

Special Education Law 101

O Initial Evaluation

- Each LEA must conduct a full and individual initial evaluation before the initial provision of special education and related services.
- Either **a parent** of a child **or the school district** may initiate a request for an initial evaluation to determine if a child is a child with a disability.
- Initial evaluations must be completed within 60 calendar days of receiving parental consent for evaluation.
- Remember holiday periods and other circumstances when children are not in attendance for five consecutive school days shall not be counted toward the 60 calendar day timeline, including the weekend days before and after such holiday periods.

Initial Evaluation



Evaluation Procedures

Notice

- Provide notice (prior written notice as defined by 34 C.F.R. § 300.503).
- 34 C.F.R. §
 300.304; SBOE
 Rule 160-4-7.04(4)(IDDF
 (4)(4)).

Tools

- Use a variety of assessment tools and strategies that may assist in determining:
 - Whether the student has a disability as defined by IDEA;
 - The content of the child's IEP.

Evaluation

- Do not use any single procedure as the sole criterion.
- Use technically sound instruments.



Evaluation Procedures, cont.

• Additional procedures exist for ensuring tests are not discriminatory, provided in a child's native language/communication, used for the purposes created, are valid and reliable, are administered in accordance with instructions, tailored to assess specific areas of educational need and administered by trained and knowledgeable personnel.

• Ensure that the evaluation is... "sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category..."

• Ensure that the evaluation is compliant with all procedures for the District and within the timelines.

Valid

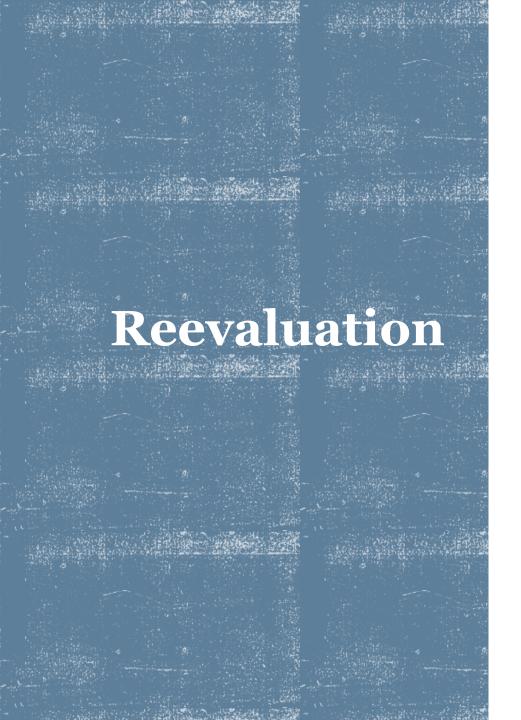
Comprehensive

Defensible



Practical advice

- Assess your evaluators' skills and know how to maximize their strengths and backgrounds – just because an evaluator is "assigned" to a school does not mean that evaluator must conduct that evaluation.
- Observation-only evaluations may be problematic (OT, PT, etc.).
- Plan evaluations as though you are going to due process – is this an evaluator you are prepared to put on the stand? Are you conducting sufficiently thorough testing?



- Each LEA must ensure that a reevaluation of each child with a disability is conducted **not more than once a year**, unless parent and LEA agree otherwise; and **at least once every 3 years, unless the parent and the LEA agree that a reevaluation is unnecessary**. SBOE Rule 160-4-7-.04-2(IDDF(04)).
- Should be conducted if student warrants reevaluation based on the student's <u>educational</u> <u>or related service performance or if the student's</u> <u>teacher or parent requests one</u>.
- A reevaluation must be conducted before determining that the child is no longer a child with a disability.



- Existing data including:
 - Evaluations and information provided by parents;
 - Current classroom-based, local, or state assessments;
 - Classroom observations; and
 - Observations by teachers, related service providers.
- What additional data, if any, needs to be collected.

34 C.F.R. § 300.305; SBOE Rule 260-4-7-.04(5)(IDDF(4)(5))

Practical Advice

- Communicate with parents the benefits of a reevaluation.
- Determine whether a full or partial reevaluation is needed and document decision surrounding same.
- A comprehensive history of the child is important reevaluation is not just for eligibility purposes.
- When you encounter problem cases one question to ask is, "When was this student last reevaluated?"

- In situations where a public agency believes a reevaluation is necessary but the parent disagrees and refuses consent for a reevaluation, the 2006 IDEA Part B regulations at 34 CFR 300.300 (c)(1)(ii) provide that the public agency **may but is not required to pursue the reevaluation by using the consent override procedures** described in 34 CFR 300.300(a)(3). See Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (OSERS 09/01/11).
- If the District chooses not to pursue the reevaluation by using the consent override procedures described in 34 CFR § 300.300(a)(3), and believes, based on a review of existing evaluation data on the child, that the child does not continue to have a disability or does not continue to need special education and related services, the District may determine that it will not continue the provision of special education and related services to the child.

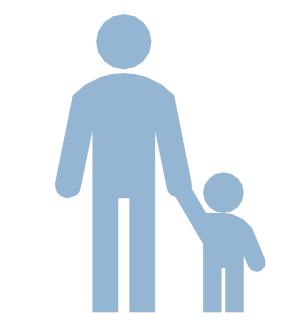


Failure to Consent, cont.

 If the public agency determines that it will not continue the provision of special education and related services to the child, the public agency must provide the parent with prior written notice of its proposal to discontinue the provision of FAPE to the child consistent with 34 **CFR § 300.503(a)(2),** including the right of the parent to use the mediation procedures in 34 CFR § 300.506 or the due process procedures in 34 CFR §§ 300.507 through 300.516 if the parent disagrees with the public agency's decision to discontinue the provision of FAPE to the child.

Eligibility

 A child or youth from 3 through 21 years of age is considered to have a disability under IDEA if the child or youth meets the eligibility criteria and needs special education and related services





Practical Advice

- When is it worth fighting about eligibility?
- Eligibility is an entry way into special education the IEP should be based on the student's individual needs, not on the student's eligibility category.
- But...eligibility categories do also provide that "snapshot" of a student such that if a teacher picks up a student's IEP there is an initial notion of the student's needs. Maybe this is why eligibility can be such a sensitive topic...

EligibilityWhat Courts Say.

 A district should consider the services a student is already receiving in determining whether he requires special education. Evidence that a student with an impairment has made nontrivial educational progress after receiving general education interventions is a strong indicator that he does not require IDEA services. See, e.g., M.P. v. Arkansas Pass Indep. Sch. Dist., 67 IDELR 58 (S.D. Tex. 2016).

However,

the eligibility team must distinguish between general education interventions and specialized instruction. Although the student in *L.J. v. Pittsburg Unified School District,* 116 LRP 37786 (9th Cir. 09/01/16), attended a general education fourth-grade class, he had the benefit of specially designed mental health services, a one-to-one behavioral aide, and accommodations that were not provided to his classmates. **The district's classification of those services as general education interventions available to all students did not support its argument that the student had no need for special education services.**

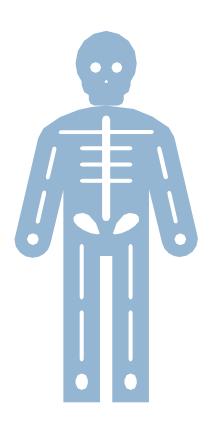
Academic **Progress** as a Measure Eligibility

- Student found ineligible by district due to academic progress, court found District in violation of IDEA and awarded compensatory ed.
- "Academic progress cannot serve as the sole 'litmus test' for eligibility."
- The fact that the student could achieve academically should have been measured in light of his "considerable intellectual potential."
- District should have looked beyond his academics at his significant attentional and behavioral issues impeding his progress.

G.D. ex rel. G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 466 (E.D. Pa. 2011); See also, Lauren P. ex rel. David and Annmarie P. v. Wissahickhon Sch. Dist., 310 Fed. Appx. 552 (3rd. Cir. 2009).

Another...

- Student with Asperger's, manifested in her poor pragmatic language skills and social understanding difficulties, as well as from a depressive disorder brought on by the stress of managing these problems.
- But, above average academic performance.
- Indeed, a child may "do well in school" without special education, accumulating a high grade point average, but may nevertheless perform below acceptable levels in other areas, such as behavior. *Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 22 (1st Cir. 2007).



A Disabling Condition Is Not Enough On Its Own

• "While Z.G.'s treating psychiatrist and teacher at Dalton testified to their observations of Z.G.'s difficulties with bipolar disorder and ADHD, there was a continuity of Z.G.'s successful performance both before and after her conditions were diagnosed."

C.B. ex rel. Z.G. v. Dep't of Educ. of City of New York, 322 F. App'x 20, 22 (2d Cir. 2009)





Consent for initial placement

Remember consent is important.

- Consent for an initial evaluation should not be construed as consent for initial placement.
- Must obtain informed consent in order to place a student and the LEA may not use due process procedures to override this consent.
- If a parent refuses to consent to initial placement the LEA will not be considered in violation of the requirement to make FAPE available.
- If a parent gives consent, he/she may later revoke that consent and should be provided with notice at that time.

34 C.F.R. § 300.300(b)

IEP Meeting Meeting Notice

Notice to Parents and Participants

What is in the notice?

• The invitation/notice to the IEP Team meeting shall indicate the purpose, time, and location of the meeting, participants who will be in attendance, and inform the parents of their right to invite other individuals who, in their opinion, have knowledge or special expertise regarding their child, including related services personnel.

When do I send the notice?

 It shall be sent early enough to ensure that the parent/guardian has an opportunity to attend the meeting.

Where should the meeting be held?

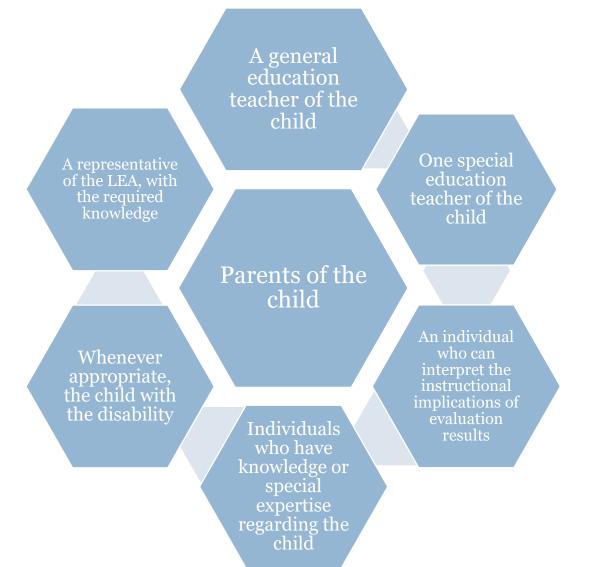
• The meeting shall be set at a mutually agreed upon time and place.





- Notice of meeting does not have to provide specific names of participants.
- Many Districts have an internal procedure (written or unwritten) to send notices 10 days before the meeting, but the law does not require that.
- If you plan on implementing a time limit, the notice is the best place to have that information.

IEP Team must include the following participants:







Practical Advice

- The DOE is quite stringent about the requirement for a general education teacher to be involved *even* if the possibility of participating in the regular education environment seems remote.
- Your general education teacher needs to understand why they are participating in the meeting.
- They need to participate.

Present Levels of Academic Achievement and Functional Performance

- Should contain at least the following:
 - The strengths of the child;
 - The results of the initial or most recent evaluation of the child;
 - The results, as appropriate, of the child's State or District wide assessments; and
 - The academic, developmental, and functional needs of the child.

Special Factors

- The IEP team must consider the following:
 - The child's behavior and whether it is interfering in the student's learning or that of others, consider positive behavioral interventions and supports and other strategies to address behavior in the IEP or BIP;
 - The student's limited English proficiency;
 - The need for instruction or use of Braille if the student is blind or visually impaired;
 - The communication needs of the student; and
 - The student's needs for assistive technology devices and services.

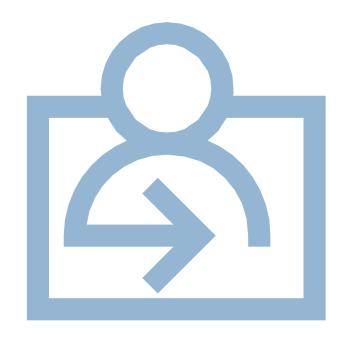
Parental Concerns

This section should contain all parental concerns related to the education of their child and any other issues that they would like to be addressed by the Team.

SBOE Rule 160-4-7-.06 B)(a)([IDDF (6))

Practical Advice

- Give parents significant leeway in this section
- Make sure and continually add to this section throughout the meeting, if needed
- If a parent wants to attach a document to the IEP allow it
- Read the section back to a parent
- Respond to parent concerns during the meeting, if at all possible and where appropriate







Goals and Objectives

• "A statement of measurable annual goals, including academic and functional goals designed to (1) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (2) meet each of the child's other educational needs that result from the child's disability."

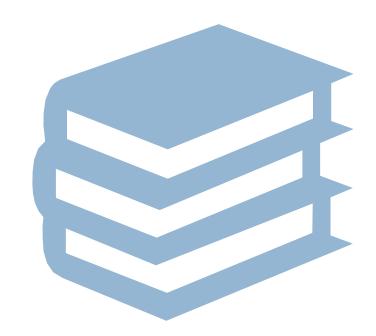
SBOE Rule 160-4-7-.06(1)(b)(IDDF (6))



- Make sure the Goals and Objectives are measurable – no really.
- Make sure the data you have taken matches up to the goals (Ex. Is listening comprehension the same as reading comprehension?)
- Make sure you know a student's baseline going into the meeting – or are prepared to measure it.
- You should not have goals that restate the State standards or are just goals to get good grades.

Accommodations / Student Supports

- The IEP must include instructional and classroom testing accommodations and student supports and/or supports for personnel to allow the student to advance appropriately toward attainting annual goals, be involved in and make progress in the general curriculum, be educated in and participate with other children in academic, nonacademic and extracurricular activities.
- The IEP must also include a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments.



Practical Advice

Make sure accommodations are for the child, not the parent.

Accommodations should not be modifications.

If accommodations become modifications, perhaps it is an indication that the IEP Team should review services instead.

Do not over-commit.

Balance legitimate needs with staff resources.



- In determining the educational placement of a child with a disability, each LEA must ensure that the placement decision is:
 - (1) made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;
 - (2) made in conformity with the LRE provisions contained in the State rule;
 - (3) made at least annually, is based on the child's IEP and is as close as possible to the child's home.

34 C.F.R. § 300.114; SBOE Rule 160-4-7-.07(IDDF(07))

Legal Resources for Georgia Administrators – Students – What to Do When You Are Facing Residential Placement

What do Courts Say?

• A district has a right to be concerned about a student's aggressive or violent behaviors. However, those concerns by themselves cannot dictate the student's placement on the LRE continuum; the district must consider whether it can meet the student's needs in a less restrictive setting. Here, psychologists testified that the student was on "high alert" throughout the school day because he was frightened of authority figures. Their testimony that the student was highly intelligent and motivated to succeed convinced the court that the student could excel in a general education setting with appropriate services and supports. *Troy Sch. Dist. v. K.M.*, 65 IDELR 91 (E.D. Mich. 2015).

Change of Placement

A change in location is not always a change in placement. A placement is a point along the child's continuum of placement options, while a location is the physical location where the child receives related services, such as a classroom. However, a change in location may rise to a change in placement if the change in location substantially alters the student's educational program. 71 Fed. Reg. 46,588 (2006). See Letter to Fisher, 21 IDELR 992 (OSEP 1994).

FAPE and LRE: Understanding What They Mean

• A free appropriate public education (FAPE) must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in 160-4-7-.18 Discipline.

34 C.F.R.§300.101(a); 34 C.F.R§300.530(d)

Legal Resources for Georgia Administrators – Students – *BOE v. Rowley* (FAPE)

Legal Resources for Georgia Administrators – Students – *JSK v. Hendry* (FAPE)

FAPE and LRE: Understanding _ What they Mean

- Least Restrictive Environment (LRE)
 - Each LEA shall have policies and procedures to ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions and other care facilities in Georgia shall be educated with children who are not disabled.
 - Special classes, separate schooling or other removal of children with disabilities from the regular class environment shall occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114(a)(2)(i), (ii).



- In *Rowley*, the Supreme Court established the following two-part test that courts should use to decide the appropriateness of a student's education:
 - Has the district complied with the procedures set forth in the IDEA?
 - Is the IEP, developed through the IDEA's procedures, reasonably calculated to enable the child to receive educational benefits?
- The Supreme Court held that when this two-part test is satisfied, the district has complied with the obligation imposed by Congress, and it is required to do no more.

Rowley acknowledged one size fits all won't work



Articulating a one size-fits-all standard is not an achievable goal for a statute that applies to students with differing abilities. For example, it applies equally to a deaf child, a child learning to eat, to dress, and to toilet represents education, as well as to a child with superior cognitive skills but behavioral challenges.



While courts have used different adjectives to describe the educational benefits required by *Rowley*, *Rowley* has proved to be a remarkably durable decision in a complex and fact-intensive area of the law.



Endrew F. v. Douglas County School District

- The Court focused on the requirement for a student by student analysis: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."
- But there is still no guaranteed outcome:
 - "... his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have a chance to meet challenging objectives."

There must be data to support that the student is making progress;

This does not necessarily mean the student has to be making good grades;

Progress needs to be evidenced within the goals and objectives;

Be careful when repeating the same goals and objectives year after year; and

What is important to know is educational benefit looks different for every student.

Evidence of progress is KEY.

Least Restrictive Environment (LRE)

- Each LEA shall have policies and procedures to ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions and other care facilities in Georgia shall be educated with children who are not disabled
- Special classes, separate schooling or other removal of children with disabilities from the regular class environment shall occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily

34 C.F.R. § 300.114(a)(2)(i), (ii)

LRE

Transition and Entitlement to FAPE through

- Beginning not later than 9th grade or age 16 (whichever comes first) or younger if determined by the IEP Team (and updated annually), the IEP must include appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills and transition services needed to assist the student in reaching those goals.
- Special Education students are entitled to services through age 21 unless they graduate with a regular education diploma.
- If a student is receiving services upon reaching age 22, the District shall have a written procedure identifying the process for completing the services whether the services will cease on the student's birthday or continue until the end of the semester or school year.

Disagreements

- All decisions are made by the IEP Team.
- Parents may address their disagreements through the IEP process and any disagreements that remain with the decision of the IEP Team through multiple avenues including:
 - Due process hearing request;
 - 504 hearing request;
 - DOE Complaint;
 - Mediation;
 - Complaints/Grievances as set out in your board policies; or
 - OCR Complaints.

"Stay Put" (where the student's "stays put" in the last agreed upon placement) is implemented in the even that a parent files a due process hearing request pursuant to IDEA.

Development of a BIP

According to the IHO's May 2015 decision, the teachers seemed unaware of the connection between the student's conduct and her difficulties with figurative language and changes in routines. "[The BIP] did not inform [the student's] teachers how to handle [the student's] behaviors, which was apparent to the [IHO] from responses given by the teachers 'that they did not understand the noncompliance,'" the judge wrote. Judge Holmes noted that the IHO had evaluated the BIP under the "more than trivial benefit" standard of FAPE -- a standard that had been superseded by the U.S. Supreme Court's ruling in *Endrew F. v. Douglas County School District RE-1*, 69 IDELR 174 (2017). Given that the BIP failed to meet the lesser standard, the judge explained *Endrew F.* did not alter the outcome of the case.

Paris School District v. A.H., by and through her parent, 69 IDELR 243 117 LRP 12828 (2017).

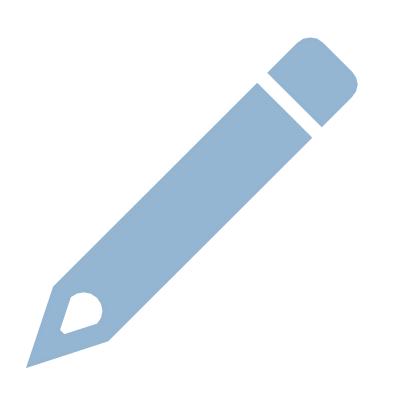
A district must have a fundamental understanding of a student's disability in order to develop a BIP that effectively addresses her problem behaviors. If a district does not understand why a student engages in certain behaviors, it cannot offer service providers effective strategies to address them. Although a BIP from the student's previous LEA identified her problem behaviors as verbal disruptions, physical aggression, property destruction, and elopement, the BIP at issue here focused solely on "noncompliance." That misclassification of the student's behavioral issues, coupled with the district's failure to identify the reasons for her "noncompliant" behaviors, made the BIP deficient. Paris School District v. A.H., by and through her parent, 69 IDELR 243 117 LRP 12828 (2017).

A systematic process for defining a child's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior.

The purpose of conducting an FBA is to determine whether a Behavioral Intervention Plan should be developed and if so, to assist the Team in identifying appropriate interventions.

SBOE Rule 160-4-7-.21(20) Definitions.

What exactly is a Functional Behavior Assessment?



What is a Behavior Intervention Plan?

A plan for a child with disabilities, included in the IEP when appropriate, which uses positive behavior interventions, supports and other strategies to address challenging behaviors and enables the child to learn socially appropriate and responsible behavior in school and/or educational settings.

SBOE Rule160-4-7-.21(7) Definitions

Disciplining students with disabilities



Basic Rules

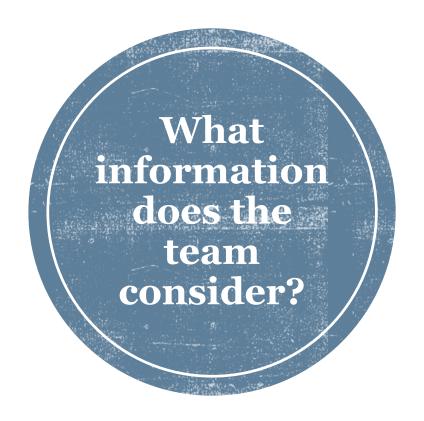
- A disabled student may not be discriminated against on the basis of disability.
- A "change in placement" for an IDEA student requires an IEP team meeting decision.

What IDEA says

- IDEA requires IEP teams to conduct a Manifestation Determination Review (MDR) within 10 school days of any decision to change placement because of a violation of the code of conduct.
- At the MDR, the MDR team must determine whether the student's misconduct was caused by his or her disabilities.

- Removal for *more than 10* consecutive school days; or
- A series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year; based on length of removals, total time of removal, proximity of removals to each other and the type of behavior involved
- Who decides what is a change in placement?





- All relevant information in the student's file;
- The child's IEP;
- Teacher observations;
- Relevant information provided by the parent; and
- Relevancy is determined by the questions before the Team.

What does the MDR Team decide?

- Did the disability <u>cause</u>, or have a direct and <u>substantial relationship</u> to the misconduct?
- Did the district's <u>failure to implement the IEP cause</u> the misconduct?
 - If the answer to either question is yes, the student's misconduct was a manifestation of the disability. If the answer to both questions is no, the misconduct was not a manifestation.

If it IS a Manifestation

- Conduct FBA and implement BIP, if this has not already been done;
- If there is a BIP, modify it as necessary to address behavior; and
- Return student to placement unless there is agreement to change placement.

If it IS NOT a Manifestation

- Conduct FBA and implement BIP, if appropriate;
- If there is a BIP, modify it as appropriate to address behavior; and
- Discipline the student just as you would discipline students without disabilities...

Remember you still must provide services

Bullying - Why do you need to know about it?



"Bullying" - O.C.G.A. § 20-2-751.4(a)

- Any willful attempt or threat to inflict injury on another person, when accompanied by an apparent present ability to do so;
- Any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm; or
- Any intentional written, verbal, or physical act, which a reasonable person would perceive as being intended to threaten, harass, or intimidate, that:
 - Causes another person substantial physical harm within the meaning of the Code Section 16-5-23.1 or visible bodily harm as such term is defined in Code Section 16-5-23.1;
 - Has the effect of substantially interfering with a student's education;
 - Is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
 - Has the effect of substantially disrupting the orderly operation of the school.

"Bullying" O.C.G.A. § 20-2-751.4(a)

"The term applies to acts which occur on school property, on school vehicles, at designated school bus stops, or at school related functions or activities, or by use of data or software that is accessed through a computer, computer system, computer network, or other electronic technology of a local school system."

The term also applies to acts of **cyberbullying** which occur through the use of electronic communication, whether or not such electronic act originated on school property or with school equipment, if the electronic communication:

- is directed specifically at students or school personnel,
- 2) is *maliciously intended* for the purpose of threatening the safety of those specified or *substantially disrupting* the orderly operation of the school, and
- 3) creates a reasonable fear of harm or has a high likelihood of succeeding in that purpose.

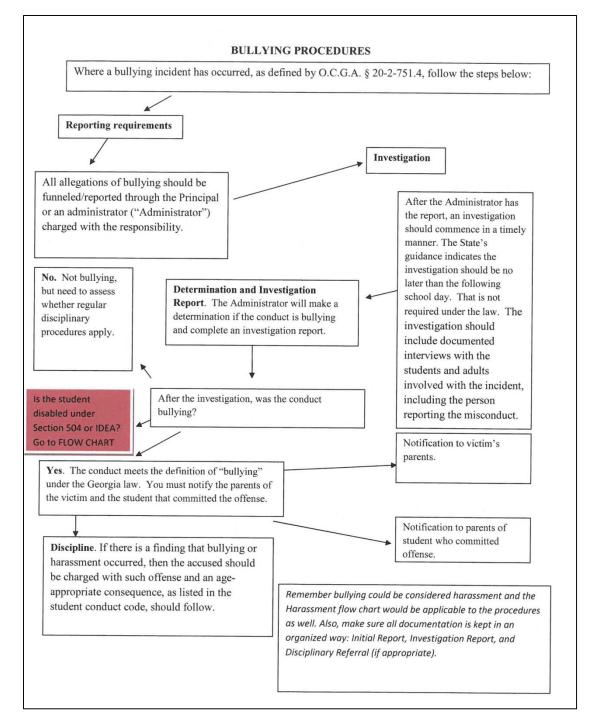
O.C.G.A. § 20-2-751.4

- All Local BOEs must adopt a policy
 - How does it define bullying? Definition should mirror state law.
- Bullying prohibition must be in Code of Conduct for ALL schools.
- Alternative school assignment for grades 6-12 after tribunal finding of 3rd bullying offense.
- Notification to parents of bully and victim.
- Reporting procedures, no retaliation, immunity for good faith.

- In 2013 OCR issued new guidance regarding allegations of bullying against students that are protected under 504.
- According to OCR, it may investigate whether there was a disability-based harassment violation, an FAPE violation or both. Districts must be prepared and have documentation outlining the steps taken to prevent any bullying-type conduct and all measures taken after it received notice of such conduct.

Requirements Regarding Bullying and Students with Disabilities

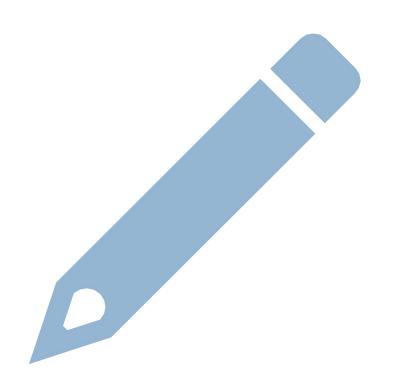
Bullying Procedures







"Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied," according to *Dear Colleague Letter*, 113 LRP 33753 (OSERS/OSEP 08/20/13).



Practically speaking, what does that mean to you?

• It means that even if the school follows the proper bullying procedures under district policy, it may not be enough because the definition of bullying as stated by OCR is far broader. Districts need to analyze bullying in the context of this definition for students with disabilities.

Be proactive;

Follow the law, plus more;

Have procedures in place;

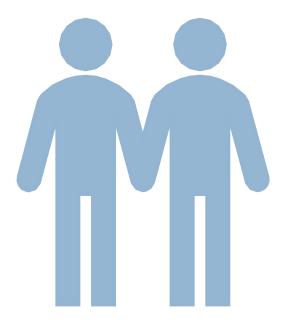
Any interventions that a school puts in place to address bullying or harassment of a student with a disability should be in writing.

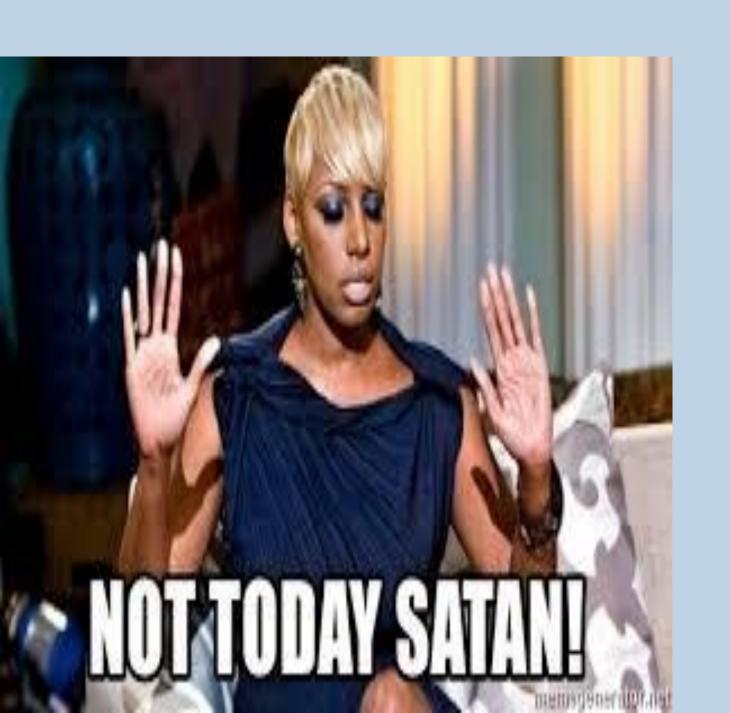
Always follow up.

What should you do?

Remember

- Parents Sue:
 - When they no longer trust the school administrators or teachers;
 - When they don't receive timely and useful information;
 - When they believe educators do not care what happens to their children; or
 - When they perceive communication to be rude and demeaning.





Once you have made it through all of that....(whew!).... welcome to the world of special education.



