parent has requested an IEE, there is no requirement to have the parents explain in writing language suitable to the school their reasons for requesting an IEE." Also see Complaint No. 1811.01 (*Reconsideration*).

Complaint No. 2047.03. Parent requested an IEE. School agreed but attempted to limit options to two evaluators. When the parent expressed preference for a third evaluator, the school indicated it would not pay for an IEE by the third evaluator. The school provided no explanation and did not request a due process hearing. The school was found to be out of compliance for creating impermissible limitations on IEE choices and by not requesting a due process hearing when it refused to pay for the IEE.

Complaint No. 1927.02. The parent requested IEEs. The public agency agreed to the IEEs but would not arrange for them until the parent signed Release of Information forms. The public agency violated Article 7 by creating an unauthorized—and unnecessary—precondition. Where, as here, a parent has requested an IEE, there is no requirement to have the parent execute a Release of Information form in order to have the IEE conducted. Also see Complaint No. 1957.02 (same issue).

Complaint No. 1906.02 (*Reconsideration*). A public agency may inquire of a parent the reasons for requesting an IEE, but the parent is under no obligation to respond or otherwise detail the nature or the parent's disagreement with the public agency's evaluation. There is also no specific time frame following the conduct of the public agency's evaluation within which a parent must ask for an IEE.

Complaint No. 1581.00. The public agency agreed to pay for an IEE for a student, including any portion not covered by the parent's insurance. The IEE cost \$1,000, of which \$800 was covered by insurance.

The agency paid the remaining \$200. Thereafter, the parent met with a psychologist to discuss the results. This consultation was for \$90, of which the insurance company paid \$72. The public agency never agreed to pay for this consultation. A collection agency contacted the parent for the remaining \$18. The public agency, although it did not have an obligation to pay this amount, nevertheless paid the collection agency the remaining portion of the latter consultation fee. The public agency was found to be in compliance.

Complaint No. 1562.00. Public agency received from parent assessments conducted by an outside tutoring agency and listed the documents as received. However, there is no documentation that the CCC ever considered the results of the math and reading assessments, constituting a violation.

Complaint No. 1536.00. After completion of the three-year reevaluation of the student, the parent requested an IEE. The school did not respond to the parent's request by either (1) agreeing to fund an IEE; or (2) disagreeing, and requesting a due process hearing to demonstrate the adequacy of the school's evaluation. This placed the school in non-compliance. See also Complaint No. 1550.00, where the public agency failed to respond to a parent's request for an IEE. Also see Secretarial Review of Anonymous, 30 IDELR 821 (OSERS 1998). Public agency violated IDEA when it did not respond to a parent's request for an IEE. The school had to either fund the IEE or make sure the IEE was at no cost to the parent, or request a due process hearing to demonstrate the appropriateness of the school's evaluation. (**Note:** Secretarial review of complaint investigations is no longer available.)

Letter to Katzerman, 28 IDELR 310 (OSEP 1997). When an IEE is obtained at public expense, no violation of IDEA or FERPA occurs when the results are provided to the school without first obtaining parental consent. The school is required to consider the results of the IEE in making decisions regarding the provision of FAPE to a student.

Complaint No. 1253.98. The parent made over eleven verbal and written requests for evaluation over a seven-month period, but the public agency stalled the requests by using internal procedures the parent was unaware of. The public agency was required to provide for an IEE for the student.

Complaint No. 1311.98. Public agency, as a means of resolving a complaint against it, agreed to pay for an IEE obtained by the parent after the public agency failed to act timely on the parent's request for an educational evaluation by the public agency.

Complaint No. 1431.99. The public agency did consider the results of the IEE at the CCC. The CCC report indicated the results were discussed, but there was disagreement between public agency personnel and the parent and parent representative regarding suggestions in the IEE. A public agency need only consider the results. There is no obligation to incorporate any suggestions or recommendations from the IEE.

Letter to Thompson, 34 IDELR ¶8 (OSEP 2000). It is inconsistent with IDEA to require a parent to first submit the costs of an IEE to the parent's insurance carrier. The parent has the right to refuse such access, and can permit submission to the insurance carrier after being fully informed of the parent's rights.

511 IAC 7-40-8

Reevaluation

34 CFR §300.303

IDEA requires that each student with a disability who needs special education and related services be evaluated at least once every three years, or more frequently should conditions warrant. The federal and state regulations for triennial evaluations do not include any exceptions or any specific right of a parent, guardian, or the student to avoid the evaluative process. This became the focal issue in Johnson v. Duneland School Corporation, et al., 92 F.3d 554 (7th Circuit 1996).

The student had significant medical problems, including seizure activity, leukemia, and mental retardation. His medical condition resulted in his being placed on homebound instruction. However, as medication stabilized his condition, his physician recommended he again attend school. The school sought to reevaluate the student and asked the parents for a release of medical information. Instead the parents sought a due process hearing challenging the school's proposed program and seeking reimbursement for an independent evaluation obtained by the parents. The parents did not raise the triennial evaluation as an issue nor did they challenge the propriety of the proposed evaluation. A number of due process issues were raised during the hearing, before the Indiana Board of Special Education Appeals, and upon judicial review in the federal district court. However, most of these issues were not raised in the appeal of the district court's decision to the 7th Circuit Court of Appeals.

On appeal, the 7th Circuit addressed only one issue while affirming the district court's grants of summary judgment to the school and other defendants: whether the school has an absolute right to conduct a three-year reevaluation.

The 7th Circuit joined other circuit courts in holding that schools have a right to conduct the three-year reevaluation. The court reasoned that "because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation of the student and the school cannot be forced to rely solely on an independent evaluation conducted at the parents behest." At 558. Parental consent is not required under such circumstances. *Id.*

The court, relying upon a decision from the 5th Circuit, also rejected the proposition that there is an exception to the school's right to reevaluate based upon alleged medical and psychological harm to the student should the evaluation occur. The 7th Circuit did not characterize the school's right as "absolute," as other courts have done. A school's right to reevaluate, the court noted, is balanced in Indiana with the parent's right to challenge through the due process hearing process any proposed evaluation by the school. But where a parent does not raise this as an issue, as in the case, the school's right is "absolute." *Id.*

Complaint No. Cp-197-2007. The student was evaluated in the second grade and determined ineligible for Article 7 services. However, the student was later determined eligible for services under Sec. 504. The parent filed a complaint that the school district failed to conduct a reevaluation at least once every 36 months. The school did not violate Article 7 because it was under no legal obligation to conduct a reevaluation for a student not eligible for Article 7 services. "Section 504 does not require ... a reevaluation every three years. However, under Section 504 a student's needs must be met and an evaluation must be done prior to any significant change of placement." In any event, the Indiana Department of Education does not monitor or enforce compliance with Sec. 504. This is the responsibility of OCR.

Complaint No. 1705.01 (Reconsideration). CCC reviewed student's previous evaluation results, standardized test scores, and behavioral checklists prepared by teachers, as well as the student's current placement and special education services. The CCC determined that no additional evaluation was needed to complete the 36-month reevaluation. The parent could not attend this CCC meeting. She was not informed that she had the right to request an evaluation nor was she informed that the school was not required to conduct such an assessment unless the parent requested same. The school, upon reconsideration, argued that its boilerplate language on its form ("the parent/guardian/surrogate(s) was/were informed of their right to request a complete reevaluation") as well as a statement on the bottom of the page that the parent was informed of and given a copy of the Notice of Procedural Safeguards should have sufficiently apprised the parent of her rights. However, this pre-printed language does not change the fact the parent was not present

at the CCC meeting where the boilerplate language could be explained. The pre-printed language, in addition, is not clearly stated.

RULE 41. ELIGIBILITY CRITERIA

511 IAC 7-41-1

**Autism spectrum disorder
34 CFR §300.8(c)(1)**

Complaint No. 2280.06. Fifth-grade student eligible for services had a definitive IEP to address his weaknesses in social interactions, including the use of “social stories” when a negative event occurred. The student was described by is CCC as having “great anxiety when he does not understand something [which] causes him to shut down emotionally.” There were a number of social supports, particularly designed to protect the student from bullying. These supports required concrete reinforcement and avoidance of punitive measures. The student was also likely to become upset in crowds or in reaction to noise, anxiety, and unexpected change. The bus driver and school security received no in-service training. The student was being teased on the bus. This escalated into a fight. The bus driver called security. When the student would not exit the bus, the security officer handcuffed the student and took him back to school. The LEA violated Art. 7 by not providing specialized in-service training. [See I.C. 20-26-5-31 (Autism Training for School Corporation Police Department)].

Complaint No. 1791.01 (Reconsideration). Although professional staff working with eight-year-old student in third grade received training in autism and specific training regarding the student’s needs, the paraprofessionals received only literature regarding autism spectrum disorder. Providing paraprofessionals with professional literature does not constitute specialized in-service training. “Specialized inservice training means more than providing someone with literature that they may or may not read. Inservice training contemplates that questions will be asked, answers will be given, and people will learn something about the condition and the particular needs of the student.”

Complaint No. 1601.00. Although the agency maintained that the Teacher of Record has provided specialized training in autism for teachers and aides working with students with autism, there were no records regarding such in-service trainings.

Complaint No. 1309.98. Public agency provided a generalized inservice training in autism for staff. However, it did not provide specific inservice to the teacher and paraprofessional assigned to a six-year-old student with autism in the kindergarten class. The public agency did not have procedures to provide inservice training to personnel hired after the beginning of the year.

511 IAC 7-41-2

**Blind or Low Vision
34 CFR §300.8(c)(13)**

Complaint No. 1560.00. Six-year-old student with low vision required the use of large-print materials and enlarged computer fonts, as well as enlarged type on handouts and tests. However, the student was never provided with these materials for most of the school year, due to some confusion at the special education cooperative as to which TOR the student should be assigned. As a result, the student’s IEP was not implemented. All TORs in the district had to attend in-service training regarding the multiple responsibilities assigned to them under 511 IAC 7-32-97.

Complaint No. 1161.97. The public agency violated Article 7 when it failed to conduct a classroom observation of the student as a part of the reevaluation. The public agency also failed to complete a functional literacy assessment as required by state statute at I.C. 20-35-9-6.

511 IAC 7-41-6 Developmental delay (early childhood) 34 CFR §300.8(b)

A preschool child with a disability is eligible for IDEA, Part B, services on the child's third birthday. See Complaint No. 1261.98 and Complaint No. 1092.96; OSEP Policy Memorandum 90-16, 16 EHLR 859 (OSEP 1990). Some confusion has occurred in the past because Indiana, by statute at I.C. 20-35-1-5, defines "preschool child with a disability" as one who is three (3) years of age by June 1. The "preschool child with a disability" statute was passed prior to OSEP's establishing age eligibility on the third birthday. The Indiana statute should not be applied.

511 IAC 7-41-8 Language or Speech Impairment 34 CFR §300.8(c)(11)

Complaint No. 2010.03 (Reconsideration). The student's IEP specified a private speech-language therapist was to provide "auditory verbal communication skills." The school terminated the services at a meeting in December. Over two months later, the school notified the parent it would provide the services through its own personnel "immediately." Also, the IEP described the length of services to be "60-90 minutes a week" but did not contain any evaluative criteria for determining whether the student would receive language therapy for 60 minutes, 90 minutes, or something in between in any given week. "The length of service is stated in such a manner that neither the parent nor the therapist can clearly identify how many minutes of language therapy the Student will actually be receiving each week. Stating the length of service as a 'range' is permissible only when necessary to meet the unique needs of the student. When a range is used, the IEP must also specify the criteria for determining the number of minutes of service that will actually be provided to the student." Compensatory services were ordered for 90 minutes a week for 10 weeks to be provided by the private therapist.

Complaint No. 1415.99. Student's IEP was not developed in accordance with state and federal regulations. Student was to receive speech therapy services twice a week in the classroom and one-to-three times a week in a small group setting. The IEP did not indicate how long each of these sessions was to be. The IEP also did not contain any evaluative criteria for determining whether the student would receive speech therapy in small group sessions one, two, or three times a week.

Complaint No. 1449.99. The public agency did not follow federal or state requirements for determining speech/language services for a student with a communication disorder. The student's IEP indicated he would receive services "30 to 60 minutes" a week, but there were no evaluative criteria for determining whether the student would receive 30 minutes or 60 minutes, or any amount of service between. It is generally impermissible to state the amount of services by using a "range" of services. "Stating the amount of services as a 'range' is permissible only when necessary to meet the unique needs of the student. When a range is used, the IEP must also specify the criteria for determining the amount of services that will actually be provided the student." Also see Complaint No. 1703.01, where services were described in terms of a range without evaluative criteria to determine actual service.

511 IAC 7-41-10 Other health impairment 34 CFR §300.8(c)(9)

Letter to Williams, 21 IDELR 73 (OSEP 1994; OCR 1994). Neither IDEA, Sec. 504, nor the A.D.A. require a school district to conduct or obtain a medical assessment to determine whether a student has ADHD/ADD. Should a school district determine a medical evaluation is needed for diagnostic purposes,

Complaint No. 1350.99. Although the case conference committee had developed a behavior intervention plan for student with TBI to utilize during transportation (first in bus line and to sit in a designated seat), the plan was not communicated to a subsequent school bus driver, resulting in a confrontation on the bus that resulted in personal injury to the student.

RULE 42. DETERMINATION OF SPECIAL EDUCATION SERVICES

511 IAC 7-42-1

**Local Procedures and Training
34 CFR § 300.321**

Complaint No. 1512.00. Student is twelve years old and has an OI, LD, and low vision. An AT assessment was conducted and a CCC convened. At the CCC, the parent requested a one-to-one instructional aide. The principal, who was acting as the agency representative with the authority to commit resources, stated she could not commit to the service without first discussing this with the local superintendent. The public agency was found in non-compliance with Article 7 by not having present an agency representative with the authority to commit agency resources.

Complaint No. 1606.00. Student is ten years old and has multiple disabilities. At the student's CCC, the parent requested a one-to-one paraprofessional for the student. Two agency representatives were present at the CCC. Both disagreed with the need for a paraprofessional, but indicated that the decision to hire additional personnel would have to be decided at a higher administrative level. As a result, they would not commit either way, treating the request as a recommendation. The agency was found in non-compliance. As a part of the corrective action, the agency provided in-service training to agency representatives to advise them that, where a service is not to be provided, resolution is through mediation or due process and not through failure to commit any resources.

Letter to Collins, 30 IDELR 404 (OSEP 1998). An attorney for state teacher union asked whether a school psychologist or guidance counselor could serve as the representative of the agency at IEP Team meetings. OSEP responded that such a person could serve as the agency representative if the person satisfies the following criteria: (1) person be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (2) be knowledgeable about the general curriculum; and (3) be knowledgeable about the available resources of the public agency.

511 IAC 7-42-2

Notice of case conference committee meetings 34 CFR §300.322

Complaint No. CP-268-2008 (Reconsideration). The school did not fail to arrange a CCC meeting at a mutually agreed-upon date, time, and place. The school and the parent had participated in a due process hearing for the student, who had multiple disabilities. The IHO ordered the student into a residential facility and ordered the CCC to convene within the next ten school days to develop an appropriate IEP. The parent appealed to the BSEA, which upheld the IHO. The school attempted over the next two months to establish a mutually agreeable date, time, and place. The parent posed numerous questions that she indicated must be answered before she would participate. Eventually, the school set a date for the CCC, advised the parent she could participate in person or by telephone, and offered her an opportunity to propose alternative dates for the CCC meeting. The parent received Notice by e-mail, next-day mail, and by hand-delivery at her place of work. The parent then asked for certain personnel to be present and would "pick a date" once she was assured these persons would be in attendance. Another date was established, but the parent then objected to the location and wanted another school person to be attendance. Eventually, the CCC was held although resolution was not achieved. A subsequent CCC meeting was to be scheduled but the parent would not provide dates where she was available. Eventually, the school established a date and advised the

parent she could participate in person or by telephone. The parent filed a complaint, asserting in part that the school did not arrange a CCC meeting at a mutually agreeable date, time, and place. The school was found to be compliant with Article 7. The school had made numerous attempts to convene the CCC at mutually agreeable dates, times, and places in order to comply with the IHO's orders. The school had maintained records of its many attempts to do so. No violation of Article 7 occurred.

Complaint No. 2036.03. A school need only reach a mutually agreeable date, time, and place for a CCC meeting with one parent. In this situation, the CCC had to reconvene. One parent expressed preferences for certain times and a different locale that would be more convenient because of her work schedule. The other parent, however, agreed to the school's proposed date, time, and place for reconvening. The school's notice form indicated that if the date and time posed a difficulty, a parent should notify school personnel. Neither parent did. Both parents appeared for the reconvened CCC meeting. Article 7 does not require a school to reach agreement with both parents.

Complaint No. 1984.02 (Reconsideration). School's notice of CCC meeting consistently failed to advise the parent who from the School would be in attendance. Names and titles/positions of school personnel would be listed, but additional school personnel often appeared and participated in the CCC meeting. In addition, the school's form indicated the parent may bring additional persons to the meeting but adds a place for the parent to "please list the name(s) and titles of the person(s) you will be bringing." There is no indication that completing this portion is optional. Parent brought an advocate to the CCC meeting. The school had a practice of not conducting CCC meetings where advocates were present unless a representative of the cooperative was also present. The CCC meeting was rescheduled. The school's form and practice required corrective action. "The statement on the School's notice of case conference form that a Parent 'please list the name(s) and titles of the person(s) you will be bringing,' when coupled with the instruction to the parent to 'complete [the] page, sign, and return it to the school' implies that a Parent must list such information. This statement is unrelated to the requirement of the School to list names and titles of anticipated participants. Since it is not stated on the notice form that such information is strictly optional, and because the cooperative-level administrator is available to join the case conference committee meeting, this requirement fails to satisfy the requirements of Article 7. When a parent has made arrangements to interrupt home- or work-life to attend a case conference, the School must fully attempt to complete the required activities of a case conference committee. There may be legitimate reasons for either the School or the Parent to pause or terminate a case conference, and there are numerous ways to work successfully through difficult case conferences. But there cannot be an established practice of singling out a particular type of participant as being the cause for terminating case conferences."

Complaint No. 1813.01. Divorced parents had joint custody. Both parents are entitled to the same procedural safeguards, including prior written notice. The parent without physical custody sought to convene the CCC, but the school declined to do so because the parent with physical custody did not want to do so. The parent with physical custody in joint-custody situations cannot dictate whether the CCC meeting will be conducted. The public agency was obliged to convene the CCC meeting.

Complaint No. 1791.01. In two successive notifications for CCC meetings, the parent was not advised that additional school personnel would attend. The failure to notify the parent regarding who will attend on the school's behalf violated 511 IAC 7-42-2(d).

Complaint No. 1384.99. Attempting to schedule a case conference committee meeting within twenty-four hours by leaving a message on the parent's voice mail and faxing a notice is not "adequate notice" where the parent disagrees with the timing.

Complaint No. 2261.05 (Reconsideration). Advocate had been associated with a parent-training group. The advocate and parent-training group became disassociated, a fact that was communicated to the school district. A parent requested a CCC meeting and informed the principal that the advocate would be attending. The principal believed the advocate was prevented from assisting any parent in the school district. The advocate informed the parent she was acting independently and would not be participating as a member of the parent-training group. When the advocate appeared with the parent, the principal would not convene the CCC meeting. The CCC later reconvened without the advocate present. The failure to convene the CCC meeting violated 511 IAC 7-42-3(e), as the parent had the discretion to invite the advocate to the CCC meeting.

Letter to Serwecki, 44 IDELR 8 (OSEP 2005). Father and mother are estranged. Mother obtained a temporary protective order to prevent the father from having contact with her. Father obtained the services of an advocate to represent his interests at the child's IEP Team meeting. The advocate acted in his stead during two such meetings until the mother indicated she did not want the advocate to participate. The school informed the advocate she could no longer attend the IEP Team meetings unless accompanied by the father. OSEP responded that where both parents have retained rights under IDEA to represent the interests of the child, unless the protective order prevents agents of the father from also having contact with the mother, the advocate may participate as the father's representative. "We find nothing in Part B [of the IDEA] that would require that a parent be present at the IEP meeting in order to have a person that the parent determines has special knowledge or expertise regarding the child at the meeting as a member of the IEP team. If the protective order does not restrict the father's ability to make educational decisions for the child, and the father wants someone with knowledge or special expertise at the IEP meeting, the father would have to make a determination as to whether that individual has knowledge or special expertise regarding the child."

Complaint No. 1833.01. Parent-advocate had attended an earlier CCC meeting that became somewhat strained. Prior to the reconvening of the CCC meeting, the principal read a statement that school personnel would discuss the student's needs only with the parent and that "the advocate will be here as an observer, not as an active participant in our discussions unless she can treat all of us with respect that we extend to all visitors to our school." The advocate was not actually prevented from participating in the CCC meeting, but the public agency was required to clarify for its staff that parents have the right to bring individuals to CCC meetings whom the parents believe have knowledge or special expertise regarding the student or the student's needs. The public agency cannot restrict such individuals from participating in the CCC meeting.

Complaint No. 1673.01. Student is eight years old with a mild mental disability and emotional disability. At his CCC meeting, the parent sought an increase of speech/language services, but the parent was informed by the principal that increases in services could not be considered because (1) the caseload of the speech/language pathologist was full; and (2) principal could not hire additional staff because that was decided at a higher administrative level. There was not a disagreement about the student's need for additional services; rather, the concern was the school's ability to deliver such services. The public agency was found out of compliance for having an agency representative present who could not commit resources to provide the identified needs of the student. The public agency was also cited for attempting to develop the student's IEP based upon available resources rather than the individualized needs of the student.

Complaint No. 1603.00. Public agency failed to ensure the participation of a general education teacher at a student's CCC. Student was seven years old and had multiple disabilities. Student had not been in general education, but at the annual case review, participation in general education was to be discussed. The school

believed a general education teacher did not have to be present until the student was actually in a general education situation, but Article 7 requires the presence of a general education teacher where the student “is or may be participating in the general education environment.” 511 IAC 7-42-3(b)(3).

Complaint No. 1579.00. The CCC notice listed by name the general education teacher expected to attend. However, the guidance counselor appeared in the teacher’s place. A guidance counselor does not satisfy the requirement for a general education teacher to be present when a student will, or may be participating in the general education environment.

Complaint No. 1511.00. The public agency violated IDEA and Article 7 when it informed the parent that the parent could not bring an attorney to the CCC meeting for the student. The school stated it wished to avoid legal action, and there was no demonstration of any particular knowledge possessed by the attorney regarding the student or the student’s educational needs. The parent stated the attorney would be there to safeguard the student’s rights. The election to have one’s attorney present is at the discretion of the one inviting the attorney.

Complaint No. CP-292-2008. The LEA violated a student’s confidentiality when it sent a notice of a CCC meeting, which contained personally identifiable information, to a representative of the local bargaining unit. Before the CCC meeting occurred, the LEA’s director of special education notified school staff and the bargaining unit that the union representative could not attend the CCC meeting. An LEA would need the written consent of the parent before a representative of a teacher organization could attend the CCC meeting.

Complaint No. 1380.99. Public agency violated IDEA by permitting a teacher union representative to attend case conference committees. The public agency also violated IDEA and FERPA through the same practice, which permitted an unauthorized person (the union representative) access to personally identifiable information with regard to the student.

511 IAC 7-42-5

**Case conference committee meetings
34 CFR §§300.322, 300.324**

Complaint No. 2155.05. The student was 12 years old, had a learning disability, and was in the middle school. The student did poorly on the ISTEP+. The principal notified the parent the student would be retained. IC 20-32-5-16(b)(4) requires that any decisions regarding retention of an eligible student at the same grade level for consecutive school years be determined through the IEP process. The school failed to convene the CCC to discuss and determine whether the student would be retained, thus violating statute. The school had to reconvene the student’s CCC to discuss retention.

Complaint No. 2170.05. A student with multiple disabilities moved from another State to Indiana where the student’s parent sought to enroll the student in school. School staff met, but not as a CCC, to review information on the student. It was evident the student was eligible for Art. 7 services, but the records from the other State had not been received. The records did not arrive until over a month later. Services to the student were, nevertheless, delayed another six months. The school denied the student a FAPE by not convening a CCC within 10 instructional days from the date of enrollment. The school was required to provide compensatory educational services. Lack of records is not a justification for delay. See also 511 IAC 7-40-1 (Child Find) and 511 IAC 7-42-5(a)(4).

Complaint No. 2139.04. The parent requested on March 19th that the CCC convene, expressing a hope this would occur within the next couple of weeks. The school suggested waiting until additional assessments had been completed. The parent renewed the request for a CCC meeting in both April and May. The

parent sent a fourth request at the end of May. The CCC finally met on June 2nd. “Although Article 7 does not specify a timeline for convening the CCC upon the request of a teacher, parent, or administrator, ... in this instance, failing to convene the CCC by April 20th was non-compliant and, therefore, constituted an inordinate delay.” This violated 511 IAC 7-42-5(a)(3).

Complaint No. 1813.01. Divorced parents had joint custody. Both parents are entitled to the same procedural safeguards, including prior written notice. The parent without physical custody sought to convene the CCC, but the school declined to do so because the parent with physical custody did not want to do so. The parent with physical custody in joint-custody situations cannot dictate whether the CCC meeting will be conducted. The public agency was obliged to convene the CCC meeting.

Letter to Anonymous, 40 IDELR 70 (OSEP 2003). IDEA does not address the use of audio or video recording devices at IEP meetings. A State or local school district could require, prohibit, limit, or otherwise regulate the use of such devices. A policy that prohibits such use must provide for exceptions, especially where it is necessary for a parent to understand the process or to secure other parental rights under the IDEA. [Also, an exception would be necessary in order to provide a participant with a necessary accommodation for a disability under Sec. 504 or Title II of the A.D.A.] Any regulation of the use of such devices must be uniformly applied. If the public agency itself employs such devices, the recording is an “education record” under FERPA.

Intrastate IEPs.

Complaint No. CP-243-2008. The student had attended a school corporation where he had received special education and related services until declassified. The student later enrolled in a charter school. The charter school provided intervention services primarily to address the student’s hearing impairment. The charter school later sought to have the student evaluated. The student was found eligible for services at a subsequent CCC meeting. The charter school did not fail to implement the IEP from another Indiana public school. The student was not eligible for services upon enrollment.

Complaint No. CP-219-2007. Thirteen-year-old student with multiple disabilities was placed in a state-licensed child-care institution by his parent. The facility was not located in the school corporation of legal settlement. The school corporation where the facility was located did not serve the student, asserting the facility was a “private school” and the student had been unilaterally enrolled there by the parent; hence, the student was not entitled to a FAPE. The school district violated both Article 7 and Indiana law. The facility is the type of child-care institution contemplated by I.C. 20-26-11-8, which entitles the student to receive educational services from the school corporation where the facility is located. The facility is not a “private school” under either the IDEA, Article 7, or Indiana law. The student had a current IEP developed by an Indiana school corporation that was not implemented, nor did a CCC convene in a timely manner. Part of the corrective action involved development of a protocol with the facility to identify school-aged children placed therein by the courts or by parents, with means to staff CCCs when appropriate and to provide services.

Complaint No. 2086.04. The students moved from one Indiana public school district to another. Although eligible for special services, the current school district delayed convening the students’ CCC until November 10, even though the students enrolled in the school district and began attending school on August 27. The school failed to convene the students’ CCC within ten (10) instructional days after the students moved into the school district from another Indiana school district. 511 IAC 7-42-5(a)(4).

Interstate IEPs

Complaint No. 330-2008. Eight-year-old student with OHI moved from Ohio during the summer into an Indiana school district. The Ohio school district faxed the student's IEP to the Indiana school district two days after the student enrolled. The Ohio IEP indicated the student was receiving resource room services in all academic areas and requires a one-on-one aide due to the student's capacity for violence. A CCC timely convened (in this case, within five instructional days from enrollment), although "comparable services" were not provided for one week until the CCC met. The CCC proposed a self-contained classroom, adding that an FBA would be conducted and a BIP developed. The guardians provided written consent. No violations of Article 7 occurred in this regard.

Complaint No. 2170.05. A student with multiple disabilities moved from another State to Indiana where the student's parent sought to enroll the student in school. School staff met, but not as a CCC, to review information on the student. It was evident the student was eligible for Art. 7 services, but the records from the other State had not been received. The records did not arrive until over a month later. Services to the student were, nevertheless, delayed another six months. The school denied the student a FAPE by not convening a CCC within 10 instructional days from the date of enrollment. The school was required to provide compensatory educational services. Lack of records is not a justification for delay. See also 511 IAC 7-40-1 (Child Find) and 511 IAC 7-42-5(a)(4).

Complaint No. 2001.03. 511 IAC 7-42-5(a)(4) requires a CCC to convene within ten instructional days of the enrollment of a student receiving special education and related services in another school district or state. School did not violate Art. 7 when it failed to convene within ten instructional days after a student enrolled who had previously attended school in Florida. The student had been receiving accommodations pursuant to a Sec. 504 plan and had not been receiving special education and related services.

Complaint No. 1728.01. The student received special education and related services for an OHI in two other states. He moved to Indiana and enrolled in an Indiana public school district. The school was advised that the student had been receiving special education and related services in two other states. However, the school did not act upon this by convening a case conference committee within ten (10) days, as required by 511 IAC 7-42-5(a)(4). The parent eventually asked the guidance counselor for assistance for the student, whereupon it was discovered the school had failed to convene a case conference. By the time the school did convene a case conference and develop an IEP, six (6) months had passed.

Complaint No. 1602.00. Student was now 18 years old. He had been identified by the local school as having an LD when eight years old. Parent withdrew him from school in the fourth grade and enrolled him in a private school in another state. The student returned to the public school for his ninth grade year. The student's CCC did not reconvene when he re-enrolled. The school assigned him to general education classes, where his academic performance and school attendance were poor (even though the student did pass the GQE). Because the student had been eligible for services when he left the school—and had received special education services at the private school—the public school was required to reconvene when the student re-enrolled. The student was not "declassified" by the passage of time or intervening enrollment in a private school out of state. The student remained eligible for services.

511 IAC 7-42-5(b)(1)(A) Methodology

Lachman v. Illinois State Board of Education, 842 F.2d 290, 297 (7th Cir. 1988), *cert. den.* 488 U.S. 925, 109 S. Ct. 308 (1988). Parents and school disagreed as to the communication methodology to be employed with the student. Court found that once the requirements of IDEA are met, questions of methodology are for school to determine. A parent does not have the right "to compel a school district to provide a specific

methodology in providing for the education” of a student with a disability. The IEP proposed by the school was based upon an accepted, proven methodology. (Lachman was later clarified by the 7th Circuit in Board of Education of Community Consolidated School Dist. No. 21 v. Illinois State Board of Education, 938 F.2d 712, 717 (7th Cir. 1991).)

Todd v. Duneland School Corporation, 299 F.3d 899 (7th Cir. 2002). School is neither required to identify a student as “dyslexic” nor employ any specific instructional methodology. (See synopsis of case under 511 IAC 7-34-10, *supra*.)

J.P. et al. v. West Clark Community School Corp., 230 F.Supp.2d 910 (S.D. Ind. 2002). Parents of child with autism have “philosophical differences” with school district, insisting a 25-40 hour-a-week Applied Behavior Analysis (ABA) method of instruction through Discrete Trial Training (DTT), popularized as “Lovaas,” be the only program employed for the student. The majority of the program would be implemented in the home. Parents represent ABA/DTT is “so far superior to other programs that it should be recognized by the Court as the only reasonable way to teach autistic children...” School disagreed, choosing instead to employ a number of techniques, including some ABA/DTT approaches (an “eclectic” approach), but in a structured school setting. The IHO found the school’s proposed IEP was appropriate, although he also noted some minor deficiencies in the IEP itself, such as addressing toilet training and the recordation of progress data. The BSEA affirmed, as did the federal district court, noting that although IDEA grants parents the right to participate in making educational decisions, IDEA does not grant the right to compel a school district to employ a specific educational methodology or program where the proposed IEP meets the substantive requirements of IDEA.. It is insufficient for a Parent to proposed an IEP that is “better” than the one the school proposed; the Parent must show the proposed IEP is inadequate. An educational approach proposed by a school district for teaching a child with a disability satisfies legal standards for soundness if:

- The school district can articulate its rationale or explain the specific benefits of using that approach in light of the particular disabilities of the student;
- School personnel involved in implementing that approach have the necessary experience and expertise to do so successfully; and
- There are qualified experts in the educational community who consider the school district’s approach to be at least adequate under the circumstances. 230 F.Supp.2d at 936.

The court also noted that there is no consensus in the educational community about the proper way to teach preschool children with autism. The court also noted at 943 that the appropriateness of an IEP “must be determined at the time it is formulated” and not after the fact. “The fact that the [Parents] signed and approved each of the IEP’s used during the [school] year is evidence that the [Parents] considered the goals and objectives contained therein to be appropriate at the time.”

Complaint No. 1960.02. There is no specific requirement that Schools include particular methodologies in a student’s IEP. “Any disagreement about the need to include methodologies in the Student’s IEP is subject to resolution through mediation or a due process hearing.”

Elgin (IL), EHLR 257:591 (OCR 1984). Use of games as motivational techniques is within discretion of teachers and part of instructional plans, and is not required to be included in an IEP.

511 IAC 7-42-6

Developing an IEP; Components; Parent Copy

34 CFR §300.320

Complaint No. CP-332-2008 (*Reconsideration*). The IEP for a nine-year-old student with ASD required full-time special education placement “with opportunities for regular education activities and peer interactions as is appropriate” for the student. There are no indications as to location, frequency, and length

with respect to either the full-time special education placement or the “opportunities for regular education activities and peer interactions,” nor is there any means for assessing when the latter would be appropriate. In addition, some of the student’s goals were ambiguous, such as for language arts where the student would be able to “read simple books with 90% accuracy” without defining what was meant by a “simple book.” The ambiguities and attendant lack of clarity prevented the IEP from being implemented.. “Ambiguous IEPs are construed against the public agency that is responsible for [the] development and implementation [of the IEPs].” Also see **Complaint No. CP-153-2007**, where the student’s IEP stated “parents will be e-mailed weekly updates as needed on [the student’s] academic/social progress.” The school district meant the parent could look up the student’s progress through its Harmony Student System; the parent thought the school would send weekly progress updates. The use of “as needed” without more created an ambiguity that resulted in misinterpretation and misunderstanding. “Where an ambiguity exists in an IEP, the ambiguity will be construed against the School that is responsible for its development and implementation. IEPs must have sufficient clarity so that both the parents and school personnel understand what services a student is to receive.”

Complaint No. CP-178-2007. The school district violated Article 7 by preventing the parent from signing the IEP until she submitted her written opinion. “Stipulating that a parent submit a written opinion before being allowed to sign the IEP places a condition precedent upon the implementation of the IEP,” which would be contrary to Article 7. Part of the corrective action required the school district to provide a written assurance that “no parent will be required to provide a written opinion prior to signing an IEP[.]”

Complaint No. 1693.01. District’s forms for developing annual goals all contain the following boilerplate statement: “SCHEDULE FOR ASSESSING PROGRESS: Every grading period a report card and/or narrative report will be sent home.” Such pre-printed forms prevent CCCs from determining manner or frequency at which parents will be informed of student progress. Additionally, use of “and/or” construction creates automatic ambiguity. Neither staff nor parents can know how progress is to be reported. Ambiguities are construed against the maker.

Complaint No. 1398.99. The public agency violated state compulsory attendance laws by permitting a student under the age of sixteen years to withdraw from school. The public agency was also aware that the student, who had a significant learning disability, had numerous excused and unexcused absences that impeded his educational program, but did not address this behavior in three subsequent case conference committees nor did it develop a behavior intervention plan.

Complaint No. 1350.99. Although the case conference committee had developed a behavior intervention plan for student with TBI to utilize during transportation (first in bus line and to sit in a designated seat), the plan was not communicated to a subsequent school bus driver, resulting in a confrontation on the bus that resulted in personal injury to the student.

Complaint No. 1083.96. The public agency violated Article 7 and IDEA when it characterized modifications to general education classes as suggestions rather than requirements. See also **Letter to Anonymous**, 20 IDELR 541 (OSEP 1993).

511 IAC 7-42-8

Individualized education program; Implementation

34 CFR §300.323

I.C. 20-18-2-9

Complaint No. 1872.02. The student’s IEP prohibited the administration of a “standardized test” to the student. The IDOE defines “standardized test” as a “large scale assessment with consistent procedures for administration and scoring [that] is administered in accordance with explicit directions for uniform

administration.” This may include norm-referenced and criterion-referenced assessments. The student was administered the “Saxon Replacement Test,” which is considered a standardized test. This was contrary to the student’s IEP’s requirements.

Complaint No. 1449.99. Where an ambiguity exists in an IEP, the ambiguity will be construed against the public agency that is responsible for its development and implementation. IEPs and CCC reports have to have sufficient clarity so that both the parent and school personnel know what services a student is to receive, from whom, and whatever other resources will be employed in this endeavor.

511 IAC 7-42-10 Least restrictive environment and delivery of special education and related services 34 CFR §§300.107, 300.110, 300.114-300.120

In D.F. v. Western School Corporation, 921 F.Supp. 559 (S.D. Ind. 1996), the district court upheld the decision of the IHO in Art. 7 Hearing No. 713.93. His decision earlier had been reviewed and affirmed by the BSEA. The issues involved the extent to which “least restrictive environment” (LRE) relates to a “free appropriate public education” (FAPE), especially where the student does not attend the school he would have attended if not disabled (typically referred to as the “home school”).

The student had significant involvement, including cerebral palsy, hydrocephalus, seizure disorder, perceptual vision deficits, and communication disorder along with low intellectual functioning due to a moderate cognitive disability. He attended school in a program operated through the special education cooperative in a neighboring school district. The parents expressed a preference for his attending school in his own school district and at his home school. They and their experts believed that with sufficient support services, he could function adequately in a general education classroom. The school did not believe the student would derive any educational benefit from a general education classroom, and that support services would have to be so intense and individualized that the student would be isolated even in the class.

The district court, while acknowledging the LRE requirements under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1412(a)(5), 34 CFR §§300.550-300.553 (now §§ 300.114-300.120), and 511 IAC 7-12-2 (now 511 IAC 7-42-10), stressed that there is no presumptive effect of LRE in favor of a home school, and that FAPE and LRE contemplate more than academic achievement or benefit. Significant holdings of the court include:

1. Mainstreaming to the “maximum extent appropriate” does not mean maximum extent feasible, at 566, or the “maximum extent conceivable.” Id. at 571. A school must “balance the preference for mainstreaming against the need for individual educational programs tailored to the special needs of the child.” Id. at 571.
2. IDEA does not provide any substantive standard for striking the proper balance between LRE and its mandate for FAPE. Id. at 566. However, a general education class would be inappropriate for a student where modification of the curriculum would change the curriculum “beyond recognition,” the student would not “be able to master” any of the general education curriculum, and the student’s presence, with supplementary aids and services, would pose a significant distraction. Id. at 568-70.
3. Too much emphasis must not be placed on “strictly educational benefits of a child’s program at the expense of non-educational benefits, such as language and behavior models of other children in a class.” Id. at 566. “If a child’s disabilities are so severe that he would get little or no benefit from mainstreaming, then mainstreaming may not be appropriate, in spite of the statutory preference for mainstreaming.” Id. at 567.

4. There are four factors federal courts have employed in evaluating the appropriateness of a placement:
 - (a) What are the educational benefits to the student in the general education classroom, with supplementary aids and services, as compared to the educational benefits of a special education classroom?
 - (b) What will be the non-academic or personal benefits to the student in interactions with peers who do not have disabilities?
 - (c) What would be the effect of the presence of the student on the teacher and other students in the general education classroom?
 - (d) What would be the relative costs for providing necessary supplementary aids and services to the student in general education classroom? At 566-67, citing to Sacramento City Unified Sch. Dist. v. Holland, 14 F.3d 1398 (9th Cir. 1994), *cert. den.*, 512 U.S. 1207, 114 S. Ct. 2679 (1994), and Oberti v. Clementon Sch. Dist., 995 F.2d 1204 (3rd Cir. 1993).
5. “Academic achievement is not the only purpose of mainstreaming. Disabled students can also benefit from exposure to their non-disabled peers.” Id. at 569.
6. A student would be placed in his home school unless his IEP requires otherwise. IDEA “state[s] a preference for local placement” but does “not require placement in the neighborhood school.” Id. at 571.

Also see Letter to Davis-Wellington, 40 IDELR 182 (OSEP 2003). The IDEA does not require the IEP Team to determine promotion or retention of an eligible student. However, IDEA does not prevent an IEP Team from engaging in such decision-making. This could be a matter of state law or local procedure. “It is also important to note that a retention or promotion decision is not synonymous with a placement decision for IDEA purposes.”

Letter to Buell, 29 IDELR 902 (OSEP 1997). Neither IDEA statutes nor IDEA regulations define the term “regular classes.” Also, because IDEA “does not use the term ‘inclusion,’ there is no Federal definition for that term.” IDEA does not dictate maximum class sizes, composition requirements (general and special education students in a class), or teacher-pupil ratios, these being matters for State regulation. “However, we believe that if the particular class size or composition impacts on the provision of FAPE to a child, the local educational agency must ensure that the child receives the special education and related services as specified on the IEP.”

Letter to Bauer, 30 IDELR 704 (OSEP 1998). Educational placements for students with disabilities must be based upon individual need and not upon state funding formulas.

511 IAC 7-42-10(b)(2)

Non-Academic and Extracurricular Activities

34 CFR §300.107, § 300. 117

Complaint No. CP-258-2008. High school student has a learning disability as well as an unspecified medical condition that causes him to be nauseous in the morning. At the end of the previous school year, the parent and the school district executed a mediation agreement that provided in part that the student would be able to try out for the basketball team. At the beginning of the new school year, the student’s physician provided a written letter to the school district, indicating the student’s health difficulties

(vomiting in the morning due to nausea that predominates in the morning) and recommending either a shortened school day or homebound. The student was placed initially on a shortened instructional day and later on homebound. When try-outs for basketball were scheduled, the school district would not let the student participate because he was not enrolled in a sufficient number of credit courses, as required by the by-laws of the Indiana High School Athletic Association, which sanctions interscholastic basketball competition. Although the mediation agreement stated the student would be allowed to try out for the basketball team, at the time of its execution, the student was enrolled in a sufficient number of credit-producing courses. The school district did not violate Article 7.

Complaint No. 2196.05 (*Reconsideration*). The student's IEP stated the student would participate in non-academic and extracurricular activities and "may need an interpreter." An after-school athletic program was conducted on the LEA's premises. An LEA newsletter and website mistakenly referred to the program as a school-sponsored extracurricular activity. School personnel did participate but only as volunteers. The program was actually sponsored by a not-for-profit organization that was not affiliated with the LEA. The not-for-profit organization applied for use of the LEA's facilities as all other groups would. The student sought to participate in the program, but the LEA declined to provide the interpreter services. The LEA did not violate Art. 7 because the extracurricular activity wasn't a school-sponsored activity. (The not-for-profit organization provided interpreter services so the student could participate.)

Complaint No. 2161.05. The student is deaf and requires interpreter services. The student's IEP calls for "interpreter services daily." These same words appeared in the student's previous IEP where interpreter services were provided for both academic and extra-curricular activities. The student wanted to try out for the golf team. A disagreement arose over whether the IEP extended to interscholastic athletics. It was resolved through agreement that interpreter services would be provided so that the student could participate on the golf team.

Complaint No. 2061.04. Student was 18 years old and had a TBI with a communication disorder. He served as a manager for one of the athletic teams. The school violated Art. 7 when it did not send him a letter inviting him to the Spring Sports Awards Program, even though all the athletes had received such an invitation. The school did not make available to the student the same educational programs and services that it did to students without disabilities.

Complaint No. 2054.04. Elementary school student wished to participate in a community-sponsored football program. However, participation required signed permission from the student's principal. The principal declined to do so because the student's grades had been poor. As a consequence, he was denied participation by the football program. This did not violate Article 7 because the program is not offered by or through the school district.

Kern (CA) Union High School District, 38 IDELR 251 (OCR 2003). It was appropriate for the school to consider potential health and safety risks for a student with cerebral palsy before allowing him to serve as "water boy" for the football team.

Complaint No. 1929.02. Elementary school child has an orthopedic impairment. She has used a wheelchair since kindergarten and has attended this school for three years. The school has sought grant funds for a wheelchair swing but has been unsuccessful. The playground is paved, but there are two sections in the center of the playground where shredded tires are used for ground cover, making these areas inaccessible to the student. The playground has no wheelchair-accessible playground equipment. The school failed to make available to the student the variety of nonacademic activities for the student that are made available to students without disabilities.

Complaint No. 1762.01. Student had a disability but was capable of earning a high school diploma. He was not entitled to participate in his class's graduation ceremony because he had not satisfied graduation requirements. The school was not required or otherwise obligated to permit him to participate in the graduation ceremony and then later, when he actually did satisfy requirements, provide him with his diploma. The school's policy did not let any diploma-track student participate in the graduation ceremony where the requirements for earning a diploma had not been met. (The student did eventually complete the requirements and did receive his diploma.)

Complaint No. 1671.01 (Reconsideration). Student's IEP indicated the extent to which the student would participate in non-academic and extracurricular activities. Included on this list were field trips and convocations. He could be removed from non-academic and extracurricular activities where the student's behavior "causes concern for teacher and students." There are no further details about the behavior that would result in deprivation of such activities. The student's BIP essentially incorporated the terms of a behavior contract, but did not address exclusion from participating in field trips. The student was prevented from attending two field trips. The school was found to have violated Article 7 in several respects: (1) the BIP did not address field trips and convocations; (2) the IEP and BIP were not coordinated in such a fashion that one would know what behavior would precipitate exclusion from non-academic and extracurricular activities; but, more importantly, (3) under Indiana law, field trips and convocations are **not** non-academic and extracurricular activities but are defined as educational programs under the direction of a licensed teacher. See 511 IAC 6.1-3-1(d), (e). "Exclusion from field trips, convocations, or other instructional time requires specific justification because of the impact on the provision of a free appropriate public education."

Complaint No. 1631.00. Student had cerebral palsy and scoliosis. He was excluded from several field trips because of safety concerns expressed by his teachers. Public agency was found out of compliance with Article 7 for not establishing, through the CCC process, criteria for determining when it would not be safe for the student to participate in a field trip and including such criteria in the student's IEP.

511 IAC 7-42-11 Instruction for student at student's home or alternative setting
34 CFR §§300.104, 300.115, 300.118

Complaint No. CP-224-2007. The school district provided homebound services to a student with a primary disability of OHI. However, one of the teachers did not currently hold a teacher license. Homebound instruction must be provided by individuals who are appropriately licensed to provide instructional services. The individual was akin to a paraprofessional. "A paraprofessional may only reinforce instruction that has already been directly provided by a licensed teacher and must remain under the direct supervision of the licensed teacher who is responsible for overseeing and supervising the services from the paraprofessional." As a part of the corrective action, the school district had to ensure that only appropriately licensed individuals were employed to provide homebound instruction. The student was also entitled to compensatory educational services.

Complaint No. 1390.99. The student was sixteen years old and had cerebral palsy with a severe cognitive disability. The student was placed on homebound in 1997 for medical reasons, but no teacher appeared to provide services. Telephone calls to the public agency were not returned. The local director, after being advised by the physical therapist that the student had not received any homebound services for the entire school year, inquired and discovered the homebound teacher, although reporting he was providing services, was not doing so. The public agency would have discovered this had it convened every sixty (60) days to review the program and to reassess its appropriateness, as required by Art. 7.

Complaint No. 1577.00. School failed to establish justification for homebound placement of student with OHI. It compounded the error by not meeting every 60 days to review the placement.

Complaint No. 1556.00. Student was nine years old and had ED/OHI. School advised the parent that the student had a pocket knife on the bus and had threatened to harm herself. Parent placed the student in a children's psychiatric unit at a local hospital. The parent requested homebound services; however, the school conditioned the provision of homebound services upon receipt of medical information regarding the student. As a result, homebound services did not begin until almost a month after the student's discharge. Under these circumstances, medical information is not required as a condition precedent to providing homebound services. There was an interruption of services occasioned by the school's failure to provide services or reconvene the CCC.

Complaint No. 1507.00. Student had an ED and was eight years old. At the CCC, it was determined the student should be served through a day treatment program. Funding would be secured through the IDOE (see 511 IAC 7-47-1). During the interim, the student would receive educational services through homebound instruction. However, the IEP did not indicate the length, frequency, and duration of services.

**511 IAC 7-42-12 Instruction for students with injuries and temporary or chronic illnesses
34 CFR §104.33**

Complaint No. CP-242-2008. High school student was not eligible for Article 7 services but did have a chronic condition (digestive system, depression, anxiety) that resulted in numerous absences from school. The school district received numerous communications from the student's physician, explaining his absences. The physician never requested homebound instruction for the student, but the school district never informed the parent or the physician that such a service was available or what documentation was required. The principal stated such information was not provided because the student had been able to make-up his work when he returned and earn credit. However, there was no documentation to support this statement. The school district violated Article 7 by failing to provide homebound instruction to a student with a temporary or chronic illness that precluded attendance at school for the requisite number of school days. The corrective action required development of policies and procedures between the special education cooperative office and the participating school districts regarding such services for students who are not otherwise eligible for Article 7 services.

Complaint No. 2246.05. The student was unable to attend school full-time due to a chronic illness. The student was eligible for homebound instruction. The LEA had been previously cited for poor homebound policies and procedures (Complaint No. 2201.05). In this case, the LEA had no clear homebound instruction plan for the student. Four teachers were listed as service providers, but there was no indication of the number of hours each would provide or on what days. Contact was sporadic (or not at all). Compensatory services were required to ensure the student met the requirements for promotion.

Complaint No. 2276.06. Student has chronic asthma. The physician completed the Certificate of Incapacity, but wrote various days the student might be absent and then struck-through the dates, offering a range of 10 to 30 days the student might be absent through the school year.³ The LEA requested another Certificate, this one without the strike-outs. This time, the physician indicated the student's condition was chronic and permanent, and would cause the student to miss more than 20 days of school during the school year. The LEA was found to be in compliance. (Although the LEA was in compliance with respect to this complaint, it became evident during the investigation that the LEA's policies and procedures for homebound instruction were not compliant with Article 7. The LEA had to amend its policies and procedures to comport with the requirements of Art. 7.)

³The Certificate of Incapacity is actually required by statute. See I.C. 20-33-2-18. A form for this purpose is available from the State Attendance Officer's web site. See www.doe.state.in.us/sservices/pdf/ChildsIncapacityForm.pdf.

Complaint No. 2201.05. The student had a chronic illness and was absent from school for extended periods of time. The student missed 58.5 days in the first semester. The parent presented the LEA with a physician's statement supporting the need for homebound instruction. However, the statement did not include a specific diagnosis of the student's illness or medical condition, and did not state the student would be absent for twenty (20) instructional days. The school did not provide homebound, even though the student had—at that time—already missed 38.5 days of school. The LEA also did not request additional information. The LEA violated Art. 7. The LEA had a duty to seek additional information it deemed necessary to complete the homebound instruction application.

Complaint No. 1677.01 (Reconsideration). Student was not found eligible for special education services, but was nevertheless chronically ill due to asthma. An initial physician's note was nonspecific as to the numbers of days the student might be absent due to his illness, listing this as "zero to all school days." The parents placed limitations on the school's ability to consult with the physician directly. The nonspecific statement of the physician was inadequate to support the need for homebound. When it was determined the school did not violate Article 7, the parents sought reconsideration. At this time, they submitted a new physician statement that complied with Art. 7. Notwithstanding, the school did not violate Article 7. The IDOE forwarded the revised physician statement to the school for consideration and action under Article 7.

Complaint No. 1543.00. Sixteen-year-old student with an ED was involved in an accident that resulted in his hospitalization. Hospital and school arranged for him to receive educational services during his hospitalization. Although school personnel and the parent discussed homebound, the CCC was not reconvened nor was an IEP developed to address homebound services. The student's physician cautioned that the student, due to the severe nature of the accident, would fatigue easily, would lack endurance, and would experience pain for some time. Upon the student's discharge, his school attendance was spotty. The school and the parent continued to discuss homebound and how to make-up first semester work. Other school administrators informed the parent that the student had missed too many days, could not make up any first semester work, could not get credit for any such work, and should be withdrawn from school. When school officials asked the parent to come to school to sign the withdrawal papers, she filed a complaint instead. The school was found to be out of compliance with Article 7. The lack of communication among school personnel resulted in a denial of FAPE. School personnel were aware of the student's medical needs and had received medical information regarding the student's decreased vitality and expected problems with full-time school attendance. This information should have triggered a CCC to discuss the possible change of placement to homebound, or a combination of homebound with typical school attendance. The CCC did eventually meet and found the student to be eligible for services as a student with a TBI, based in part on a neuropsychologist's report obtained by the parent. Homebound was continued during the summer to compensate for the lost instructional time.

511 IAC 7-42-13 Nonpublic School or Facility Placements by Public Agencies
34 CFR §§300.2, 300.104, 300.114(b), 300.145-300.147
I.C. 20-35-6-2; 511 IAC 7-47-1

Complaint No. CP-228-2007 (Reconsideration). The student was 14 years old and in the eighth grade. Due to his ED, he had been placed in a private residential facility to receive a FAPE. The private residential facility determined the student's needs were too great for it to address and notified the school corporation that the student would be discharged. The facility was concerned that it was not secure enough given the gravity of the student's needs. It recommended "a more secure setting," notably one that would provide "long-term psychiatric hospital care in an in-patient setting" to address the student's "need of intense behavior modification." The school corporation sought parental permission to seek other potential facilities; however, before the school could do so, the parent moved into a neighboring school district. The

student was enrolled in the new school district. A CCC developed a new IEP but until an appropriate residential setting could be obtained, the student was to receive homebound services at a secure setting. The parent disagreed with the homebound services and would not provide permission for the new school district to seek a residential placement. Because the parent would not consent to homebound services, the student did not receive any educational services for four (4) months. Although the unusual circumstances in this matter explain the new school district's failure to implement the IEP of the student upon his arrival in the new school district, the new school district's failure to provide any services for a four-month period cannot be explained. While the school district may have to avail itself of mediation and due process under Article 7 in order to secure an appropriate residential setting for the student, the school district should have utilized other available procedures to ensure that a student of compulsory school age receives educational services. Such procedures may include involvement of the county Child Protective Services. (The student in this matter eventually did receive homebound services in a secure setting while the school district and the parent engaged in a due process hearing and administrative appeal. It was determined that the student still requires a residential placement in order to receive a FAPE.)

Butler, et al. v. Evans, Indiana Department of Education, et al., 225 F.3d 887 (7th Cir. 2000). A student's unilateral hospitalization was for medical care and not for educational reasons. As a result, the IDOE was not responsible for the costs of the psychiatric hospitalization. The student's IEP did not require in-patient psychiatric care.

Complaint No. 1609.00 (Reconsideration). Student was in the eighth grade and received full-time day-school programming through the local community mental health center, funded through the IDOE. The public school submitted a reapplication for funding but did not indicate a need for respite care or case management services. The school amended its application to include pages from an IEP calling for 15 hours of case management a week and 16 hours of respite care services a month. However, these services were added to the IEP by the school after the CCC had concluded. The parent was not provided a copy of the IEP that was revised to add the additional services. Also, the IEP did not detail how the parent would be advised of the student's progress towards the annual goals that were properly in the IEP.

Complaint No. 1507.00A. Student was eleven years old and had an ED. CCC determined LRE would be a day treatment program once the student was discharged from an out-of-state program. Once the student was discharged, the student was placed first into an alternative program and then placed on homebound, pending application for funding. However, the school took six weeks to complete and submit the application after the student had been discharged and returned to his school district. This constituted a failure to implement the student's IEP.

Letter to Gilchrest, 29 IDELR 977 (OSEP 1998). The reauthorized IDEA does not prohibit appropriate placements of students with disabilities into private schools in order to receive a FAPE in the LRE. The "continuum of alternative placements" is not undermined nor is "a State's ability to place a disabled child in a costly, intensive private school placement...if it is properly determined that such a placement is necessary in order for a particular disabled student to receive a free appropriate public education (FAPE)." Under IDEA, §1412(a)(5)(B) "does not require a State to revise a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, unless it is determined that the State does not have policies and procedures to ensure that the funding mechanism does not result in placements that violate the LRE requirements [of IDEA]."

511 IAC 7-42-14

Transportation of students in public or private residential placements

34 CFR §§ 300.34(c)(16), 300.107(b)

I.C. 20-35-8-1, I.C. 20-35-8-2

Complaint No. 2150.04. The student was placed residentially for educational reasons. The student’s IEP did not describe the relative responsibilities for the costs of transportation associated with the residential placement. The parents had to travel to the out-of-state placement to participate in a CCC meeting, but the school did not reimburse them for these costs. The school reimbursed the parents for their transportation costs and reconvened the CCC to address specifically transportation related to the residential placement.

Complaint No. 1216.97. A 17-year-old student with autism and a moderate cognitive disability was placed in a residential facility out of state. However, disagreements between the parent and public agency arose over the number of trips that could be made to the facility. The public agency did not have any policy or procedures regarding transportation under such circumstances, and the student’s IEP did not reflect the number of parental trips or the number of times it would be appropriate for the student to come home. The public agency also lacked procedures for discussing with the private facility the appropriateness for home visits by the student.

RULE 43. RELATED SERVICES; TRANSITIONS; TRANSFER OF RIGHTS

511 IAC 7-43-1

Related Services

34 CFR §300.34

Complaint No. 1743.01. A physician’s order prior to providing OT services is not required by Article 7 and cannot be required by a school district in advance of providing such a service. Also see Complaint No. 1778.01, Complaint No. 1649.00, and Complaint No. 1574.00.

Complaint No. 1583.00. Agency violated Article 7 by describing related services to be provided as a range of services (i.e., 10-30 minutes, “as appropriate”), but without describing “as appropriate” or other criteria for determining length and frequency of services to be provided.

511 IAC 7-43-2

Transition from early intervention services (Part C) to early childhood special education (Part B)

34 CFR § 300.124

Complaint No. 2079.04. Student with a significant hearing impairment turned three years of age in December. First Steps, the Part C provider, referred the student to the school district in September rather than six months prior to exiting its program, as required. A transition meeting for October at the parent’s home was established by First Steps. School personnel were invited. First Steps provided the school with copies of its records on the student. The school did not attend the transition conference. The school sent the parent its “Ages and Stages Questionnaire” (ASQ), which is a questionnaire to be completed by a parent and then used by the school as a screening instrument to gather information on the child’s current skill levels. The school “scores” the ASQ and sends the parent a letter entitled “Preschool Developmental Screening Results,” addressing six developmental areas and indicating whether the student is age appropriate or additional evaluation is indicated. The letter concludes with three alternate conclusions, one of which is to be checked-off by the school: (1) the child is age appropriate and no further evaluation is needed; (2) there are possible developmental delays in one or more areas and additional evaluation is recommended; or (3) the results indicate a possible delay in speech. Depending upon which area the parent checks, there are designated people the parent should contact for further information. The school checked the third conclusion (possible speech delay). The letter did not include any information regarding the criteria for an initial, comprehensive educational evaluation or the role of the CCC in determining evaluation needs and eligibility. The school’s speech pathologist did evaluate the student in November and recommended a comprehensive evaluation for the student. A second transition conference was conducted

in November with school personnel in attendance. After the transition conference, the school convened a CCC meeting where the student was determined eligible for services and an IEP was developed. The IEP would be implemented on the student's third birthday in December, even though a comprehensive educational evaluation would still be conducted. Although the school was able to make available services to the student by his third birthday despite First Steps' failure to timely refer the student, the use of the ASQ was considered a problem. The ASQ can be used as a screening tool or as part of a comprehensive evaluation scheme, but "the ASQ may not be used as the single piece of information to determine the need for a more comprehensive evaluation, nor may it be used as the sole evaluation instrument in determining a student's eligibility for special education and related services." The language in the "Preschool Development Screening Results" letter appears to make an eligibility determination and does not inform a parent of the right to request an evaluation or participate in the CCC to determine eligibility." Corrective action was warranted to ensure the proper use of the ASQ and its reporting letter.

Complaint No. 1092.96. Failure of the Head Start program to initiate transition between IFSP and IEP does not excuse the public agency or otherwise permit the public agency not to have preschool services available for an eligible student on his third birthday.

Complaint No. 1098.96. Public agency violated Article 7 and IDEA when the school psychologist determined eligibility without benefit of the case conference committee.

511 IAC 7-43-4

**Transition IEP 34 CFR §§300.43, 300.320(b),
300.321(b), 300.324(c)**

Complaint No. 1482.99 (Reconsideration). A public agency is required to invite a student to attend a CCC where the student's transition needs will be discussed regardless of the student's age. Should the student not attend, the CCC is to consider the student's preferences. Although a student's parent can preclude the student's attendance at the CCC until the student is 18 years old, the parent cannot preclude the agency from complying with federal and state law by inviting the student to attend. If the parent does not want the student to attend, the agency must take other steps to ensure the student's preferences and interests are considered at the meeting in the student's absence.

511 IAC 7-43-5

**Transfer of Rights to Student
34 CFR §§ 300.520, 300.625**

Complaint No. 2167.05. The student turned 18 years old. The parent and the student were informed by the school of the Transfer of Rights because of the student's age. The parent indicate a guardianship would be obtained but this never occurred. At a subsequent CCC meeting, school personnel had the parent remain in a waiting area while procedural safeguards were explained to the student, including the right to have the parent participate in the CCC meeting. The student indicated he wanted the parent to participate. The parent participated in the rest of the CCC meeting. The CCC later reconvened. The parent participated fully in the subsequent CCC meeting. Although the school had properly and timely notified the parent and the student of the Transfer of Rights, it violated Article 7, specifically 511 IAC 7-42-3, by not permitting the parent, at the invitation of the student, to participate fully in the CCC meeting. However, the school's unilateral corrective action was sufficient to remedy the error.

Complaint No. 2138.04. The student was over the age of 18 and not subject to a guardianship. The school failed to advise of the Transfer of Rights and did not invite the student to the CCC meeting. This constituted a violation of 511 IAC 7-42-3(b)(5)(B).

RULE 44. DISCIPLINE PROCEDURES

511 IAC 7-44-1

**Removals In General
34 CFR §§300.170, 300.530-300.536**

Suspensions

CP-348-2008 (*Reconsideration*). Thirteen-year-old student with ASD received total of 19 days of in-school and out-of-school suspensions during the first semester. School district argued the student's IEP was implemented during the in-school suspensions. However, the student was assisted at these times by aides and not licensed teachers. Because the student's IEP could not be implemented by aides, the in-school suspensions were considered "suspensions" to the same extent as the out-of-school suspensions. The school district failed to ensure the student received educational services during extended periods of suspension.

Complaint No. CP-303-2008 (*Reconsideration*). Eight-year-old student with ED was, according to school records, suspended for 12 days during the first semester. There were other days the student was not in attendance. These were marked as "voluntary pull-out" days, although the student's IEP and BIP did not provide for a "voluntary pull-out." The school bus driver declined to pick-up the student on one day, in the mistaken belief the student was suspended. The student was also sent home early on two other days but this was not marked as a suspension. "A unilateral, temporary removal of a student from a student's current placement, not pursuant to the Student's IEP, is a suspension. Suspension for part of a day constitutes a day of suspension." A part of the corrective action required compensatory educational services for the student.

Complaint No. 2333.06. High school student with an ED was suspended eight times for 25 days during the school year, mostly for profanity, failure to follow directions, and fighting. After the tenth cumulative day of suspension, the school sent homework to the student, which he completed. When he returned to school, his teacher reviewed his work with him. This did not constitute appropriate instruction for a student who has been suspended for more than ten (10) cumulative instructional days in the same school year. Instruction is from a licensed teacher. Sending homework to the student is insufficient to satisfy the requirement that a student on long-term suspension receive services that enable the student to progress appropriately in the general curriculum or achieve the goals in his IEP. The student was entitled to compensatory educational services.

Complaint No. 2249.05 (*Reconsideration*). LEA suspended the student for more than ten instructional days. Following the tenth day, the LEA had the student take his textbooks home and accepted homework for credit. However, the LEA did not provide any instruction. The student was later suspended again. The principal determined the student would require ten (10) hours of homebound instruction during the period of suspension. The LEA violated Art. 7 by not ensuring the continuation of educational services following the tenth day of suspension. Allowing a student to submit homework without instruction does not satisfy the requirement that educational services continue during the period of expulsion or long-term suspension. In addition, the amount of homebound services is a CCC function and not a unilateral decision by a school administrator.

Complaint No. 2074.04. Student was 18 years old and had an ED. He was suspended from school for four days for aggressive behavior. The Notice of Suspension indicated the student could be brought back to school on November 4th. The parent brought the student back on Nov. 4th. The parent was not prepared for a CCC meeting that date. The school acknowledged it failed to provide notice. The CCC met anyhow and proposed a placement at a different school. The parent wanted to visit the other placement. The school and the parent agreed to reconvene on November 7th, giving the parent a chance to visit the program. After the

meeting on November 4th, however, the principal would not permit the student to return to school. The principal indicated the student would have to remain out of school until the CCC met on November 7th, but added the days missed would not count as out-of-school suspensions. The principal's actions constituted a constructive suspension from school and failed to follow the procedures in statute for suspending a student. See I.C. 20-33-8-18. The principal's actions required compensatory educational services.

Complaint No. 1996.03. Student was not suspended from school. The student was assigned to detention and did spend seven days in a middle-school program that was an alternative to suspension. However, the student's IEP was implemented during this alternative placement.

Complaint No. 1962.02. Student moved into Indiana school district with an IEP from another state requiring self-contained placement. Indiana school district did not revise the IEP and did not implement it either. Student was placed through the CCC into an in-school suspension (ISS) for 25 days. However, the student's IEP was not implemented during the ISS. Accordingly, the 25 days were considered the same as out-of-school suspensions.

Complaint No. 1778.01. Due to behavior, a six-year-old student was often sent home early during the first half of a school year. The school did not maintain records to indicate how often this occurred, nor did it consider that these actions constituted "suspensions" for Article 7 purposes. Under 511 IAC 7-44-1, a suspension is a unilateral temporary removal of a student from the student's current placement by the public agency. Short-term removals pursuant to a student's IEP are not considered suspensions. These removals were not pursuant to the IEP. As a result, each removal constituted a day of "suspension."

Complaint No. 1698.01. School failed to ensure the continuation of educational services to a seven-year-old first grade student suspended multiple times from school. The school sent home homework assignments but did not provide a licensed teacher. Also, although the school conducted an FBA and developed a BIP that described the student's untoward behaviors and identified targeted replacement behaviors consistent with the FBA, the BIP did not identify any interventions or strategies to be used to change the untoward behaviors of non-compliance, temper tantrums, and physical aggression. Also, the CCC did meet to determine whether the student's behavior was a manifestation of his disability, and found that this was so. However, the school continued his suspension for a full week past the CCC's determination of manifestation.

Complaint No. 1674.01 (Reconsideration). Local school district and court had cooperative program that would provide supervision for students who were suspended from school. There were no licensed teachers and the IEPs of students could not be implemented in the court program. However, the student had not been suspended for over ten (10) instructional days (in fact, he was suspended for only three days). During this period, the school was not required to provide any services to the student. The fact that the services may have been inadequate during this period does not create a violation of Article 7. There was no duty on behalf of the school to do anything. See I.C. 20-33-8.5 *et seq.* (Court-Assisted Resolution of Suspension and Expulsion Cases).

Complaint No. 1539.00. Where the school knew that a student did not have an alternative means to attend school without transportation, suspension from the school bus was tantamount to suspension from school. Accordingly, the suspensions from the bus were included in the cumulative suspensions from school during a school year. Also, the school was found in violation of state law by counting out-of-school suspensions as "unexcused absences" and adding sanctions for violating the school's attendance policy. I.C. 20-33-8-31 indicates that suspensions are exceptions to compulsory school attendance. A student who is suspended from school cannot be counted as having an "unexcused absence." See 511 IAC 7-44-1(e).

Complaint No. 1493.99. The school district violated special education and state law when it used the CCC process to extend a student's suspension by "waiving" the limitations on allowable days of suspension. At the time, the school had already suspended the student for eight (8) cumulative days. Through the CCC process, the school attempted to "waive" the time limitations by extending allowable days of suspension to fifteen (15) days. State and federal law do not authorize a CCC to waive discipline rules.

Expulsions

Complaint No. 1748.01. LD student, 15 years old, was expelled from school. The principal, although advised by the local director of special education that this was inconsistent with Article 7, had the student sign a *Waiver of Statutory Rights Applicable to Expulsion*, which waived statutory hearing rights under I.C. 20-33-8 *et seq.* Although there was a line for a parent to sign, the student was a ward of the state and the parent signature line remained blank. Statute requires the parent to sign such a waiver. The school violated both Article 7 and I.C. 20-33-8-28.

Complaint No. 1542.00. Thirteen-year-old student engaged in frequent episodes of inappropriate and disruptive behavior, and displayed low academic performance. She had received detentions, suspensions, and other forms of school-based sanctions. There were frequent telephone conversations between school personnel and the parent. A referral for special education was initiated, with the suspected disabilities of ED and LD. While the evaluation process was occurring, the student was charged with fighting and gross insubordination, and suspended from school for ten (10) school days pending expulsion. She was expelled from school for the remainder of the second semester and all of the first semester of the following school year. Eventually, the case conference committee did find her eligible for services as a student with an ED. The school was found to have committed numerous procedural lapses:

- Upon initiation of the referral, the procedural safeguards attach, and would remain applicable to the student until or unless the student was determined not eligible for services.
- The school violated IDEA/Article 7 by exceeding the number of cumulative days of suspension in a school year and by expelling her without ensuring a continuation of educational services.
- When the case conference committee eventually convened and found her eligible, it did not determine whether the behavior was a manifestation of her disability.

Complaint No. 977.95. Foster parent attempted to refer student for an educational evaluation in September. However, the school would not accept the foster parent's request until November. During this period, the student was suspended three times and eventually expelled. The procedural safeguards attached upon referral by the "parent" and are to be followed until case conference procedures are completed and a determination is made as to eligibility. If eligible, the case conference needs to assess whether or not the student's behavior was a manifestation of his identified disability and determine what compensatory educational services, if any, would be necessary should the disciplinary actions be determined inappropriate.

Complaint No. 1323.98. The student was expelled from school on September 21. However, the student's case conference committee did not meet until October 29. The school implemented a homebound instruction program that addressed the inordinate delay in the provision of services, discussed possible compensatory educational services, and methods for conducting a functional behavioral assessment.

Complaint No. 1305.98. It is a denial of FAPE, and thus a violation of IDEA and Article 7, to deny credit to an expelled student who otherwise completes course work during the term of his expulsion.

Complaint No. 1355.99 involved the same school district as in Complaint No. 1305.98. Indiana Protection & Advocacy initiated a complaint against the district, alleging that the district denied an expelled student a FAPE. In this case, the student was alleged to have cut with a knife the tire of a car while attending a football game. The student's case conference committee met to review the behavior and determine whether it was a manifestation of his disability. Determining no causality, the student was placed on homebound instruction for five (5) hours a week. The case conference committee did not discuss whether the student would receive credit. The parent was informed by a separate letter that no credit would be provided the student for the work performed while expelled. The school district was again found out of compliance with State and Federal law by unilaterally determining, outside the case conference committee, not to award the student credit for the instruction provided during the term of his expulsion. Informing parents of their right to due process to challenge a unilateral decision does not change the fact the decision made was a unilateral one made outside the case conference committee. A denial of FAPE occurred.

Complaint No. 1138.97. Where a case conference committee determines the student's behavior is not a manifestation of his disability, the parent is to be advised of the parent's right to school-based expulsion meeting process or an expedited special education due process hearing.

511 IAC 7-44-5

Manifestation determination 34 CFR §§300.530(e),(f); 300.532

Complaint No. 2240.04. ED student was suspended for untoward behavior. The student's CCC met timely to assess whether the student's behavior was a manifestation of his disability. The CCC discussed a number of recent behaviors exhibited by the student, including verbal and physical aggression. The student's BIP was also reviewed. The CCC was in unanimous agreement the behaviors were not a manifestation of his disability. However, rather than being referred for an expulsion meeting, the LEA decided to give the student another chance. Seven school days later, he engaged in the same behaviors. The student was referred for expulsion. The student was subsequently expelled. However, the CCC did not convene to conduct a manifestation determination after the most recent exhibition. The CCC was required to convene within ten (10) instructional days of the LEA's decision to remove the student from his education placement.

Letter to Yudien, 39 IDELR 242 (OSEP 2003). IDEA does not limit a manifestation determination review only to the disability that served as the basis for eligibility. The review can include consideration of a previously unidentified disability of the student. IDEA does not provide for the "reopening" of a manifestation determination review where a subsequent evaluation determines the student has an additional disability that is related to the behavior. This does not preclude the IEP Team from making appropriate determinations that additional evaluations must be completed in order to make a manifestation determination.

Complaint No. 1817.01. The student was suspended from school for ten instructional days. During the period of suspension, the CCC met and determined the behavior that precipitated the suspension was a manifestation of her disability. Nevertheless, the student remained suspended. The public agency violated Art. 7 by continuing a suspension following a determination that the behavior was a manifestation of the student's disability.

Complaint No. 1719.01. State law does not grant a public agency "ten free days" to suspend a student before honoring a request by a parent to reconvene the CCC to assess whether a behavior is a manifestation of the student's disability or placement. The student had been suspended for six instructional days during the school year. Following the sixth suspension, the parent requested the CCC convene to determine whether the behavior was a manifestation. The director declined, stating that a CCC meeting is not necessary until the student had been suspended at least ten instructional days. The so-called "ten day" rule, however,

determine the student's eligibility for IDEA services.⁴ In Complaint 977.95, the foster parent requested a student be evaluated but the assistant principal refused to act upon the request. The student was subsequently suspended on three separate occasions and eventually expelled for possessing a knife and an animal syringe. The school eventually did evaluate the student, but not until well after the expulsion. The school had to convene the case conference committee and, if the student were found eligible, to determine compensatory educational services.

Letter to Anonymous, 49 IDLER 227 (OSEP 2007). The student had not been determined eligible for IDEA services. He engaged in behavior for which the school district now seeks to expel him. The parent has initiated a referral for an expedited evaluation and has requested a due process hearing; nevertheless, the school district plans to proceed with an expulsion hearing. The parent and the school district disagree over whether the school district had any "basis of knowledge" for suspecting the student might be eligible for IDEA services. "There is nothing in the IDEA...that requires an LEA to put a disciplinary hearing on hold until a hearing officer determines whether...an LEA did or did not have knowledge that a child is a child with a disability." The parent and the LEA could agree to postpone the expulsion hearing until after the expedited hearing, but this is not required. "In your case, if the LEA proceeds with the expulsion hearing before the expedited due process hearing, the provisions of 34 C.F.R. § 300.534(d) would apply since your child has not yet been determined eligible for special education and related services, you did not request an evaluation until your child was subject to disciplinary measures, and the issue whether the LEA had a basis of knowledge that your child was a child with a disability has not yet been decided. In that case, the LEA may treat your child like a child not determined eligible for special education and related services and subject your child to disciplinary measures applied to children without disabilities who engage in comparable behaviors."

Complaint No. 1716.01. The student's grades fell from A's and B's through the sixth grade to mostly D's and F's in the 7th and 8th grades. An outside evaluation determined the student had ADHD and dyslexia. This information was conveyed to the school. The student also began to accumulate disciplinary referrals. She was eventually referred for a special education evaluation in October. However, between the initiation of the referral and the CCC determination of eligibility, the school suspended her for 20 instructional days. Although the CCC did eventually determine her eligible with an emotional disability and further determined that her behaviors were a manifestation of her disability, the excessive suspensions without educational services constituted a denial of FAPE, warranting compensatory educational services. The school had notice of a potential disability in advance of the actual referral.

Complaint No. 1692.01. Public agency did not violate Article 7 with respect to disciplining a student. Student was suspended from school on October 13th, pending expulsion. The parent had never expressed any concerns in writing to certified personnel nor requested an evaluation prior to this most recent disciplinary matter. No school personnel had expressed any concerns regarding the student's behavior or academic performance. School personnel characterized the student's behavior as willful and attention-seeking, and did not believe his actions required any special education intervention. The parent initiated an educational evaluation on November 10th. However, the school did not convene the CCC until 40 instructional days later (January 25th of the following year). This constituted a violation of Article 7, which requires evaluations under these circumstances to be expedited.

Complaint No. 1568.00. The student was a fourteen-year-old middle school student. Her classroom performance and standardized test scores indicated that she was at or above grade level. She had friends at

⁴Under IDEA, a parent/guardian can refuse consent for the placement, thus breaking the chain of procedural safeguard application.

school and, although she occasionally reported feeling somewhat anxious, her behavior was not out of the ordinary. The public agency was not found to be on notice that the student might have a disability.

Complaint no. 1542.00. Thirteen-year-old student engaged in frequent episodes of inappropriate and disruptive behavior, and displayed low academic performance. She had received detentions, suspensions, and other forms of school-based sanctions. There were frequent telephone conversations between school personnel and the parent. A referral for special education was initiated, with the suspected disabilities of ED and LD. While the evaluation process was occurring, the student was charged with fighting and gross insubordination, and suspended from school for ten (10) school days pending expulsion. She was expelled from school for the remainder of the second semester and all of the first semester of the following school year. Eventually, the case conference committee did find her eligible for services as a student with an ED. The school was found to have committed numerous procedural lapses:

- Upon initiation of the referral, the procedural safeguards attach, and would remain applicable to the student until or unless the student was determined not eligible for services.
- The school violated IDEA/Article 7 by exceeding the number of cumulative days of suspension in a school year and by expelling her without ensuring a continuation of educational services.
- When the case conference committee eventually convened and found her eligible, it did not determine whether the behavior was a manifestation of her disability.

Complaint No. 1516.00. The public agency was found to have deficient child find procedures. The student was ten years old. From the beginning of the school year, he had exhibited aggressive and disruptive behaviors in the classroom setting, failed nearly all of his classes, and had numerous discipline referrals and sanctions. Although referred to the school's Student Assistance Program (SAP) to discuss interventions, this team did not meet until five (5) weeks later. At this meeting, the student's teacher signed a referral form for a special education evaluation. Internal procedures required the principal to "sign off" on such a referral, but this didn't occur until nearly eight (8) weeks after the teacher initiated the referral, significantly delaying the referral and evaluation process.

Complaint 1483.99. Fourteen-year-old student attempted suicide at school. Parent and school had numerous conversations prior to the suicide attempt about the student's poor academic performance and behavioral problems (truancy, tardiness, insubordination, disrespectfulness, failure to serve detentions, disruption in classroom settings, and refusal to do assignments). The student had been repeatedly suspended from school and had been expelled from school the previous semester. The parent initiated a referral two months after the suicide attempt. The CCC found her eligible as a student with an ED. School was found in violation of Article 7 for failing to initiate an evaluation on its own as it had actual notice the student had a disability.

Complaint No. 1377.99. The school district did not violate Art. 7 when a student not eligible for special education was suspended from school. The student was 12 years old and attended the local middle school. The student had been suspended earlier in the year for what was considered misbehavior. On February 10, he was suspended for five (5) days. At this time, the parent made a verbal request for an educational evaluation. The school initiated a *Referral for Educational Evaluation* on the next day. The Assistant Principal asked the parent to put the request in writing, which she did but not until February 18th. On February 25th, the student was involved in another incident and was again suspended for five (5) days. The school had no records of anyone ever indicating the student should be referred for an evaluation to determine his eligibility for special education services. The evaluation was timely completed, and a case conference committee convened on March 17th. The student was found in need of services due to an ED. The school did not suspend the student for more than ten (10) instructional days from the time the school was deemed to have some knowledge the student might have a disability (Feb. 10th).

Complaint No. 1379.99. The school district violated IDEA and Art. 7 when it suspended and then expelled a student for whom the school had notice that the student may have a disability. The student was expelled on Feb. 19th. On Feb. 26th, the parent signed a *Permission for Educational Evaluation* form. The school expedited the evaluation due to the involvement of disciplinary measures. The school's records indicated that 18 months earlier, the student had been hospitalized for major depression and suffered from ADHD. A psychiatric evaluation shared with the school at that time referenced earlier medical treatment the student had required. The school did not act upon this information until the parent initiated a formal request for an educational evaluation on Feb. 19th, although the student's teacher had earlier expressed concerns over the student's academic and behavioral difficulties. Because the student's record contained documentation regarding the medical, behavioral, and academic difficulties, the school was deemed to have knowledge of the student's disability.

511 IAC 7-44-10 Referral to law enforcement and judicial authorities 34 CFR §300.535

Complaint No. CP-293-2008. High school student with a primary exceptionality area of ASD had a behavioral incident where he struck other students and teachers as well as school property. A part of the complaint alleged the school failed to provide a copy of the student's special education and disciplinary records to law enforcement when the school reported the incident as a crime. However, the school had not reported the incident to law enforcement. The school had a School Resource Officer (SRO) on duty at the time, who was present while school personnel attempted to calm the student. The student was turned over to his father when the father arrived at school following a phone call from school personnel. The presence of the SRO was to maintain order. The school was not obligated to provide relevant special education and disciplinary records to the SRO as the school did not report the incident as a crime and the SRO did not constitute "law enforcement."

Complaint No. 1899.02 involved an 18-year-old student eligible for special education and related services who allegedly sent threatening e-mails to fellow students. He was suspended from school, pending expulsion. Later, his case conference committee determined that his behaviors were a manifestation of his disability, which precluded expulsion proceedings. The county sheriff's department provided a deputy sheriff to the school to serve as a school resource officer (SRO). The school reported the incident to the SRO. The assistant principal also sent personally identifiable information regarding the student to the county circuit court. Under FERPA at 34 CFR §§ 99.31(a)(5), 99.38, a public school can provide information to juvenile justice officials so long as a state has a law to that effect and the information is provided in advance of adjudication. Indiana does have such an enabling law. See I.C. 20-33-7-3. However, before such information is to be provided, the juvenile justice agency—in this case, the circuit court—must certify in writing that it will not disclose the personally identifiable information to a third party without first obtaining the written consent of the parent or guardian, or the student, if the student is 18 years of age and does not require a guardian. I.C. 20-33-7-3(b)(3). The school did not violate Art. 7 when it reported the alleged threats to the SRO as the SRO is considered local law enforcement. However, the school did violate Art. 7, which incorporates IDEA's and FERPA's confidentiality and privacy requirements, when it provided personally identifiable information regarding the student to the circuit court without receiving a written certification from the circuit court that it would not disclose the information to any third party without first obtaining the requisite written consent.

Complaint No. 1247.98. The public agency did not violate Article 7 or IDEA when a paraprofessional reported to the local police that a student stole two of her candy bars. The paraprofessional acted on her own and not on behalf of the school. The school can report alleged crimes to police authorities, but declined to do so in this instance.

Complaint No. 1332.98. The school district did not violate IDEA and Art. 7 when it contacted the police following an incident where a 14-year-old student with an ED used matches to set another student's sweater on fire. The incident could reasonably be considered a commission of a crime. IDEA and Art. 7 require that necessary information of a personally identifiable nature be shared with the responsible law enforcement agency.

RULE 45. DUE PROCESS PROCEDURES

511 IAC 7-45-1 Complaints

34 CFR §§300.151-300.153

Letter to Anderson, 50 IDELR 167 (OSEP, FPCO 2008). IDEA does not simply restate FERPA. It incorporates FERPA but has additional requirements tailored to address the requirements and responsibilities that arise under the IDEA. Where a complainant initiates a complaint investigation with the SEA where there are both IDEA and FERPA issues, the SEA is not prevented from investigating both IDEA and FERPA issues, particularly as these are intertwined for IDEA programs. The FPCO does not have the authority to investigate and enforce the Confidentiality of Information requirements under the IDEA. The SEA, however, does have such authority and responsibility. A complainant should be aware of the differences. A complaint initiated with the SEA must be based on an occurrence that is not more than one year old; however, a complaint filed with the FPCO must generally be based on an occurrence within the last 180 days. It is recommended that complainants initiate investigations through the SEA's complaint investigation process, where appropriate, to resolve IDEA confidentiality disputes. "Parents of special education children may file a FERPA complaint with FPCO instead of or in addition to an IDEA Part B complaint with their SEA. When parents of special education children elect to file both a FERPA complaint with FPCO and an IDEA Part B complaint with the SEA, FPCO's policy is to hold the FERPA complaint in abeyance pending a decision by the SEA."

Procedural Safeguards and Due Process Procedures, 47 IDELR 195 (OSERS 2007). Although the complaint investigation process establishes a one-year limitations period within which a person or entity may file a complaint, "a State may choose to accept and resolve complaints alleging violations that occurred outside the one-year timeline, just as a State is free to add additional protections in other areas that are not inconsistent with the requirements" of the IDEA. Also, IDEA does "not require an SEA to provide mediation when an organization or individual other than the child's parent files a State complaint."

Complaint No. 2234.05. Complainant raised a host of allegations against the LEA. However, the complainant, in an earlier Art. 7 hearing, negotiated a settlement agreement with the LEA. Both the LEA and the parent were represented by counsel. The IHO approved the settlement and dismissed the hearing. The settlement agreement resolved all past and present disputes. The parent-complainant agreed not to pursue any further claims against the LEA regarding past and present disputes. The parent was not precluded from raising any claims subsequent to the settlement agreement. All the issues raised in the complaint were covered by the settlement agreement. As a result, the issues were deemed resolved and no further action was required.

Complaint No. 2227.05. Complainant raised issues regarding events that occurred more than one (1) year prior to the filing of the complaint. The issues were not considered continuing or systemic in nature. Accordingly, the issues were not investigated.

Complaint No. 2124.04 (Reconsideration). A complaint investigation addresses issues of procedural compliance. Once a public agency has demonstrated it has discharged its responsibilities, even minimally, the complaint process will go no further. (Complainant did not dispute the TOR's minimal compliance; complainant felt the TOR was not sufficiently professional enough in the discharge of these responsibilities.)

Complaint No. 2056.04. The complaint investigation process is not designed to address potential or future violations but to address issues regarding present procedural compliance. (The complainant sought to challenge a program at the correctional facility that had not yet been implemented.)

Complaint No. 1394.99. The SEA will refer a complaint issue to the IHO or the BSEA that has jurisdiction over the affected parties and issues. In this case, the complainant alleged the IHO failed to maintain the student's current educational placement during the pendency of the hearing. However, the BSEA had jurisdiction at the time the complaint was filed. See 511 IAC 7-45-1(r).

Complaint No. 1252.98. Complaint investigation results are applicable statewide.

Wagner v. Logansport Comm. Sch. Corp., 990 F.Supp. 1099 (N.D. Ind. 1997). The IHO's written decision sufficiently apprised the parties of their appeal rights, especially of Indiana's thirty-day statute for seeking judicial review, which began on the day of issuance by the IHO of her written decision. The parents' seven-month delay in filing for attorney fees precluded recovery. The fact the parent filed a complaint in an attempt to implement the IHO's decision did not extend the time frame within which the parent could seek judicial intervention in obtaining attorney fees.

511 IAC 7-45-2 Mediation

34 CFR §300.506

Complaint No. CP-305-2008. The parent and the school had differences regarding assistive technology devices and services necessary for the student. The teacher informed the parent that mediation was a required first step in initiating a due process hearing. The teacher and the parent signed a Request for Mediation form. Local procedure indicates only the director or assistant director can sign a Request for Mediation on behalf of the school; nevertheless, the assistant director forwarded the mediation request to CEL five weeks after the parent and teacher executed the form. A mediation session was scheduled but the local director canceled it because "an unauthorized staff member signed the agreement for mediation without the Director's or Assistant Director's knowledge[.]" The local director also did not agree to mediation. The school was not in compliance with Article 7. First, the teacher misinformed the parent regarding the relationship between mediation and due process hearings, thus impeding the parent's right to initiate a hearing. Second, although the teacher was not authorized to act on behalf of the school district, the assistant director was authorized and did forward the mediation request to CEL. Third, the five-week time frame that it took the school to forward the mediation request to CEL delayed the parent's right to mediation. Mediation requests are to be submitted to CEL in a timely fashion. A five-week delay is not timely. A part of the corrective action required the CCC to reconvene and for the local director to be in attendance.

Complaint No. 2152.05. The student was 14 years old and had a moderate cognitive disability. The parent agreed to an IEP in September that would provide various services and supports, including acclimation to transportation on a regular bus route. The student was hospitalized thereafter, but was discharged on October 24th. The LEA told the parent the student could not return to school until the CCC convened. On November 3rd, the CCC convened. The LEA proposed an IEP that called for five hours of homebound a week after school hours but with the parent present. The parent would also be required to provide transportation. The parent did not consent, objecting to the limited amount of instructional time, the requirement that she attend the homebound instruction, and that she provide the transportation. The LEA and the complainant sought mediation under. On December 9th, the parties executed a Mediation Agreement that called for additional evaluations, the reconvention of the CCC once the evaluative results were obtained, and a "waiver" of the compulsory school attendance laws, letting the student stay home till the CCC reconvened. On February 13th, the CCC reconvened, with the LEA proposing another IEP, increasing the homebound instruction per week to 7 ½ hours, either at school (after hours) or at complainant's home, but in

either situation, the complainant must be present. The parent did not consent. The LEA provided none of the services agreed to in the September IEP from October 24th till the end of the school year. The LEA provided none of the services proposed in the first and second IEPs. The LEA did not develop a plan for conducting an FBA or review/modify the student's BIP. The LEA did not conduct a CCC for the purpose of conducting a manifestation determination. The LEA did not seek due process to ensure FAPE to the student when the parent refused to consent to services. The LEA was found to have violated multiple provisions of Art. 7, including impermissible change of placement, failure to implement an agreed-upon IEP, denial of FAPE, denial of services at no cost, violation of compulsory school-attendance laws, and overall denial of FAPE and failure to ensure such a FAPE. The LEA had to provide, in part, nearly 650 hours of compensatory services, including 14.5 hours of OT services and 14.5 hours of speech/language services. Extensive in-service training of LEA personnel in Art. 7 procedures was also required.

Complaint No. 1874.02. The student was a ward of the state. The parent remained involved in educational decision-making for the student. A mediation session was conducted to resolve differences between the parent and the public agency. A caseworker from the county Office of Family Children attended the mediation session and later, at the direction of the court, prepared a written summary of the mediation session for the judge, identifying the participants, the issues discussed, and the results. Although 511 IAC 7-45-2(g), (h) preclude information from mediation sessions from being used as evidence in any subsequent due process hearing or civil proceedings, the confidentiality violation that occurred was at the instigation of parties (judge, caseworker) over whom neither the public agency nor the IDOE had jurisdiction.

Complaint No. 1168.97. Although Article 7 does not contain timelines for when a mediation session must be held after mutual consent is obtained, six business days is not considered an inordinate delay.

Letter to Chief State School Officers, 33 IDELR ¶247 (OSEP 2000). Wide-ranging “Q & A” on mediation, OSEP stressed the mediator must be impartial, not an employee of the school or the SEA, and the process is to be supported financially by the State. IDEA is silent as to the presence of attorneys at such sessions. Parties can be required to sign a confidentiality agreement prior to mediation.

511 IAC 7-45-3 Due process hearing Requests

34 CFR §§300.507, 300.508

Procedural Safeguards and Due Process Procedures, 47 IDELR 195 (OSERS 2007). OSERS reiterated that a parent may not file for a due process hearing because the child's teacher does not meet the “highly qualified” standard. The parent may file a complaint on this issue. OSERS also noted that where the parent amends the hearing request, either through mutual agreement or by order of the Independent Hearing Officer, the public agency must offer another resolution meeting. OSERS also stated that, where a student is perceived to be a danger to himself or others, the public agency could seek injunctive relief or a restraining order through court “when necessary and legally appropriate.”

Complaint No. 1606.00. Parent presented a letter to the school at a CCC meeting, requesting a hearing. The letter was addressed to the IDOE but was never mailed. The public agency advised the parent what the procedures were for initiating a hearing in Indiana, including providing the parent with specific directions as to how to initiate such a request. Later, the public agency wrote the parent, detailing in writing the procedure for initiating a hearing. The parent eventually filed a complaint. The public agency was found to be in compliance with Article 7. When presented with a request for a hearing, an Indiana public agency must do one of two things: (1) send the letter to the IDOE; or (2) inform the parent what needed to be done to initiate a hearing. The school did the latter, which satisfied Indiana requirements.

511 IAC 7-45-4 Sufficiency of Hearing Request

34 CFR § 300.508(d)

511 IAC 7-45-5 Responding to Hearing Request**34 CFR § 300.508(e), (f)****511 IAC 7-45-6 Resolution Meeting****34 CFR § 300.510**

Procedural Safeguards and Due Process Procedures, 47 IDELR 195 (OSERS 2007). Although a public agency has to convene a resolution meeting where the parent has initiated the hearing, there is no requirement to convene a resolution meeting where the hearing was initiated by the public agency. Where a parent has initiated the hearing but the parent and the public agency elect to utilize the mediation process instead, the 30-day resolution period would still be applicable. It is noteworthy that resolution meetings—unlike mediation—are not specifically required to be confidential, except as IDEA and FERPA would apply to disclosure of personally identifiable information regarding a student to third parties. Lastly, OSERS stated that where the parent fails to participate in a resolution meeting, at the conclusion of the 30-day timeline, the public agency may ask the IHO to dismiss the hearing. Where the public agency has failed to convene the resolution meeting for failed to participate, the parent can request the IHO to begin the hearing process.

511 IAC 7-45-7 Conducting the Hearing 34 CFR §§ 300.511-300.515, 300.518

Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528 (2005). The IDEA does not allocate the burden of persuasion on any party in a dispute brought under 20 U.S.C. § 1415. In the absence of such, the “ordinary rule” will apply: the burden of persuasion is with the party requesting the hearing and seeking the relief.

Complaint No. 2180.05. The parent and the school were involved in a due process hearing. The IHO issued a lengthy opinion that contained 15 Orders, most involving programming for the student in the upcoming school year. Neither party appealed. The school contacted the parent to begin implementation of the Orders. The parent declined to meet in a CCC meeting or consent to evaluations ordered by the IHO. The parent elected to home-school the student. The school canceled the scheduled CCC meeting. After doing so, the parent indicated she would be willing to discuss implementation of some of the IHO’s Orders but not all of them. The school declined this offer. The school did not fail to comply with the IHO’s Orders because the parent prevented the school from doing so. See 511 IAC 7-45-1(t). The school had also taken steps to make available services to the student as a private school (home school) student. See 511 IAC 7-34-1.

Complaint No. 1678.01. The school did not appeal an adverse decision from an IHO. However, it also failed to implement timely the IHO’s decision and acted in a manner that was not a “good faith” effort to implement the decision. The school was required to engage in significant additional corrective action, including compensatory educational services, to put the student in the position the student would have been but for the school’s inactions.

Indiana Department of Education, EHLR 352:576 (OCR 1987). The closing of programs not under the control of the public agency or SEA excused a change of placement during the pendency of a due process hearing.

Complaint No. 1394.99. The SEA will refer a complaint issue to the IHO or the BSEA that has jurisdiction over the affected parties and issues. In this case, the complainant alleged the IHO failed to maintain the student’s current educational placement during the pendency of the hearing. However, the BSEA had jurisdiction at the time the complaint was filed. See 511 IAC 7-45-1(r).

L.W. and Valparaiso Community Schools, Article 7 Hearing No. 1037.98 (BSEA). This is the appeal referred to in Complaint No. 1394.99. The BSEA found that the IHO did not have the authority to maintain the student’s current educational placement because a juvenile court had issued an order preventing the

student from attending the middle school. The IHO determined an interim educational setting for the student, which was proper under the circumstances.

Letter to Armstrong, 28 IDELR 303 (OSEP 1997). IDEA does not specify what specific powers IHOs have to fashion remedies, but IHOs must have the authority to order any relief necessary to ensure a student receives a FAPE, and States must ensure that such orders are implemented and enforced. Also, where the parties cannot agree to the “stay put” placement of the student during the exhaustion of the administrative process, either an IHO or a court can order a placement.

Letter to Steinke: Secretarial Review, 28 IDELR 305 (OSEP 1997). This was a Secretarial Review of a State complaint investigation report. The complainant had been involved in a due process hearing, wherein the attendance of a witness was sought. The witness was not an employee of the public agency. The IHO did not compel the attendance of the witness, and the complainant was unable to “confront and cross examine” the witness. The SEA found that it had no authority to compel the attendance of non-employee witnesses. OSEP differed, noting that the State must have a mechanism that provides IHOs with sufficient authority and power to carry out the requirements of IDEA, including the authority to “compel the attendance of witnesses.” (**Note:** Secretarial Review is no longer provided for in the federal regulations for IDEA.)

511 IAC 7-45-8 IHO Qualifications

34 CFR § 300.511(c)

Reed v. Shultz, 715 N.E.2d 896 (Ind. App. 1999). The State Superintendent of Public Instruction has the authority to determine who will be considered “qualified” to serve as an IHO. No person has a right to be placed on the list of available IHOs in Indiana.

511 IAC 7-45-9 Due process hearing appeals

34 CFR §300.514(b)

L.M. v. Brownsburg Comm. Sch. Corp., 28 F.Supp.2d 1107 (S.D. Ind. 1998). Where a party fails to appeal timely to the Board of Special Education Appeals—or fails timely to request an extension of time to prepare a Petition for Review—a party cannot obtain judicial review on the merits of the IHO’s decision.

E. L. and the MSD of Martinsville, Article 7 Hearing No. 927.96 (BSEA). A parent cannot seek monetary damages or attorney fees through the administrative procedures.

Letter to Arons, 16 EHLR 1028 (OSERS 1990). If a party to a due process hearing believes personal opinions of the hearing officer affected the hearing officer’s impartiality, the party may raise such an objection during the proceeding or raise it on appeal.

Article 7 Hearing No. 613.92 (BSEA). An IHO cannot be removed merely because the IHO has declined to recuse himself at the request of a party. A party’s remedy is to assign the IHO’s refusal to recuse himself as error on appeal.

Article 7 Hearing No. 750.93 (BSEA). There are no interlocutory appeals under Article 7 or IDEA. The BSEA can only review the final orders of IHOs. It cannot review interim orders.

Article 7 Hearing No. 729.93. An IHO may impose sanctions under I.C. 4-21.5-3-8 on a party who fails to comply with a discovery order where there is notice that sanctions have been requested, there is an articulated basis for sanctions, the amount imposed is based on an ascertainable standard, and the amount imposed is reasonable.

Article 7 Hearing No. 777.94 (BSEA). Newly discovered evidence, to be admitted and considered on appeal, must be (1) material and relevant, (2) not merely cumulative, (3) not merely impeaching, (4) not privileged or incompetent, (5) shown not to be discoverable before original hearing by exercise of due diligence, (6) credible, (7) readily produced at appeal, and (8) reasonably and likely to change the outcome of the hearing. I.C. 4-21.5-3-31(c)(1)-(3).

M.S. and the Eagle-Union Comm. Sch. Corp., 26 IDELR 106, Article 7 Hearing No. 941.97 (BSEA 1997). Although it is unusual for an IHO to consider IDEA/Article 7 claims in conjunction with Sec. 504/A.D.A. claims, where the parties have requested this and the IHO has not separated the issues, the BSEA will have jurisdiction to review the IHO's decision.

511 IAC 7-45-10 Expedited due process hearings and appeals 34 CFR §300.532(c)

Letter to Gamm, 30 IDELR 711 (OSEP 1998). When a parent disagrees with a determination that the student's behavior was not a manifestation of the student's disability or with any decision regarding emergency placement, the parent may request a hearing. In such a case, an expedited hearing shall be arranged.

511 IAC 7-45-11 Attorney fees 34 CFR §300.517

The Indiana Supreme Court held that a parent-attorney of a student with disabilities was not entitled to recover attorney fees for representation of the attorney-parent's child. This dispute began as Article 7 Hearing No. 519.91. The student was represented by his father, who was an attorney.

In Miller v. West Lafayette School Corporation, 665 N.E.2d 905 (Ind. 1996), the Supreme Court agreed with the school district that the father was acting as a "pro se parent and a party" rather than as an attorney, and as "a pro se litigant [he]...is not entitled to [attorney] fees" which are available to parents who prevail through IDEA procedures. The decision relied upon Rappaport v. Vance, 812 F.Supp. 609 (D. Md. 1993), appeal dismissed, 14 F.3d 596 (4th Cir. 1994), which found that a lawyer-parent representing his child in IDEA proceedings is a pro se litigant and thus not entitled to attorney fees under the IDEA. The Rappaport court, in turn, relied upon an analogous U.S. Supreme Court decision in Kay v. Ehrler, 499 U.S. 432, 111 S.Ct. 1435 (1991), which held that attorneys who are pro se litigants are not entitled to attorney fees in civil rights actions because "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under [42 U.S.C.] §1988." 111 S.Ct. at 1437-38.

The Indiana Supreme Court quoted extensively from Kay, 499 U.S. at 436-38, 111 S.Ct. at 1437-38:

Although [the fee-shifting section] was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.

In the end...the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the

judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that “a lawyer who represents himself has a fool for a client” is the product of years of experience by seasoned litigators.

A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar--would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Miller, 665 N.E.2d at 906-7.

For another Indiana case involving or affecting attorney fees under IDEA, see: Powers v. The Indiana Department of Education, 61 F.3d 552 (7th Cir. 1995), which began as a dispute over residential placement (Art. 7 Hearing No. 626-92). The 7th Circuit Court of Appeals upheld the district court’s grant of summary judgment to IDOE because the parent’s attorney did not timely request attorney fees. The parent, school and state successfully mediated the dispute. As a result, the parent withdrew her hearing request. The parent’s attorney requested payment of attorney fees, but IDOE declined, asserting that mediation is not an “action or proceeding” under IDEA, because IDEA did not at that time require mediation (although mediation was encouraged by a **Note** to then 34 CFR §300.506). IDOE did not inform the parent’s attorney of the right to seek judicial review or the limitations period for doing so. The parent’s attorney did not file suit for attorney fees until seven months later. IDOE moved for summary judgment, arguing that the thirty (30) calendar day timeline for judicial review found at I.C. 4-21.5-5-5 should be applied to attorney fee requests arising out of administrative procedures subject to I.C. 4-21.5 (Administrative Orders and Procedures Act or AOPA). The 7th Circuit agreed that the thirty-day limitations period applied, but cautioned that such a short limitations period increases the responsibility of the public agency to inform parents and their attorneys of the short limitations period. Even though IDOE did not do so here, the parent’s attorney offered no legal reason for the delay in seeking such fees through judicial review.

Out-of-State Attorneys

Whether an out-of-state attorney can claim attorney fees for representing a party in an administrative proceeding in Indiana remained unanswered until Nathan C. v. School City of Hobart, 30 IDLER 396 (N.D. Ind. 1999), where the federal district court found that an Illinois attorney not admitted to the practice of law in Indiana could not recover fees for attorney services performed in this state. In reaching this decision, the court relied upon a decision from the 9th Circuit Court of Appeals released while Nathan C. was under consideration. See Z.A. v. Bruno Park School Dist., 165 F.3d 1273 (9th Cir. 1999).

An attorney representing a party in IDEA administrative procedures is not required to be admitted to the bar of the state where the dispute is. See Letter to Eig, EHLR 211:270 (OSEP 1980) and Virginia Department of Education, EHLR 257:349 (OCR 1982). Such a foreign attorney, however, cannot recover attorney fees for legal work performed in Indiana.

Also see:

Linda W. v. Indiana Department of Education , et al., 200 F.3d 504 (7th Cir. 1999). Parents were not entitled to attorney fees for unilateral placement of student in a private school. Although the parents won a “procedural victory” at the hearing level against the public school district, this was a minor matter that the IHOs (there were two due process hearings and two due process appeals) orders rectified and could have been addressed had the student remained in the public school program. The parents’ decision to remove the student and place him unilaterally was not justified under the facts in this case. “Even the decisions of the hearing officers did Ryan no good in the end, because his parents removed him from the public schools before those decisions took effect. The district court did not abuse its discretion in holding that defendants are the prevailing parties in this litigation.” At 507.

Wagner v. Logansport Comm. Sch. Corp., 990 F.Supp. 1099 (N.D. Ind. 1997). The IHO’s written decision sufficiently apprised the parties of their appeal rights, especially of Indiana’s thirty-day period for seeking judicial review, which began on the day of issuance by the IHO of her written decision. The parents’ seven-month delay in filing for attorney fees precluded recovery. The fact the parent filed a complaint in an attempt to implement the IHO’s decision did not extend the time frame within which the parent could seek judicial intervention in obtaining attorney fees.

The Indiana Court of Appeals weighed in on trickier question: What does it mean to “prevail”? MSD of Lawrence Township v. M.S., 818 N.E.2d 978 (Ind. App. 2004) began as an administrative hearing under 511 IAC 7-17 *et seq.* (“Article 7”), specifically 511 IAC 7-30-3. The dispute centered around a nine-year-old student with multiple disabilities, including a mobility impairment. She used a wheelchair but she also used a “stander” during the day to help strengthen her legs and torso muscles as well aid her in digestion. The parent requested the student be transferred to a different school so she could participate in a “Life Skills” program. The student was transferred to the new school and participated in both general education and the “Life Skills” program. The student’s CCC revised the student’s IEP to indicate the student would use the “stander” twice a day for one hour each session. During the school year, the parent became concerned the student was not spending as much time in the general education classroom and requested the student be transferred to her original school. The school district disagreed. The parties were unsuccessful in mediating the dispute. 818 N.E.2d at 980.

During this period, school staff became concerned that the one-hour “stander” sessions were causing the student’s knee caps to dislocate. School personnel notified the parent that the sessions would be reduced to 30-45 minutes each until a medical opinion could be obtained regarding the advisability of a one-hour session. Shortly thereafter, the parent withdrew the student from the school district and requested a due process hearing, raising 22 issues, many of which were allegations of violations of Article 7 rather than student-specific program disputes.

Following a hearing, the Independent Hearing Officer (IHO) found the school district did fail to comply with Article 7 in the following four instances:

1. The school failed to include the parent in the CCC meeting where it was decided to reduce the student’s time in the “stander” and by failing to document student progress in the use of the “stander” for a two-month period;
2. The school failed to have one of the student’s general education teachers attend the CCC meeting;⁵

⁵A general education teacher is a required CCC participant where, as here, the student is or may be participating in the general education environment. 511 IAC 7-42-3(b)(3).

3. The school failed to make available to the parent at least five (5) instructional days prior to the CCC meeting a copy of one of the student's evaluations;⁶ and
4. The school failed, by twelve (12) days, to review and revise the student's IEP on an annual basis.

Id. at 981. The IHO, however, found that these procedural violations were not "material" violations in that they did not result in a denial of a "free appropriate public education" (FAPE) to the student. Id. The IHO did issue orders, but these orders addressed the procedural lapses and were akin to corrective action typically ordered through a complaint investigation. Id. Neither party sought administrative review by the Board of Special Education Appeals.

The parent then filed in State court for attorney fees, asserting that she "had prevailed on some of the issues in contention" at the due process hearing, adding that the IHO's orders "changed the legal relationship between [the student] and the [school] and ordered changes in the school's policies and procedures." Id. at 981-82. The school moved for summary judgment, arguing the parent did not prevail on any significant issue nor did the parent establish any substantive right for the student. The parent filed a cross-motion for summary judgment, claiming the student was denied a FAPE and that the violations were material ones.

The trial court noted the IHO had found the school did not deny a FAPE to the student and that the procedural violations were not "material." The trial court also noted the IHO found the school was justified in unilaterally reducing the student's time in the "stander" because of the "reasonably perceived imminent risk." When the parent eventually did provide the medical authorization, the IEP was implemented fully. Id. at 982-83. Although the parent had "prevailed" on only four (4) of the 22 issues raised, the trial court declined to employ a "scorecard of issues" as a means of determining whether the parent prevailed for IDEA and Article 7 purposes. The trial court found the unilateral reduction in "stander" time for two months was a significant issue upon which the parent prevailed, granting judgment to the parent in the amount of \$5,000, which was one-half of the amount sought by the parent.⁷ Id. at 984.

The school filed a Motion to Correct Errors, arguing in part that a substantial period of time when the "stander" was not used at school, the parent had withdrawn the student from the school. The trial court denied the Motion. The school appealed to the Indiana Court of Appeals. Id. at 985.

The Court of Appeals reversed the trial court, finding the parent did not prevail in the due process hearing. The appellate court noted the IHO did not designate any party as "prevailing."⁸ Under such a situation, the trial court will need to review the IHO's order and the evidence presented at the due process hearing. If the parent realized "only limited success," the parent cannot be considered the prevailing party. The parent must have succeeded on a "significant issue in the litigation which achieves some of the benefit" the parent sought in initiating the due process hearing. Id. at 986, quoting Kellogg v. City of Gary, 562 N.E.2d 685, 714 (Ind. 1990), Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782, 789, 109 S. Ct. 1486 (1989). "Thus, at a minimum, to be considered a prevailing party...the plaintiff must be able to point to a resolution of the dispute which changes the legal

⁶This is an Indiana-specific requirement. See 511 IAC 7-40-5(h).

⁷Actually, the parent sought \$12,076.15 in attorney fees. 818 N.E.2d at 983.

⁸Neither an IHO nor the BSEA will designate a "prevailing party" for Art. 7 purposes as neither can award attorney fees. Only a court can do so. See 511 IAC 7-45-9(m)(2)(C), 511 IAC 7-45-11(b).

relationship between itself and the defendant.” Id. “Where such a change occurs, the degree of the plaintiff’s success goes to the reasonableness of the award...not to the availability of a fee award[.]” Id. quoting Garland, 489 U.S. at 793, 109 S. Ct. at 1494.

In this case, the IHO found in favor of the parent on the “stander” issue; however, the IHO concluded the school’s procedural lapses did not constitute a “material violation.” Specifically, the IHO held:

Had it not been for the reasonably perceived medical emergency, the failure of the [School] to include the parents in a CCC decision regarding the reduction of the child’s time in the “stander” would have been a violation that might lead to arbitrary and erroneous decision making and therefore a material violation. When a choice has to be made between CCC procedure and the abatement of a reasonably perceived imminent risk to the child’s physical well-being, the latter consideration must certainly take precedence.

Id. at 986-87. The Court of Appeals agreed with the school that the evidence did not support the trial court’s determination the school kept the student out of the “stander” for two months. The evidence showed the following time line: On February 1st, school personnel became concerned the one-hour sessions on the “stander” were causing the student’s knee caps to dislocate. The teacher informed the parents the CCC had reduced the session time for the “stander” until the parent could provide medical authorization. On February 11th, the parent requested a due process hearing and then withdrew the student the following day to home-school her. On March 31st, the parent provided the school the physician’s statement regarding the student’s session times in the “stander.” The school did not deny the student access to the “stander” for the brief period she was in school from February 1st to February 11th. From that time to March 31st, the student was not in the school; rather, she was being home-schooled. The trial court’s finding the school denied the student access to the “stander” for two months is not supported by the record.

While we acknowledge that success on an issue involving a child’s physical needs has the potential to be significant, we cannot conclude that success on this issue, significant or not, achieved some of the benefit the Parents sought in bringing the due process action. The hearing officer’s order from the due process hearing shows that the Parents’ request for a due process hearing was motivated by their desire to have [the student] transferred to a school where she could spend more time in a general education classroom. Furthermore, the hearing officer did not order the School to put [the student] back in the stander. The hearing officer only ordered the School to circulate a memo to appropriate staff reminding them that progress toward [the student’s] IEP goals needed to be adequately documented. Indeed, the evidence shows that prior to the due process hearing, the Parents had resolved the issue of whether [the student] would be put in the stander for one-hour increments when they complied with the School’s request to provide a written assurance from a physician that the one-hour period in the stander was not injuring [the student]. Therefore, we cannot say that the Parents achieved some of the benefit they sought in bringing the due process action. Thus, as a matter of law, the Parents were not a prevailing party entitled to reimbursement of attorney fees from the due process hearing

Id. at 988. The trial court should have granted summary judgment to the school. Accordingly, the Court of Appeals reversed the trial court and remanded the matter so that the summary judgment could be awarded to the school. Id.

RULE 46. CHILD COUNT AND DATA COLLECTION

511 IAC 7-46-1 Federal Child Count Procedures

34 CFR §§ 300.640-300.646

Complaint No. CP-227-2007. The student is six years old and has multiple disabilities complicated with numerous medical needs. The student's cardiologist recommended the student attend school only if one of the student's parents would accompany. If this is not feasible, then the student should receive homebound services. However, homebound services did not begin for the student until January 8 in the second semester. He received no educational services during the first semester. Notwithstanding, the school district included the student in its December 1st child count, which generated nearly \$9,000 in Additional Pupil Count (APC) funds. A student must be receiving a FAPE from the school district on December 1st in order to be included in the child count. In addition to compensatory educational services for the student, the school district had its APC funds reduced by nearly \$9,000.

RULE 47. STATE FUNDING OF EXCESS COSTS

511 IAC 7-47-1 Application from School Corporation or Charter School

I.C. 20-35-6-2

Complaint No. 1609.00 (Reconsideration). Student was in the eighth grade and received full-time day-school programming through the local community mental health center, funded through the IDOE. The public school submitted a reapplication for funding but did not indicate a need for respite care or case management services. The school amended its application to include pages from an IEP calling for 15 hours of case management a week and 16 hours of respite care services a month. However, these services were added to the IEP by the school after the CCC had concluded. The parent was not provided a copy of the IEP that was revised to add the additional services. Also, the IEP did not detail how the parent would be advised of the student's progress towards the annual goals that were properly in the IEP.

Complaint No. 1507.00A. Student was eleven years old and had an ED. CCC determined LRE would be a day treatment program once the student was discharged from an out-of-state program. Once the student was discharged, the student was placed first into an alternative program and then placed on homebound, pending application for funding. However, the school took six weeks to complete and submit the application after the student had been discharged and returned to his school district. This constituted a failure to implement the student's IEP.

Kevin C. McDowell, J.D.

Last revised: 09/08