

THE CHANGING AND CHALLENGING LEGAL LANDSCAPE OF ONE-TO-ONE AIDES

Presented by David M. Richards, Attorney at Law
RICHARDS LINDSAY & MARTÍN, L.L.P.
13091 Pond Springs Road • Suite 300 • Austin, Texas 78729
Telephone (512) 918-0051 • Facsimile (512) 918-3013 • www.504idea.org
© 2011 RICHARDS LINDSAY & MARTÍN, L.L.P. All Rights Reserved. Summer 2011

A note about these materials: The analysis of regulations and case summaries below are neither an exhaustive treatment of aide issues under the IDEA, nor an attempt to address each and every issue argued and decided in the cases summarized. Instead, the summaries are the author's attempt to highlight interesting legal arguments, fact patterns, trends, and application of rules. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation.

I. Guiding Principles in the IDEA

The issues addressed here are often complicated by parent demands and serious concerns for student health and safety. Consequently, it is not uncommon in IEP Team discussion of these issues that some basic, yet critical, IDEA principles are either forgotten or inappropriately de-emphasized.

A. Least Restrictive Environment (LRE): The presumption that the IDEA student, with the provision of special education and related services, will be taught in the mainstream class with nondisabled peers.

The statute is crystal clear on this issue. Congress intended through the IDEA to create in the mainstream classroom the “default placement” for the IDEA-eligible student.

“IN GENERAL.—To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A).

Of course, rules have exceptions. Sometimes, because of the severity of the disability, FAPE cannot be delivered in the regular classroom. While it did not want separation of students with disabilities from their nondisabled peers, Congress recognized that in order to receive the necessary special education and related services, some eligible students would have to be educated outside the mainstream.

“The Conferees point out that while instruction may take place in such locations as classrooms, the child's home, or hospitals and institutions, the delivery of such instruction must take place in a manner consistent with the requirements of law which provide that to the maximum extent appropriate handicapped children must be educated with children who are not handicapped, and that handicapped children should be placed in special classes, separate schooling, or any other educational environment only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and supportive services cannot be achieved satisfactorily.” 24 U.S.C. §1401. (1978) Historical note.

School districts are required to create and maintain a continuum of educational placements so that, regardless of severity of disability, an appropriate public education can be offered. The instructional arrangement/setting for each IDEA-eligible student is determined by his IEP Team based upon his individual needs. The instructional arrangement is determined from among a continuum of educational placements. §300.115 of the federal regulations provides:

§ 300.115 Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under §300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Should a more restrictive setting be necessary to meet the student’s needs, the IEP Team must be able to demonstrate that lesser restrictive settings are inappropriate, even with supplementary aides and services.

The commentary to §300.551 of the 1999 federal regulations (a regulation identical to the 2006 version of §300.115 quoted above) makes clear that while the IEP Team does not have to wait for the student to fail in the less-restrictive setting before trying something more restrictive, it does need to seriously consider the situation.

“The regulations do not require that a child has to fail in the less restrictive options on the continuum before that child can be placed in a setting that is appropriate to his or her needs. Section 300.550(b)(2) of the regulations however, does require that the placement team consider whether the child can be educated in less restrictive settings with the use of appropriate supplementary aids and services and make a more restrictive placement only when they conclude that education in the less restrictive setting with appropriate supplementary aids and services cannot be achieved satisfactorily.” *DOE Commentary to Subpart E, §300.551 (1999)*.

Supplementary aides and services. While IDEA requires the student with disability to be educated in the least restrictive environment, it recognizes that merely depositing a disabled student into a mainstream classroom without adequate supports will not provide the student with a free appropriate public education. “Supplementary aids and services” are defined at 34 C.F.R. §300.42 as “aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116.”

Related services. “Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.” 34 C.F.R. §300.34(a). Included among recognized related services are school health services and school nurse services. “School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child’s IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person.” 34 C.F.R. §300.34(b)(13).

Required Statements Regarding Services in IEP. The IDEA regulations require the IEP to include “A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section[.]” 34 C.F.R. §300.320(a)(4).

B. Special education services are determined on the basis of evaluation data.

Whether a student requires an aide or nursing services in order to receive FAPE is a question for the IEP Team to answer based on evaluation data. A few examples from the case law on the need for an aide illustrate the point.

Won’t a 1-1 aide make the regular classroom appropriate for all students? No. A Hawaii case demonstrates the importance of a case-by-case, one-child-at-a-time analysis. *Department of Education, State of Hawaii*, 109 LRP 19681 (SEA HI 2008). While the assistance of an aide can make a regular classroom accessible and beneficial for some students, for others a more restrictive setting will be required. Consider these facts from a Hawaii case involving the impact of an aide on the appropriateness of a regular kindergarten class.

“The evidence showed that during August and September 2007, the SSC, Board Certified Behavior Analyst, and Psychologist #2 observed Student in Student’s kindergarten classroom setting. According to the observations, Student required a lot of cueing or prompting by Student’s skills trainer in order to attend and/or participate in the class. **Student could not understand the teacher’s verbal instructions unless prompted by Student’s skills trainer.** Student, a passive, solitary child, was not sufficiently engaged during the class to gain meaningful educational benefits. Student’s responses and actions in class were solely based on the prompting done by Student’s skills trainer and held no independent meaning for Student. Student was also engaged in self-stimulatory behaviors, which interfered with Student’s focus and attention to the teacher and the lesson. Student was not at the same skill level as Student’s peers and could not keep up with the class.

According to testimony from Psychologist #2 and the Board Certified Behavior Analyst, the kindergarten setting was inappropriate for Student because Student was not able to participate in class in a meaningful way. Many of the tasks in the kindergarten classroom required interactive, language-based responses or both. Student did not currently possess this level of skill. **Even with the constant prompting or cueing by Student’s skills trainer, Student lacked the necessary understanding, language, and communication skills to benefit from a kindergarten program. Student was not benefiting from Student’s kindergarten placement.** Student’s language and communication skill levels were not sufficient to allow for meaningful class participation. Student required a program in a pre-school setting.” (emphasis added).

Evaluation data does not support the requirement of a one-to-one aide. Parents of a student with microencephaly, quadriplegia and spastic cerebral palsy sought an assigned one-to-one aide rather than the services of the aides assigned generally to the classroom. The Administrative Law Judge determined that, based on the data, the student did not require a one-to-one aide in order to receive FAPE.

“Petitioner presented no evidence to show that [] was in any danger, did not receive meaningful educational benefit, or regressed as a result of the absence of a personal one-on-one attendant. The School District presented standardized testing results and two educators observations that [] is progressing well without an exclusively dedicated personal aide. Standardized tests showed that Petitioner did 62 percent better in the first year he was without an exclusive personal aide and another 10 percent better in the second year [] was without a personal aide, than [] had the first year [] was without one. Educators opined that [] should be expanding [] interaction with a number of people; that [] is affirmatively expanding [] interaction with more people as a result of not having an exclusive personal aide; and that an exclusive aide might stunt [] progress in this regard. It is conceivable that one exclusive aide would not represent LRE.” *Flagler County School District, 49 IDELR 296 (SEA FL. 2007).*

Evaluation data requires an aide, nurse, or other adult on the bus. The student’s doctor reported that an epinephrine injector had to be administered “expeditiously” following the student’s exposure to peanut protein (whether ingested, touched, or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the epinephrine injector, “there is absolutely no way” he would survive. The Administrative Law Judge ordered an aide be placed on the bus, further finding that:

“Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen® and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen®. Therefore, a nurse, aide or other trained adult is required for those purposes.” *Manalapan-Englishtown Regional Board of Education, 107 LRP 27925 (SEA NJ 2007).*

C. Fostering independence is a goal of special education.

In its findings in the 2004 reauthorization of the IDEA, Congress identifies independent living and self-sufficiency as important human needs and desirable goals in the education of students with disabilities. “(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 1400(c)(1). Consistent with its findings, Congress then identified the purposes of the IDEA. “The purposes of this title are... to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]” 1400(d)(1).

“Learned Helplessness.” The use of an aide or paraprofessional can assist a student in accessing the regular curriculum. However, when provided inappropriately, the service can reduce independence and skill acquisition. The concern is often referenced as “learned helplessness.” A case from New York involving special education services for a student with pervasive developmental disorder provides a helpful introduction to the concerns arising from inappropriate assistance.

“The Court holds that the IEP was not reasonably calculated to afford M.C. a FAPE. It is true that the District provided M.C. with extensive ‘support’, most notably in the form of a 1:1 aide throughout the day. But as the IHO noted, **‘the constant presence of a 1:1 aide may be viewed as a crutch or**

palliative measure, especially where, as here, lack of independence is one of the student's most significant deficits. The 1:1 aide may have been very inhibiting in the proposed middle school placement, where he or she would have followed M from class to class.'

Defendant's failure to address the need to increase M's independence conforms to the pattern of 'learned helplessness' that was being fostered by the District's IEP. **This approach is epitomized by the District's designation of a separate bathroom facility for M.C., and the fact that the District admitted that there was no 'instruction goal aimed to have M.C. use a community bathroom.'** By failing to address M.C.'s need to increase his independence, and indeed by fostering 'learned helplessness' through the indefinite use of a 1:1 aide, the Court concludes that the IEP was substantively inadequate and not reasonably calculated to provide M.C. with a FAPE." *A.C. v. Board of Education of the Chappaqua Central School District*, 47 IDELR 294 (S.D.N.Y. 2007)(emphasis added).

Learned helplessness is increasingly common language in IDEA decisions. The language focuses on the desired goal of independence, together with the recognition that excessive services or inappropriate services may negatively impact FAPE. When the school does for the child what he should do for him or herself, educational opportunity can be lost.

When help is provided matters. "Recognizing []'s need for independence, the paraprofessional in Mrs. Ringler's room does not sit next to [] but instead circles the room and helps [] only when needed. This focus on independence comes not only from the parents, but also from outside experts and consultants. The 1998 Cappers Evaluation recognized that too much assistance could lead to a learned helplessness and a lack of confidence." *USD #253*, 102 LRP 2897 (SEA KA 2000)(internal citations omitted).

How the student is helped matters. "While at lunch, Dr. Cooper observed an adult aide obtained food and other items for this Student. The aide also verbally directed this Student while she ate and the aide repeatedly wiped her mouth. In Dr. Cooper's opinion, the utilization of the aide in this manner was 'terrible.' Dr. Cooper opined that it is highly likely that this Student has the skills to perform lunchroom activities; and, if she did not have such skills, the District should focus on teaching her how to perform mealtime activities, rather than perform the activities for her. Dr. Cooper saw no evidence that the District had paid any attention to her current and/or future needs in this area; and, she testified that the District's failure in this regard contributes to her 'learned helplessness.'" *Jefferson County Board of Education*, 103 LRP 7409 (SEA AL 2003).

The importance of timely support and fading assistance in the provision of services by an aide. "Examination of the IEPs, progress reports, work samples and testimony of School staff show that the School District was able to achieve this balance. The IEPs that the School District proposed gave Seb an opportunity to do many skills (i.e. banking, laundry, accessing transportation) with support and fading assistance. The progress reports and communication logs show that Seb was able to do tasks with gradual fading and less cueing and in some cases independently. BICO did not put Seb on public transportation alone but provided him with repeated training in the classroom and in the community. **The School District began by having staff ride with Seb on the van that had limited passengers, some of whom Seb knew, with a limited amount of drivers who Seb knew. This assistance was faded when Seb was ready with staff shadowing the van to having Seb get on the bus with only a staff member or a work employee at either end.** Similarly, when Seb first began his vocational placements, Ms. Lapointe had more frequent contact with the employers and then began to fade her daily onsite supervision only when the employers and Seb were comfortable. While Ms. Lapointe did not make visit on site frequently, she did maintain frequent phone contact, made accommodations when necessary and the employers were able to adequately supervise Seb because Ms. Lapointe was available and the employers called her when they needed her." *King Phillip Public Schools*, 52 IDELR 29 (SEA MA 2009).

When the parent makes the “learned helplessness” argument as part of a reimbursement case. “The Student’s mother testified that he could not do his homework, and that she believed that the Student’s one-on-one assistant was giving him the answers in school. This was not based upon direct observations of his performance in school, however, but on the difference between his schoolwork and homework. Both the Student’s mother and Ms. [] objected to the use of a personal assistant because they contended that this approach did not foster independence and an ability on the part of the Student to advocate for himself in a learning environment. Ms. [] said she observed evidence of ‘learned helplessness’ in the Student, which she attributed to the use of a personal assistant. She recognized, however, that the Student may need direct assistance after he has reached a level of frustration on his own. Ms. [] wrote in her screening evaluation that the Student ‘needs one-on-one multi-sensory instruction for language arts... .’” *Baltimore County Public Schools*, 105 LRP 57779 (SEA MD 2005). Hearing Officer denies reimbursement, finding that the student received FAPE.

Not surprisingly, the same problem can arise at home when family performs tasks for the student that the student should do himself. “The evidence is strongly suggestive that the young adult-soon-to-be in this case may be engaging (not unexpectedly) in a form of ‘learned helplessness’ while in the home. Skills or behaviors that he independently performs at school or in the work setting are apparently being provided by [] in the home. Such actions on the part of the mother or other family members only serve to exacerbate dependencies and prolong the road to independence.” *Montgomery County Public Schools*, 23 IDELR 852, (SEA MD 1996).

D. The school makes employment decisions including the assignment of personnel.

1. LEAs make personnel decisions under the IDEA. “So long as basic state law requirements are met, **it is the school district, and not the parents or hearing officers, who may select appropriate personnel to implement IEP goals and objectives....** A school district is in the best position to judge the professional skills of its staff and to determine the nature and scope of the instructional needs of its students. Thus it is a school district, not a Hearing Officer or a parent, who has a duty to allocate resources and personnel in meeting those needs.” *Sonya S. v. Spring Branch ISD*, Docket No. 221-SE-296 (SEA TX 1996)(emphasis added). **Of course, the person chosen must possess the required credentials for the position.** *Loren H. v. Royal ISD*, Docket No. 406-SE-0802 (SEA TEX. 2003). *See also, Alameda Unified School District*, 107 LRP 45568 (SEA CA 2007)(“Like the choice of methodology, the choice of service provider is also up to the district, as long as it offers or provides a FAPE.... **Student is not entitled to his choice of service providers....** The Act requires only that the service provider be able to meet his needs.”); *Blanchard v. Morton School District*, 52 IDELR 3 (W.D. Wash. 2009)(No violation of IDEA where Parent fails to demonstrate that the aide assigned by the school was unqualified, despite parent preference for a different aide. “All observing educators found the working relationship between [the aide] and [the student] satisfactory,” Also noteworthy was the parent’s removal of the student from the program 22 days after he began working with the educational assistant.).

2. Assertion of a parent right to choose providers is common, but wrong. A federal district court rejected the common argument that the IDEA grants to parents the right to choose service providers (here, a personal care assistant or PCA) for their daughter. “Here, the Plaintiffs do not criticize the services that could be provided by another PCA, as they have not allowed their daughter to be exposed to any such services. Rather, the Plaintiffs are insistent that, if they do not get their way, then there is no other alternative to their removal of their daughter from the services, and educational benefits, of the District. If the District had removed Nelson, and refused to provide the services of another PCA, then we would be presented with a far different circumstance, which would prompt a different decision, but that is not the issue we confront.” The court simply found that school districts have the sole discretion to assign staff. **“We have found no case, and the Plaintiffs have drawn none to our attention, which granted sole discretion to a parent to select a specific individual to**

provide the generic-like services of a PCA.” *Slama v. Independent School District No. 2580*, 259 F. Supp. 2d 880, 39 IDELR 3 (D. Minn. 2003); *See also, Department of Education, State of Hawaii*, 47 IDELR 175 (SEA HI 2006)(“**Although the Supreme Court has recognized the importance of parental consultation, and participation in the IEP decision-making process, nothing in the Court’s opinions suggest that parents usurp the District’s role in selecting its staff to carry out the IEP’s provisions.”**)(emphasis added).

II. Frequently Asked Questions on 1-1 Aides & Paraprofessionals

Question 1: O.K., I understand the general rule on employing and assigning personnel. But what if the parent *really* wants someone else?

The fact that the parents prefer someone else to provide the services does not change the general rule. In a Ninth Circuit case, despite the fact that the school offered the services of an aide with 13 years of experience working as a classroom aide, including a year with a high-functioning student with autism, **the parent insisted that the classroom aide could only be someone who had served the student’s needs in the home.** The 9th Circuit disagreed, finding inconsistent testimony supporting the notion and nothing in the current IEP that would require it. The student received FAPE despite the school’s use of its own chosen aide. *Gellerman v. Calaveras Unified School District*, 37 IDELR 125 (9th Cir. 2002). *See also, Naugatuck Board of Education*, 106 LRP 10981 (SEA CT 2004)(“The Board is not obligated to assign a particular staff member to a Student or to notify a parent of a change in staff unless the IEP specifies it.”); *B.F. v. Fulton County School District*, 51 IDELR 76 (N.D. Ga. 2008)(“The parents may have desired different changes, (i.e. that particular staff members work with B.F.), but the IDEA is not a guarantee to the parents of the satisfaction of their preferences.”). A couple of related questions:

Can the parent require an aide of a particular gender? The sole issue in this California case was whether a male one-to-one aide was necessary in order for the male 8th-grade student with Asperger’s and Tourette’s to receive FAPE. The student’s IEP required that he receive one-to-one aide support for the entire school day. The parents were concerned that the student would not be able to utilize the female aide assigned to him in the boys’ locker room (leaving him vulnerable to harassment and perhaps not receiving prompts to lock up his clothes). The school addressed the issue by giving him “preferential lockering” (a locker directly in front of the coach’s office). Further, the parents argued that the student would feel less socially limited with a male aide (having a female aide was like “having his mom around all day” and the student had attempted to “ditch” previous female aides), and that a male aide would be able to go into the restroom with the student and prevent him from “manifesting visual tics while at the urinal.”

“The Hearing Officer concludes that there is no evidence to demonstrate that STUDENT’S unique needs include an inability to work with female aides. Indeed, there is no dispute that a female cannot perform the primary tasks required of STUDENT’S aide, such as assisting him with academics, helping him transition from class to class, and reminding him to bring his books and other materials to class. **Regarding socialization, the evidence did not establish that STUDENT needs a male aide in order to socialize with peers. Rather, the Hearing Officer considers that, by definition, any adult aide may potentially hinder STUDENT’S socialization with peers.** While STUDENT may claim that having Ms. Normart as his aide is like having his mother around all day, it is not clear that STUDENT would feel much less constrained having a father-like individual with him at school all day....

Regarding the concern that STUDENT has on some occasions tried to evade and ‘ditch’ his female aides, again this issue pertains to the individual aides involved and not to all female aides. In any event, STUDENT’S previous attempts to evade his aide’s oversight do not appear to be a significant problem. Ms. Normart testified that although STUDENT has tried to ‘ditch’ her on a few occasions,

he has since agreed that he will stay within her sight. **Ms. Normart testified that, now that she stays several feet away from STUDENT during lunchtime, he no longer attempts to lose her.** Regarding the argument that STUDENT needs aide support in the boys' restroom, the evidence did not persuasively establish that STUDENT needs such assistance. No problems with STUDENT'S use of the restroom have been reported, and Petitioner's concerns are speculative and do not rise to the level needed to show a unique need for assistance in the restroom." (emphasis added).

The Hearing Officer further found no evidence that a female aide was more socially inhibiting than a male aide, but determined that it would be better if the school assigned someone else. Nevertheless, the school was not required by FAPE to assign a different aide as the services were appropriate. *Dublin Unified School District*, 37 IDELR 22 (SEA CA 2002).

A little commentary: An interesting complication arising from this case is testimony by the special education director that the employee's union contract gave her a continued right to remain in the current position. "This argument is disconcerting because, regardless of the contents of contractual agreements into which the District enters, the District remains bound by the requirements of IDEA and the California Education Code. To the extent that any given employee is not able to function in his or her role providing education to a special education student, and those circumstances interfere with a student's receipt of FAPE, the District is obligated to reassign the employee or otherwise resolve the problem and ensure that the special education student receives a FAPE consistent with State and federal law."

What about a demand for continued services by the same aide year after year? For a parent concerned about the child's well-being at school, the continuity of an aide from year to year can be a major source of security. This is especially true if the parent and aide have developed rapport. Unfortunately, things change, and the aide may be needed elsewhere. The law clearly allows the change, but the IEP Team needs to understand the parents' concern over the transfer. Where possible without violating FAPE, consider using a variety of aides with each student. Exposure to a number of aides not only makes things easier when a particular aide is absent, it also conditions the student to change and may decrease the parent's concern about the reassignment of one of the many aides who serve the child.

Does the parent have the right to require the school to hire the parent as the aide? **No.** In a very compassionate decision, a Hawaii Hearing Officer, having considered the unique ability of the parent to serve the child, rejected the demand that the school utilize the parent as an aide (here, paraprofessional tutor or PPT) for the child.

"The Hearings Officer is mindful that Parent 1 has unique qualifications, motivation, and dedication, in regards to his/her commitment to Student. Parent 1 and to some degree Parent 2 have demonstrated their respective abilities to fulfill their responsibilities as Student's PPTs. The Hearings Officer has no doubt that Parent 1 is uniquely qualified and motivated to serve as Student's PPT. Additionally, the Hearings Officer is very aware of the potential adverse consequences if Student is not provided with appropriate training and support regarding his/her walking and posture. **However, as discussed above, it is within the sole discretion of the Home School to determine the appropriate personnel to implement the IEP once the IEP is developed. If the staff selected by the Home School were inadequate, unqualified, or incapable of providing the services IEP, there could be issues as to the implementation of the IEP.** However, in the present case, Student's EAs were found to be qualified, and were performing their duties to the best of their abilities and to the extent that they were familiar with Student's medical conditions. There was insufficient evidence to establish that the IEP Team and the Home School were aware of the requirements to utilize specific techniques in assisting Student with his/her ambulation goals."

Department of Education, State of Hawaii, 47 IDELR 175 (SEA Hi. 2006)(emphasis added).

See, also, Bd. of Educ. of Scotia-Glenville Central Sch. Dist, 23 IDELR 727 (SEA NY 1995) (Rejecting a claim that a disabled student required the services of his parent as an aide, and finding that the services of any appropriately trained individual were sufficient); *Belkin v. Sioux City Community School District*, 46 IDELR 224 (N.D. Iowa 2006)(No retaliation found in removing parent as student's classroom aide).

Question 2: Can the school, through IEP language, give up the right to choose the aide? Yes. The fact that the IEP requires an aide does not, absent the identification of a particular aide, require the assignment of a particular aide to provide the service. *Manalansan v. Bd. of Educ. of Baltimore City*, 35 IDELR 122 (D. Md. 2001)(when the provision of an aide is included in a student's IEP, the provision of an aide is mandatory, but that does not require the District to assign a particular aide). Of course, the IEP Team can be more specific. In *Slama*, the following language appeared in the student's IEP. "Theresa's parents have chosen to provide Personal Care Attendant (PCA) services for Theresa in the school setting. The PCA will be responsible for Theresa's personal care: toileting [sic], feeding, care of the electric wheelchair, and transportation throughout the school day. The PCA will provide instructional assistance under the direction of the special education and general education teachers." When the school assigned a new PCA, the parents argued noncompliance with the IEP and that the change was an IDEA violation. Both the Hearing Officer and District Court disagreed, recognizing the traditional interpretation that the IDEA leaves to school districts the "prerogative to assign staff to provide educational services without parental consent." The school merely accommodated the parent's desire to use the parent-provided personal PCA "and not because [the District or the IEP Team] had concluded that a parent-provided PCA was necessary in order for Theresa to receive FAPE[.]" (Bracketed material in original). "Theresa's IEP never contained any provision that expressly reserved to the Plaintiff's the right to select Theresa's PCA. Rather, the IEP merely documented the District's attempt to accommodate the Plaintiff's interest in Nelson's selection." *Slama, supra*.

A little commentary: Of course, the more important question is why would the school give up the right?

Question 3: Is choice of aide an IEP Team issue? Probably not. Just as the hiring of an aide is the school's decision, so too is the reassignment. "School districts have the discretion to determine who will provide students with their programs of special education and are not required to seek parental input when a staffing decision is made.... The IHO did not err in finding that a change in paraprofessionals was within the province of the District and not subject to discussion by the IEP team.... Moreover, even though a meeting was not required, the evidence showed that an IEP meeting was scheduled by the District pursuant to the Parent's request to discuss the staff change issue but the Parent ultimately declined to participate." *Independent School District No. 11, Anoka-Hennepin*, 36 IDELR 81 (SEA MN 2001)(internal citations omitted).

A little commentary: Note that while the District prevailed on the issue of IEP Team discussion, it nevertheless offered to discuss the staff change. That's a sensible and thoughtful position. While the parent's objection may seem quite simple at the time ("we want someone else") and that objection may seem to be the type of thing that need not be discussed, the issue is easily recast later in a due process hearing and could be articulated as concerns about FAPE, safety, or a related concern that may reach the hearing officer's jurisdiction. Offering an IEP Team meeting to discuss the concerns gives the parent an opportunity for meaningful input, and makes a later challenge to the aide (on grounds not raised at the IEP Team meeting) less persuasive.

A related question: Is the aide's competency a personnel issue or a safety issue? Good question. The parent of two "very medically fragile students" attempted to discuss in an IEP Team meeting the qualifications and competency of the aides providing feeding and other services to her children.

"At the September 30th IEP meeting, the District prevented the IEP team from discussing this important, legitimate issue. The Parent was clearly advocating for her children when she brought up the issue of the 'competency' of the instructional aides. The District's response that it will only describe the

training that was provided to the instructional aides and that the ‘competency’ of the instructional aides was a ‘personnel’ matter not subject to discussion, did not meaningfully address the Parent’s concern; moreover, by stating that this was a personnel matter, the District effectively barred the discussion of this legitimate issue not just at the current IEP meeting but at future IEP meetings as well.”

Policy likewise prohibited the parent from speaking directly to the aides about educational matters. OCR concluded that various policies precluded the parent from gathering information about the aides and determining their ability to implement the health plans and IEPs. To resolve the issue, the District agreed to “convene an IEP meeting to discuss the extent to which the Parent may be present in the Students’ classroom, the Parent’s concerns about the abilities of the Students’ instructional aides, and a process whereby the Parent can obtain relevant, candid, and direct information from the Students’ instructional aides.” *Paradise (CA) Unified School District*, 47 IDELR 271 (OCR 2006).

A little commentary: An exacerbating factor in the case is the school’s enforcement of its visitation policy during the school year due to the parent’s presence in the classroom on a daily basis during ESY. OCR notes that a second parent who seems to also have visited a great deal did not receive an enforcement letter limiting her presence. Also interesting is that the ESY teacher was not consulted to determine whether the parent was distracting, and the letter was issued prior to the new school year, rather than waiting to determine whether the new teacher would have a concern over the parent’s presence. On these facts, the restrictions on visits played a role, said OCR, in the parent’s desire to discuss the aides’ competency to provide services as she could not observe for herself. OCR appears to recognize the needs of the parent of medically fragile students to have some level of information to ensure safety of her students.

Question 4: If the school doesn’t provide (per school policy) aides for certain types of disabilities, does the school even need to discuss a parent’s request? You’re kidding, right? A school cannot refuse to discuss the parent’s request for an aide on the basis of a policy position that aides are only available to students with particular disabilities. *Gloria Justice M. v. Houston ISD*, Docket No. 120-SE-1202 (SEA TEX. 2003). The parent’s right to meaningful participation in IEP Team meetings requires the Team to discuss the parents’ request, and good sense would seem to require that the Team discuss the facts and data upon which the parents’ request is based. In particular, the Team needs to discuss why the parents believe that the services of an aide or paraprofessional are required for the student to receive FAPE. *See also, White v. Ascension Parish School Board*, 39 IDELR 182, 343 F.3d 373 (5th Cir. 2003)(“The right to meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such.” *Id.*, at 380).

A little commentary: A policy prohibiting the provision of an aide except for certain pre-approved impairments is a dangerous thing should it prevent the IEP Team from making case-by-case determinations about the provision of appropriate services.

Question 5: Can the aide be provided “as needed” throughout the year? Yes. In a Texas case, the Hearing Officer approved an IEP that provided for adjusting the provision of one-to-one aide services over the course of the school year, depending on the student’s behaviors and need, as determined by ongoing assessment by the student’s teachers.

“Tommy will have an aide-teacher with him in all classes for the first six weeks. After the first six weeks, the special education teacher will evaluate with Tommy’s other teachers which classes he might be able to function in independently for all or part of the class. Factors such as the structure of the class, Tommy’s skills in the class, the number of other students in the class and the behavior of the other students, etc. will be determining factors in this evaluation. If Tommy becomes more independent and a one-on-one teacher is not attending every class with him, Tommy’s teachers will continually re-evaluate his progress and may need at some point to re-establish a one-to-one ratio for every class or, for example, a few classes with particularly difficult tasks involved. The need for a one-on-one aide will

be evaluated on an on-going basis throughout the year and Tommy will be provided an aide whenever needed.” *Conally ISD*, 34 IDELR 309 (SEA TX 2001).

The Hearing Officer was comfortable with a reduction in one-to-one services as the behaviors that posed a threat to himself and others had “decreased significantly.” Concluded the Hearing Officer, “Ms. H.’s fears for Tommy’s safety should not override a reasonable recognition of Tommy’s improved behavior and sometimes reduced need for one-on-one assistance. The goal of providing increased independence according to Tommy’s unique needs as a student with autism is appropriate.” *See also USD #253, discussed previously.*

Question 6: What if the student needs an aide for FAPE but the school can’t afford it? “Under state and federal law, **the local education agency has an obligation to implement a student’s IEP....** Just as the court must respect the expertise of educators in determining best practices for educating children with special needs, the court must hold the school to its word: **if it has determined that an aide is necessary to provide FAPE, an aide must be provided.** If the school believes some lesser assistance, such as merely adult or peer supervision, is appropriate, such services should be outlined in the IEP.” *Manalansan v. Bd. of Educ. of Baltimore City*, 35 IDELR 122 (D. Md. 2001)(emphasis added). Consequently, **when the IEP required the services of an aide to participate in community outings, a school administrator could not refuse the service on the basis of budget difficulties.** “The determination not to provide the student with a 1:1 aide was made by one or more district administrators who did not know the student and/or his placement options.” *Washoe County (NV) School District*, 51 IDELR 52 (OCR 2008)(emphasis added).

Similarly, a special education student attending the Washington State School for the Deaf complained to OCR when the aide required by the student’s IEP to assist in the development of independent living skills was not provided due to a funding problem. Since the school could not afford the aide, and the school felt that the student could not be safely served in the residential facility without the aide, the school returned the student to a home placement. The school did not determine that the home placement was appropriate, only that it was required for administrative and financial reasons. OCR had no trouble finding a 504 violation. “The lack of funds is not an adequate legal justification for not providing a student with needed related aids and services under Section 504 and for not providing an appropriate educational program.” *Washington State School for the Deaf*, 22 IDELR 987 (OCR 1995); (*See also Modoc County (CA) Office of Education*, 24 IDELR 580 (OCR 1996)(The “practice of determining which services to offer based on cost and staff availability did not take into consideration whether the least costly or available services were appropriate for the particular individual characteristics of the student. The practice therefore violates the requirements of Section 504 and Title II.”)

Question 7: Can the aide be responsible for the student’s instruction? **No.** In an Iowa case, instruction for a student with autism was provided almost entirely by the aide, with a very limited involvement by the special education teacher. “By virtue of the provision of a 1:1 aide over the three years in question, direct provision of special education services were diminished. The services of an associate may not replace special education services identified in the IEP. The educational and behavioral plans require development, implementation and evaluation by a trained professional. Isolated with his aide or sitting in his ‘office’ the majority of the day with his associate would certainly prevent the provision of special education services to advance Michael toward attaining his IEP goals.” *Linn-Mar Community School District*, 41 IDELR 24 (SEA IA 2004).

No violation, but the teacher will provide direct instruction in the future. Under state law, a paraprofessional was permitted “to assist in the instruction of pupils under the immediate supervision of a teacher, holding a valid certificate, directly engaged in teaching subject matter or conducting activities. The teacher shall be continuously aware of the non-certificated persons’ activities and shall be able to control or modify them.” Pursuant to the child’s IEP, the student was to be provided with specialized instruction designed to meet her needs in the Child Development course. OCR determined

that the instructional aide provided direct instruction to the student, under the direction of the special education teacher. The special education teacher determined the course objectives, created the daily lesson plans, evaluated the student's work, and "utilized her merely to deliver the educational material" under his direction. While no violation was found, the district (to address complainant's concerns) told the special education teacher that "he, rather than the aide was to provide direct instruction." *Taylorville (Ill) Community Unit School District #3*, 42 IDELR 178 (OCR 2004).

Question 8: Does the school have to provide parent-preferred training? No, as long as staff is appropriately trained. As a general rule, the aide has to know what to do. For example, a six-year-old student with ADHD and an emotional disturbance had a history of serious behaviors including suicide threats and aggression toward peers. The ALJ was critical of the lack of evaluation data (No FBA had been conducted and there were no behavioral objectives nor identified behavioral interventions). In that context, the ALJ reviewed the assignment of an aide. "As of May 8, 2008, the IEP team determined that Student required a one-on-one aide and provided Student a one-on-one aide. This aide turned out to be untrained and unprofessional and only worked with Student a few weeks. In the June 12, 2008 IEP, District offered an AAA assigned to the SDC placement. District did not offer Student a one-on-one aide trained in behavior interventions. District's offer of a general classroom aide untrained in behavior interventions was inappropriate." *Compton Unified School District*, 108 LRP 69430 (SEA CA 2008).

Faced with a **parent demand for a particular type of behavior training**, a New York Hearing Officer and State Review Officer agreed that parent-preferred behavior training was not required as the student had responded to the techniques used by the school.

"The hearing record indicates that classroom personnel are adequately trained in techniques to manage the student's behaviors. The district provides its crisis management paraprofessionals with training regarding how to manage aggressive behaviors, which consists of redirection and positive reinforcement. Although the district conceded that there is no specific training on how to physically detach a student who is biting another student, in the past, when the student bit another student, classroom personnel were able to successfully remove the student, and the classroom teacher testified that the student has not exhibited this behavior since that time. Furthermore, the psychologist testified that the district 'basically does a lot of the same behavioral interventions and redirection and the preventative techniques that are taught in the [SCIP] class.' He also opined that the current strategies and emphasis on positive proactive approaches are appropriate for the student."

Interestingly, while the school was not required to conduct the parent-preferred training, the Review Officer encouraged the District to seek additional training to address emergency situations, such as the biting. *In Re: Student with a Disability*, 50 IDELR 150 (SEA NY 2008). *See also, Moorestown Township Board of Education*, 38 IDELR 139 (SEA NJ 2003)(ALJ looked at the services to be provided by the aide and determined that 5 of the 6 duties "do not even appear to require any extensive training whatsoever other than the type of gentle reminders and caring which has been conceded by all as the hallmark of [the aide's] assignment to GDL throughout her contacts with him in this matter." Staff training with respect to Asperger's, to meet the 6th duty, was provided).

Question 9: What happens when the aide is absent? The District must have a process for providing the required services. While formal training had been provided to regular staff, a substitute aide assigned to assist a student with diabetes did not have formal training in preparation for the aide duty. She "did receive written instructions from the regular paraprofessional concerning the care of the Student on the days in question. The instructions were written on a copy of the daily schedule provided to the substitute that specifically named the Student and identified his teacher. The instructions stated that after recess he should be reminded to check his blood sugar and, at lunch, he should be asked if he input his reading into his insulin pump." OCR found no 504 violation as the student received the agreed upon service. *Millington (MI) Community Schools*, 49 IDELR 232 (OCR 2007).

An aide's absences are not just an employment issue. In an Illinois case, the student's IEP required the services of an aide on the school bus to assist with loading, unloading, and safety while in transit. The aide, in the parent's calculations, was absent 20 times, and no substitute was provided. The principal (who apparently terminated the aide) argued that the aide violated the absence policy by not providing sufficient notice to allow for the provision of a substitute. The Hearing Officer was not persuaded. "The principal's assertion that District could not put a substitute aide in place for Student to meet his needs if the aide assigned to Student's bus did not call in for a substitute is not viable here. This was a 'highly absent' employee, per the principal's testimony. The principal had the ability to replace him or call for a sub, even if he couldn't get one until the afternoon trip home, just as he would if a teacher failed to come to work without calling in for a sub, so that the children would not continually be left without replacement supervision for the entire day." *Chicago School District 299*, 38 IDELR 21 (SEA IL 2002).

Question 10: Can the school offer access to additional supervision as opposed to a one-to-one? Sure, if it's appropriate. In a Massachusetts case, the student's IEP called for daily support in mainstream classes by regular and special education staff. At her previous elementary school, no other students in her mainstream class received support services from an aide other than the student. Consequently, the classroom aide only provided assistance to the student, giving the appearance of a one-to-one aide. When the student moved to a new school, where she was one of seven students in the classroom receiving support services from a paraprofessional, the services were no longer provided 1-1. Instead, her needs were met by one of the available adults in the class. *Malden* used the following distinction: one-to-one aide vs. classroom or resource room aide. *Malden Public Schools*, 42 IDELR 73 (SEA MA 2004).

"A person holding the title of 'one to one paraprofessional ('para')' in Malden has been hired or assigned under this designation, and is assigned to a particular student to perform functions dictated or implied in the IEP. A one-on-one aide generally follows his or her assigned student throughout the day, in regular and special education classrooms as well as the corridors, lunchroom etc. Depending on the student's individual needs, the one-on-one may modify curriculum, assist with academics, assist with physical needs, or other, similar duties related to the child's particular situation.

A classroom aide, on the other hand, is assigned to a regular or special education classroom rather than to a particular student. His or her job consists of assisting and carrying out the instructions of the classroom teacher in order to run the class. Based on the instructions of the teacher, the aide may accompany or help children individually and/or in groups. The essential difference in the two job descriptions is that a one-to-one aide is assigned to a student pursuant to an IEP, while a classroom aide is assigned to a class or teacher." (internal citations omitted).

Since the student's IEP did not require services by a one-to-one aide, provision of the services at the new school by various individuals was not a fundamental change in the IEP, and was not in violation of IDEA. *See also, Gwinnett County School District*, 45 IDELR 60 (N.D. Ga. 2005)(Court concludes that the school's offer on paraprofessional services was not clear at this stage of the litigation).

So a rotating set of aides, rather than one aide, can be used? It depends. "Obviously, an aide devoted to this Child solely would be preferable, as was admitted by at least one of the special education teacher witnesses." Nevertheless, despite concern about the special education teacher not having a walkie-talkie (walkie-talkies were used to coordinate aides) and minor concerns over safety, the use of shared or on-call aides did not violate FAPE for the student. *Jackson County Board of Education*, 38 IDELR 83 (SEA AL 2002). *See also, Gwinnett County School District*, 45 IDELR 60 (N.D. Ga. 2005)("Given the apparent severity of J.B.'s cerebral palsy, the Court agrees that J.B. needs a full-time parapros. The Court also feels comfortable that a rotation of two or three parapros is a sufficiently small group to protect and preserve J.B.'s dignity on sensitive issues like personal care and to become familiar enough with her speech patterns to effectively communicate with her.").

Consistency vs. Generalizing Learning & Skills. A Maine Hearing Officer addressed this common dispute. The parents' position was that a single employee designated to provide aide services throughout the school day results in consistency and better communication/coordination among the various employees providing services to the child. "The school makes an equally compelling argument that the student will benefit from different support personnel working with him. They argue that the student will be better served if he can begin to generalize learning from one staff member to another and not depend so heavily on one individual as part of his teaching team." Interestingly, this Hearing Officer approached the dispute as one of methodology ("Decisions of methodology and educational philosophy are not a right conferred to the student by IDEA") and determined that a dedicated one-to-one aide was not required in this case. *Bangor School Department*, 36 IDELR 192 (SEA ME 2002).

Question 11: Is there any IDEA duty to provide an aide after school to access a school program or activity? **Yes.** The 2006 IDEA regulations include the requirement to provide aids and services necessary for students to have equal opportunity to participate in nonacademic and extracurricular activities.

"The State must ensure the following:

(a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available." 34 C.F.R. §300.107.

Question 12: Are collateral attacks on the aide designation possible? **Unfortunately yes.** Since the hiring, firing, assignment, and reassignment of the aide are matters of school district discretion, parents angered by the employment action may resort to collateral attacks on the aide to force a change. Note that the author does not opine that the following cases are contrived to attack the aide decision. Instead, the author merely notes that claims of assault and abuse do arise when parents are concerned about the aide and the treatment received by their students at the hands of the aide. *See, for example, B.F. v. Fulton County School District*, 51 IDELR 76 (N.D. Ga. 2008)(allegations of post-traumatic stress as a result of case manager and aide); *San Joaquin County Office of Education*, 49 IDELR 120 (SEA CA 2007)(allegations of sexual contact); *Rowan County (KY) Schools*, 48 IDELR 195 (OCR 2006)(allegation of child abuse arising from aide pinching child on the arm).