

# Advocating for Children and Youth with FASD in the Public Education and Juvenile Justice Systems

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1:30 pm - 2:30 pm

# Agenda

- Juvenile Justice
- Education
  - Eligibility
  - FAPE
  - Behavioral Supports
  - Discipline
  - Maine Specific Information

# Format

- This is an overview only.
- If you have a specific case you wish to discuss, please briefly note the facts and your email address and provide this to me during the presentation. Please be sure not to include any identifying details about the child or location.
- If I have time during the presentation, I will cover it. If we are out of time, I will follow up with you afterward.

# P&As

- NDRN is the national membership organization for the Protection and Advocacy (P&A) and Client Advocacy System (CAP) Systems, the nationwide network of congressionally mandated, legally based disability rights agencies.
- P&A agencies: Largest provider of legally-based services for people with disabilities in the nation.
- Maine's P&A is Disability Rights Maine: <http://drme.org/>

# Juvenile Justice/Disability

Juvenile incarceration rates are down but many serious problems continue ...

- Inhumane conditions in facilities
- Youth treated as and intermingled with adult prisoners
- Physical and sexual abuse
- Lack of treatment
- Solitary/room confinement

# Juvenile Justice/Disability

- Youth from particular racial and ethnic backgrounds/ YWDs incarcerated at disproportionately high rates.
- 65-70 % of youth in the justice system meet the criteria for a disability- more than three times higher than that of the general population.
  - See: Skowyra & Coccozza, Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System, National Center for Mental Health and Juvenile Justice, (May, 2015); [http://www.ncmhjj.com/wp-content/uploads/2013/07/2007\\_Blueprint-for-Change-Full-Report.pdf](http://www.ncmhjj.com/wp-content/uploads/2013/07/2007_Blueprint-for-Change-Full-Report.pdf).

# Juvenile Justice/Disability

- Can be especially detrimental to youth with disabilities
  - Exposed to:
    - Solitary/Room Confinement
    - Negative peers
- Removed from
  - Family supports
  - Treatment services

# Juvenile Justice/Disability

NDRN Report:

*Orphanages, Training Schools, Reform Schools and Now This?*

**Recommendations to Prevent the Disproportionate Placement and Inadequate Treatment of Children with Disabilities in the Juvenile Justice System**

<http://ndrn.org/en/public-policy/justice-system/164-juvenile-justice.html>

Issues include:

- **Diversion** of children and youth with disabilities from the juvenile justice system (particularly stemming the “School to Prison Pipeline”) due to failure of other systems.



# Juvenile Justice/Disability

## Inhumane **Conditions**

- Failure to provide necessary substance use treatment; mental health treatment health care and education.
- Inappropriate use of restraint, seclusion, use of psychotropic medication; segregation/solitary confinement.
- Inadequate nutrition, space, exercise, bed coverings; heat; light; air,
- Failure to accommodate youth with disabilities
- Failure to protect youth from physical and sexual abuse by peers and staff.

# Juvenile Justice/Disability

**Re-entry** service: Some factors that improve a youth's chances of success upon release include:

- A clear residential plan, where he or she will live, and with whom
- Meaningful and respected involvement of the youth
- Contact with family, community, and positive peers
- A receiving school placement
- Continuation of any mental health, medical, and substance abuse treatment
- For youth with an IEP, IDEA transition planning and timely records transfer.

# Juvenile Justice/Disability

## Example: **MARYLAND**

- A seventeen year old African American student was arrested at school 9 times, and was handcuffed and restrained. His behavioral issues in school began in first grade.
- Despite these continued problems the district continued to draft IEPs that were not effective.
- Despite numerous suspensions and arrests, the district did not revise his BIP or update assessments
- Instead the district had him arrested by the school resource officer.
- He was placed in detention as a result and remained there for many years

# (Some) Recommendations

- Divert youth from JJ system and prevent incarceration whenever appropriate by using probation or other alternatives when necessary to ensure safety
- Schools with high school-based arrest rates
  - Prevented from using federal funds to employ School Resource Officers (SROs)
  - Required to have MOUs that ensure that SROs work is limited to traditional police activities and not school discipline
  - SRO training; youth development; disability; rights; de-escalation
- ED and DOJ should fully enforce all provisions of Title VI, Title IX, the ADA, Section 504, and the IDEA

# Special Education Overview

**Section 504 and I.D.E.A.**

# Free Appropriate Public Education (FAPE)

Available to all students with disabilities aged 3 through 21

20 U.S.C. § 1414(c)(5)(i): the right to a FAPE ends when a student graduates with a regular high school diploma.

Certificate/GED is not a diploma

## **FAPE (cont.)**

To be eligible under IDEA, student must meet the definition of one of several enumerated disabilities and, “by reason thereof,” need special education and related services

Must be at no cost to parents or student: Medicaid & private insurance for AT are often cost issues.

***Bd. of Ed. of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176 (1982).***

First Supreme Court case on IDEA

An appropriate education does not mean the “best” education or one designed to maximize a student’s potential. *Rowley at 199.*

Program must be based on the student’s unique individual needs and be designed to enable the student to benefit from an education.

In other words, the student must be making progress.

Standard eroded over the years



## **Two part test to determine if a program is appropriate.**

- 1) First, did the District comply with IDEA's procedures and,
- 2) Second, was the individualized education program (IEP) reasonably calculated to enable the child to benefit?

# Recent Supreme Court Decision: *Endrew F*

- *Endrew F. v. Douglas County School District RE-1*, 580 U.S., 2017 WL 1066260 (March 22, 2017)
- Revisited the Rowley FAPE standard
- IDEA's preference is for fully integrating students with disabilities in the regular classroom
- FAPE "typically means ... providing a level of instruction reasonably calculated to permit advancement through the general curriculum."
- For students for whom "that is not a reasonable prospect" ed. program must be "appropriately *ambitious*" in light of child's circumstances.

## Child Find

Locate, evaluate and identify students with disabilities

*After Rowley, many districts would not even classify a student who was advancing from grade to grade*

2006 regulations- Applies even to children advancing from grade to grade. 34 C.F.R. § 300.101(c).

## **“Zero reject”**

Children entitled to FAPE “regardless of the severity of their disabilities.” 20 U.S.C. § 1412(a)(3)(A); §1412(a)(1)(A)

*Timothy W. v. Rochester, N.H., School Dist.*, 875 F.2d 954 (1st Cir. 1989), cert. denied, 110 S. Ct. 519 (1989).

# ELIGIBILITY

How Do I Determine Whether My Client is Eligible For Special Education Per the IDEA?

1. Age
2. Category of Disability
3. Needs Special Education
4. Decision made by group of professional and parent
5. Problems caused by lack of instruction in reading, math or limited English Proficiency – not enough

## **Special Situation: Other Health Impairment**

Includes Tourette syndrome among the list of “chronic or acute health problems.” 34 C.F.R. § 300.8(c)(9). 71 FR 46550.

List of conditions in the regulations is not exhaustive.

*Fetal Alcohol Syndrome*, Bipolar Disorders and other organic neurological disorders are not specifically mentioned. 71 FR 46550

## **Special Situation: Protections for Students Not Yet Eligible for IDEA**

1. ADA , Section 504 or state civil rights statutes
2. IDEA protections.

## Initial Evaluations

1. Before initial evaluation school district must obtain parental consent
2. If parent refuses, district may go to hearing
3. Do not need parental consent if child is a ward AND school cannot locate parent, parent's rights terminated.
  - a. School does not have to delay initial evaluation for appointment of a surrogate
  - b. School does not need parent's consent if judge appoints someone
4. If child home-schooled or privately placed– school may not use due process/mediation for initial evaluation.



## **Evaluation Timeline:**

1. Initial request/referral must come from parent or school, not some other person.
2. Initial evaluation must be conducted within 60 calendar days of receiving parental consent for the evaluation for children in the Child Development Services System, or within 45 school days of receiving parental consent for the evaluation for children 5-20 years of age under the responsibility of the public school system.

## **Initial Evaluation Content**

1. Comprehensive Evaluation needed
2. Evaluation to determine a) if child has a disability, and b) needs
3. Review existing data—including parent, current teachers, and providers
4. Must assess cognitive, behavioral, physical and developmental factors and the ability to participate in general education

## **Initial Evaluation Content (Continued)**

5. No single procedure used as sole criterion
6. Assess in all areas of suspected disability
7. Must be sufficiently comprehensive
8. Materials may not be racially or culturally discriminatory.
9. Tests must accurately reflect child's aptitude or achievement level and factors test purports to measure— not reflect child's impaired sensory, manual or speaking skills

## **Initial Evaluation Content (Continued)**

10. Lack of instruction or Limited English Proficiency cannot be factor in eligibility

11. District must draw on variety of sources when interpreting evaluations

12. Must assess whether student's functional capabilities may be increased, maintained or improved through Assistive Technology (AT)

# **Independent Evaluation at District Expense (IEE)**

1. Parent may request IEE at District expense when disagree with school
2. Should submit request before obtain it, but not required
3. Independent means qualified and not employed by public agency
4. Evaluation must meet public agency criteria
5. School may provide list of approved evaluators, but cannot limit use of providers to the list

## **Independent Evaluation at District Expense (IEE) (Cont.)**

6. School can ask why disagree, but cannot require answer.
7. School must either agree to pay or file for due process
8. Parent has right to IEE if parent disagrees with school's evaluation and school fails to prove it's evaluation was appropriate.
9. IEE limited to one IEE each time disagree with public agency (is more than once a lifetime).
10. If parent gives school IEE obtained a private expense or if parent obtains IEE at school expense, school must consider and may use in hearing

# Reevaluations

1. Informed Consent required. District may file due process for consent, but not required to.
2. If district made reasonable efforts to obtain consent and parent failed to respond agency may proceed with reevaluation.
3. Occur every 3 years unless agreement not to.
4. Limited to once a year, unless school and parent agree
5. District must review evaluations, data and observations to determine child's needs.

# Placement/Least Restrictive Environment (LRE)

1. High standard “ maximum extent”
2. Placement is entire program of services
3. Placement decisions made by team
4. IEP team and placement team can be same people.
5. Usually teacher selection and location are left to school



## **Placement Decisions:**

1. Made by group of knowledgeable persons and in conformity with LRE provisions
2. Child's Placement is determined annually, based on the IEP and close as possible to child's home
3. Should attend school would attend if not disabled
4. LRE – considers potential harmful effect on child or quality of services needed

## **Placement Decisions (Cont.)**

5. Cannot remove a child solely because need to modify general curriculum
6. Need parental consent before provide initial special education services. District cannot force services through due process.
7. Schools must make attempts to involve parents in IEP meetings. If cannot obtain involvement school may make placement decision without parent.

## **Least Restrictive Environment**

4. Children should be removed from the regular education environment only if the nature or severity of the disability is such that education in regular classes with supplementary aids and services cannot be achieved satisfactorily.
5. Supplementary aids and services: assist children to remain in regular education environment and includes AT.
6. LRE includes extracurricular activities.
7. Should always consider regular education first (before more restrictive placements)

## **Least Restrictive Environment (Cont.)**

1. Schools must provide a full continuum of services.
2. This means a school cannot refuse or fail to place a student in the right placement just because the placement is not available.
3. Schools must create or modify existing programs.
4. The comments to the 2006 regulations provide useful language about LRE. 71 FR 46587-88

## **Examples:**

If the student requires a full time aide to participate in the regular classroom and the district does not wish to provide one, it may not place the student in an already existing segregated or remedial classroom for part of the day so that s/he "can receive the intensive services s/he needs." If providing an aide is the only accommodation that will allow the student to be fully integrated within the school system, the district must provide the aide.

## **Related Services:**

1. Definition: Services a student requires in order to benefit from special education.
2. Supplementary aids and services are aids, services and other supports that allow the IDEA eligible student to be integrated with non-disabled students to maximum extent appropriate.
3. Services required is varied.

# WRITTEN INDIVIDUALIZED EDUCATION PROGRAM (IEP) DEVELOPMENT

## **Definition of Parent—34 C.F.R. § 300.30**

300.30(a)(1)--means biological or adoptive parent.

300.30(a)(2)-- Foster parent (unless State law, regulations or contractual obligations prohibit). There is a substantial change in this section.

## Parental Participation

Parents are members of the IEP Team

Parents are equal participants with district staff in developing the IEP

District's must ensure that the parents are present or are afforded the opportunity to participate, including:

scheduling meeting at agreed upon time and place. Can only proceed without parents if public agency “unable to convince” parents to attend and even then agency must record attempts to arrange a “**mutually agreed**” time and place.



# IEP Team

The IEP Team ***must*** be composed of the following:

1. Parents
2. One regular education teacher (if child may or is in regular edu)
3. One special education teacher or where appropriate one special education provider
4. LEA member who: can provide or supervise instruction, and knowledgeable about gen'l edu curriculum and availability of resources.
5. Person who can interpret instructional implications of assessments.
6. The child ( if appropriate)

# IEP Team Members: Options

An IEP team member may be excused by agreement between parent and district.

If member's discipline not going to be discussed during meeting then no written consent or written input required.

If member's discipline will be discussed then informed written consent and written input from the member required.

# Amendments to IEP's

Parent and LEA may agree to amend the IEP without reconvening IEP team.

Must be in writing

No requirement amendment writing signed by parent

IEP team must be informed of the changes

School only required to give amendment to parent if parent requests it.

# IEP Content

1. Written Document setting out needs, services and goals
2. Must list present level of performance and effect on ability to be in general curriculum.
3. Must list annual goals ( no repeaters...)
4. Goals must be measurable and relate to meeting each of the child's educational needs.

## IEP Content (cont)

5. Short-term objectives or benchmarks only required for students taking alternative assessments (but may use for all children if want)
6. When developing IEP team must consider:
  - strengths of child
  - concerns of parents
  - results of evaluations
  - academic, developmental and functional needs

## IEP Content (Cont.)

7. The IEP must list all Special Education, related services and supplementary aids and services to be provided and they must be based on peer reviewed research to the extent practicable.

8. IEP must also list all program modifications and supports for school personnel

9. Projected date for initiating services and modifications and frequency, location and duration

## **IEP Content (Cont.)**

10. Transition service by age 16

11. Extent segregated from non-disabled peers

12. Statement of accommodations necessary to measure educational achievement or functional performance on state or district-wide assessments.

13. Reason for any alternative assessments

# IEP Content (Cont.)

14. Progress Reporting: Must state how progress will be measured and of when periodic reports will be provided.

15. Additional Considerations:

- a. Behavioral interventions needed
- b. Limited English Proficiency effects
- c. Use of Braille
- d. Instruction in child's language and mode of communication for deaf or hard of hearing students
- e. Assistive Technology needs



# IEPs

1. IEP must be reviewed at least annually.
2. Must be in effect at beginning of each year.
3. Teachers/service providers must be informed of their IEP duties and have access to the IEP.

# Section 504 of the Rehabilitation Act

1. Basics: prohibits discrimination, intended to “level the playing field”
2. Legal Standard: No otherwise qualified Individual with a disability shall solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by the U.S. Government.

## Section 504 of the Rehabilitation Act (Cont.)

1. Covered Entities: Public schools, private schools receiving public money
2. Eligibility: Must broader than IDEA. A person's impairment substantially limits one or more major life activities, has a record of the impairment or is regarded as having such an impairment.

## **Section 504 of the Rehabilitation Act (Cont.)**

3. Accessibility: Schools must take reasonable steps to ensure students have access to all programs and activities; higher standard for new construction. Applies to students and parents with disabilities.

4. FAPE: Use of related aids and services to meet students' needs.

5. LRE: Students with disabilities must be educated with students who are not disabled to the *maximum extent appropriate*.

## **Section 504 of the Rehabilitation Act (Cont.)**

### 6. Procedural Safeguards:

- a. Must develop procedure to determine student's needs—may use IDEA process.
- b. Procedures must meet certain requirements
- c. Parents have due process rights that includes “status quo”

# Educational Records

1. Protections apply to guard against access to students records.
2. Family Educational Rights and Privacy Act (FERPA). Controls issues of consent, access, and confidentiality of school records.
3. IDEA eligible students have additional protections

# What is a Record Under IDEA?

1. Defined the same as under FERPA– Directly related to a student;  
Maintained by an educational agency
  
2. Things that are NOT records:
  - a. Law enforcement records of education agency
  - b. Employee records made and maintained in normal course of business related only to employee's work. (e.g. teacher notes)
  - c. Treatment records disclosed to other professionals involved in the treatment
  - d. Information about individual after leaves agency

## Records (Cont.)

1. Must inform parents about their right to access records
2. Parent or student has right to review records, list of records, explanation of records, copies (if failure would prevent parent from having right to review— copying fee can apply); representative review of records
3. Parental consent to release records required in most cases.



## Records (Cont.)

4. Parents may request corrections/alterations be made to records.
5. If district refuses, parent may appeal decision, if loses appeal may still place statement of inaccuracy in student's file.
6. Parents can request that a child's records be destroyed when the school no longer needs them. Some info may be kept indefinitely such as name, address, grades.
7. Discipline-State may require district to provide discipline info to new school, District may report behavior to law enforcement as long as does not violate FERPA.

# Discipline IDEA

## Legal Requirements:

1. Goss v. Lopez— Set standard; applies to all students
2. May consider case-by-case basis whether or not to apply the penalties in the discipline provisions, but may not punish without going through procedural protections

## **Discipline: IDEA**

School officials can remove an IDEA eligible student from his or her regular school placement for up to 10 consecutive school days, if the punishment is appropriate and is administered in the same manner as it would be to non-disabled students.

This means that if the student can still legally be punished after the district has completed the due process procedures required by *Goss*.

## **Discipline: IDEA**

Suspensions Longer than 10 days:

1. Immediate notice to parent
2. Manifestation Determination Review within 10 school days
3. If a Manifestation, either conduct a functional behavioral assessment or review and modify existing plan; child must be returned to placement
4. If Not Manifestation, then discipline like non-disabled peers

# Calculation of Suspension

1. In-school suspension counts unless child continues in general curriculum, receives IEP services, and participates with non-disabled peers
2. Bus: If on IEP and no alternatives provide then Bus counts as suspension. If not on IEP, not a suspension day.

# Manifestation Determination Review:

1. MDR team must review all relevant information about student
  
2. Determine if:
  - (a) Conduct was caused by or a direct and substantial relationship to the child's disability  
or
  - (b) If the conduct was a direct result of agency's failure to implement the IEP

# When do a series of short term disciplinary removals become a change in placement?

1. Child removed a series of times that results in a pattern because:
  - a. Removals total more than 10 days and because length of removal, total amount of time the child has been removed and the proximity of the removals to each other results in change of placement. And
  - b. And the behavior is substantially similar to the child's behavior in previous incidents.

## **Protections For Children Not Yet Identified As Eligible:**

1. Student protected if district knew child had disability before behavior occurred
2. District has knowledge if:
  - a. Parent gives concern in writing
  - b. Parent requested evaluation or
  - c. Teacher or other staff express concerns to director of special education or other supervisor

Exception: Parent refuses evaluation



# **Stay Put Exceptions: Weapons, Drugs, and Serious Bodily Injury**

1. Weapon defined in 18 U.S.C. sec. 930(g)(2)
2. “Controlled substance” defined in 21 U.S.C. sec. 812(c)
3. Serious bodily injury defined in 18 U.S.C. sec. 1365(h)(3)

**Threats do not count**

# What are the requirements for the IAES?

1. Determined by IEP team
2. Includes services and modifications to address behavior
3. Limited to 45 days, unless hearing officer grants extension
4. Tutoring typically insufficient (curriculum/ IEP)

## **BIP/FBA's:**

1. Based on Functional Behavioral Assessment (FBA)
2. FBA used to determine reasons for behavior
3. Behavioral Intervention Plans (BIPs) created to address problems:
  - a. Regulation requires FBA/BIP be considered if child has behavior problems
  - b. Required for all students excluded from school for more than 10 days or change in placement

# Suspension or Expulsion of 504 Students

1. Before remove child (COP = 10 total days or more /pattern), must complete an evaluation
2. If there is a relationship between disability and incident then school cannot change the student's placement.
3. If school determines there is no relationship the student may punished in same manner as regular ed. student.
4. If student is suspended or expelled educational services NOT required.

# What is “Informal Removal”?

## **Removal of students from school without due process**

- Goss v. Lopez (gen'l ed) 419 U.S. 565 (1975)
- I.D.E.A.
- Section 504

### **Various Methods**

- “Sent homes
- Shortened Days
- Homebound/tutoring
- Transfers to no where

# Who Does It Impact?

- It appears to impact particularly disenfranchised families
  - Student: School removals increase likelihood of JJ referral and drop out
  - Community: Unsupervised youth
  - Family: Parents often have to quit work
- Hard to say for sure because of lack of data collection, but anecdotally
  - People of Color
  - Low Income People
  - Single parents

# The “Dear Colleague Letter”

- Press release

- <http://www.ed.gov/news/press-releases/us-department-education-releases-guidance-schools-ensuring-equity-and-providing-behavioral-supports-students-disabilities>

- “Dear Colleague” Letter

- <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>

- Stakeholder Brief

- <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-summary-for-stakeholders.pdf>

# OSEP August 1, 2016 Guidance Document

## Key Points

- The need for and provision of appropriate behavior supports are important elements in FAPE and LRE analyses
- There are no “10 Free Days”
- All removals count, including informal removals
- There is a 3 factor test for use in determining when a removal impacts FAPE/LRE ( counts as a suspension)
- This guidance applies equally to all public school programs, including charter school and JJ facility programs.



# 3 Factor Test

1. Opportunity to be involved/make progress in the general ed curriculum
2. Receive the Instruction and Services on the IEP
3. Participate with non-disabled students as they would have in their current placement.

# Case Law

SEA decision re: “sent homes”: *School District of the City of Flint*, 66 IDEALR 197, (April 2015)

IDEA eligible child had been sent home repeatedly for behavior related issues, but these removals were not called suspensions.

A school district was required to provide MDR when ten days out of school were reached, even when those 10 days were not called suspension. (“ a suspension by any other name...”)

## Case Law (cont.)

*Millennium Community School*; Ohio State Educational Agency  
CP 0021-2016; March 25, 2016

A public charter school in Ohio failed to provide FAPE when a student was not provided educational services and an MDR after the school shortened his school day. The Ohio ED ordered the school to undergo training and to determine whether and how much compensatory education the student required.

# Maine Specific Information

- Tutoring
- 1:1 instruction/LRE
- Abbreviated Day
- Transition Plan: 9<sup>th</sup> Grade
- Eligibility Categories: FASD
  - B-2 Developmental Disability
  - 3-20
    - Developmental Disability
    - ID
    - Multiple
    - OHI
    - SLD

# Maine Tutoring

- “Tutorial Instruction. The IEP Team may consider tutorial instruction as a component of a child’s program while assuring consistency with the federal requirements of **least restrictive environment**. Tutorial instruction may occur in school, during or outside of school hours, off site in a neutral setting, in an interim alternative education setting, in the child’s home, or in a hospital setting. The IEP must be revised to add tutorial instruction. ... Tutorial instruction is to be used in conjunction with **abbreviated school day** (Section VI.2.L) or **Discipline of Children with Disabilities** (Section XVII.), but in no other circumstances. “ (Chapter 101, page 113)

# Maine Tutoring (Cont.)

- Any tutorial instruction offered to a child with a disability shall be provided by an appropriately **certified special education teacher**, by a certified regular education teacher, or by an educational technician III.
- There is no minimum or maximum number of hours a day that must be provided, rather this determination will be made by the IEP Team based on the **child's individual educational needs**.
- Receipt of tutorial instruction does not **preclude a child's participation** in other school administrative unit activities and programs. Tutorial instruction may not be used in lieu of specialized instruction.

# Contact

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