



AVENUES FOR OBTAINING NECESSARY ASSISTIVE TECHNOLOGY AND THE UNDERLYING LAWS

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OVERVIEW





Disclaimer

- The purpose of this training is to provide general information.
- The information is provided in summary form and is **not** intended as a substitute for legal advice.
- Federal and state law can change at any time, so please stay abreast of possible changes to the law.



Legal Routes to AT

- Assistive Technology (AT) can be pursued under multiple laws/programs.
- This presentation will provide an overview of those laws and the legal routes by which one can advocate for AT.



Presentation Roadmap

- Special Education Laws and AT – Amanda Glass
- Vocational Rehabilitation and AT – Linda Fischer
- Medicaid/ALTCS and AT – Chris Carlsen

ASSISTIVE TECHNOLOGY & SPECIAL EDUCATION

Amanda Glass



AT and Special Education

- Children with disabilities may be entitled to receive AT through their school district as part of their special education program.
- Both IDEA and Section 504 of the Rehabilitation Act entitle students with disabilities to a Free Appropriate Public Education (FAPE).



The Individuals with Disabilities Education Act (IDEA)

- IDEA requires IEP teams to consider the assistive technology needs of all children with disabilities. (20 U.S.C. 1414(d)(3)(B)(v))
- The law requires schools to use assistive technology devices and services "to maximize accessibility for children with disabilities." (20 U.S.C. 1400(c)(5)(H))



Overview of Special Education Process

- Evaluation.
- Determination of Eligibility (MET meeting).
- Individualized Education Program (IEP).
- Reevaluations.



IDEA Eligibility

- 1) Fit under one of 13 explicit disability categories listed by the law; and
- 2) Child's disability causes child to need special education services and related services.



IDEA Eligibility Categories

- Autism
- Cognitive Impairment
- Deaf-blindness
- Deafness
- Emotional Disturbance
- Hearing Impairment
- Multiple Disabilities
- Orthopedic Impairment
- Other Health Impairment
- Specific Learning Disability
- Speech or Language Impairment
- Traumatic Brain Injury
- Visual Impairment



Definitions

- IDEA has definitions for both “assistive technology device” and “assistive technology service” (20 U.S.C. 1401)
- Assistive Technology Device:
 - *Any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability.*



Definitions, ctd.

- Assistive Technology Service:
 - *any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.*



Examples of AT Services

- IDEA explicitly names the following as examples of assistive technology services:
 - *(A) the evaluation...*
 - *(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices...*
 - *(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing...*



Examples of AT Services, ctd.

- *(D) coordinating and using other therapies, interventions, or services with assistive technology devices...*
- *(E) training or technical assistance for such child, or ...the family of such child...*
- *(F) training or technical assistance for professionals...*

(20 U.S.C. 1401(2))



Exception

- For a child with a surgically implanted medical device, the school is not responsible for the maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device).

However...

- Each public agency must ensure that the external components of surgically implanted medical devices are functioning properly.



AT Evaluation Under IDEA

- To determine if a student requires assistive technology in school, the IEP team must refer the child for an evaluation by an assistive technology specialist.
- The evaluation is performed at public expense (the school district pays, not the parents).



Document AT in IEP

- 20 U.S.C. 1414 (d)(a)
 - The IEP document must include information about AT.
- 34 U.S.C. 300.324(a)(2)(v)
 - The IEP team must consider whether the student needs assistive technology devices and services—this should be documented in every IEP.



When does a school provide AT?

- 34 C.F.R. 300.105
 - The school district is responsible for assistive technology when it is required as a part of the student's special education services, related services, or supplementary aids and services.
 - School-purchased assistive technology may be made available in the child's home or in other settings if the IEP team determines that the child requires assistive technology to receive (FAPE).



When does a school provide AT?, ctd.

- AT devices and services must be included to the extent that they are necessary “in order for the student to make progress appropriate in light of the child's circumstances.”
 - *Andrew F. Douglas County School District RE-1, 137 S. Ct. 988 (2017)*



Resolving Disputes Under IDEA

- Independent Educational Evaluation.
- Mediation.
- State Complaint.
- Due Process.



Independent Educational Evaluation (IEE)

(at public expense)

- Specifically request an Assistive Technology IEE.
- “Evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.”
- School district must either pay for IEE or file due process complaint.
- One IEE per school evaluation, 2 year SOL.
- District does not need to follow IEE, but must consider it.



Mediation

- Neutral third party facilitates communication.
- Doesn't decide who is right/wrong.
- Voluntary process.
- ADE administers their mediation program.
- Agreement is binding.
- <http://www.azed.gov/disputeresolution/mediation/>



State Complaint

- A way to notify the Arizona Department of Education (ADE) that a school is not complying with IDEA.
- Better for procedural violations, not substantive (e.g., file this if the school is failing to provide AT that is listed in an IEP, but not if you think your child needs AT and the school disagrees).
- Any individual or organization may file.
- Must be filed within 1 year of noncompliance.
- <http://www.azed.gov/disputeresolution/state-admincomplaintsystem/>



Case Law

- The AT provided to the student must be tailored to his individual needs.
- *Houston County Sch. Dist.*, 67 IDELR 133 (SEA GA 2015)
 - Although the district decided to provide the student a voice-output device, the device's static display and 32 buttons limited his communicative vocabulary and impeded his ability to make "measurable or adequate gains in the school setting."



Case Law, ctd.

- Districts are not required to provide a student the AT devices or services specified by parents.
- *Southington Bd. of Educ., 116 LRP 28397 (SEA CT 04/21/16)*
 - Determining that a district did not have to provide a student the text-to-speech software preferred by the parents because the student was able to receive FAPE by using a district-issued laptop.



Case Law, ctd.

- Districts do not necessarily fulfill their responsibility to provide an AT device by permitting the student to use his own device, absent an agreement to that effect.
- *Washoe County Sch. Dist.*, 69 IDELR 201 (SEA 2016)
 - A student's IEP afforded him the use of a cell phone to record assignments in class. Noting that the district relied on the student's own phone to satisfy its obligations, the Nevada ED concluded that the district violated the IDEA's no cost requirement.



Case Law, ctd.

- A district is not required to select a more costly device that may provide more or better assistance to the student and maximize his or her education.
 - *Board of Educ. of the Hendrick-Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982)

- On the other hand, a district is not permitted to use the cost consideration to select a device that is inconsistent with the student's needs as expressed in the IEP.
 - *Greenwood County Sch. Dist.*, 19 IDELR 355 (SEA SC 1992)



Section 504 of the Rehabilitation Act of 1973

- 34 C.F.R. 104.33
 - “A recipient [of federal financial assistance] that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.”



Section 504 Eligibility

- A student must be determined to:
 - *(1) have a physical or mental impairment that substantially limits one or more major life activities; or*
 - *(2) have a record of such an impairment; or*
 - *(3) be regarded as having such an impairment.*

- Major Life Activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, breathing, learning, and working.



AT Under Section 504

- Even if a child does not qualify for special education under IDEA, she may still be considered to be a child with a disability under the broader definition of Section 504.
- Section 504 is not as explicit about AT as IDEA is, but AT must still be provided under Section 504 if it is necessary for a student to receive FAPE.



Enforcing Section 504

- If AT is listed in a student's 504 plan but is not being provided, or if a school district does not agree to include needed AT in a student's 504 plan, parents may file a complaint with the U.S. Department of Education's Office for Civil Rights (OCR Complaint).
- https://www2.ed.gov/about/offices/list/ocr/complaint_process.html

ASSISTIVE TECHNOLOGY AND VOCATIONAL REHABILITATION

Linda Fischer



What is Vocational Rehabilitation (VR)?

- VR is a public program funded through a Federal/State partnership and administered by the Arizona Rehabilitation Services Administration (ARSA).
- It provides a variety of services to persons with disabilities to prepare for, maintain, or regain employment.



Basic Requirements to be Eligible for VR Services

- Applicant has a physical or mental impairment.
- The impairment constitutes or results in a substantial barrier to employment.
- Requires VR services to prepare for, secure, retain, advance in or regain employment.



Order of Selection

- The Arizona VR program is currently under an Order of Selection due to limited funds to serve all individuals who apply for services.
- VR is currently only serving clients in Priority Category 1 – Most significant disability.
- Some on Waiting List in Priority Category 2.



What is Assistive Technology (AT)?

- For VR, the term “Rehabilitation technology” is sometimes used. This includes devices and services to meet the needs of and address barriers in education, rehabilitation, employment, transportation, independent living and recreation.



AT services VR can provide

- Evaluation to determine AT needs of the individual, including functional evaluations in the place where the individual will use the AT device.
- Selecting or designing an AT device.
- Purchasing the AT device and service.
- Customizing an AT device to meet the needs of the client.
- Training and technical assistance for the client on how to effectively use the device.



Examples of AT Available Through VR

- Computers and related items (keyboard, screen, software).
- Mobility equipment.
- Special Software/Speech Recognition.
- Dragon Dictate.
- Augmentative Communication Devices.



Examples of AT Available Through VR, ctd.

- School-related items.
- Vision Aids.
- Home Modifications.
- Hearing Aids or Other Assisted Listening Devices.



Individualized Plan for Employment (IPE)

- A plan that lists your specific employment goal and steps to achieve it.
- Outlines the AT services VR will provide the client and the responsibilities of the client.



AT Services and Economic Need

- Arizona VR only considers economic need for vehicle modifications.
- Disability-related costs can be subtracted from your income for determining economic need.



VR Policies

- Exceptions to policy may be granted to meet a client's unique rehabilitation needs if that service is necessary for that client's vocational goal.
- VR can not establish arbitrary limits on the nature and scope of services and can not place absolute dollar limits on services.



Right to Appeal

- Any decision made by VR the client disagrees with. Includes denial, reduction, suspension or termination any of services.
- Services stay in place during appeal.



Client Assistance Program (CAP)

- Assists in informing and advising clients and client applicants of all available benefits under the Rehabilitation Act.
- Advocates for individuals in their relationships with the projects, programs, and facilities providing services.
- Assists and advocates in pursuing legal, administrative, or other appropriate remedies to ensure the protection of rights.

ASSISTIVE TECHNOLOGY AND MEDICAID/ALTCS

Chris Carlsen



Arizona Health Care Cost Containment System (AHCCCS)

- Arizona's Medicaid program.
- Jointly funded by Arizona and the federal government .
- For individuals and families who may qualify for acute or long-term services.
- For AHCCCS and ALTCS, you may receive comprehensive services that are outlined on www.ahcccs.state.az.us.



Durable Medical Equipment

- DME is “sturdy, long-lasting,” can withstand repeated use, and is generally not useful in the absence of medical condition.
- AHCCCS Medical Policy Manual (AMPM), Policy 310-P
 - *Covers durable medical equipment (DME), supplies and devices.*
 - *When order by PCP.*
 - *AND, reasonable and medically necessary.*



Durable Medical Equipment

- Medically Necessary: “Prevent disease, disability, or other adverse health conditions or their progression, or to prolong life.” AAC R9-22-202(B), R9-22-101(B).
- Cost Effective: Services must be the least costly *that will give the same result.* AAC R9-22-202(B)



Successfully Navigating AHCCCS

- Keep copies of all records.
- Always make requests in writing (email is okay). Keep a record of all phone calls (Date, Names, Title, nature of discussion).
- Read notices carefully – check dates/deadlines, etc.
- Good Letters of Medical Necessity are really important.



Letter of Medical Necessity

- See your primary care doctor or specialist.
- Ask your doctor or specialist to conduct an evaluation outlining why you need the service or equipment.
- Make sure that the doctor and/or the specialist submits their request (prescription, letter of medical necessity, evaluation, other documentation) to your health plan and sends you a copy.



Letter of Medical Necessity

- The letter should state:
 1. *Your current functional limitations, capabilities and abilities.*
 2. *Your exact diagnosis.*
 3. *Duration of your condition.*
 4. *Anticipated limitations or health problems which can occur if the request is not authorized or provided.*
 5. *Description of the service or item being prescribed.*



Letter of Medical Necessity

- The letter should state:
 6. *How the use of the service or item will allow the patient to function independently: e.g. perform tasks in the home, improve patient's mobility, improve muscle strength.*
 7. *Rationale: safety, cost effectiveness by preventing further complications/limitations, need for specific medication/service/item that is not covered because other medications/services/items have been tried and failed to work (i.e. power wheelchair v. manual wheelchair).*



Medicaid Appeal

An opportunity to dispute:

- A request for a new service/equipment that has been denied by your AHCCCS plan, or
- A request for continued service/equipment provided through an AHCCCS plan.



How do I appeal?

- Anytime you are denied a service or a continued service, this denial should be **in writing**.
 - ***This writing is called a "Notice of Action" or "Notice of Adverse Benefit Determination."***
- If your AHCCCS plan is denying you, you appeal through the AHCCCS plan that sent your notice.



Notice of Action

- Should be issued within 14 days of change to services.
- NOA should include:
 - *Name/information/service.*
 - *Reason for change.*
 - *Effective date.*
 - *How/When to appeal.*



Notice of Appeal Resolution

- Sent within 30 days after appeal is received.
- Expedited appeal – if granted – DDD must respond within 3 days.
- NOAR should include:
 - *Reason for decision.*
 - *Right to fair hearing – how to appeal.*
 - *How to request continuing services.*



State Fair Hearing

- Must file request for fair hearing within 30 days of appeal resolution (or date listed).
- Heard by the Office of Administrative Hearings.
- Prehearing Conference to outline issues. AAC R2-19-112
- Can subpoena relevant testimony. AAC R2-19-113



State Fair Hearing

- Can present and cross-exam witnesses. AAC R2-19-115
- Burden of Proof:
 - The person asserting a “claim, right, or entitlement” (including medical necessity) must establish it by a preponderance of the evidence. AAC R2-19-119.



State Fair Hearing

- Hearing officer makes recommendation.
- Within 30 days, AHCCCS Director issues a decision, in which the recommendation is either accepted, modified, or rejected. ARS § 41-1092.08(B)
- Can ask for rehearing or review. ARS § 41-1092.09
- Director's Decision may then be appealed to Superior Court.



Successfully Appealing

- Understand which issues are being appealed and considered by the judge.
- Gather evidence that is relevant to those issues.
- Present evidence that is relevant to those issues.
- Do not use the appeal as an opportunity to list all of your complaints about AHCCCS.
- Stay focused.



Need legal help?

Call the Arizona Center for Disability Law

Arizona Center for Disability Law

Phone: (602) 274-6287

Website: www.azdisabilitylaw.org