



South Dakota REPORT

Advocating the Rights of South Dakotans with Disabilities

THE PROTECTION AND ADVOCACY SYSTEM FOR SOUTH DAKOTA

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November, 2014

Transition Planning: Yes! There's an App for That!

by Tim Neyhart

South Dakota Advocacy Services is always interested in finding ways to help students and parents identify and use methods to make the special education process easier and more effective. One of the frequently-discussed topics in the special education process is transition planning. The federal regulations that apply to transition planning are complex and call for coordination with agencies that will provide services to students when they leave public school services. The federal regulation, at 34 C.F.R. §300.43, defines Transition Services as:

(a) *Transition services* means a coordinated set of activities for a child with a disability that—

(1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes—

- (i) Instruction;
- (ii) Related services;
- (iii) Community experiences;



(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) *Transition services* for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

There is an App for That!

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There is an App for That!

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Transition services are a coordinated set of activities that must include discussion of post-school activities. This requirement for coordination with agencies that provide supports for post-school activities has created a lot of confusion about how to plan, write, and implement this part of a student's Individual Education Plan (IEP). Students, parents, and schools often struggle with getting all of the required elements into the IEP, as well as with identifying and including information about a student's preferences and interests in the IEP. As with many things, the answer to these concerns may be found in the Internet.

One of the new ideas for transition plan development is a computer-based application (App) created by the Disability Rights Center of Kansas. It is a web-based app called "iTransition." The application is free and is accessible by using the following link: www.itransitionks.org. The application is user-friendly and can be used by many students with minimal or no supports. By using the questions in this tool, the student and his team can develop a transition plan that will be in line with the requirements of the federal special education law.

Students and parents frequently report to SDAS various concerns about the transition planning process that took place at their IEP meetings. Common complaints are school staff rushing this part of the IEP and not beginning the transition elements of the IEP until too late in the student's high school career. The plan written by using the tool found at www.itransitionks.org provides a way for the student and the school to meet these requirements. It identifies a student's age at the start of the process. This step allows for students as young as 14 to use the tool and begin to plan for transition-related activities.

The app survey usually takes less than 10 minutes to complete. The student answers thirteen main questions, along with various drop-down questions that appear based on the response to the initial question. The thirteen questions cover the various elements of the transition process. The user can review the questions and use a simple check system to answer most of them. Some of the drop-down questions require a typed response. If you want to change a response, add something, or go back to a previous screen, you simply click the "previous" button and return to the previous page.

The app is designed to assist students and their parents to develop goals to address the choices regarding the transition topic areas that are important to them. The app quite simply writes this section of the IEP for you. This tool was designed in Kansas, but it is based on federal law so most parts of it are relevant in South Dakota. When the questions are completed, the app produces a draft transition plan that can be emailed to you or you can view it and print it from the browser.

What Elements of "Transition Services" are Addressed by Use of this Application? Student Participation

One might question why a student would need to use this app. Isn't the school supposed to work with the student to write

South Dakota Advocacy Services (SDAS) is an independent (not a part of state or federal government or any service provider), private, non-profit corporation established in the State of South Dakota and designated by the Governor to provide protection and advocacy services to eligible South Dakotans with disabilities. SDAS is funded in part by the U.S. Department of Health and Human Services, U.S. Department of Education, and Social Security Administration. Articles are intended for informational purposes only and are not intended as legal advice. Comments on SDAS services and priorities are welcome.

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There is an App for That!
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New PADD Director in Pierre

Emily Garcia of Pierre became the new Advocacy Services Representative on September 2, 2014, and was promoted to PADD Program Director on December 1 following Emily Paulsen's resignation. She is located in the Pierre office.

Garcia comes to South Dakota Advocacy Services (SDAS) with one year experience in the financial planning field and six years in education. Prior to joining SDAS, Garcia was a fifth grade teacher at Washington Elementary in Pierre and a Spanish/English teacher for Stanley County Schools in Fort Pierre. She has also worked for Modern Woodmen of America in Pierre.

She is a graduate of Papillion-LaVista High School in Papillion, Nebraska. Garcia earned a Bachelor of Arts degree from Augustana College, Sioux Falls, with a major in Elementary Education and a minor in Spanish.



Emily Garcia

Emily's husband, Gabe, is a Network Security Engineer with the State of South Dakota. Emily and Gabe are foster parents and have recently adopted their son, Jovi. For fun, Emily enjoys boating on the Missouri River and traveling.

SDAS, LifeScape, and SDPC Collaboration Available Soon

Recognizing the lack of material, or at least *eye-catching* material, available for students and parents regarding decisions that need to be made as the student approaches age 18, South Dakota Advocacy Services, LifeScape, and South Dakota Parent Connection have worked together over the past six months to create one-page "Infographics" - one for students and one for parents. The infographics address "Transfer of Rights," "Power of Attorney," and "Conservatorship/Guardianship" in bright colors and easy to understand text. The plan is to complete the documents and have them ready for printing/distribution in early 2015. In addition to being available from the three agencies, we hope they will soon be provided to students/parents when students turn age 17 by all public school districts.

The SDAS Protection & Advocacy for Persons with Mental Illness (PAIMI) Program completed a new anti-stigma video focusing on YOUTH, called "Wipe Out Stigma." The video was screened at the South Dakota Film Festival in Aberdeen in September, 2014. It can be viewed on the SDAS website.

FILM LENGTH: 17 MINUTES

WIPE OUT STIGMA

SOUTH DAKOTA ADVOCACY SERVICES PRESENTS

WIPE OUT STIGMA

REAL STORIES OF STIGMA & MENTAL HEALTH

AMANDA, JILL, D'ART AND MAX SHARE PERSONAL STORIES OF MENTAL HEALTH JOURNEYS REVEALING HOW A PATH IS BEING PAVED TOWARD A HEALTHIER WORLD AS WE CONTINUE TO WIPE OUT THE STIGMA OF MENTAL ILLNESS IN OUR MINDS AND IN OUR CULTURE.

SPECIAL FEATURES:

- X RIPPLE EFFECT
- X THE ORIGINAL ANTI-STIGMA FILM (27 MINUTES)
- X EXTRA INTERVIEW FOOTAGE
- X SUBTITLES: ENGLISH AND SPANISH
- X VOICE OVER: CAPTIONS AND CREDITS ARE READ OUT LOUD
- X DIRECTOR'S COMMENTARY

WIPE OUT STIGMA

ADVOCACY SERVICES

Imagine Zion

SOUTH DAKOTA ADVOCACY SERVICES PRESENTS AN IMAGINE ZION FILM "WIPE OUT STIGMA" PRODUCED AND DIRECTED BY DAN OBERG
 INTERVIEWS WITH AMANDA CONWAY, JILL ELVAN, MAX CHAMBERLAIN & D'ART SCHMITZ
 FEATURING MUSIC WRITTEN BY RADICAL FACE PERFORMED BY AMANDA CONWAY & MUSIC WRITTEN AND PERFORMED BY MAX CHAMBERLAIN
 FUNDED BY THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, CENTER FOR MENTAL HEALTH SERVICES

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Tech Bytes

by Valorie Ahrendt

Tech Bytes is a column that appears in each edition of the **South Dakota Report**. The column usually features apps, software, and devices that can provide technology assistance to people with disabilities. This edition of Tech Bytes will be a little different, however, as it will explain some things to consider when thinking of acquiring and using assistive technology.

The **first step** in the process is to **identify** areas where a person may need assistance in order to be more independent or for a task to be easier. Here are a few questions to ask:

Which activities in the person's day require personal assistance?

Where would the person like to have more independence or control in their life?

Does the person have the ability to communicate their wants and needs?

How might the assistive technology make a task easier or successful?

Is additional help needed to assess a person's AT needs (e.g., referral for professional services, referral to DakotaLink, evaluations by school districts)?

The **second step** is to **research** the assistive technology that would pertain to the identified needs.

Are there technical assistance programs or loan/rental programs to ask for suggestions?

Are there teachers, therapists, family members, or friends that may have ideas of AT used in similar situations?

What information can be found with an internet search?

What information can be found from others with similar interests using social networking sites?

The **third step** in the process is to **decide** whether using the AT would produce the desired outcome.

How might a person's life change as a result of the AT?

Will the AT support the person to:

- ◆ interact with others?
- ◆ participate and contribute in activities?
- ◆ have greater control over their life?

With the help of AT, will the person:

- ◆ improve their health, safety, or well-being?
- ◆ decrease the need for personal assistance?
- ◆ gain self-confidence or self-esteem?

How often will the person use or benefit from the AT?

Will the purchase be cost-effective in helping the person?

Have alternatives been identified and considered?

Are there additional costs to consider?

- ◆ usage fees?
- ◆ maintenance costs?
- ◆ education or training costs?

Does the person have the capacity to use the AT?

Does the person need help to use it beyond the training period?

The **fourth step** in the process is to **obtain** and **implement** the AT.

What are the options for funding the purchase of AT?

- ◆ private health insurance?
- ◆ Medicaid?
- ◆ Rehabilitation Services?
- ◆ school district?
- ◆ personal funds?
- ◆ Social Security benefits?
- ◆ individual's trust?

What training will be needed in order to use the AT?

What support will the person need during the training period?

Who else will need to be trained to assist when the user has difficulties with the AT?

What measures need to be taken to minimize the risks of theft or loss?

The **fifth and last step** in the process is to **evaluate** the effectiveness of the AT.

How is the person's life different now that AT has been implemented?

Does the person choose to use the AT to meet the desired outcome?

Is the AT being used enough to meet the desired outcome?

Are others who support the person using the AT consistently and/or encouraging the person to use it?

What is working well?

What is not working?

What other improvements or modifications are needed?

Does the person need additional training on using the AT?

Does the AT still support the person's need?

There are so many options for AT devices, services, software, and apps that can assist someone in nearly every area of their life. Prices can range from no cost at all to thousands of dollars. It would be better to take some time to analyze the person's needs by using the five steps before the investment of time and money. Reading through the questions in each step may generate more questions pertaining to specific situations.

The area of assistive technology is vast and can be overwhelming. Hopefully, the five steps will provide a path to follow when thinking about using assistive technology to increase independence and success.

More information can be found at the Oregon Technical Assistance Corporation website (www.otac.org).

Stop Me If You Have Heard This Before . . . About Assistive Technology

by Gail C. Eichstadt

Children with disabilities were guaranteed the right to a free appropriate public education by the Education for All Handicapped Children Act (Public Law 94-142) in 1975. Congress reauthorized EAHCA several times, most recently in December 2004 as the Individuals with Disabilities Education Improvement Act (IDEA). Educators should be familiar with IDEA's requirements and follow them. Yet, it is amazing what SDAS hears at IEP meetings! This article will discuss one such example relating to assistive technology ("AT").

At an IEP meeting for a student with sensory issues who received occupational therapy, the team came to the section on the IEP asking, "Does the student require Assistive Technology Devices and Services? Yes No. If yes, what device or service will be provided?" (Page 3 of Special Education Programs' model IEP form is located at <http://doe.sd.gov/oess/sped/IEP.aspx>.) SDAS staff suggested that an assistive technology (AT) evaluation might be appropriate for the child. School staff responded stating, "*AT evaluations are only for students who cannot communicate.*"

IDEA defines "Assistive Technology Device" at 34 C.F.R. §300.5:

An assistive technology device is defined as: 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 the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of that device.

IDEA defines "Assistive Technology Service" at 34 C.F.R. §300.6:

Assistive technology service means: any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes--

- (a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;
- (b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;
- (c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
- (d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
- (e) Training or technical assistance for a child with a disability or, if appropriate, that child's family; and
- (f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to,

employ, or are otherwise substantially involved in the major life functions of that child.

While the 1990 amendments placed these definitions into the law, IDEA '97 mandated that IEP teams consider a child's need for assistive technology devices and services at each IEP meeting. In 1997, it was reported that more than 20,000 different assistive technology devices existed for students. The following are a few examples of types of AT to consider:

- ◆ If a child had a reading goal on his/her IEP, the team could consider AT that enhances or enlarges standard text and graphics, converts text to speech, or converts text to Braille.
- ◆ If writing was a concern, an IEP could determine that a child needs changes to pencils, pens, and paper, such as an adaptive grip for a pencil or special paper.
- ◆ A child on an IEP may need a laptop or iPad with a word prediction program, spell check, thesaurus, dictionary, or dictation to help with written expression difficulties. When oral expression difficulties were present, the team could determine augmentative communication devices or an iPad with applications for speech as appropriate for the child.
- ◆ For math concerns, the team could decide a talking calculator, calculator with large print and keypad, or even an abacus is appropriate. Measuring instruments have speech output, tactile output, or large print display.
- ◆ When study skills support is needed, the team could consider a visual schedule, visual organizers, or electronic organizers.
- ◆ If the child has listening needs, assistive listening systems, closed captioning on television or videos, computer-assisted real-time captioning (CART), or computer assisted note taking can be included on the IEP.
- ◆ White canes, auditory location signaler systems, speech output devices giving verbal directions, grab bars, door openers, and tactile signs on walls are assistive technology for students with orientation, mobility, or ambulation needs.
- ◆ When writing transition goals to enable a child to live independently, begin a job, or go on to postsecondary school, a team could consider adapted watches and alarms, adaptive dressing aids (Velcro, button holers, sock guides), adaptive eating utensils, hand controls for driving a vehicle, modified games or decks of cards, or adaptations for sports.

To determine a student's assistive technology needs, school districts must conduct evaluations (just as with all other special education needs). After AT needs are determined for the child, the IEP Team should consider if the child, the child's family, or the school staff need training about the AT devices to enable the child to benefit from his/her special education. See 34 C.F.R. §300.6(e) and (f) above. Plainly, assistive technology for a child on an IEP goes far beyond just children who cannot communicate. If you have any questions about assistive technology, please contact SDAS at 1-800-658-4782.

Expect. Employ. Empower.

by Irma Arens

Expect. Employ. Empower. was the National Disabilities Employment Awareness Month (NDEAM) theme for 2014. Cities throughout South Dakota celebrated during the month of October with various events. Yankton's NDEAM committee hosted a community breakfast at Mt. Marty College geared especially for area businesses to help promote the hiring of persons with disabilities.

Lieutenant Governor, Matt Michels, acted as emcee and presented the annual awards for employee and employer of the year. Kyle Duke was the winner of the 2014 Pat Smith Employee of the Year Award. Kyle has been employed full-time at Pizza Ranch since June of 2011 and seasonally at Wintz/Ray Funeral Home and Cremation Service, Inc. since August of 2008. Kyle's employers described him as hard working, great work ethic, positive work attitude, reliable, dependable, courteous, respectful, friendly, cooperative, consistent, fast, and a lot of fun as well. Congratulations to Kyle!

Applied Engineering was chosen as the outstanding employer of the year. Bridget Benson and Rick Duimstra from Applied Engineering accepted the award from Lt. Governor Michels. Benson, HR Specialist, has been a huge advocate for hiring persons with disabilities. She spoke at the Council on Quality and Leadership and also submitted an article to the Freedom to Work Newsletter on Applied Engineering's positive experiences with hiring persons with disabilities.

Following the awards presentation, Lt. Governor Michels introduced a panel of area business leaders and SD Department of Human Services Secretary, Gloria Pearson. The business participants were:

Jim Gevens – Fox Run Golf Course Assistant Clubhouse Manager;



L-R: Paul Wintz; Kyle Duke; and Steve Wintz

Bridget Benson – Applied Engineering HR Specialist; Michael Thunker – Walmart Personnel Coordinator; and Nickie Beltan – Goodwill Industries Manager.

Each panelist talked about the advantages and positive experiences they have had with hiring persons with disabilities. All agreed that employers need to look past a person's disability when hiring new employees, as these workers may become some of the best they have.

Secretary Pearson spoke about the issues employers face when hiring persons with disabilities and what programs the state has in place to assist them. She stated, "We want everyone who wants to work to be able to work. And we want to support them to help them get the skills and the experience that they need to find employment because it is so valuable."

How Can I Become a Poll Worker in a South Dakota Election?

by Gail C. Eichstadt

When we go to the polls at municipal, primary, general, or school district elections, we often see our neighbors, young or old, working there. The poll workers set up equipment, record who has voted and what kind of ballot was used, count the ballots, and see that the counted ballots are taken to the proper place.

Have you wondered how to become a poll worker? To find the answer, we start at the South Dakota Constitution. It states, "The Legislature shall by law define residence for voting purposes, insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections, the nomination of candidates and the voting rights of those serving in the armed forces." 1889 Const., art. VII, § 3. In administering elections, the Legislature determined a poll worker must be a registered voter in South Dakota.

To be a registered voter, one must be at least 18 by the "next municipal, primary, general, or school district election" (SDCL

12-4-1), a resident of South Dakota, and not disqualified from voting. SDCL 12-3-1. Eighteen-year-old students may be excused from school to work at the polls. SDCL 13-27-6.1. A person is disqualified from voting and working at the polls if he/she is serving a sentence for a felony conviction, has been declared mentally incompetent, or has died. SDCL 12-4-18.

A common misconception held by many South Dakotans is that a person with a developmental disability may not vote. Legislators disagreed. SDCL 27B-7-44 states in part, "No person is incompetent ... to register and vote, solely by reason of a diagnosis of a developmental disability, or by reason of a commitment by a county review board."

Political party county central committee persons are involved in the process of selecting poll workers. State law defines a po-

Poll Workers
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Legal Pull-out Section

November 2014

Is Illegal Removal from School Becoming a Trend? It's Time to Recognize and Address that Duck!

by John A. Hamilton

Over the past few years, South Dakota Advocacy Services has become aware of several situations where districts have removed students from their current placements and/or from school altogether without affording the students/parents their procedural due process rights. The scenario goes something like this: Districts inform the students they are no longer welcome at the school; are subject to arrest for trespassing on school grounds; and may not return for either a certain number of days, until a risk assessment is completed, or indefinitely. However, no formal suspension ever takes place. A formal suspension triggers procedural due process rights under South Dakota statutes (for all students) and under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) for students with disabilities. This article will discuss the applicable laws, provide examples of situations SDAS has encountered, and provide discussion.

Regular Education Procedural Due Process Rights

In *Goss v. Lopez*, 419 U.S. 565, 574 (1975), the United States Supreme Court held the Due Process Clause of the United States Constitution prohibits districts from depriving a student of his/her state-created right to a public education on grounds of misconduct "absent fundamentally fair procedures to determine whether the misconduct occurred." Early in its decision, the Court stated that "education is perhaps the most important function of state and local governments . . . and the total exclusion from the educational process . . . is a serious event in the life of the suspended child." *Id.* at 576. The Court ruled any disciplinary suspension, including a short-term suspension of ten school days or less, is a substantial deprivation of a 14th Amendment property interest that entitles the student to Due Process protection. Therefore, even with a short-term suspension, the district must give the student the opportunity to be heard (which the Court found to be satisfied by informal notice and a hearing – essentially a verbal discussion between the school administrator and the student where the administrator tells the student why he/she is being suspended and the student is given an opportunity to tell the administrator his/her version of the events). *Goss v. Lopez* dealt solely with short-term suspensions. "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id.* at 584.

If school personnel seek to deprive a student of the right to public education for more than ten school days for misconduct, to ensure the suspension is not arbitrary, Due Process requires, at a minimum, the right to an adjudicatory fact-finding hearing to determine if the misconduct has actually occurred.

South Dakota enacted SDCL § 13-32-4, which requires school personnel to give the student written notice of his/her due process rights, including the right to appeal a long-term suspension in a hearing before the school board, before a disciplinary suspension extends into the eleventh school day. "The administrative due process procedures shall include a requirement that the school give notice of a student's due process rights to the parent or guardian of the student at the time of suspension or expulsion. Each school district board shall provide a procedural due process hearing, if requested, for a student in accordance with such rules if the suspension or expulsion of the student extends into the eleventh school day." If school personnel seek to deprive a student of the right to public education for more than ten school days for misconduct, to ensure the suspension is not arbitrary, Due Process requires, at a minimum, the right to an adjudicatory fact-finding hearing to determine if the misconduct has actually occurred.

A student's constitutional right to appeal a suspension of more than ten school days is further codified in SDCL § 13-32-4.2: "In the event of a suspension for more than ten school days, if the pupil gives notice that he wishes to appeal the suspension to the board, the suspension shall be stayed until the board renders its decision, unless in the judgment of the superintendent of schools, the pupil's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, in which case the pupil may be immediately removed from school, and the notice and hearing shall follow as soon as practicable." South Dakota statutes are thus consistent with the Supreme Court's ruling in *Goss v. Lopez*.

South Dakota defines the terminology used in the discipline process at ARSD § 24:07:01:01:

- (1) "Expulsion," the action of the school board that terminates a pupil's membership in school for not more than 12 consecutive months;
- (2) "Long-term suspension," the exclusion of a pupil by the superintendent or school board from a class or classes or from school for more than 10 but not more than 90 school days;
- (3) "Parent," a parent, guardian, or person in charge of a pupil;

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Illegal Exclusion

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(4) "Policy," a rule, regulation, or standard enacted by a school district board;

(5) "Short-term suspension," the exclusion of a pupil by a principal or superintendent from a class or from school for not more than 10 school days.

South Dakota statutes mandate that when a student will be removed from a class, classes, or from school altogether for more than ten school days, that removal constitutes a long-term suspension triggering procedural safeguards of notice and the right to a hearing to contest the charges.

When a student is to be excluded from a class, classes, or from school altogether for over ten school days, ARSD §24:07:03:01 requires the superintendent to file a written report and provide a copy to the parents. Specifically, "The superintendent must file a sealed, written report with the school board by the end of the fifth school day following the first day of the long-term suspension and may request that a hearing be held before the school board. The report must include the facts of the situation, the action taken, the reasons for the action, and the superintendent's decision or recommendation. The report must remain in the possession of the school board secretary or business manager, sealed and unavailable for review by individual school board members, until the time set for a hearing. The superintendent must send a copy of the report to the pupil's parent or to the pupil if the pupil is 18 years of age or older or an emancipated minor at the same time the report is filed with the school board's secretary or business manager."

The important written Notice that parents or students who are age eighteen or emancipated are to receive must meet the following requirements per ARSD 24:07:03:02:

"If the superintendent finds grounds for a long-term suspension from a class or classes, the superintendent may exclude the pupil from a class or classes by using the short-term suspension procedure in §24:07:02:01. The superintendent shall give a written notice to the pupil's parent or to a pupil who is 18 years of age or older or an emancipated minor and may schedule a hearing. The notice shall contain the following minimum information:

- (1) The policy allegedly violated;
- (2) The reason for the disciplinary proceedings;
- (3) Notice of the right to request a hearing or waive the right to a hearing.
- (4) A description of the hearing procedure;
- (5) A statement that the pupil's records are available at the school for examination by the pupil's parent or authorized representative; and
- (6) A statement that the pupil may present witnesses.

If a hearing is requested, the superintendent shall give notice to each school board member of an appeal to the board for a hearing. The superintendent shall set the date, time, and place

for the hearing and send notice by first class mail to each school board member and by certified mail, return receipt requested, to the pupil's parent or to a pupil who is 18 years of age or older or an emancipated minor.

If no hearing is requested or the hearing is waived, the action of the superintendent is final."

These procedures apply to *all students* subject to a long-term suspension. All students have the right to contest the charges against them at a hearing before the school board in situations where the student will be excluded from a class, classes, or from school for over ten school days. Without the constitutionally- and statutorily-based rights to notice and to contest the charges, school districts would have the unfettered discretion to remove students at their whim based on trumped-up charges.

Special Education Discipline Procedures

In *Honig v. Doe*, 485 U.S. 305 (1988), the school system asked the Court for the authority to unilaterally remove students with disabilities indefinitely whom it considered dangerous or disruptive, despite the plain statutory language that gave students the right to "stay put" in their current educational placement during the pendency of review proceedings. *Id.* at 308. The Court noted the "stay-put" language is "unequivocal," and despite this "clear directive," the district sought

for the Court to read a "dangerousness" exception into the stay-put provision, arguing Congress either believed the exception too obvious to include or simply inadvertently failed to include it. *Id.* at 323.

The Court rejected "petitioner's invitation to rewrite the statute." *Id.* The Court instead found that it was "clear . . . that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students,

from school." *Id.* (emphasis in original). The Court explained that Congress did not leave school districts without the authority to discipline students with disabilities or to ensure school safety, as they could still use their standard procedures for disciplining students, including use of study carrels, detentions, timeouts, and restricted privileges. *Id.* at 325. In addition, under Department of Education policy, schools could suspend students with disabilities for up to ten school days before it becomes a prohibited "change in placement." *Id.* The Court noted that school districts can file for a due process hearing, but can also attempt to go directly to court, argue futility of exhausting administrative remedies, and seek for a court to temporarily enjoin a dangerous child with a disability from attending school. *Id.* at 326-27. "In short, then, we believe that school officials are entitled to seek injunctive relief under §1415(e)(2) in appropriate cases. *Id.* at 328. The Court explained that in such situations, the district must prove that "maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others." *Id.* The Court in *Honig*, consistent with its ruling in *Goss v. Lopez*, prevented school administrators from unilaterally excluding students from school for more than ten consecutive school days. *See id.* at n. 8.

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IDEA Discipline Provisions

Congress codified the *Honig* decision in IDEA's 1997 amendments, providing extremely detailed procedural processes when addressing discipline of a student with disabilities, with additional amendments in 2004. Consistent with all the other authorities discussed above, IDEA allows school personnel to remove a child with a disability who violates the code of student conduct from the student's current placement to an interim alternative educational setting, another setting, or suspension for not more than ten consecutive school days (and additional removals for up to ten consecutive school days for further incidents, so long as the additional removals do not constitute a change in placement per 34 C.F.R. §300.536). 34 C.F.R. §300.530(b)(1). However, after a student with a disability has been removed from his/her current placement for ten cumulative school days in a school year, during any additional days of removal, the district must provide services in another setting that will enable the student to continue to participate in the general educational curriculum and to progress toward meeting the goals set out in the student's IEP. 34 C.F.R. §300.530(d)(4).

When a district seeks a long-term suspension (more than ten consecutive school days) of a student with a disability because of a violation of the code of student conduct, within ten school days of that decision, the district, parents, and relevant IEP Team members must meet to determine if the conduct in question was a "manifestation of the child's disability." Specifically, the team considers "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability" or "if the conduct in question was the direct result of the [district's] failure to implement the IEP." 34 C.F.R. §300.530(e)(1). If the IEP Team determines the behavior *was a manifestation* of the student's disability, the IEP Team must either conduct a functional behavioral assessment and implement a behavioral intervention plan, or revise a current plan if one already exists, and return the student to the placement from which the student was removed unless the parent and school agree to a different placement. 34 C.F.R. § 300.530(f). Thus, if the IEP Team determines the behavior *was a manifestation* of the student's disability, the long-term suspension overridden by IDEA.

If the IEP Team determines the behavior *was not a manifestation* of the student's disability, the district may apply the relevant disciplinary procedures in the same manner and duration applicable to students without disabilities. 34 C.F.R. §300.530(c). However, a student with a disability must continue to receive educational services in another setting for the length of the long-term suspension that will enable the student to participate in the general curriculum and progress toward meeting the student's IEP goals. Furthermore, the student must receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior so that it does not recur. 34 C.F.R. §300.530(d)(1). These services may be provided in an interim alternative educational setting. 34 C.F.R. § 300.530(d)(2).

Parents who disagree with any decision regarding the appropriateness of the child's alternative placement or with the manifestation determination may appeal by filing for a due process hearing. Similarly, a district that believes maintaining a

student in his/her current placement is substantially likely to result in injury to the child or others may file for a due process hearing. 34 C.F.R. § 300.532(a). In response to the *Honig* decision, Congress created a separate "stay-put" provision for discipline cases, requiring the student to remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the suspension, whichever occurs first, unless the parent and district agree otherwise. 34 C.F.R. § 300.533.

Students with disabilities thus have dual protections in discipline situations involving long-term suspensions. Not only do they have the right to contest manifestation determinations and the appropriateness of interim alternative educational settings under IDEA, but they also have the right to contest the underlying charges in a hearing before the school board. Despite these constitutional and statutory mandates to afford students procedural due process rights, some South Dakota districts have circumvented both the general due process requirements and IDEA's discipline procedures by removing students, but *not* formally suspending them. Instead of providing the required Notice of a long-term suspension and accompanying rights, districts are not calling it a suspension; *they are not calling it anything!* They are simply informing students/parents that the student is no longer allowed in the school building. The following are examples from three different South Dakota districts:

Example #1

In spring 2013, a regular education student in eighth grade was suspended for ten school days due to a violation of the code of student conduct. After serving the suspension, the student moved to live with the student's other parent in a different district for the remainder of the semester. The student moved back with the original parent to began high school for the 2013-14 school year. The student was removed from the high school after a couple days *simply for being there* and was unilaterally placed in an alternative school. No procedural due process rights were provided. Approximately two months later, due to comments made that the district interpreted as a threat, the student was also banned from the alternative school. No suspension occurred. The district provided no procedural due process rights. The student has been home for over a year. In May 2014, the district determined the student was eligible for special education services, but no IEP meeting took place until mid-October 2014, and the student had yet to receive any special education services when the *South Dakota Report* went to press. There appear to be multiple violations of procedural due process, as the district removed the student first from the high school and then the alternative school without following the procedural requirements of the law. There also appear to be IDEA violations of both a substantive and procedural nature.

Example #2

The student was an 11-year-old with significant diagnosed emotional issues that interfere with the student's ability to be educated. However, the student was on an IEP for only specific learning disabilities, with related services of speech therapy and counseling. After he threw a desk on October 4, 2010, the

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district held an IEP Team meeting and changed his placement from the regular classroom to “home” on a temporary basis, although the district provided no services in the home. The district took no disciplinary action. The child remained in the “home placement” until the IEP Team met in December, when the “home placement” was made permanent. This “home placement” continued for the rest of the 2010-11 school year, but the district provided no services in the “home placement.” However, the district allowed the student to attend school about an hour a day total for special education and speech therapy. While the student continued to be excluded from school, no suspension occurred. Despite the district’s failure to educate this child for three-fourths of the school year, the student received passing grades in all classes (even art, music, and PE) and the district promoted the student to the next grade level. In August 2011, the Principal and Special Education director came to the family’s home with homeschooling paperwork for the parent to sign, as the district felt the child was too violent and posed too much of a threat to continue with the public school. Given no other option, the parent signed the paperwork for homeschooling. The child did, however, continue to receive five hours of special education services at the school per week.

In December 2011, the parent refused further homeschooling, later stating the district never sent a single teacher to teach in the home, apparently not understanding that the paperwork she felt forced to sign meant that *she* was to provide the education. The district increased the child’s time at school to two hours per day for the second semester of the 2011-12 school year. The student again received passing grades in all classes and was promoted to the next grade. The student had been excluded from school for 1¾ school years, but the district had never formally suspended the student. Because the district never suspended the student, no manifestation determination occurred and the parent and student were never put on notice of their right to contest the charges at a hearing before the school board.

Example #3

On October 29, 2013, the district informed the grandmother of a student with a disability that due to behaviors, the student

could not return to school (or step foot on school grounds) until a risk assessment was completed. However, the student was to go to the city library for an hour a day to receive special education from a *paraprofessional*. The district took no action to suspend the student. The district also took no immediate steps to get a risk assessment completed. The district eventually set up a risk assessment in late January 2014. An IEP Team meeting resulted in a determination the student could attend school for a period or two, with the plan to increase his time at school. Essentially, the student was denied an education for three months and then began receiving just an hour or two of education per day. Again, because no formal suspension occurred, the district provided no notice of a long-term suspension, no notice of the procedural due process right to contest the underlying charges, and no notice of IDEA procedural safeguards.

Discussion

About twenty-five years ago, a parent contacted SDAS and wanted to know if a meeting she had with the school was an IEP meeting. While that seemed an odd question, the school district apparently refused to answer her. One can only imagine the conversation – Parent: “Is this meeting an IEP meeting?” District: “Maybe – We are not going to tell you.” We asked the parent what took place at the meeting, such as who attended and what occurred, and then told the parent something like, “if the district will not commit to whether a meeting is or is not an IEP meeting, use the duck test. If it looks like a duck, swims like a duck, and quacks like a duck, it is probably a duck.” I recall the parent later calling and stating, “I think we had another duck.”

South Dakota school districts are removing students from school, telling the students they may not step foot on school grounds, but are not referring to the district’s exclusion of these students as a suspension. South Dakota law defines a long-term suspension as “the exclusion of a pupil by the superintendent or school board from a class or classes or from school for more than 10 but not more than 90 school days.” IDEA similarly refers to removal of a student for more than ten consecutive school days as a change of placement triggering a manifestation determination and if the behavior was not a manifestation of the

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Illegal Exclusion - Parent Tips

- ◆ If the district removes your child from his or her current school to another setting or sends the child home for over 10 consecutive school days due to alleged misconduct, you should have received: 1) Notice of a long-term suspension; and 2) Notice of the right to request a hearing before the school board to contest the charges.
- ◆ If the child is on an IEP, the district must hold an IEP Team meeting within 10 days of the decision to remove the child to determine if the conduct in question was a manifestation of the child’s disability.

If the district excluded your child from school for over 10 consecutive school days, but did not take these actions, the district has probably violated your child’s constitutional right to procedural due process, as well as both state and federal statutes.

If you believe your child has been or is currently being improperly excluded from school and you have received no Notice of long-term suspension or procedural safeguards, SDAS wants to hear from you.

If your child is currently excluded, please contact SDAS for assistance or, at the very least, to share your story. If your child has been illegally excluded from school in the past, we also want to hear your story. Please contact SDAS at 1-800-658-4782. One can also go to the SDAS website (www.sdadvocacy.com) and fill out the “Illegal Exclusion Questionnaire.”

Transition Services – An Introduction on IDEA Requirements

by Elizabeth Overmoe

Ensuring that people with disabilities have the opportunity and appropriate supports to live how they choose, where they choose, and with whom they choose is a major focus of disability advocacy in the United States.¹ In order to have this opportunity, many students with disabilities will require transition services prior to graduating or aging-out of high school. The National Council on Disability has reported to the U.S. Department of Education that many children continue to leave school without appropriate transition services that could make it possible for them to access higher education or meaningful employment.² This article will detail the legal requirements of transition services established under the Individuals with Disabilities Education Act (IDEA) to prepare students and parents to advocate for appropriate services when the student reaches transition age.

What are transition services?

Transition services, according to the IDEA definition, are a “coordinated set of activities for a child with a disability that is designed to be within a results-oriented process that is focused

on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities. Post-school activities to discuss should include the following: post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The student’s post-school activities should also be based on the individual’s needs, taking into account their strengths, preferences, and interests.³

When should transition services begin?

The choices for students with disabilities can oftentimes take additional planning and be more complex than it is for other high school graduates. Therefore, transition services must be included in all IEPs beginning with the IEP in place when the student reaches age 16 and may be included for younger students if deemed appropriate by the IEP team.⁴ Although the

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child’s disability, requires provision of educational services in an alternative setting sufficient to allow the student to work toward all IEP goals and continue to participate in the general curriculum. When this occurs, the student is also to receive a functional behavioral assessment and behavioral intervention services. Does each of the case examples described above meet the state and federal definitions of a long-term suspension? Let’s use the duck test. In each of the case examples, was the student excluded from a class or classes or from school altogether for more than ten school days? Was it a result of a violation of the code of student conduct? Yes, clearly we have three case examples where the duck’s name is “Long-term Suspension.”

The concerns with these and similar situations go beyond the fact that districts have blatantly violated students’ rights. First, recall that South Dakota defines a long-term suspension as more than ten, but no more than 90 school days. Recall also that IDEA states when the conduct in question is determined not to be a manifestation of the student’s disability, districts may apply discipline as they would to students without disabilities. In the first two examples above, the very longest the students could have been removed through long-term suspension would have been 90 school days (slightly more than half a school year). Even if expulsions took place, the longest expulsion can be twelve months. Both students would have been back in school had they been long-term suspended or even expelled due to their conduct. The districts’ actions resulted in unilateral indefinite long-term exclusions.

Second, while much has been said herein about the right to contest underlying charges at a school board hearing, in reality, most students up for a long-term suspension are responsible for the behavior in question, but a hearing would allow the school board to consider mitigating factors and perhaps lessen the length of the suspension. However, what about the student who is unknowingly “set up” or otherwise completely innocent of the charges prompting the exclusion? Assuming for a moment the students in the above three case examples were innocent of any wrongdoing, the districts’ actions would have deprived innocent students of anywhere from three months to nearly two years of education. This deprivation of education would not have occurred if the student had the opportunity to prove his/her innocence at a hearing before the school board. A district’s unilateral deprivation of education without procedural due process denies students their right to be heard and contest the charges, either to demonstrate mitigating factors or to prove their innocence of the wrongdoing.

Conclusion

There can be no dispute as to what is occurring: Indefinite long-term removals accompanied by no procedural safeguards – a denial of constitutionally-guaranteed procedural due process. These removals are illegal under both state and federal law. Such utter disregard of the law sets students with disabilities’ procedural due process rights back to the pre-*Goss v. Lopez*, pre-IDEA, and pre-*Honig v. Doe* eras (25-40 years). If any readers have come across similar situations, either currently or in the past, SDAS would like to hear from you (*see box on opposite page*). Illegal exclusion from school of students with or without disabilities must end.

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law does not mandate transition services for students beginning at age 14 or younger, the provision of these services could have a extremely positive effect on the employment and independent living outcomes for many students, especially those who are likely to drop out before age 16. Therefore, the following note is included with the law for guidance to IEP teams:

Although this language leaves the final determination of when to initiate transition services for students under age 16 to the IEP process, it nevertheless makes clear that Congress expects consideration to be given to the need for transition services for some students by age 14 or younger. The Committee encourages that approach because of their concern that age 16 may be too late for many students, particularly those at risk of dropping out of school and those with the most severe disabilities. Even for those students who stay in school until age 18, many will need more than two years of transitional services. Students with disabilities are now dropping out of school before age 16, feeling that the education system has little to offer them. Initiating services at a younger age will be critical.⁵

Who should be invited to the IEP meeting to discuss transition?

The members of the IEP Team prior to transition would continue to be on the IEP Team during transition, including regular and special education teachers, providers, parents/guardians, and any other persons at the discretion of the parent or school.⁶ The IEP Team must include a representative of the public agency providing and supervising the transition activities and, if appropriate, representatives of other participating agencies.⁷ This requirement would include individuals from agencies such as the Division of Rehabilitation Services (“Voc. Rehab”), a community support provider, or any other entity that will be responsible for transition services. The student should also be there to ensure her or his needs, preferences, and interests are addressed.⁸

What information should be included in the IEP?

The IEP Team should list services (instruction, related services, community experiences, and when appropriate, daily living skills and functional vocational evaluation) that are needed in each of these transition areas: post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.⁹ The IEP must contain a statement of each public agency’s and each participating agency’s responsibilities related to the transition activities.¹⁰ If the IEP Team determines an individual student does not need services in one or more of the areas above, the IEP must contain a statement to that effect and the basis upon which the determination was made.¹¹ Since the decision to not include certain services is an IEP determination, it must be re-considered annually.¹²

According to the South Dakota Transition Service Liaison Project, the following areas *must* be addressed in all transition IEPs:

- ◆ The student’s measurable post-secondary goals, which includes the type of employment they will have, what education or training they will need for that employment, where they will get the education or training, and where they will live.
- ◆ A list of all the courses the student will need to take during high school to meet their post-secondary goals.
- ◆ A description of the areas the student does well in and the areas where the student might need some extra help.
- ◆ A list of activities and services which will help the student to meet their post-secondary goals.
- ◆ Transfer of rights must be addressed prior to the student’s 17th birthday.¹³

What happens if a participating agency does not provide services outlined in the IEP?

If a participating agency fails to provide agreed-upon transition services contained in the IEP of a student with a disability, the school shall, as soon as possible, initiate a meeting for the purpose of identifying alternative strategies to meet the transition objectives and, if necessary, revising the student’s IEP.¹⁴ This meeting does not relieve them of their responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.¹⁵

Where should I go for help and for more information on transition services?

There is an excellent resource for parents and students to assist with transition entitled, *Cornerstones to Effective Transition Planning*. This document explains the process in further detail and provides valuable checklists and tools for parents and students to utilize in order to develop their own idea of what transition services should look like for that particular student. *Cornerstones* can be found online at www.tslp.org. Another resource that can be very beneficial to the planning process can be found at <http://www.itransitionks.org/>. This interactive questionnaire allows you to answer information regarding the transition process and it inputs that information into a draft plan for transition services (*see* related article on page 1). South Dakota Parent Connection also has a plethora of resources available online at www.sdparent.org to assist you in becoming knowledgeable about transition services as it relates to employment, higher education, and healthcare. All three websites have the information you need in order to be an effective advocate with regard to transition services.

¹Nat’l Council on Disability Topical Overview – Living Independently and in the Community: Implementation Lessons from the United States (2005) (abridged version), <http://www.ncd.gov/publications/2005/08022005-Liv2>.

²Nat’l Council on Disability, Olmstead: Reclaiming Institutionalized Lives 188 (2003) (abridged version), available at <http://www.ncd.gov/newsroom/publications/2003/pdf/reclaimabridged.pdf>.

³20 U.S.C. 1401(34)(A)&(B).

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Estate Planning to Protect and Provide for Heirs with Disabilities

by Nicole O. Tupman & Jordan D. Veurink, Lindquist & Vennum, LLP Sioux Falls, SD

The topic of estate planning often forces families to have difficult discussions. These discussions, however, are important and necessary to protect your legal rights and the rights of your children, other family members, and friends who may inherit from you (*i.e.*, your heirs). When a family has a child or potential heir with a disability, effective estate planning requires additional considerations. Although there are numerous issues in estate planning for an heir with disabilities, this article discusses two main concerns: (1) supplemental needs trusts; and (2) appointing a guardian and/or conservator.

Supplemental Needs Trusts

The most common estate planning tool used to financially provide for an heir with a disability is a special needs or supplemental needs trust. In general, a supplemental needs trust allows a beneficiary (*i.e.*, the person with the disability) to enjoy limited distributions from the trust while still being eligible to receive government benefits. Supplemental needs trusts vary widely in the specific provisions used to provide for the heir with a disability. The following guidelines, however, apply to almost all supplemental needs trusts:

- ◆ Supplemental needs trusts can be established by anyone for anyone's benefit, either during life or upon his or her death, and can be revocable or irrevocable. The settlor's or grantor's (*i.e.*, the creator's) intentions and estate planning needs, as well as the beneficiary's (*i.e.*, the person with disabilities) financial and family environment typically determine how a supplemental needs trust is drafted. It is important to note, however, that if the beneficiary desires to create a supplemental needs trust for the benefit of himself or herself, he or she must comply with more strict and detailed rules to attain or retain governmental benefits. You should ask your attorney to discuss these rules with you.
- ◆ The settlor must clearly state that his or her intention in creating the supplemental needs trust is to improve the quality of life for the beneficiary. The settlor should specifically state that the intent of the supplemental needs trust is to supplement, not replace, government benefits.

- ◆ The settlor must appoint a trustee, which can be an individual (other than the beneficiary), a trusted advisor, or a trust officer at a bank or trust company. Special care should be taken if a non-corporate trustee is selected. Family disputes over trusts are, unfortunately, somewhat common. Further, breaches of fiduciary duties are generally more likely when individuals lacking fiduciary experience (*i.e.*, have little to no experience handling another person's financial affairs) serve as trustee. If a supplemental needs trust is being created as a part of a testamentary transfer, a corporate trustee may provide ease of mind to the settlor.
- ◆ The settlor generally gives the trustee discretion on how to distribute the trust funds, but cannot allow the trustee to make distributions for expenses covered by government benefits. Because the settlor's intent, as expressed in the trust, controls how a trust is administered, the settlor should consider adding provisions specifically stating what types of items the trust funds can be used for, including but not limited to the following items: medical care, dental care, non-necessary medical procedures (such as plastic surgery), recreation and transportation costs (including payments for a companion or care provider to travel with the beneficiary), psychological support services, payments for the differential in cost between housing for shared versus private rooms, supplemental nursing care, telephone and internet providers, mobility aids (motorized wheelchairs, mechanical beds, etc.), hair and nail care, medical treatment not covered by government programs, such as experimental treatments, additional or private rehabilitative training, payments to family or friends for visitation of the person with a disability if the trustee finds that such visitation is in the beneficiary's best interests, private case management, and drug or alcohol treatment.
- ◆ A trust's corpus is owned by the trustee, not the beneficiary. Thus, if a supplemental needs trust is properly created, then the assets belong to the trustee and the assets will not be considered a resource when determining eligibility for government entitlement programs.

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⁴OSEP Letter to Anonymous, 17 EFLR 842.

⁵House Report No. 101-544, 10 (1990).

⁶34 C.F.R. § 300.344(a)(1)-(5).

⁷34 C.F.R. § 300.344(c)(3)(ii).

⁸34 C.F.R. § 300.344(c)(3)(i).

⁹Transition Planning, What Parents Need to Know, South Dakota Department of Education, <http://www.tslp.org/docs/Tacklebox/ParentBrief.pdf>.

¹⁰34 C.F.R. § 300.346(d).

¹¹OSEP Letter to Cernosia, 19 IDELR 933.

¹²34 C.F.R. § 300.346, Note 2.

¹³Cornerstones to Effective Transition Planning ... Student and Parent Involvement, South Dakota Transition Liaison Project (2006), <http://www.tslp.org/docs/Tacklebox/Cornerstones.pdf>.

¹⁴34 C.F.R. § 300.347(a).

¹⁵34 C.F.R. § 300.347(b).

Example Involving a Supplemental Needs Trust

If a supplemental needs trust is not used, the heir with a disability can suffer adverse consequences. Assume, for example, that John and Jane have one child, David, who is currently 15 years old. John is 47 and Jane is 45. David has a primary diagnosis of cerebral palsy and a secondary diagnosis of a seizure disorder related to the cerebral palsy. David must use a motorized wheelchair to be mobile. David also has a moderate cognitive disability and several learning disabilities. When David is home, John and Jane are his primary caregivers. David also receives some in-home services when John and/or Jane are unable to be home or when David is home for a school holiday. David currently receives health insurance from John's work and is not currently entitled to Supplemental Security Income (SSI), although he may qualify for SSI when he is older. When John and Jane are no longer able to take care of David, he will need to live in an assistive care facility. David will likely qualify for public assistance to help pay for the assistive care facility and his healthcare. John and Jane have some assets, including a house, stock, and some life insurance policies, and desire to create an effective estate plan to provide for David, who is their only heir.

If John and Jane have no will or a will with no special provisions to care for David, David is likely to lose his rights to SSI, Medicaid health insurance, and other public assistance programs once John and Jane pass away. For example, assume that John passes away in 25 years. Assuming Jane inherits everything from John, David will not likely suffer any adverse consequences of John dying without a will or with a will with no special provisions for David. Jane then dies 5 years later, with assets totaling \$500,000. If she dies without an estate plan that provides for a supplemental needs trust, David will receive (or be deemed to have received) the \$500,000 left by Jane. At the time of Jane's death, David is 45 and living in an assistive care facility, for which Jane has always paid. David receives public health insurance from Medicaid and the state. If David inherits \$500,000, he will almost certainly lose his government benefits, including his public health insurance because he will have sufficient assets to purchase other health insurance on the market. After David's \$500,000 inheritance is spent on the assistive care facility, health insurance, and David's other needs, then he will need to apply for health insurance and public assistance to pay for his assistive care facility.

The above situation may not appear terrible - David will use his inheritance to pay for his medical and living needs and then receive public assistance later. But it can be difficult for David to secure public assistance once he has inherited large assets, such as the \$500,000 inheritance from Jane. There can be a delay in securing benefits (the Social Security Administration, for example, is not known for its speed in handling cases) and David may be unable to secure necessary medical attention while he waits for a determination on his right to assistance. He may be forced out of the assistive living facility. In the worst case, the Social Security administrative law judge, or other agency, may determine that David "squandered" assets and

should be able to provide for himself. In that situation, the agency could deny David coverage all together.

John and Jane should have sought assistance from an attorney proficient in supplemental needs trusts and created a trust or a will that would create a supplemental needs trust upon death using the guidelines stated above. If John and Jane had a properly drafted supplemental needs trust, David could continue to receive SSI, Medicaid and state-provided health care, and any other assistance to which he is entitled while still receiving the benefits of from the supplemental needs trust.

As the above example shows, an effective estate plan is necessary to protect the rights of a person you love who has disabilities. If you plan on passing property to a person with a disability, you should consult an attorney experienced in supplemental needs trusts to discuss your specific needs and the needs of your beneficiary.

Guardian / Conservator

The guardian/conservator issues usually arise when the parent or guardian of a child with disabilities is creating his or her estate plan. A guardian or conservator handles a person with disability's or a child's finances and, in some cases, makes the medical decisions for the person.

If a successor conservator or guardian is not named by a parent or guardian, then a state social worker or conservator may be appointed. Alternatively, a family member or friend of the person with a disability can petition the state court to be appointed as guardian or conservator. Litigation over guardianships and conservatorships can be lengthy, expensive, and emotionally draining for all involved. A court-appointed guardian may not know the person's history as well as another individual who could have been named in a parent's or guardian's will. In the worst case, the court-appointed guardian or conservator may not act in the best interests of the person with a disability.

Returning to our example, assume that John and Jane became David's guardian and conservator when he turned age eighteen, but did not name a successor guardian or conservator for David at that time and also failed to do so in their wills. If John and Jane had considered the need for a successor guardian/conservator, they would have named Bob, John's brother, because Bob often took care of David and has formed a close and supportive relationship with David. They would not have named Jane's sister Mary because she always been hostile towards David. If Mary, however, petitions to be guardian/conservator and Bob does not oppose the petition, does not know about the petition, or files his own petition and a court chooses Mary over Bob, then Mary will be appointed guardian/conservator. John and Jane could have avoided any litigation and ensured that David had a loving and caring guardian by naming Bob as successor guardian/conservator of David in their estate plan.

As these two estate planning issues show, estate planning involving an heir with a disability requires additional considerations and special estate planning tools. In order to preserve a person with a disability's right to government-based benefits and provide for a supportive and knowledgeable guardian/conservator, you must create a proper estate plan. You should consult an experienced attorney if you have any questions about estate planning for an heir with a disability.

There is an App for That!

(Continued from page 2)

the transition part of the IEP? The answer to that question is clearly “yes.” However, one of the key elements of the transition process is the need to gather information about the student’s expressed interests and desires. This process is facilitated by using the app. The app covers the areas of service identified in the regulation and provides the student the opportunity to create and share this information with the team.

One of the most important uses of a tool like this is to encourage and document the participation of the student in the meeting and the development of the IEP. Parents and students often tell SDAS that no information is collected and transition evaluations may not be completed before the IEP meeting just prior to the student’s 16th birthday. There are times when no pre-planning activities take place and the student is left unprepared to answer the transition-related questions at the meeting. When put on the spot, the students’ most common answer is “I don’t know.” The use of the tools in this app can assist in getting meaningful participation from the student.

The following provides examples of the questions found on this app. As you go through them, there are drop-down boxes with follow-up questions that offer choices about various topics. I pretended to be a student named William Smith who wishes to go to work full-time after completing his educational activities. I went through each question and included the answer I selected below. I listed the questions and some of the options available on each page.

Options for post school activities:

1. I know what I want to do after high school: yes; no; not sure. I chose *yes*.

A. I want to: I chose, *get a job, be involved in community activities, and continue with my education*. There are other options, but I selected only these three.

2. I am: 14; 15; 16 or older. I chose *16 or older*. The app provides information about the law that applies to students of each age.

3. I have a written IEP plan. I chose *yes*.

4. I attend my IEP meetings. I chose *not sure*. The app provided me with information about my right to attend my own IEP meetings.

Postsecondary education:

5. I want to continue my education: I chose *not sure*.

A. The app asked for information about subjects I am good at. I chose *auto mechanics*.

Employment:

6. I want to get a job: I chose *not sure*.

A. The app provided several options for areas of interest. I chose *industrial manufacturing*.

7. Due to my disability, I think I will need some help to be successful at my job. I chose *not sure*.

A. The app provided a list of options for services and training. I chose *information about rights and information about nondiscrimination*.

8. This screen offers a range of services related to going to work. Some of the options are finding job, job shadowing, etc. I chose *finding a job*.

9. I am interested in finding work experience while in high school. I chose *yes*.

Post school adult living objectives:

10. After high school I want to:

A. The app offers a variety of living options. I chose *living in an apartment or home with a roommate or friends*.

Instruction:

11. I want to learn the following skills so that can live independently.

A. The app offers multiple options, but I chose *self advocacy skills and my legal rights as an individual with a disability*.

12. I am interested in:

A. The app offers multiple choices for activities in the community. I chose *volunteering, learning to drive and participating in clubs*.

Community experiences:

13. I will need the following help to participate in community activities:

A. Again there are multiple options, but I chose *finding the activities and transportation*.

14. Type your name and print or have the information emailed to you.

After completing each of these questions, the app provided a remarkable amount of information that could be used as, or included in, a transition plan. The following is the plan created from my responses. The blanks are the result of specific fill-in-the-blank questions I did not answer.

Transition Plan for William Smith:

Input for IEP Meeting Regarding Transition Services

(Date) _____, 201____

I am 16 years old or older. I am attending this meeting to discuss my transition goal. I want to discuss what I want to do after high school, develop and implement into my IEP the specific transition services necessary for me to achieve my desired goals for life after high school.

My transition goal is: _____.

1. My goals after high school are:

◆ **Employment:** I am interested in jobs in the following career clusters: industrial, manufacturing, and engineering systems. I request my IEP team explain the different types of jobs available with each career cluster listed above.

◆ **Skills:** I request my transition services include the acquisition of all the following skills I am good at: _____ . I am interested in a work experience while in high school and in finding a job.

◆ **Community Experiences:** I have the right to be a full and active member of my community. I am interested in: _____ . I request my transition services

There is an App for That!

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Changing Systems One Class at a Time

Year 23 Began in November

by Sandy Stocklin Hook

The Partners in Policymaking Class of 2015 (Year 23) is made up of ten self-advocates, fourteen parents, one family member, two partner assistants, and one interested person. There are six males and 22 females in the class. Participants include: Tara Boechler, Joyce Molitor, and Natalie Molitor, Rapid City; Meghan Bonin, Westington; Caty Clement, Ryan Fromm, Emily Garcia, John Hodgson, Janessa Longbrake-Hughes, Jonna Powell, Char Steuck, and D.J. Titus of Pierre; Wendy Figland, Mitchell; Theodora (Sissy) First In Trouble, White River; Jill Furan and Crystal Reuter of Sioux Falls; Howard Green, Zachary McFail, and Anthony White of Hot Springs; Carrie King, Tea; Tania Kostal, Tyndall; Kraig Leichtenberg and Mindi Noisy Hawk, Huron; Ethel Left Hand Bull of Harrold; Tammy Lunday of Flandreau; Monique Runnels, Mobridge; Jill Trego, Aberdeen; and Kandi Weismantel of Groton. When selecting the participants for each class, the selection committee uses criteria including representation from varying ethnic and cultural backgrounds, different geographic regions of the state (thirteen counties are represented in this year's class), and a mix of parents and consumers.

Partners in Policymaking is an innovative leadership and advocacy training program designed to involve and empower individuals with developmental disabilities, parents of children with disabilities, and other family members. It requires a serious commitment by each participant during the training, as well as after graduation. The expectation is that each Partner will commit to actively use



the acquired skills to encourage positive changes in the areas of community awareness, sensitivity, accessibility, and inclusion for people with disabilities.

Class participants attend six two-day training sessions from November through April. At each session, experts in disability and advocacy fields present information and interact with the class. Participants have the opportunity to work on communication skills, assertiveness, decision-making skills, legislative testimonial presentation skills, and group activities. Each participant must complete homework assignments every month.

The Class of 2015 met at the Governors Inn in Pierre, November 7-8, 2014, for Session One. Tim Neyhart, Executive Director of South Dakota Advocacy Services (SDAS), and Sandy Stocklin Hook, Executive Assistant/Partners in Policymaking Coordinator, both of Pierre, welcomed the class to Partners and spoke about SDAS and the DD Network.

Dennis Hook of Pierre opened the session with a fun ice breaker, literally throwing things at the class! Throughout this exercise, participants learned each other's names and became at ease with each other, all the while learning that it is

okay to be afraid of change, but if change doesn't happen, progress isn't made.

Kathie Snow of San Antonio, TX, challenged the class to think "different." Snow stressed the importance of Partners Top 10 Values and how car pooling and room sharing all add to the networking process of Partners. She spoke of People First Language, putting the person first and the disability second, and how it helps to change attitudinal barriers: "Labels are used for services and for nothing else. People First Language will help change the attitudinal barriers that face people with disabilities on a daily basis." Snow introduced the class to the history of Partners in Policymaking and the positive impact it can have on their lives. She stressed the importance of fulfilling their responsibilities to the program and the empowerment and connections gained by being a Partner.

Snow also discussed the History of the Parent and Independent Living Movement. Snow left the class with the following: "You have responsibility as a Partner to network together and to change the status quo. Partners will have a positive impact on your life, so be open-minded and ready to accept and generate change."

Neyhart provided a historical perspective of the landmark decisions that affect individuals with disabilities. Neyhart told Year 23, "Building supports in local communities is the first step in achieving inclusion and it is everyone's responsibility. While the past has fostered discrimi-



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nation and segregation against people with disabilities and despite some improvements, discrimination and segregation still exist and it is YOUR job as a Partner to change this! Change takes time and perseverance -- it doesn't happen overnight."

Six Partners graduates shared how Partners changed their lives. Danella Peterson, Box Elder, a Year 22 graduate, told of her experiences and how Partners became her family and gave her emotional support and courage. Leon Adams, Jr. of Sioux Falls, Year 22, said Partners taught him to think things through and the skills of negotiation. Kathie Erdman Becker of Crooks, Year 22, relayed that Partners not only changed and improved her life, but also that of her family. "Sometimes it is hard as a parent to 'let go,' but Partners showed me it is okay to let my daughter be a teenager!" Year 15 graduate, Lisa Merchen of Spearfish, stressed the importance of networking. "I did Partners because first and foremost I am a mom of a son who has Down syndrome, but I gained so much - friendships, support, knowledge, and I learned to forgive myself. Partners is about sharing our stories, positive conversation, and



Past graduate presenters (l-r): Julie Yellow Cloud; Lisa Merchen; Max Merchen; Danella Peterson; Leon Adams, Jr.; and Kathie Erdman Becker.

working forward." Max Merchen, Year 21, Spearfish, shared, "I learned to move forward, how to have patience, persistence, and how to get involved. I learned to do it right!" He also encouraged the class to get to know each other "and not just those in your immediate class but also the 500+ graduates throughout the state." Year 15 graduate, Julie Yellow Cloud of Porcupine, explained that Partners gave her a voice that she is sharing throughout her reservation, helping families to learn to advocate for their children. "Advocating on a Tribal Nation is totally different than in an urban area, but Part-

ners gave me the knowledge and voice to educate other and to make a difference."

Sandy Stocklin Hook is in her 18th year as Coordinator of the Partners in Policymaking training program. Assisting in Year 23 is Lori Douville (Year 7) of Chamberlain.

Partners is funded in part by grants from the SD Council on Developmental Disabilities, Center for Disabilities at Sanford School of Medicine at USD, and SD Parent Connection. Also providing funding are the PADD, PAIR, and PAIMI Programs of SDAS.

Poll Workers

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litical party as, "a party whose candidate for Governor at the last preceding general election at which a Governor was elected received at least two and one-half percent of the total votes cast for Governor." SDCL 12-1-3(10). The county central committee of each political party sends a list of names to the county auditor for appointment to the precinct election boards at least forty-five days before the election. If the political party county central committee does not send the list of names at least forty-five days before the election, the county auditor selects superintendents and deputies for voting precincts or centers without input from that political party. SDCL 12-15-3. If three or more political parties have candidates on the official ballot, one precinct deputy shall be appointed from each party whose candidate for Governor in the last gubernatorial election had at least fifteen percent of the votes shown by the precinct returns. If two political parties had ballot candidates for governor and each party's candidate received fifteen percent of the vote, the majority of the members of the precinct election board will be selected from the political party whose candidate for governor received the most votes in the precinct. See SDCL 12-15-3.

To administer elections, the Legislature divided South Dakota counties into voting precincts or vote centers. See SDCL 12-15-1. Legislators also determined that each county auditor shall

appoint a precinct election board to oversee the election process at each voting precinct or vote center. *Id.* This must be done at least twenty days before the election. *Id.* The precinct election board consists of one superintendent and two precinct deputies who are registered voters and reside in that precinct or vote center. See SDCL 12-15-1 and 12-15-2. If the county auditor cannot appoint enough workers for the election board within twenty days of the election, any registered voter in the county can fill the spot. SDCL 12-15-2. The worker appointed to fill the spot still needs to be a member of the correct political party based on the party distribution required by SDCL 12-15-3.

If a precinct or vote center counted more than three hundred paper ballots (including absentee ballots) in the last general election, the county auditor must appoint a counting board. SDCL 12-15-14. Five precinct deputies need to compose the counting board and one must be superintendent of the board. *Id.* Additional deputies must be appointed in sets of two. If a voting precinct or center with fewer than three hundred paper ballots had difficulty counting ballots and delayed completing the final ballot count in past elections, a counting board should be appointed for a smaller voting precinct. See SDCL 12-15-14.1.

Poll workers must be trained about their duties and election laws by the county auditor and state's attorney before the elec-

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include the acquisition of all the following skills: participating in clubs or organizations in the community; learning to drive; passing the driver's test; obtaining a driver's license; I want to volunteer in: _____. I will need the following help to participate in community activities: finding community activities and transportation assistance.

- ◆ **Instruction & Post-Secondary Education:** I am interested in studying auto mechanics. I request my transition services include the acquisition of all the following skills: completion of all required courses for a regular high school diploma; campus tours of post-secondary programs of interest; meeting with office for students with disabilities to learn about accommodation process and requirements; understanding of admission requirements for program/school; assistance in completing admission applications; entrance exam; and assistance in completing financial application.
- ◆ **Post-High School:** Adult daily living skills to include living in an apartment or a home with a roommate or friends.
- ◆ **Related Services:** I request that my transition services include the following: connection to services for note taking, tutoring, coach, mentoring, reader services, etc. Learning about my health care needs and options for services; learning about my mental health care needs and options for services.
- ◆ **Assessments:** I request the IEP team discuss and identify my past assessments done to determine my present level of academic achievement and functional performance. Those include the following: _____.
- ◆ **Additional Assessments:** I request the IEP team discuss and conduct any of the following additional assessments to help me determine my interests and abilities: functional communication assessment; social skills assessment; functional academics assessment; self-care and activities of daily living assessments; recreation and leisure assessments; career interest inventory; career aptitude assessment; vocational assessment; functional vocational assessment; community based work assessment and job tryouts; functional behavioral assessments; sensory assessments; and assistive technology assessments.
- ◆ **Transition Service Referrals:** I request my transition services to include the following referrals to community agencies/supports, identify other potential needed referrals, identify the agency responsible for providing the service; and dates of the services to include: referral to Adult Disability Services; referral for assistive technology; referral to Social Security Administration; referral to (state) Vocational Rehabilitation (VR); referral to (state) Department of Children and Families; referral to Community Mental Health Center; and referral to Independent Living Center.
- ◆ **Vocational Referral:** I request that the school district make a referral to (state) Vocational Rehabilitation. I request that VR provide me with an application for services and provide assistance to my school counselor in conducting vocational and/or functional assessments to help identify my interests, skills, and preferred occupations.

◆ **Supplementary Needs:** I need the following supplementary aids, supports, assistance, accommodations and/or modifications to achieve my transition goals: applicable accommodations to assist me in my desired community activities.

◆ **Summary:** I request that my summary of performance include: a summary of my academic achievements and functional performance; recommendations on how I can best achieve my post-secondary goals; a description of the accommodations/modifications that worked well for me during high school; all information necessary to satisfy requirements connected to my post-high school goals; documentation of my abilities; documentation of my disability; description of my disability; description of my abilities; all information my IEP team has determined is necessary to include; and other _____.

Coordination of Services

The above plan lists a number of outside agencies that could be involved in this hypothetical student's transition planning and services. The IEP Team needs to plan ahead, as 34 C.F.R. §300.321(b)(3) states, "To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services." Based on the complaints received by SDAS, schools do not always follow this direction. Schools will often identify the parent as the party responsible for contacting outside agencies or otherwise carrying out the required coordination activities. The family does not always know who should be contacted, why they are calling the outside agency, or what to ask if they do call. As a result, when districts improperly pass this responsibility onto parents, outside agencies are frequently absent from IEP meetings. This app can obviously help parents and students with identifying appropriate participating agencies for the school to invite to the IEP meetings.

Responsible Party

Any lack of coordination or follow-through can impact the ability of the student to make a successful transition from school to adult services. The federal regulations, at 34 C.F.R. §300.324 (c), state: "*Failure to meet transition objectives—(1) Participating agency failure.* If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with §300.320(b), the **public agency** (emphasis added) must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP." This language makes it very clear about the need for the school to perform the coordination activities identified in this regulation, as the district is ultimately responsible for ensuring appropriate services continue if a participating agency fails to provide previously agreed-to services.

The app can help address this concern. The plan written by the app identifies the agencies that will need to be contacted to carry out the elements identified in the IEP. By identifying these agencies in advance, it will allow the school and the student or family to discuss the need for the participation of the agencies and provide school staff with the opportunity to assure that the

There is an App for That!

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Poll Workers

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tion. SDCL 12-15-7. If precinct superintendents and deputies attend training, they will be paid a fee set by the county commissioners. By law, the fee must be at least \$5.00. *Id.*

Poll workers must take an oath stating they will perform their duties "according to law and the best of my ability and that I will studiously endeavor to prevent fraud, deceit, and abuse and that I will act in an impartial manner in conducting the election about to be held." SDCL 12-15-9. A record of the oath-taking must be made in the poll book by the worker who administered the oath. *Id.*

If needed, the precinct superintendent can appoint a precinct deputy and then determine the duties assigned to the deputy. *See* SDCL 12-15-2. Both the precinct superintendent and deputy need to be registered voters and live in the precinct. If there are not enough members of a political party in a voting precinct to fill the deputy position(s), a registered voter in the county with the needed party affiliation can be appointed. *Id.*

A poll worker of thirty-nine years told me that interested registered voters can request that their names be included in



SDAS Protection and Advocacy for Individuals With Mental Illness Advisory Council Members (l-r): Jill Furan; David Larson; Wanda Peacock; Art Conners; Ellen Washenberger; Lisa Kiser; and Kelly Bass. David Larson's term ended September 30 and he received a plaque in appreciation of his service on the Council.

the list of names submitted by the county central committee chairperson to the county auditor. If that interested voter is married to a candidate or is the grandchild, sister, brother, or grand-parent of the candidate, the voter is prohibited from working. SDCL 12-15-14.3.

In summary, to work at a polling place in South Dakota, a person must be a registered voter, be paid if they attend training, and take an oath the day of the election. The county auditor is responsible for ensuring that the poll workers meet the political party affiliations required by law.

2nd Notice - The *South Dakota Report* is Going Green

Because of increased printing costs, and well as a number of requests to have the *South Dakota Report* sent via email instead of receiving a paper copy, South Dakota Advocacy Services is converting its subscription mailing list to an email list to the extent possible. This transition will occur through the end of June 2015. To-date, we have received less than 30 responses (< 1% response).

What You Need To Do:

- ◆ Call or email SDAS with your email address. We will then remove you from our mailing list and you will receive the next *South Dakota Report* via email.

Phone: 800-658-4782

Email: sdas@sdadvocacy.com

- ◆ If you do not have access to a computer/email and/or wish to continue to receive a paper copy of the *South Dakota Report*, call SDAS.
- ◆ For those currently receiving the *South Dakota Report* in large print, we also want to hear from you whether you wish to continue to receive it in that format or would prefer receiving it via email. Those receiving it on audio disc will continue to do so and need not respond.

The March edition of the *South Dakota Report* will provide a deadline of June 30, 2015. With the exception of those receiving audio discs, if we have not heard from you with either your email address or your desire to continue receiving a paper copy, you will be dropped from the mailing list at that time.

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There is an App for That!

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appropriate releases are signed or that other steps are completed to assure the participation of the outside agencies in the meeting. If the agencies do not show up or perform their agreed-upon tasks, the school staff can use this document as the basis to reconvene the team to address any issues regarding the failure of the outside agencies to participate.

Ways to Use this Tool:

The following are ideas about how to use your newly drafted Transition Plan:

- ◆ Print and sign two copies of your draft transition plan.
- ◆ Schedule your IEP team meeting to discuss your draft plan.
- ◆ Identify someone who can help you explain the plan and the supports that you need to be able to transition into adult life.
- ◆ Take both copies of the draft plan to your IEP meeting, give one to the school and keep one for yourself.
- ◆ Attend your IEP meeting and finalize your Transition Plan.

Calendar

- ◆ **December 19, 2014** - Youth Leadership Forum Application deadline (*see www.tslp.org*)
- ◆ **January 17, February 28, April 25, 2015** - Sibshops (*see www.sdparent.org*)
- ◆ **April 24-25, 2015** - Partners in Policymaking graduation weekend, Ramkota, Sioux Falls

The following are tips for making your meeting successful:

- ◆ Remember that this meeting is about what you want to do after high school and what you need to do while still in school to make your plan come true. Listen to the people on your team and advocate for what you want.
- ◆ Do not be intimidated by the professional jargon and terms. It is very appropriate to ask people to explain things in terms that you understand.
- ◆ Share your long-term goals and dreams of what you want to do after high school. The more information you share with your team, the better your plan will be.

Conclusion

I was amazed at this app and the end product. This app can be an incredible

help to students, parents, and school personnel as they develop a student's transition services. Because of the thoroughness of the end product, this app takes transition services to another level - perhaps to the level Congress and Department of Education intended when transition services was added to the law in 1990. I strongly encourage all students of transition age to try it.

Although based on federal law, this app and the resulting plan is intended to serve as a guide for the IEP Team and should not be considered legal advice. If you have specific questions about transition services, please call SDAS for further information. All contacts with SDAS are kept strictly confidential and the services provided by SDAS are without cost.