ADVOCATING FOR CHILDREN WITH SPECIAL NEEDS
AND
SPECIAL CONSIDERATIONS IN FAMILY LAW MATTERS
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A) SPECIAL CONSIDERATIONS IN FAMILY LAW MATTERS THAT INVOLVE
CHILDREN WITH SPECIAL NEEDS

There are a myriad of considerations when dealing with a child with special needs in family law matters. It is extremely important that the attorneys familiarize themselves with the child’s disabilities and the special needs that the child has, as well as the federal, state and local laws that provide services for these children, in order to be able to educate the Court and obtain an appropriate agreement between the parties. Children with special needs often have school based as well as home based services and these services are provided by public and private agencies. It is important for family law attorneys to evaluate where the services are coming from and if they are paid for by the state or federal government, private insurance or if the families are paying out of pocket. It is also important in that evaluation to determine if all of the services that the child might need are being provided and if not whether there is a public or private agency that can provide the services. Some children will be eligible for Medicaid or other public insurance programs depending on the laws in the state where the family resides. These public programs often have restrictions on the types of services that they will cover and families will have to look at private insurance and school districts in an attempt to obtain all of the services and supports the child might need. Often private insurance companies do not cover services such as speech therapy or behavior intervention. If the child needs the service, who will
pay for it? Every state will have different laws regarding insurance so it will be important to know the laws in your state. In California, where I practice, a law was recently passed requiring certain private insurance companies to pay for the cost of behavior intervention services for children on the Autism spectrum. However, when it was passed it specifically exempted children with Medi-Cal (California’s Medicaid). Now the State has passed a bill to require Medi-Cal to cover the cost of behavior services for children on the Autism Spectrum. If a child does not have a diagnosis of Autism, these laws do not apply and the family would have to look to the Department of Developmental Services and the school districts to obtain these needed services.

As set forth below, the laws that provide services for children in education are very specific and sometimes not all of the child’s needs will be met. At that point, the family will need to evaluate whether they should pursue an administrative Due Process proceeding for appropriate school based programs and services. Due Process is an administrative proceeding that is set forth in the Individuals with Disabilities Education Act (the primary law providing services for children with disabilities). However, the process is implemented by each state individually, usually through either their Office of Administrative Hearings or their Department of Education. This process is described in more detail below.

Very often the Courts do not have special procedures or systems for dealing with families that are falling apart because of the extreme stresses involved in raising a child with special needs. The stresses are both financial and emotional and often have serious effects on the siblings of the child with special needs. The standard state laws may not apply when determining custody, visitation and support of children with special needs.
**Custody and Visitation:** Joint physical custody might create huge problems if the child with special needs is Autistic and has problems making transitions. Joint custody might also require having two of everything that the child needs such as equipment like wheel chairs and walkers; dietary needs and medicine; and occupational, physical, behavioral and speech therapies. The child with special needs often has a very structured schedule to accommodate all of the services he or she requires. It might be difficult to duplicate the schedule in another home. It might also be necessary to consider whether the noncustodial parent has the appropriate training and the desire to implement the needed program while the child is in their home. The Court might also need to consider the developmental age of the child rather than his/her chronological age when determining custody arrangements.

**Support:** It might be necessary for the Court to consider support above the recommended guidelines when considering the special needs of the child. The parties need to look at the child’s medical and therapy needs, equipment, medication, supplements and dietary needs and special toys or clothing required. The parties also need to consider whether the homes where the child will be living are appropriately equipped to allow the child access to the home, his/her bedroom, the bath tub and toilet and the kitchen. Will one or both of the houses need to be modified to allow the child access? What are the child’s long term needs and how will the child’s needs change over time? How willing is the custodial parent to do the things necessary to appropriately meet the special needs of the child. Who will pay for which services? Who will take the child
to therapies or doctor appointments? Who will be responsible for obtaining all of the child's medication, equipment and dietary needs and who will pay for these things?

**Medical Decisions:** Do the parents agree upon the types and amounts of medical intervention that the child needs? If not, who will have the ultimate decision making power when it comes to the medical needs of the child? What services are paid for through insurance or public benefits and what are out of pocket costs?

**Educational Decisions:** It is extremely important to define which parent or parents have the powers to make decisions regarding the child’s educational program. If parents cannot agree and are very hostile toward each other, it might be necessary to obtain a Court order deciding which parent has the final decision making power when it comes to the child’s education. Another consideration is what to do if the parents live in two different school Districts. Where will the child go to school? If the child goes to school on the bus in one District, he/she may not have transportation to school when he/she is staying with the parent who lives in the other District. Is the other parent willing to transport the child to school? Can that parent accommodate any equipment needed by the child at school? Can the wheelchair fit in the car?

These are only some of the matters that need to be considered when you have a child with special needs in a family going through a divorce. The considerations will be as varied as the needs of the child and the laws in the state where the child lives.
B) TWO MAIN FEDERAL LAWS AFFECTING CHILDREN WITH SPECIAL NEEDS IN EDUCATION:

Below is a summary of the two federal laws that apply to children with special needs in education matters, The Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Every state will have their own laws that mirror the federal laws and sometimes provide greater protections.

1) IDEA: Before 1975 children with disabilities were often excluded from school or educated in segregated sites. Then Congress passed the Education for All Handicapped Children Act of 1975. This was the first federal law that provided all handicapped children (whom we now refer to as children with special needs) with access to a “free, appropriate public education” which is commonly referred to as “FAPE”. This Act established a process by which state and local educational agencies may be held accountable for providing educational services to all children with special needs. The Act was re-authorized in 1990 and renamed The Individuals with Disabilities Education Act (IDEA). IDEA was amended in 1997 and re-authorized again in 2004 which is the current version of IDEA. IDEA can be found at 20 U.S.C. §1400 et. seq. and it's implementing regulations are at 34 CFR Part 300.

The IDEA serves all children in educational settings between the ages of 3 and 22. For children ages 0-3, the Act provides early intervention programs for children with disabilities and those at risk of developing disabilities. IDEA receives federal funding and includes legal time lines that must be followed. There are several delineated purposes of IDEA. These are: to have high expectations for children to access the general education
curriculum; to prepare children for further education and to lead productive and independent adult lives; to strengthen the role and responsibility of parents in the process of determining their children’s educational programs; to have highly qualified teachers in accordance with the No Child Left Behind Act (NCLB); to increase academic achievement and functional performance of children using scientifically based instructional practices; and to reduce paperwork.

There are six main principles of IDEA:

1) Free Appropriate Public Education (FAPE)
2) Least Restrictive Environment (LRE)
3) Appropriate Evaluation
4) Individualized Education Program (IEP)
5) Parent and student participation in decision making
6) Procedural Safeguards

Free, Appropriate Public Education (FAPE): 20 U.S.C. §1401(9): The term “free appropriate public education (FAPE) means special education and related services that have been provided at public expense, meet the state educational standards, include an appropriate education and are provided in conformity with the Individualized Education Program (IEP).” The first United States Supreme Court decision to define FAPE was Board of Education of the Hendrick Hudson Central School District, Westchester County, et.al. v. Amy Rowley, by her parents, Rowley, et. al., 458 U.S. 176; 102 S. Ct. 3034 (1982). The Court held that a State would satisfy its obligation to provide a FAPE to a handicapped child, “by providing personalized instruction with sufficient
support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP.” (458 U.S. 176, 204) Additionally, the Court held, “Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” (458 U.S. 201) The Court determined that the public educational system did not have to maximize a child’s potential. It only had to provide a program in which the child was receiving “some educational benefit.” This is the same legal standard that is applied to IEP’s today.

**Least Restrictive Environment (LRE): 20 U.S.C. § 1412(a)(5):** Under IDEA children with disabilities are to be educated with their non-disabled peers to the maximum extent possible. Children should only be removed from the regular education environment if the nature or severity of their disability is such that they would not receive educational benefit in the general education classes with appropriate supplementary aids and services. Consideration of placement should always begin by looking at the class in which the student would be educated if he/she did not have disabilities.

**Appropriate Evaluation: 20 U.S.C. §1414 (a)-(c):** If a disability is suspected, a parent or any other interested person may request an appropriate evaluation to determine a student’s eligibility for special education and related services. A school district has fifteen days from their receipt of a written request to provide the parents with an
assessment plan or a written explanation of why they won’t assess. They should assess in all areas of suspected disability. The school district has sixty (calendar) days from the date of their receipt of the consent for assessment to conduct the assessments and hold an Individualized Education Program (IEP) meeting. The instruments used for assessment must be free of racial or cultural bias. They must be valid and reliable for the purposes for which they are used. No single instrument is to be used as the sole criterion and districts must consider information provided by the parents. If a parent disagrees with the results of the district evaluation, the parent may request that the district pay for an Independent Educational Evaluation (IEE). The parent must make this request at the IEP meeting during which the district assessment is being discussed or in writing after the meeting. The request should state what the parent disagrees with and indicate that they want the district to pay for an IEE. The independent assessors should be at least as qualified as the district’s assessors in their areas of expertise. Once the parent requests an IEE, the district must either pay for the IEE or file for Due Process to defend their assessment.

**Individualized Education Program (IEP): 20 U.S.C. § 1414 (d):** An IEP meeting is held to discuss the results of the assessments and to determine eligibility. There are ten categories of eligibility under IDEA. These are: hearing impairments (including deafness); visual impairments (including blindness); speech and language impairments; orthopedic impairments; autism; mental retardation; emotional disturbance; traumatic brain injury; specific learning disabilities; and other health impairments. If it is determined that a child has one of these disabilities and because of their disability they need special
education and related services, an IEP document will be developed. An IEP is a legally binding, written document describing the agreed upon program specifically designed to meet the unique educational needs of the student.

The IEP document is written by a team of people that includes the parents; a regular education teacher, if the child is participating at all in general education; a special education teacher; the evaluators or someone qualified to interpret the results of the evaluations; a school district representative that has knowledge of programs and services and the authority to make decisions on behalf of the district; other people who have special knowledge or expertise regarding the child; and whenever appropriate, the child. This team of people will look at the academic, developmental and functional needs of the child; the strengths of the child; the child’s unique needs; and the concerns of the parents.

The contents of the IEP will include the assessment results; the student’s present levels of performance; long term goals and, if appropriate, short term objectives; progress toward meeting prior goals; the extent of time the student will be participating in general education; transition services when the child is sixteen; the transfer of educational rights when the student turns eighteen; a statement of the special education and related services and supplemental aids and services the child needs, based on peer-reviewed research to the extent practicable and a statement of the program modifications and/or accommodations that will be provided for the child. Related services are those supplemental aids and services that a student needs in order to benefit from his/her educational program. Some examples of these are occupational therapy, speech therapy, and physical therapy.
In certain circumstances the IEP team must take into consideration certain special factors. For a child whose behavior interferes with his/her learning or that of others, the IEP team needs to consider the use of positive behavioral interventions and other strategies that address the child’s behavior. If a child is not proficient in English, the team must consider the language needs of the child in relation to his/her IEP. If a child is blind or visually impaired the team must consider whether Braille is appropriate for the instructional needs of the child. For a child who is deaf or hard of hearing, the IEP team must consider the child’s language and communication needs. Finally, in all cases, the team must consider whether a child is in need of assistive technology devices and services.

**Parent and Student Participation in Decision Making:** The parent’s concerns are to be considered as well as any information that the parents bring to the IEP meeting concerning the child such as evaluations from outside assessors, medical documentation, or information regarding outside services the child may be receiving. It is appropriate for the child to attend an IEP meeting when the discussion will include an Individualized Transition Plan (ITP) which is considered when the child turns sixteen and sometimes earlier. An ITP looks at what is needed to prepare the child for further education, employment and independent living.

**Procedural Safeguards: 20 U.S.C. §1415 et. seq.:** At the IEP meeting the district must provide the parents with a document that explains that they and their child have certain procedural safeguards with respect to the provision of a free appropriate public education by the school district. These include the opportunity for the parents to examine
all records relating to their child; to provide parental consent to evaluations; to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free, appropriate public education; to obtain an independent educational evaluation of the child; the opportunity to present and resolve complaints including the timeline for filing the complaint and the availability of mediation; a description of what the child’s placement will be during the pendency of the due process proceedings; procedures for students who are subject to interim alternative placements; information regarding procedures for parents unilateral placement of children in private school at public expense; procedures for due process hearings including disclosure of evaluation results, state level appeals and civil actions; and attorneys’ fees. This notice shall also be given to parents upon initial request for evaluation, the filing of a due process complaint or upon request by the parent. All districts must also establish procedures to protect the rights of a child whose parents cannot be identified or if the child is a ward of the State, which involve the appointment of a surrogate parent to act on the child’s behalf.

**Prior Written Notice: 20 U.S.C. §1415 (b)(3) & (c)(1):** Whenever the district proposes to initiate or change or refuses to initiate or change the identification, evaluation, or educational placement of the child, the district must provide prior written notice to the parents. This notice must contain: a description of the action proposed or refused by the district; an explanation of why the district proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency relied upon in making their decision; a statement that the parents of a child with a disability have procedural safeguards under the IDEA; a list of resources available for parents to obtain
assistance in this regard; a description of other options considered and why those options were rejected; and a description of the factors that are relevant to the district’s decision in regard to their proposal or refusal to make changes. This notice must be provided to the parents in their native language.

States must establish a mediation process for parties to attempt to resolve disputes either before the filing of a formal complaint or after filing a complaint and before a hearing. Mediations are voluntary, not used to deny or delay a parent’s right to a Due Process hearing, shall be free for the parent and shall be conducted by a qualified, impartial mediator. Mediations are to be held in a timely manner and in a location that is convenient to the parties.

**DUE PROCESS: 20 U.S.C. §1415(b)(7)(A):** If the parents disagree with the district’s action or refusal to act, they have the right to file a complaint for Due Process with an agency of the state government assigned to receive and administer those complaints. These are administrative proceedings that in most states will be handled by the state’s Department of Education or the Department of Administrative Hearings. IDEA provides for a two year statute of limitations for the filing of Due Process complaints which control unless the state’s law provides for a different time line. The complaint must contain the name and address of the child; the name of the school that the child is attending; a description of the problem; and a proposed resolution of the problem. Within fifteen days of a district’s notice of the parent’s complaint, the district is to hold a Resolution Session to attempt to resolve the dispute prior to the Due Process hearing. This meeting must include a district representative that has decision making authority. The district is not
permitted to bring an attorney to the Resolution Session unless the parent has given notice that they will be bringing their attorney. If after thirty days from the date the complaint was filed, the parties have not been able to resolve the dispute, the parent shall have the opportunity to proceed with an impartial Due Process hearing. Not less than five days before the hearing, each party must disclose to the other all evaluations including the recommendations, completed by that date and intended to be used at the hearing. Most states also require a disclosure of all exhibits and a list of witnesses that the parties intend to call at the hearing not less than five days before the hearing. The hearings are conducted by impartial Hearing Officers who make decisions based upon whether the child received a free, appropriate public education (FAPE). In making the decision, the Hearing Officer looks at the substantive issues as well as procedural violations that interfere with a child’s right to FAPE, significantly impede the parent’s opportunity to participate in the process regarding their child’s education or caused a deprivation of educational benefits. The parties have the right to appeal the decision of the Hearing Officer to state or Federal Court within ninety days. Individual states may provide a different or shorter time line. With the exception of appeals related to discipline, when a Due Process complaint is filed, the child stays in the last agreed upon placement with the last agreed upon services unless the parents and the District agree otherwise. This is commonly referred to as “stay-put.” 20 U.S.C. §1415 (j)

Pursuant to 20 U.S.C. § 1415 (i)(3)(B), the prevailing party in an action or proceeding under IDEA is entitled to an award of reasonable attorneys’ fees. Costs can also be awarded but not fees for expert witnesses. Fees are determined based on what
is reasonable and customary. Fees are not recoverable for attendance at Resolution Session or IEP meetings unless the IEP is ordered pursuant to Due Process. When IDEA was amended in 2004, a provision was added that allows school districts to recover their attorneys’ fees against the parent and/or the parent’s attorney, if the district wins at hearing and is able to show that the parents’ claims were frivolous, unreasonable, or without proper foundation or the cause of action was presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. 20 U.S.C. § 1415 (i)(3)(B)

2) Section 504: Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §701 et. seq.) is a broad civil rights law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance. This includes public school districts that receive Federal funding. With the exception of providing access to buildings and modifications and accommodations in testing, Section 504 does not provide the level of protections and benefits to children with special needs that IDEA does. However, children with IEP’s under IDEA are automatically protected by Section 504. 29 U.S.C. §794(a) states, “No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance……” 29 U.S.C. §705(20)(B) defines an individual with a disability as a person who, “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities; (ii) has a record of such an impairment; or (iii) is
regarded as having such an impairment.” The regulations implementing Section 504 that apply to educational institutions are located at 34 C.F.R. Part 104. 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as, “(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 34 C.F.R. 104.3(j)(2)(ii) states, “Major life activities means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”

The Americans with Disabilities Act Amendments Act of 2008 which became effective January 2009, included a conforming amendment of Section 504 which broadens the interpretation of disability. In the Amendments Act Congress provided more examples of major life activities such as eating, sleeping and standing and listed more major bodily functions such as the immune system and reproductive functions. The Amendments Act also provided that school districts must not consider “mitigating measures” in determining whether a student has a physical or mental impairment that substantially limits a major life activity. This is a change in the law that previously did require districts to take into consideration such mitigating measures. Mitigating measures include such things as medication and hearing aids. The only exception is ordinary eye glasses and contact lenses but doesn't include “low-vision devices.” The ADA
Amendments Act clarified that a person who has an impairment that is minor and not long lasting is not regarded as a person with a disability and not subject to the protections of Section 504. Just because a student might have a medical diagnosis does not automatically qualify him/her for services under Section 504. The medical condition must cause a substantial limitation on the student’s ability to learn or other major life function in order for the student to qualify.

The Section 504 implementing regulations require public school districts to provide a free, appropriate public education or “FAPE” to students with disabilities who qualify under Section 504. FAPE under Section 504 includes regular or special education and related aids and services to meet the unique needs of a disabled student as adequately as the needs of nondisabled students are met. The process begins with an evaluation of the student to see if he/she is eligible under Section 504. The evaluation process is similar to that under IDEA. No single measure should be used to determine eligibility. Once evaluations have been completed there is a meeting of the evaluators, teachers, and parents to consider the information and make a determination of eligibility. Independent evaluations and other outside information such as medical records, should be considered by the team. Like evaluations under IDEA, evaluations under Section 504 must be conducted after obtaining informed consent from the student’s parents. The Section 504 regulations require that re-evaluations be conducted periodically and prior to any change of placement. If a student transfers to a different district with a current 504 plan in place, the receiving district is required to review the plan and determine if it is appropriate for them to implement. If not, they can conduct new evaluations and devise a
new 504 plan. The 504 plan may include accommodations for a child such as more time to turn in homework or the ability to take a test in a quiet environment. The plan may also include services such as tutoring or a note taker for a student. The goal of the 504 plan is to meet the unique needs of the student in order to “level the playing field” in the classroom with non-disabled students.

If a parent disagrees with the team decision to provide a 504 plan or not, the parent has the right to a Due Process hearing similar to that under IDEA. The procedural safeguards under Section 504 require school districts to establish a procedure that provides parents with notice, an opportunity to review records, to have an impartial hearing when there is a dispute, to be represented by an attorney and the right to an appeal. There is no requirement for mediation like there is under IDEA.

The United States Department of Education maintains an Office for Civil Rights (OCR) whose job it is to eliminate discrimination against students with disabilities in programs that receive federal funds from the Department of Education. If a student, parent or advocate thinks that a student is being discriminated against because of his or her disability, they can file a complaint with OCR. OCR conducts an examination of the policies and procedures maintained by the district as well as a review the facts as set forth in the complaint with the district. If they determine that the district is out of compliance with Section 504, they will seek to obtain voluntary corrective action on the part of the district. If they are unable to achieve this, they can file an administrative complaint with the Department of Education to have them stop providing funds to the district or they can file an action in Federal Court to enforce the terms of their corrective action. Further, a
student may file an anti-discrimination action directly in Federal Court. There is no requirement that administrative remedies be exhausted under Section 504 like there is under IDEA.

RESOURCES FOR MORE INFORMATION


IDEA Information: http://idea.ed.gov/explore/home

National Dissemination Center for Children with Disabilities: http://www.nichcy.org

Wrightslaw: www.wrightslaw.com

National Center for Learning Disabilities: www.ncld.org

Autism Society of America: www.autism-society.org

United Cerebral Palsy: www.ufp.org

Association of Retarded Citizens: www.thearc.org

American Epilepsy Society: www.aesnet.org


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