



Advocate

Newsletter of the National Assistive Technology Advocacy Project
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SERVICES TO PRESCHOOL CHILDREN WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Introduction

Very young children with disabilities will be most successful, as school-aged students and eventually as adults, if their needs are identified early and interventions put in place to address their needs.

Preschool children with disabilities, from birth through age five, are served by two different parts of the federal Individuals With Disabilities Education Act (IDEA). 20 U.S.C. §§ 1400, *et seq.* Children with disabilities between the ages of birth through two are covered by Part C of the IDEA. 20 U.S.C. §§ 1431-1444; 34 C.F.R. Part 303. Often referred to simply as Part C or the Early Intervention Program, this program authorizes funding for a wide range of services for infants and toddlers within the eligible age range. Children with disabilities between the ages of three through five are covered under Part B of the IDEA, the Part that covers school-aged children with disabilities. There is additional funding provided to meet the needs for children in this age group, but the provisions of the school age program apply. 20 U.S.C. § 1419; 34 C.F.R. §§ 300.800 - 818.

This article will discuss in some detail the services, including assistive technology (AT) devices and services, available to children between the ages of birth through two under Part C and then briefly discuss some of the special issues that come up for students between the ages of three through five who are covered by Part B.

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IDEA PART C:

The Early Intervention Program

Although the Early Intervention Program is within the IDEA, because of the young age of the children being served, the services can be much less “educational” in nature. The emphasis is on meeting the overall developmental needs of the child. There is also a strong emphasis on prevention. For example, services are to be designed not only to meet the developmental needs of each child, but also to meet “the needs of the family related to enhancing the child’s development.” 34 C.F.R. § 303.12(a)(1). When enacting Part C (then Part H), Congress found that there was an urgent and substantial need to enhance the development of infants and toddlers with disabilities; to minimize their potential for developmental delay, and need for special education when they reach school age; to maximize their potential for living independently; and to enhance the capacity of families to meet the special needs of infants and toddlers with disabilities.

20 U.S.C. §1431(a).

This section describes the Part C Early Intervention Program; explains what services are available through the program, including assistive technology (AT) devices and services and how to apply for them; explains how a child’s Individualized Family Service Plan (IFSP) is developed; and details the options available when a family wishes to challenge the denial of services.

What Is the Early Intervention Program?

Part C requires each state to develop a “state-wide, comprehensive, coordinated, multidisciplinary, interagency system that provides early intervention services for infants and toddlers with disabilities and their families.” 20 U.S.C. § 1431(b); 34 C.F.R. § 303.1(a). Each state must designate a lead agency, which bears responsibility for overall implementation, administration, and monitoring of the Early Intervention Program. 20 U.S.C. § 1435(a)(10); 34 C.F.R. § 303.142. Unlike Part B, the lead agency is not necessarily the state education agency. Although

“Helpful” Links to the U.S. Dept. of Education Websites

We say that because none of these sites are that easy to navigate.

- Office of Special Education and Rehabilitative Services (OSERS) Home Page—includes OSEP, which enforces IDEA and the Rehabilitation Services Administration (RSA) which enforces the vocational rehabilitation provisions:

<http://www.ed.gov/about/offices/list/osers/index.html?src=oc>

- Office of Special Education Policy (OSEP) Home Page:

<http://www.ed.gov/about/offices/list/osers/osep/index.html>

- Index to OSEP Policy Letters:

<http://www.ed.gov/policy/speced/guid/idea/letters/revpolicy/index.html>

- Office for Civil Rights (OCR) Home Page—right hand column has a link to how to file a complaint: <http://www.ed.gov/about/offices/list/ocr/index.html>

- OCR “Reading Room”: <http://www.ed.gov/about/offices/list/ocr/publications.html>

- OCR Questions and Answers <http://www.ed.gov/about/offices/list/ocr/faqs.html>

- Family Policy Compliance Office (FPCO) Home Page—enforces the Family Educational Rights and Privacy Act (FERPA):

<http://www.ed.gov/policy/gen/guid/fpco/index.html>

- FERPA “for Parents”—includes how to file a complaint:

<http://www.ed.gov/policy/gen/guid/fpco/ferpa/parents.html>

Don’t forget that URLs can change and if you encounter a dead link you may want to search by name—there is a “search this site” option. If worse comes to worse, start with the generic U.S. Ed. website, which probably won’t change--www.ed.gov. If it does, there is always Google and other popular search engines.

a number of public agencies may be involved in delivering services, the lead agency must also have a procedure in place to ensure that services are provided in a timely manner pending resolution of any disputes between those agencies or the service providers. 20 U.S.C. § 1435(a)(10)(D); 34 C.F.R. § 303.525.

To be eligible for services a child must meet the age requirement and need early intervention services because the child has a developmental delay in one or more of the following areas:

- cognitive development
- physical development (including vision and hearing)
- communication development
- social or emotional development
- adaptive development, or
- a diagnosed physical or mental condition which has a high probability of resulting in developmental delay, and
- at a State's discretion, at-risk infants and toddlers.

20 U.S.C. § 1432(5); 34 C.F.R. § 303.16. See 20 U.S.C. § 1432(1) (“The term ‘at-risk infant or toddler’ means an individual under 3 years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to the individual.”). Each state must specify the criteria by which it measures developmental delay. 20 U.S.C. § 1435(a)(1); 34 C.F.R. § 303.161.

Limitations on Fees or Costs

All services under the Early Intervention Program must be provided at no cost unless federal or state law allows for payment by families. States may establish a sliding scale of fee payments. 20 U.S.C. § 1432(4)(B); 34 C.F.R. § 303.12(a)(3)(iv). However, if the state guarantees a free appropriate public education from birth, the state may not charge parents for any services required under that state law which are provided to children eligible for early intervention services. *Id.* § 303.521(c).

Each state must establish a policy concerning payment of fees, if any. *Id.* § 303.520(a). Such a policy may not allow fees for services a child would otherwise be entitled to receive at no cost and the parents' inability to pay for services cannot result in the denial of services to the child or family. *Id.* § 303.520(b)(3)(i) and (ii).

Moreover, the following services must be provided at no cost:

- Implementation of the State's child find requirements

- Evaluations and assessments
- Service coordination
- The development, review, and evaluation of the IFSP
- Procedural safeguards

Id. § 303.521(b).

For all other services, including AT devices and services, the Part C program is the payor of last resort. 20 U.S.C. § 1440(a). Although the child need not be eligible for Medicaid to obtain services under Part C, the child's Medicaid or private insurance must be used to pay for early intervention services if available. *Id.*; 34 C.F.R. § 303.527(a). To prevent the delay of services, however, early intervention funds may be used to pay for services pending payment by the ultimate entity responsible. *Id.* § 303.527(b)(1). Furthermore, although it is not as clearly stated as under Part B, parents may refuse to give consent to the use of either public or private insurance. See 20 U.S.C. § 1440(c); 34 C.F.R. § 303.527(c) (“Nothing in this subchapter shall be construed to permit the State to reduce medical or other assistance available.”)

The Process Begins with a Referral

As part of its required comprehensive child find system, each state must develop and publicize its procedures for referring children for early intervention services. 20 U.S.C. § 1435(a)(6); 34 C.F.R. § 303.320. Parents who believe their child needs early intervention services may make the referral directly. The list of others who may make referrals is very broad. *Id.* § 303.321(d)(3).

The Service Coordinator

Once a child has been referred to the Early Intervention Program, a service coordinator must be appointed by the agency implementing the program. *Id.* § 303.321(e)(1). The service coordinator is responsible for overall implementation and coordination of the early intervention services to be provided, and must be from the profession most relevant to the child's or family's needs or otherwise qualified to carry out all of his or her responsibilities. 20 U.S.C. § 1436(d)(7); 34 C.F.R. § 303.344(g)(1).

The service coordinator's role is an ongoing and active one, designed to be a single point of contact for the family to ensure that they receive all the rights and services to which they are entitled. It is the duty of the service coordinator to be “continuously seeking the appropriate services and situations necessary to benefit the development of each child” throughout the child's period of eligibility. *Id.* § 303.23(a)(3)(iv).

**Save the Dates –
September 28-30, 2010**

**Our 14th Annual “Bridges to
Better Advocacy” Conference**

Just before the holidays, our staff moved quickly to secure these dates for our next “Bridges to Better Advocacy” conference. Once again we will be at the Hilton Garden Inn in Austin, Texas. Based on our negotiated rates, we should be able to keep registration fees the same and overnight rooms for those attending the conference will be slightly cheaper.

Planning for the conference will begin in earnest in January 2010. As always, please let us know if there are sessions you would love to see presented at the next conference.

Based on input from those who have attended the conference, we have moved to a Tuesday, Wednesday, Thursday format. As always, we will deliver a full-day pre-conference (topic to be named) on the first day, followed by a two-day primary conference. It is not too early to mark these dates in your calendar and identify the funds in your budget to join us in September!

The specific duties of the service coordinator include:

- Coordinating the evaluation process
- Facilitating and participating in the development, review, and evaluation of Individualized Family Service Plans (IFSPs)
- Assisting families in identifying available service providers
- Coordinating and monitoring the delivery of available services
- Facilitating the development of a transition plan to preschool services, if appropriate
- Coordinating with medical and health providers
- Informing families of the availability of advocacy services

Id. § 303.23(b).

***A Comprehensive, Multidisciplinary
Evaluation Is Required***

As noted above, the process for determining eligibility and services begins with a referral. Once a referral is received, there must be a timely, comprehensive, multidisciplinary evaluation designed to identify “the child’s unique strengths and needs and the services appropriate to meet those needs; and the resources, priorities, and concerns of the family and the supports and services necessary to enhance the family’s capacity to meet the developmental needs of their [child].” 34 C.F.R. § 303.322(a)(1) and (b)(2). The evaluation must include a review of health and medical records and an assessment of the functioning level and unique needs of the child in each of the following areas of development: cognitive, physical, communication, social and emotional, and adaptive behavior. *Id.* § 303.322(c)(3).

***Handouts Available from 2009
“Bridges to Better Advocacy”
Conference***

Since 1997, our National AT Advocacy Project has delivered an annual conference, “Bridges to Better Advocacy,” in Austin, Texas. In 2009 our 13th annual conference was held in late October.

The majority of our conference handouts are now available on our website: www.nls.org/conf09.htm. You will find one link to handouts from our full-day pre-conference (“Preparation for a Medicaid Assistive Technology Hearing”) and session-by-session links to handouts from our traditional two-day conference.

The multidisciplinary evaluation must be nondiscriminatory and in the family’s native language or “other mode of communication, unless it is clearly not feasible to do so.” *Id.* § 303.323. A “Family Assessment” must also be offered to help identify the concerns, resources, and strengths of the family. However, this assessment is voluntary on the part of the family, and protections for the family are included in the regulations. *Id.* § 303.322(d).

If the child or family needs immediate services, they may be available before an evaluation takes place. In such a case, an interim IFSP must be developed. The interim IFSP lists the early intervention services that have been determined to be necessary immediately and identifies a service

coordinator to be responsible for implementing it. *Id.* § 303.345. This allows the child and family to receive services until the evaluation is completed and a final IFSP is written.

Developing the IFSP

If the evaluation team determines that a child is eligible for services, an Individualized Family Service Plan (IFSP) meeting will be held at a time and place convenient for the parents. 20 U.S.C. § 1436; 34 C.F.R. § 303.342(a) and (d)(1)(i). The meeting will be attended by the evaluator, the service coordinator, service provider(s), as appropriate, and the parents, along with other persons the parents invite, including an advocate. *Id.* § 303.343(a). At the IFSP meeting, the same service coordinator as the one who handled the evaluation process may be assigned for ensuring implementation of the IFSP or a new service coordinator may be selected. *Id.* § 303.344(g)(2). The name of the service coordinator must be listed on the IFSP. *Id.* § 303.344(g)(1). The evaluations must be completed and the IFSP meeting must be held no later than 45 days after the early intervention official receives the referral. *Id.* § 303.321(e)(2).

The IFSP must be in writing and include:

- The child's current level of development: current level of physical development (including vision, health and hearing), cognitive development, communication development, social or emotional development, and adaptive development, based on professionally acceptable objective criteria.

- Family information: if the family agrees, a statement of the family's resources, priorities, and concerns related to enhancing the development of the child.

- Outcomes: a statement of the major outcomes the child and family are expected to achieve, and how progress toward the outcomes will be evaluated.

- Services: a statement of the specific early intervention services necessary to meet the unique needs of the child and the family, including the frequency, intensity, and method of delivering the services, the natural environments, the location of the services, and the payment arrangements, if any.

- Other services: such as medical services that the child needs but that are not required under Part C, and the funding sources to be used in paying for those services.

- Service Coordinator: the name of the service coordinator assigned to the child.

- Service provision: the projected dates for

initiation of the services and anticipated duration of services.

- Transition: a plan for transition from Part C services to preschool services under Part B, or other services that may be available to the child. 20 U.S.C. § 1436(d); 34 C.F.R. § 303.344.

Parents must give informed written consent before services may begin. If there is not agreement on all services, only agreed upon services will be provided. 20 U.S.C. § 1436(e); 34 C.F.R. § 303.342(e). Services must be initiated "as soon as possible" after the IFSP meeting. *Id.* § 303.344(f). Each state defines "as soon as possible." The IFSP must be reviewed at least every six months and evaluated at least annually at an IFSP meeting. 20 U.S.C. § 1436(b); 34 C.F.R. § 303.342(b) and (c). Additionally, the parents may request a review of the IFSP at any time. *Id.* § 303.342(b)(1).

Specific Services Available Are Very Broad

Services must be designed to meet the developmental needs of the child and the needs of the family and are to be selected in collaboration with the parents. *Id.* § 303.12(a). To the maximum extent appropriate for the child, services are to be provided in a natural setting, such as the home or a day care center, or other "community settings in which children without disabilities participate." 20 U.S.C. § 1432(4)(G); 34 C.F.R. § 303.12(b).

Services available through the Early Intervention Program include:

- Family training, counseling, and home visits
- Special instruction
- Speech-language pathology and audiology services
- Occupational therapy
- Physical therapy
- Psychological services
- Service coordination services
- Medical services only for diagnostic or evaluation purposes
- Early identification, screening, and assessment services
- Health services necessary to enable the infant or toddler to benefit from other early intervention services
- Social work services
- Vision services
- AT devices and AT services
- Transportation and related costs that are

Services Available Through the National AT Advocacy Project - A 2010 Update

Our National Assistive Technology (AT) Advocacy Project is a special project of Neighborhood Legal Services in Buffalo, New York. This project has been funded by the U.S. Department of Education, since 1996, to provide technical assistance, training, and related services to the Protection and Advocacy for AT (PAAT) programs and other AT advocates throughout the country and U.S. territories.

Since 2005, our project is part of the National AT Technical Assistance Partnership (NAT-TAP). The Rehabilitation Services Administration (RSA), within the Department of Education, funds NATTAP through a grant to the Rehabilitation and Engineering Society of North America (RESNA). RESNA subcontracts with our National AT Advocacy Project to serve, primarily, the attorneys and advocates who are involved in AT-related advocacy through the PAAT and other P&A programs.

Since its inception, our National AT Advocacy Project has provided a number of core services, all geared toward helping PAAT programs (and others) provide high quality, AT-related advocacy services to individuals with disabilities. The ultimate goal, of the PAATs and our services to them, is to make it easier for individuals with disabilities to receive appropriate AT on a timely basis, at little or no cost to the individual or family. These core services, which continue, are briefly summarized below.

Provide advocacy-related technical assistance (TA) to attorneys, advocates, and others with an interest in funding of AT, to assist them in their advocacy-related activities. TA is provided by telephone, fax, email, and mail.

Provide management-related TA to P&A managers and fiscal officers to assist them in their management and fiscal responsibilities associated with their PAAT grants as funded through RSA. Most of this is done through our partners on the project, the National Disability Rights Network.

Provide advocacy-related training through: an annual, three-day Project conference; sessions at the annual NDNR conference; sessions at statewide or regional conferences sponsored by P&A programs or State AT Act Projects; and distance training events through telephone conference or other formats. Our project staff can travel to your state to provide training to your staff or to assist with a major conference if you can pay for our travel expenses.

Prepare publications on the funding of AT through a variety of funding sources. Publications include newsletters, feature articles, booklets, and training handouts. Nearly all of these publications are published on our website which is described below.

Act as a clearinghouse for documents (mostly in electronic formats) related to the funding of AT through in-house Resource Libraries containing: administrative hearing decisions; a wide range of court-related documents, including briefs and complaints; AT-related model policies, procedures, and practices; and medical and technology-related documents. During our early years (i.e., through early 2006), we created a word-searchable digest of hearing decision abstracts on our website. More recently, we have supplemented this digest with an in-house system for retrieving decisions. Attorneys and advocates can continue to search for older decisions on the website at www.nls.org/digest2.htm and contact Diana Straube (dstraube@nls.org) or Jim Sheldon (jsheldon@nls.org) for more recent decisions.

Maintain a project website (www.nls.org/natmain.htm) containing information relative to the funding of AT, including many of the our publications and links to other web-based resources to support AT advocacy efforts. Some of the key publications you will find on the website include: our AT Advocate newsletter, now published at least three times per year; handouts from past "Bridges to Better Advocacy" conferences; our Funding of AT booklet/manual series; and a new Frequently Asked Questions series.

Maintain a national AT list serve allowing PAAT attorneys and advocates, and others on this list, a low-cost, efficient way to communicate with a nationwide network of AT advocates. Often, by posting a case-related inquiry on the list serve the attorney or advocate will quickly hear back from an individual who has encountered a very similar issue. For more information about the list serve or to request that you be added to it, contact Jim Sheldon.

Organize periodic Funding of AT Work Group meetings by phone conference. These meetings, scheduled three or more times per year, could be described as a long distance case

review. The attorneys and advocates who attend these meeting have an opportunity to present issues they are facing in their case work and request the collective input of the dozen or more attorneys and advocates who are attending the meeting. Announcements for upcoming meetings are always posted on the list serve. Contact Jim Sheldon for more information.

Our AT Advocacy Project staff:

Our combined staff (a little more than one full-time attorney combined) bring with them decades of experience, with expertise on all the key AT funding sources, including: Medicaid, Medicare, special education, vocational rehabilitation, private insurance, various anti-discrimination laws, Veterans' benefits, the Social Security work incentives, federal tax provisions, and many lesser-known funding sources and funding strategies.

James R. Sheldon, Jr. Jim is the Supervising Attorney of the project and has held that position since we started in 1996. Jim has some level of expertise on all the key AT funding sources, with more extensive expertise with Medicaid, Medicare, and the Social Security work incentives. He can be reached through either email (jsheldon@nls.org) or by phone (716-847-0650 ext. 262).

Diana M. Straube. Diana is a project Staff Attorney and, since 2004, has split her time between the project and our state PAAT project. She has very extensive expertise with all facets of Medicaid as it related to AT funding, including special expertise with children's issues and the EPSDT program. Diana is a former family law and divorce law specialist and joined with Jim on the recently updated publication, Disability, Divorce, SSI and Medicaid, which outlines strategies that can help maintain SSI and Medicaid and create special funding streams for AT purchases. She has expertise with many of the other AT funding sources and has recently developed expertise on funding AT through the Department of Veteran's Affairs. She can be reached through either email (dstraube@nls.org) or by phone (716-847-0650 ext. 220).

Ronald M. Hager. Ron is a Senior Staff Attorney with NDRN and devotes his time to special education issues, providing TA and training to the P&A network. Ron worked with the National AT Advocacy Project from its inception in 1996 through 2007 when he left to join NDRN. As part of our collaboration with NDRN, Ron continues to be available for all special education-related TA as it relates to AT. Ron can be reached through either email (ron.hager@ndrn.org) or by phone (202-253-5252).

Unfortunately, over the years we have lost about 30 percent of our funding while our costs for delivering the service have gradually increased. Fortunately, however, we have been able to employ many economies (e.g., email/list serve postings instead of mail, electronic only copies of some materials, slightly reduced schedule for publications and meetings) to continue providing our core services through very experienced staff. We are also extremely fortunate to have retained experienced staff, even Ron Hager to some extent, after he left to join NDRN.

necessary to enable an infant or toddler and the infant's or toddler's family to receive another service.

20 U.S.C. § 1432(4)(E); 34 C.F.R. § 303.12(d). This list is not exhaustive.

Similar to Part B, school health services are covered by Part C. For example, a U.S. Department of Education, Office of Special Education Policy (OSEP) policy letter clarified that nebulizer treatments are similar to clean intermittent catheterization, tracheotomy care, tube feedings, and changing of dressings and meet the definition of health services under Part C of the IDEA. *Letter to Dickson*, 6 ECLPR 75 (OSEP, July 1, 2008). The fact that a nurse administers nebulizer treatments does not affect their coverage under Part C. However, health services must be necessary to enable a child to benefit from other early

intervention services during a time the child is receiving those other services. Therefore, a child would not be eligible for overnight treatment unless the child also needed other early intervention services during that time and needed the nebulizer treatments to benefit from those services.

Assistive Technology Is Covered

Both AT devices and AT services are available under the Early Intervention Program and have the same definitions as they do for preschool and school aged special education programs.

An "AT device" is any item or piece of equipment "that is used to increase, maintain, or improve the functional capabilities of a child with a disability." It does not include, however, a medical device that is surgically implanted or the replacement of such a device. An "AT service" is "a service that directly assists a child with a

disability in the selection, acquisition, or use of an assistive technology device.” It also includes training or technical assistance for professionals, the individual or, where appropriate, the family. 20 U.S.C. §1401(1) and (2); 34 C.F.R. § 303.12(d)(1).

Some examples of AT devices used by infants and toddlers (and available under the Early Intervention Program) include:

- Manual or power wheelchairs
- Specialized strollers or car seats to accommodate the needs of a child with a disability
- Specially adapted toys and recreation equipment
- Augmentative communication systems
- Assistive listening devices including hearing aids, personal FM units and closed caption TV
- Assistive feeding devices including electric feeders

There is an OSEP letter that addresses AT for Part C (at that time Part H) eligible children. In *Letter to Anonymous*, 21 IDELR 1126 (OSEP, Dec. 20, 1993), OSEP clarifies that AT and audiology services must be provided to an eligible child *only* if they are determined to be relevant to meeting the developmental needs of the child and the needs of his/her family – an analysis that is to be done on a case-by-case basis in connection with the development of the IFSP.

Personally Prescribed Devices May Be Covered

Prior to the addition of AT devices and services to the IDEA, OSEP had ruled that school districts were not required to provide a personal device which a student would require whether or not in school. However, because the definition of AT device does not include this limitation, OSEP changed its position.

A number of these policy pronouncements on this issue have come in the context of students who are school age. The closest OSEP policy letter under Part C (which at the time was called Part H) is the one referred to above, but it did not directly answer the question of the availability of personally prescribed devices under Part C. It noted that AT devices and audiology were covered services as long as they were required to meet the developmental needs of the child. In the case before it, the state had purchased hearing aids for the child under another program. OSEP noted that this was consistent with the requirements of Part C, as it is a payor of last resort. But, OSEP never directly answered the question

of whether they were covered under Part C. *Letter to Anonymous*, 21 IDELR 1126 (OSEP, Dec. 20, 1993). Nevertheless, OSEP has directly answered this question under Part B and the same analysis would apply to Part C.

For example, OSEP has stated that a hearing aid is covered under the definition of “AT device.” Therefore, if the child requires a hearing aid in order to receive a free appropriate public education (FAPE), the school district must provide it at no cost to the child or parents. *Letter to P. Seiler*, 20 IDELR 1216 (OSEP, Nov. 19, 1993); *Letter to J. Galloway*, 22 IDELR 373 (OSEP, Dec. 22, 1994). Similarly, if a student requires eyeglasses in order to receive a FAPE, the school district must provide the eyeglasses at no cost to the parents. *Letter to T. Bachus*, 22 IDELR 629 (OSEP, Jan. 13, 1995). The same analysis would apply to a pulmonary nebulizer. See *Letter to Anonymous*, 24 IDELR 388 (OSEP, Jan. 23, 1996).

The comments to the 2006 Part B regulations confirm this position. As a general matter, public agencies are not responsible for providing personal devices, such as eyeglasses or hearing aids that a child with a disability requires regardless of whether the child is attending school. However, if it is not a surgically implanted device and a child’s IEP Team determines that the child requires a personal device (e.g. eyeglasses) in order to receive a FAPE, the public agency must ensure that the device is provided at no cost to the child’s parents. 71 Fed. Reg. 46581.

In a case where the school district was charged with not obtaining an FM system for a student in a timely manner, OCR found that the school district took other steps to ensure that the student’s needs were met in the interim, including providing a set of school-issued hearing aids for the student because he often forgot to wear his and the batteries were at times corroded. *Wake County (NC) Public Schools*, 48 IDELR 52 (OCR, Feb. 21, 2007).

Finally, the definition of related services includes transportation in and around school buildings and can involve specialized equipment. 34 C.F.R. § 300.34(b)(16). Based on this definition, the Department of Education has issued an opinion that if a wheelchair is required, the school district must provide the service at public expense and without charge, regardless of whether the parents possess a wheelchair or can obtain one through private insurance. However, the school district is not required to provide the wheelchair for personal use while the student is not in school. *Letter to J. Stohrer*, 13 EHLR 213:211,

212 (OSEP, April 20, 1989). Of course given the broader purposes of Part C and the requirement that services occur in the natural environment as much as possible, the restriction on taking the wheelchair home would probably not apply under Part C. However, if the wheelchair is purchased by the Early Intervention Program, it would not be owned by the family. Therefore, purchasing a wheelchair with Part C funds should probably be considered only as a last resort.

The Right to Appeal

Parents must be informed of their appeal or due process rights throughout the process. They are entitled to written notice a reasonable period of time before there is a proposal or refusal to “initiate or change the identification, evaluation, placement,” or provision of Early Intervention Services. 20 U.S.C. § 1439(a)(6); 34 C.F.R. § 303.403(a). The notice must describe the action and reasons for it and include due process rights. *Id.* § 303.403(b). The notice must be in the native language or dominant method of communication of the parents (including sign language, braille, or oral communication). *Id.* § 303.403(c). The parents also have the right to confidentiality of records and the right to review and inspect records concerning the child and family. 20 U.S.C. § 1439(a)(2) and (4); 34 C.F.R. § 303.402.

An appeal can be pursued to resolve disagreements concerning any matter to which the parents were entitled to notice. 20 U.S.C. § 1439(a)(1); 34 C.F.R. § 303.420. Parents may request mediation, an impartial hearing, or file a system complaint. *Id.* § 303.420 and Note 1. However, if mediation is offered, it must be voluntary and cannot be used to delay or deny a parent’s rights. *Id.* § 303.419(a).

The Impartial Hearing. Each State must develop an administrative process for resolving complaints through impartial hearings. States may adopt the due process procedures under Part B, the preschool and school-aged special education provisions. States may also develop a separate administrative process, as set forth below. *Id.* § 303.420.

Once a hearing has been requested, an impartial hearing officer will be appointed. The hearing officer must have knowledge about the law, and familiarity with the needs of and services for children and their families. *Id.* § 303.421. The hearing officer must make a written decision, including findings of fact and conclusions of law, within 30 calendar days of receipt of the request by the early intervention agency. *Id.* §§ 303.421(a)(2)(ii), 303.422(b)(5), 303.423(b). A verbatim record of the hearing must be made.

Id. § 303.422(b)(4).

The hearing must be scheduled at a “time and place that is reasonably convenient to the parents.” *Id.* § 303.423(a). Parents have the right to bring an attorney or other person with special knowledge or training on early intervention. They have the right to present evidence, cross-examine, and compel the attendance of witnesses. The parents have the right to exclude any evidence not disclosed to them at least five days before the hearing. *Id.* § 303.422(b).

After a hearing decision is rendered, either party may file an appeal in state or federal court. In such cases, as under Part B, the court is to receive the administrative record, hear additional evidence on request, and render a decision based on the preponderance of the evidence. 20 U.S.C. § 1439(a)(1). There is no provision for attorney’s fees under Part C, but such a right may exist under state law. Additionally, the rights available under Part C are potentially enforceable under 42 U.S.C. § 1983, which has its own attorney’s fees provision, 42 U.S.C. § 1988. See *Marie O. v. Edgar*, 1996 WL 48515, 14 A.D.D. 871 (N.D.Ill. Feb 02, 1996) *aff’d Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997). (State of Illinois was not in “meaningful compliance” with then Part H, due to significant waiting lists and delays in obtaining services.) Note that since this decision, the majority of Circuit Courts are holding that section 1983 does not offer parents a remedy for violations of the IDEA or section 504 of the federal Rehabilitation Act. See, for example, *A.W. v. The Jersey City Public Schools*, 486 F.3d 791 (3d Cir. 2007).

Once a hearing is requested, the child is entitled to receive all of the services that are not in dispute, and to continue to receive any services already being provided, until a decision is made by the hearing officer or until an appeal to court is concluded. 20 U.S.C. § 1439(b); 34 C.F.R. § 303.425. Because the lead agency may not change or discontinue services, this is known as the stay-put provision. Moreover, parents have the right to decline a service or withdraw their consent to a service without jeopardizing their right to receive other services. 20 U.S.C. § 1439(a)(3); 34 C.F.R. § 303.405.

System Complaints. A complaint may also be filed with the lead state agency implementing Part C for individual or systemic violations. The complaint may be filed by either an individual or organization. *Id.* §§ 303.510, 303.511.

Some examples of systemic violations include:

- Charging for evaluations

- Providing services without parental consent
- Refusing to consider serving children in natural settings
- Not meeting the time requirements for evaluations or developing IFSPs
- Waiting lists for the initiation of services.

IDEA Part B: Services to Preschool Children

This section will not provide an overview of the general rights of preschool aged students under Part B, as those rights are the same as for school aged students. It will review a few special issues that arise when providing services to students in this age group. First, it will look at the option of maintaining three through five year olds in the Part C program. Next, it will discuss the transition from Part C to Part B services. Finally, it will look at how students receiving preschool services under Part B may be educated with their non-disabled peers when most school districts do not offer a preschool program.

States May Continue to Serve Preschool Aged Students under Part C

A State may elect to allow parents of students receiving services under Part C to choose to have their children continue to receive services pursuant to Part C, even after they turn three, until they are eligible to enter kindergarten or elementary school under state law. In such cases, their services must include “an educational component that promotes school readiness and incorporates pre-literacy, language and numeracy skills.” 20 U.S.C. §§ 1432(5)(B)(ii) and 1435(c).

The Transition to Special Education Services

The Part B preschool program covers students between the ages of three through five. Additionally, states may, at their discretion, serve two year old children under Part B who will be turning three during the school year. *Id.* § 1419(a); 34 C.F.R. § 300.800.

A transition plan must be developed to support and prepare the child and family for the time when the child will be too old to receive early intervention services. With parental consent, a meeting to review preschool eligibility must be held at least 90 days before the child becomes eligible for preschool special education services. If the child is not thought to be eligible for preschool special education, the district must make reasonable efforts to convene a conference among the lead agency, the family, and providers of other services to discuss other appropriate services that the child may receive. *Id.* § 303.148.

The parents must give permission before any

records such as evaluations or the IFSP are sent to the school district. *Id.* § 303.344(h)(2)(iii). For children eligible for preschool special education, the transition planning process must include “mechanisms to ensure the uninterrupted provision of appropriate services to the child.” *Id.* § 303.148, Note.

Stay Put for Students Transitioning from Part C to Part B

Generally, under Part B, if a parent disagrees with a school district’s recommendation and requests an impartial hearing, the child’s program may not be changed pending the resolution of the hearing request. *Id.* 300.518. This is typically referred to as the pendency, stay put or status quo provision.

What happens, though, when a child is transferring from Part C to Part B and the parent disagrees with the school’s recommendations under Part B and requests an impartial hearing? Will the Part C program be the child’s status quo placement? The 2006 regulations explicitly state that when a student is applying for initial services under Part B and is no longer eligible under Part C, the school district is not required to continue providing the early intervention services set out in the child’s IFSP. *Id.* § 300.518(d); 71 Fed. Reg. 46709.

However, the Third Circuit has taken a different position on this issue. In *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir. 2005), cert. denied, 547 U.S. 1050 (2006) the court held that when there is a dispute about the services for a child transitioning from Part C to Part B of the IDEA, the Part B public agency must provide the educational services that were provided to the child under Part C as the “cur-

Upcoming NATTAP Conference

Planning is moving forward for the Annual Conference of AT Act Programs to be hosted by the National Assistive Technology Technical Assistance Partnership (NATTAP). The conference will be held on April 28-30, 2010 at the Hyatt Regency Crystal City (703/418-1234), 2799 Jefferson Davis Highway in Crystal City, Arlington, Virginia, near the Reagan-National Airport. For a copy of the tentative agenda, including many sessions that may be of interest to PAAT attorneys and advocates, contact Nancy Meidenbauer of RESNA (Nmeidenbauer@resna.org)

rent educational placement” while the dispute is pending. OSEP has stated that even though the court’s position is contrary to the 2006 regulation, school districts in the Third Circuit should be careful about what to do if a parent requests an impartial hearing for a student moving from Part C to Part B. *Letter to Zahorchak*, 48 IDELR 135 (OSEP, Feb. 2, 2007). Note that the Ninth Circuit has not followed the Third Circuit’s holding. It held that the stay put provision did not apply to a student moving from Part C to Part B. The court said the student should be treated as applying for initial admission to public school. *L.M. v. Capistrano Unified School Dist.*, 556 F.3d 900 (9th Cir. 2009).

As a practical matter, then, parents should not assume that the Part C services will be provided as stay-put services when the child transfers into the Part B program.

NOTE: (If a child is eligible for Medicaid, some of the early intervention services could be eligible for Medicaid funding under the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program. For a comprehensive summary of a state’s obligations to provide AT and other services, through EPSDT, see our Winter 2008 issue of *AT Advocate* and its lead article, *MEDICAID, AT AND KIDS: How Medicaid’s EPSDT Program Expands the Availability of Assistive Technology for Children Under 21 in All States*, available at: www.nls.org/av/winter08.pdf.

Providing Preschool Students Services in the Least Restrictive Environment and at No Cost to the Parents

Under Part B, students are to receive their educational program in the least restrictive environment (LRE) to the maximum extent appropriate to their needs. They are to be educated with their non-disabled peers unless it can be demonstrated that they cannot be successful in that environment even with supplemental aids and services. Moreover, services are to be at no cost to the family.

How is a school district to meet the LRE requirement for preschool aged students when most school districts do not offer a public preschool program? In these instances, there are no non-disabled peers in a school district program with whom to educate the preschool student with a disability. The comments to the 2006 regulations address this situation as follows:

Public agencies that do not operate programs for preschool children without disabilities are not required to initiate those programs solely to satisfy the LRE requirements of the Act. Public

agencies that do not have an inclusive public preschool that can provide all the appropriate services and supports must explore alternative methods to ensure that the LRE requirements are met. Examples of such alternative methods might include placement options in private preschool programs or other community-based settings. Paying for the placement of qualified preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to public agencies to meet the LRE requirements. We believe the regulations should allow public agencies to choose an appropriate option to meet the LRE requirements. However, if a public agency determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent of the child.

71 Fed. Reg. 46589. A federal district court has required a school district to pay for part of the costs of a parentally selected preschool program when the school district determined the student should be educated with non-disabled peers, but never considered any community-based options to place the student. *Madison Metropolitan School Dist. v. P.R. ex rel. Teresa and Rusty R.*, 598 F.Supp.2d 938 (W.D. Wisc. 2009).

Conclusion

The Early Intervention and Part B Preschool Programs can provide children with disabilities the services they need to get them started on the right track and minimize their need for special education services later in life. In many cases these programs should be available to fund AT, particularly where no other funding source is available to purchase the equipment in question.

One final note. Although Part C was amended in 2004 along with the rest of the IDEA, the regulations implementing the statutory changes have yet to come out. OSEP has indicated that they hope to put them on a fast track. In the meantime, to the extent that the current regulations do not contradict the statute, they are still in effect.

If you have any questions about any of the issues discussed in this article, you can contact its author, Ron Hager, an attorney with the National Disability Rights Network (ron.hager@ndrn.org or 202-253-5252). Mr. Hager, who worked with our National AT Advocacy Project for more than 10 years, continues to collaborate with us in the provision of technical assistance to Protection and Advocacy staff on AT-related special education issues.

The **AT Advocacy Project** will provide nationwide services to PAAT projects including technical assistance to advocates wanting to access funding for assistive technology for individuals with disabilities.



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