

Helping Parents Understand Their Rights in Special Education

An Interview with a Legal Expert

by **Matthew D. Cohen, Esq.**, Co-founder of the Law Firm Monahan & Cohen, Chicago, IL

adults with mental illnesses. The state delegations will work to develop effective policies and strategies that will be implemented upon their return to their respective states. NAMI national has played an active role in planning for the upcoming Policy Academy and will participate in the academy in December. We will notify NAMI leaders in those states chosen to participate in the Policy Academy to work with state leaders upon their return in the implementation of effective transition-age mental health, employment, and housing services, and supports.

The release of the GAO report coincided with the introduction of *The Healthy Transition Act of 2008*, federal legislation that will provide planning and implementation grants to states to develop statewide coordination of services for youth and young adults with serious mental illnesses. The House and Senate bills (H.R. 6375/S. 3195) also call for the creation of a federal interagency task force to provide technical assistance to states as they design and implement plans to address the needs of transition-age youth and young adults.

The Healthy Transition Act of 2008 was introduced by Senators Dodd and Smith in the Senate and Representative Pete Stark in the House. NAMI applauds their leadership in recognizing the critical need to address the needs of transition-age youth and young adults with serious mental illnesses who often struggle with education, employment, and housing. Stay tuned for updates on this and related legislation...

To review or order the GAO report, visit www.gao.gov (in the search area, include Report #GAO-08-678).

To review *The Healthy Transition Act of 2008*, visit thomas.loc.gov (search for the bills by using the bill numbers HR 6375 and S 3195). 

Q: How can parents ensure that their child with a disability is learning reading, writing, math, and other subjects?

A: The Individuals with Disabilities Education Act (IDEA) and No Child Left Behind (NCLB) both require that schools ensure children with disabilities receive an appropriate education and make educational progress. The two laws are different in how they define the standards for measuring progress.

IDEA, which is the federal special education law, requires the development of an Individualized Education Program (IEP) for students with disabilities. The IEP articulates standards and goals for students. By contrast, NCLB measures the academic progress of the school as a whole rather than for individual students. NCLB identified students with disabilities as one of the special subgroups that schools must evaluate and report on from year to year. NCLB has school-wide standards, including school-wide standards for children with disabilities, but does not require that there be any level of particular progress for individual students. In addition, NCLB allows schools to evaluate the students who have the most severe or profound disabilities using alternative assessments, so those students may be harder to compare in evaluating their progress.

Schools must review a student's IEP every year and develop annual

goals that identify the progress that the student is expected to make in each of the areas identified as needing attention due to the student's disability. The areas of need can include academic subjects, including reading, writing, and math. They can also include social, behavioral, and emotional needs that directly impact how the student functions in school. This includes how the student functions socially, is able to comply with school rules, and gets along with others. The social, behavioral, and emotional needs of the student should be addressed in the annual goals in the IEP. IDEA leaves it up to the states to determine whether they will use short-term objectives in the IEP, along with annual goals. Although not required to, many states are continuing to use short-term objectives or benchmarks along with the annual goals.

When parents meet with the school to review an IEP, they should make sure that the IEP identifies their child's academic needs along with other needs in the areas of emotional growth, behavior, social skills, organizational skills, and related issues. Once these needs are identified, the school should include at least one goal to address each area of need and should have services to assist the student in accomplishing each goal. The goals are not legally binding, but the school must develop goals that will lead to the student making meaningful

progress. The key is to ensure that there is a balance between addressing the need for the student to achieve meaningful growth while remaining realistic about the student's ability. The IEP must have objective measurement procedures that allow for the student's progress to be regularly evaluated, at least quarterly, to assess whether the student is making sufficient progress.

If it appears that the student is not making sufficient progress, then the school should adjust the program.

IDEA changed in 2004 to require the IEP evaluation and IEP process to address a student's academic, developmental, and functional needs. Schools must focus on how a student functions in all areas of school not just in academic performance. For a student with a mental disorder, this is important because he or she may do well academically but have major difficulties emotionally, behaviorally, and socially. The law now makes clear that these issues must be addressed by schools if they are interfering with the student's functioning in school.

Section 504 of the Rehabilitation Act of 1973 can also be used to ensure the student receives an appropriate education. Section 504 has less detail than IDEA and focuses on services and accommodations without requiring schools to monitor student progress or to measure progress in achieving goals.

Q: Many schools are willing to provide modifications and accommodations, but are not willing to provide remediation to get a student back to grade level, is this allowed? Do schools have to pay for private services needed to get a student to grade level?

A: Public schools are required to provide instructional services, accommodations, remediation, modifications, and related services under IDEA and Section 504. They are not obligated to ensure that a student reaches grade level. Unfortunately, the nature of students' disabilities and the severity of those disabilities are such that the ability to reach grade level varies by student. A student may have a disability that, with appropriate remediation, allows him or

her to perform at grade level. Another student with a more severe disability may make progress but never achieve grade level. As a result, the law does not require schools to provide services that allow every student to reach grade level. Instead IDEA and Section 504 require schools to provide the services that allow a student to make reasonable or meaningful progress and to achieve progress toward independence as he or she reaches adulthood.

Schools have the right to identify assessment procedures they deem appropriate to address the nature of a student's disability. Parents have the right to request instruments that they believe are appropriate or to express concern if they believe the school's measurement or assessment procedure is inadequate. If there is a dispute about how the student's progress will be assessed, the parents may need to present information about why the school's proposed assessment is inappropriate or why theirs is more appropriate. This should be based on outside clinical consultation or research that is shared with the school.

Under IDEA, if there is a dispute related to a student's programming, including how the student should be evaluated or assessed, the parents may request a due process hearing. However, it is always better to attempt to work conflicts out informally or through mediation unless it is absolutely essential to initiate a due process hearing.

Parents always have the right to supplement services the school provides. However, the fact that the parents provide private supplementary services does not automatically mean that the school must pay for those services. When parents believe that the school's program is not appropriate and that private services are needed, they should give the school written notice of their concerns. They should inform the school that they want supplementary services, whether it is tutoring, placement in a special education program in a private

school, or some other service—and that they want the school to pay for the services. Parents should provide the school with notice at least ten business days before they start the private services. Providing the notice does not obligate the school to pay, but failing to provide the notice may relieve the district of any obligation.

Sometimes parents believe that their child has a need for a particular methodology or intervention. Schools are not obligated to provide a particular program or methodology simply because the parents want it. However, the IDEA 2004 amendments require for the first time that the program the school offers be based on peer reviewed research to the extent practicable. Schools must address methodology in the IEP to the



Matthew D. Cohen

extent that the methodology is necessary for the student to make progress. While parents do not have a right to pick an instructional method of study or skill building just because it is something they prefer, the school has an obligation to show that the program it is proposing is research based or has been studied and shown to be effective. At the same time, parents have a right to request a particular method if there is research to support it and the school's program is not working. For example, the parents of a child with autism might request that the school provide an Applied Behavioral Analysis method, also called the Lovaas method or Discrete Trial Training, which is a research-based approach designed to help students with autism.

Q: How can parents get schools to do functional behavioral analyses and positive behavioral supports?

A: Parents may request an evaluation at any time to assess their child's behavior within the school environment. When a functional behavioral assessment is done and it identifies problem behaviors, the school should convene an IEP meeting. This should lead to the development of instructional strategies, accommodations, and supports in

the IEP, including the development of a behavioral intervention plan. If a student is having behavioral difficulties, a behavioral plan should be developed as part of the IEP process and should be included in the IEP. The behavioral plan may include intervention strategies. The IEP goals may address behaviors of concern and educational strategies. For example, if a student has trouble reading that involves acting out during reading time, it may be appropriate to use the functional behavioral analysis to develop some behavioral strategies to address the acting out during reading. It might also be appropriate to determine whether the student has a reading problem, which requires goals and reading interventions through the IEP. If a school is not responding to the parents' request for a functional behavioral analysis or a behavioral plan, and attempts at informal resolution or remediation are unsuccessful, parents may request a due process hearing.

IDEA requires schools to consider positive behavioral supports for a student with behavioral challenges. Many schools have implemented the Positive Behavioral Interventions and Supports (PBIS) program. With school-wide PBIS, there are levels or tiers of intervention in which the school promotes positive behavior as a general value and goal of the school and provides reinforcements for all students to engage in positive behavior. The program then has a hierarchy of more intensive interventions for students with behavioral difficulties that goes beyond the scope of the school-wide intervention strategies. When a student has an IEP, the student must be provided with interventions that address his or her behaviors that may be interfering with his or her ability to learn. The school should place an emphasis on positive approaches to address difficult behaviors rather than punishment, discipline, or other negative approaches. The student should not be subjected to losing privileges, being excluded from lunch or recess, having detention, or suspension. The goal is to develop effective approaches that are meaningful for the student and that help him or her learn appropriate behaviors. Positive behavioral approaches reinforce appro-

priate behaviors and provide support that redirects a student to appropriate behaviors when he or she is struggling.

Q: How should parents develop an IEP for their child living with bipolar disorder? What kind of services should be included?

A: The starting point for any student with a disability is to identify how the disability impacts his or her functioning in school. Bipolar disorder is a particularly complicated disorder to address within a school framework because many school staff know very little about bipolar disorder. Bipolar disorder manifests itself in inconsistent ways depending on the circumstances and the student's emotional state. It tends to confuse school staff who may misinterpret the student's behavior. They often believe that the student is choosing to act out rather than that the misbehavior is related to a mood swing associated with a depressive or manic state. It is important to ensure that the evaluators and the implementers of the IEP have an understanding of bipolar disorder and how it impacts students.

Given that understanding, it is important to build into the IEP, strategies that address the different ways in which bipolar disorder may manifest itself. Rather than having one strategy based on one constellation of symptoms, there may need to be a series of strategies that are implemented when a student is displaying the different characteristics of bipolar disorder. It is important to prepare the school staff on how to recognize when a student is either in a highly depressed state or is beginning a manic state. This will help staff intervene quickly to help the student manage the challenging symptoms.

With a student with bipolar disorder, it is especially important to have mental health professionals involved as key members of the IEP team. It is also important to have close coordination between the school and the family in tracking the student's progress and in monitoring symptoms. That way everyone is alert when the student is having a problem and is consistent and

supportive in responding. The school should have a plan that recognizes that a student with bipolar disorder may need room to regroup and the ability to take a break in an environment where he or she can receive assistance outside of the classroom. A student should also have access to mental health professionals and his or her family to help de-escalate the complex symptoms that often accompany the disorder.

Q: What are parents' rights in keeping their child in a previously agreed upon placement when the school is proposing a new placement?

A: Parents should make sure that the IEP is being implemented as written. Some of the problems that students typically experience that lead to a proposed change of placement are based on a failure to sufficiently implement the IEP in the way that it was intended rather than a change in their condition or behavior. If the school is considering a change in placement for a student, parents should first verify that the IEP is being appropriately implemented.

Parents should also identify whether there are additional supports that would be appropriate for their child within the existing environment that would help to control or modify the behavioral concerns and that would alleviate the need for a change of placement.

Even if the school has been implementing the IEP as written, there may be other services that can be added to the IEP to improve progress and behaviors within the existing setting before considering a change of placement. Both IDEA and Section 504 require that a student be served in the least restrictive environment appropriate for the student's needs. Consequently, schools must consider whether there are additional supports that would allow the student to remain in the current setting before the student is moved to a more restrictive environment.

Parents may also request that there be a functional behavioral analysis or a re-evaluation of their child's emotional

and psychological functioning before making a determination on a change in placement. It may be that the functional analysis or the evaluation provides information on what can be done within the existing environment to support the student. One cautionary note, if a school conducts an evaluation, it may give the school ammunition to support the basis for a change in placement. While we generally expect that school evaluation teams will be objective, if there is already concern that a change of placement may be needed, an evaluation team sometimes may provide more ammunition in support of the proposed change. Parents might benefit from the involvement of outside mental health professionals, ideally to observe their child at school and help them understand whether things can be done in the current setting or whether a more intensive program or restrictive environment is needed.

If the school is recommending a change in placement, they must convene an IEP or 504 plan meeting. They must give parents notice of the proposed change, and under IDEA, if the parents request a due process hearing immediately, the student's placement is frozen in the last agreed upon placement until the due process procedure is resolved. The only exception exists if the school is suspending the student or makes an emergency placement in an *Interim Alternative Educational* Setting. The school is only allowed to do this under the following circumstances:

- The student is involved with drugs.
- The student is in possession of dangerous weapons.
- The student has injured another student.
- A hearing officer determines that the student is substantially likely to injure a student.

Other than those four circumstances, if the school proposes a change of

placement and the parents request a due process hearing, the school must maintain the student in the prior placement until the due process hearing is resolved.

Q: What are the rights of students

with disabilities to get the programs they need to succeed once they are out of high school?

A: This question highlights a major change in IDEA 2004 in favor of much clearer school responsibility for transition planning for students aged 16 and older who are eligible for special education. Since the law was adopted in 1975, it has required schools to develop transition plans for students and to have those plans in place by age 16 to help prepare students for life beyond high school. Unfortunately, transition planning has been a low priority in the IEP process for many schools and students often either fail to have transition plans or the plans do not include meaningful services.

The IDEA 2004 amendments dramatically strengthened schools' obligations in evaluating a student's transition needs. Now the school and family must develop transition goals. Once those goals are developed, they help shape the creation of the student's annual goals. Schools must now focus more on what needs to be in place for the student when the student graduates. This substantially expands the school's responsibility in the services that must be provided.

This is made even more powerful because of the increased emphasis on a student's developmental and functional progress in addition to academic progress. For a student with a mental health disorder, he or she may be getting sufficient academic credit to progress from year to year, and may be doing well on achievement tests, but may be unable to function after graduation based on his or her emotional, behavioral, or social needs. The law now clearly requires schools to address those needs in a manner that takes into account the student's functioning in high school and what the student will need to function independently when he or she graduates from high school.

The transition planning language in IDEA also calls for schools to invite other community agencies to the IEP meetings if their services are needed for transition planning. The school also must reconvene the IEP meeting if those agencies fail to provide the needed serv-

ices. Whenever an IEP includes a referral to another agency, parents should ask that the IEP also include a fairly short time frame for verifying that the other agency has agreed to provide the services. If the outside agency is not doing what the school requested, the school must hold a new IEP meeting to establish new approaches to address the student's needs.

IDEA 2004 also now requires the development of a *summary of performance* when a student either graduates or ages out of special education services. It is a document that identifies the student's needs to help when the student seeks services in the adult service system.

Even if a student has the credits to graduate at the end of senior year, the IEP team can determine that the student continues to have significant needs and therefore should continue to receive services and not graduate. Alternatively, the parents may object to the school's decision on graduation. In that case, if they request a due process hearing before graduation, the hearing will decide whether the student should graduate or continue to receive services. Obviously, whether or not to challenge graduation is an important decision and parents are advised to consult with a knowledgeable advocate or attorney before they decide whether to halt graduation and proceed with due process.

The IDEA 2004 amendments also make clear that when a student turns 18, the student becomes the decision maker about the special education services he or she receives rather than the parents, unless the parents have obtained legal guardianship or the state provides some mechanism that transfers authority from the student to the parents. In many states, a student assigns his or her parents the right to act as his or her advocate or spokesperson.

Q: What if parents know that their child needs a certain type of service to ensure an appropriate education, however, the school district claims that they do not have the resources to provide that service? Does the school district have to find the resources to provide the service?

A: A student is entitled to receive a free and appropriate education regardless of whether a particular service is affordable or available in a school district.

However, the challenge becomes how do you prove that a particular service, support, or resource is necessary for a student to ensure he or she receives a free and appropriate public education? If a school acknowledges that a service is necessary, but claims that it does not have the money to pay for it then the school must provide that service. If the parents or school cannot work out getting the service for the student and if the parents can prove that the school has acknowledged the need for the service but it has been denied because of cost, then the parents have a strong claim to pursue through due process.

Unfortunately, more often than not, if the school does not have the resources due to cost or lack of trained staff, the school will likely indicate that the service is not essential rather than admit that the service is needed but not available. When this is true, then the burden falls on the parents to show that the service that the school is offering is not appropriate and to identify the service that is needed for their child to make progress. These issues should be discussed at the IEP or 504 meeting. If the parents are unable to get the services they deem necessary, then they should consider mediation or due process to resolve the disagreement.

Parents can request a service or accommodation; however, they must have a clinical or educational basis for demonstrating why the service is needed.

The bottom line is that if the school acknowledges that a student needs a particular service, preferably in writing, then parents have a much stronger case to go after that service.

Q: How do parents show a service is necessary for a free and appropriate education?

A: There are two steps in approaching this question. First, if parents want a service that they are told is not available, they must show that the program the school is offering is not working. If the

school is proposing something new that the parents do not want, it is harder because if the service has not been tried, then it is speculation to say that it will not work. But if the school has been providing a program and it has not worked, then the parents must take all the information the school has provided through report cards, progress reports, IEPs, achievement tests—and compare how the student is doing with how the student was expected to do. If the same goal statement is repeated year after year in the IEP it suggests that the student is not making progress. Also, if the student's level of performance is the same from year to year or is only going up a small amount, then it suggests that the program is not working.

The second step is to prove that a particular service is needed to help ensure progress. Proving that the school's program is not working does not automatically prove that the program or service requested is needed. Typically parents either have to find research that shows that the service is part of an accepted intervention to address their child's needs or they need to get outside educational or mental health professionals involved. These outside experts will help to show why the requested service is needed for the student to make progress.

Q: How can parents hold their own in an IEP or 504 meeting if they cannot afford to hire an attorney or a special education specialist?

A: It is important for parents to bring someone with them to an IEP meeting to provide moral support, to be an extra set of ears, and to take notes. Even if parents do not have a professional with them, one or more additional participants are important. If parents cannot afford to hire an advocate or attorney, family advocacy organizations can often help identify individuals to go with the parents at no cost. Parents should not assume that the only option is to hire an attorney or advocate.

Parents should also do as much research as possible before the IEP or 504 meeting about how their child is doing and the school staff's perception of

how their child is doing. It is often useful for parents to have conversations with key staff before the IEP meeting.

Parents should also research the programs and services that are available at the school. If there is more than one school in the district, parents should learn what is available in other schools in the district. This research is useful because schools do not always volunteer information on what is available. There may be things the student can benefit from that the parents may wish to discuss in the meeting. It is always easier to get services for the student when they are already available rather than requesting that the student receive a special program or new service.

It is also useful for parents to go into the meeting with a list of their child's concerns and needs to assure that they are addressed during the meeting. Sometimes meetings are terminated before a full discussion can occur. Parents always have the right to ask that the meeting be reconvened if they feel their issues have not been fully discussed.

Parents should also obtain a copy of the IEP or 504 plan either at the IEP meeting or as soon thereafter as possible. These documents should be received to ensure that they accurately reflect decisions made at the meeting. If not, parents should send a letter to the school asking for clarification on the issues.

The IEP should be as specific as possible in defining the services and accommodations that will be provided. It should address who, what, where, and when the services will be provided and how the services will be evaluated. One frequent concern is that an item discussed as a needed service may have qualifying language in the IEP, such as—counseling will be provided “as needed” or time out will be provided “if the student asks for it.” Parents should be aware of qualifying language because it may limit the use of the service. If it is essential, then it should be explicitly described as a required service.

Parents should also seek help from the Parent Training and Information Center (PTI) in their state, including training that is available on how to suc-

cessfully participate in an IEP meeting. To find out about the training and related issues, visit www.taalliance.org (click on the *Parent Center Map* on the homepage).

Q: How can parents enforce a manifestation determination before suspension and prevent schools from using home instruction as an interim alternative placement?

A: When a student is being considered for suspension for more than ten consecutive days or has been suspended for more than ten days in total for behaviors that are related or are close in time, the school must conduct a manifestation determination review to determine if the student's behavior is caused by his or her disability.

The review includes two parts. First, the school must verify that the IEP has been appropriately implemented. If not, the behavior is automatically deemed to be related to the disability and the student may not be suspended long-term or expelled. If the IEP team determines that it has been appropriately implemented, it then must decide whether the behavior was directly caused by the student's disability. If the student's behavior was caused by his or her disability, then the school cannot proceed with a long-term suspension or expulsion but rather must explore ways to address the behavior within the school setting.

If the behavior was not related to the disability, then the school may impose a longer term suspension (more than ten days) or expulsion. However, under IDEA there is a *No Cessation of Services Rule*. This means that even if a student receives a long-term suspension or is expelled, the student has the right to continue to receive some form of service that allows him or her to address his or her IEP goals and objectives, have access to the general curriculum, and receive support to address the behavior that got him or her into trouble.

Q: How can parents get school districts to stop putting their child with a mental illness with other

students with serious disruptive behavioral issues?

A: Schools are required to serve a child in the least restrictive environment based on his or her individual needs, not based on his or her label. Many schools group students based either on their label or behavioral characteristics. They are allowed to do this if they can show that the program they are providing is appropriate to each student's needs. Grouping students by label or behavior would violate the requirement of an individualized plan that is uniquely designed to meet the needs of each student.

For many students with mental disorders, placement in these settings may contribute to a deterioration of their behavior. In these situations, it is also useful to consult mental health professionals for recommendations about the programming a student needs and the placements that should be avoided. For example, if the student is highly vulnerable, is unlikely to be able to protect himself or herself, maintain himself or herself safely, or to make emotional or educational

progress in a setting with students who are noisy, disruptive, aggressive, or even predatory—it would be helpful for a mental health professional to provide a clinical opinion through a letter or report that includes the reasons why this type of placement is inappropriate and may cause the student to regress.

Editors Note: The questions included in this article were submitted by families interested in learning more about special education services. NAMI greatly appreciates the time and expertise Matthew Cohen provided for this article.

This article continues on NAMI's Child and Adolescent Action Center website, visit www.nami.org/caac



IDEA and Special Education Online Resources



The Council of Parent Attorneys and Advocates
www.copaa.net

Department of Education –
IDEA 2004 News, Information,
and Resources
idea.ed.gov

Monahan & Cohen
www.monahan-cohen.com

National Dissemination Center for
Children and Youth with Disabilities
www.nichcy.org



National Technical Assistance
Center on Positive Behavioral
Interventions and Supports
www.pbis.org

SchoolMentalHealth.org
www.schoolmentalhealth.org

Technical Assistance Alliance
for Parent Centers
www.taalliance.org

Wright's Law on Special Education
www.wrightslaw.com