

Slide 1



TRAINER NOTES
"PROVIDING ASSISTIVE TECHNOLOGY: A LEGAL PERSPECTIVE"

SLIDE 1

SAY: Welcome to "Providing Assistive Technology: A Legal Perspective."

During this presentation, we will discuss legal mandates and guidelines that govern the provision of Assistive Technology, which we will call "AT," to students with disabilities in our public schools. We will be exploring statutory and regulatory requirements related to AT, as well as AT case law guidance.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

A Professional Development Module

Collaboratively developed by:
The Texas Assistive Technology Network with leadership provided by Region 4 Education Service Center and consultation from Bracewell & Giuliani LLP.

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SAY:

This training module was collaboratively developed by:
The Texas Assistive Technology Network, with leadership provided by Region 4 Education Service Center and Bracewell & Giuliani LLP.

You have been provided a copy of the slide set to serve as a note-taking guide. It frees you to concentrate on the presentation and add your own notes rather than copying the slides.

Your handouts also include a document entitled, "Guide to Assistive Technology Legal Issues," which is a more in-depth treatment of legal issues, from statutes, policy, and case law, regarding the provision of AT than we can accomplish during this presentation. I highly recommend that you review this detailed legal analysis as a supplement to this presentation.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

Slide 3

**A Professional
Development Module**

Available at www.texasat.net

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SLIDE 3

SAY:

The entire training module, which includes this power point presentation, the trainer notes that accompany the presentation, and the Guide to Assistive Technology Legal Issues is available at www.texasat.net.

If everyone has the handouts, let's begin.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

Objectives

Participants will learn about:

- Federal and state statutes, regulations, and policy related to AT
- Legal guidance through case law examples on specific AT issues

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SAY: During this presentation, you will receive information that will enable you to better understand and comply with:

- Federal and state statutes, regulations, and policy that govern the provision of AT in general, and
- Legal guidance regarding specific common AT issues, including:
 - the consideration of AT needs;
 - AT evaluations;
 - ownership and repair of AT devices;
 - at-home AT devices;
 - personal AT devices;
 - medically related AT devices; and
 - AT and copyright law concerns.

First, we'll discuss the law and policy that define and govern public school districts' provision of AT to students with disabilities.

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Standards that Define and Govern the Provision of AT

- Federal statutes and regulations
- Texas statutes and regulations

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SAY:

Legal requirements related to the provision of AT come from several different sources:

- Federal statutes and regulations related to the provision of services to children with disabilities, and
- Texas statutes and regulations related to the provision of educational services to students with disabilities.

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AT Requirements in Federal Law



- Individuals with Disabilities Education Act (IDEA)
- Section 504 of the Rehabilitation Act (Section 504)
- Americans with Disabilities Act, Title II (ADA)
- Assistive Technology Act of 2004 (AT Act)

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SAY: There are several federal statutes that create an obligation on the part of public school districts to provide appropriate AT and AT services to students with disabilities.

First, the Individuals with Disabilities Education Act, or "IDEA," is a federal statute that protects the right of students with disabilities to receive appropriate education services from public school districts. Special education programs in the public schools must comply with the IDEA. This statute defines the terms "assistive technology device" and "assistive technology service," and contains specific requirements for districts with respect to the provision of AT.

Second, Section 504 of the Rehabilitation Act of 1973, which I'll refer to as "Section 504," prohibits discrimination against any qualified individual with a disability in a program receiving federal financial assistance. Because public schools receive federal funding, they are subject to the requirements of this statute.

The Americans with Disabilities Act, or "ADA," is a federal statute that prohibits various types of discrimination by public and private entities against individuals with disabilities. Title II of the ADA addresses access to and participation in services, programs, or activities of governmental entities. Children with disabilities who attend public schools are protected by the ADA as individuals who are participating in programs or are using services provided by governmental entities.

In addition, the Assistive Technology Act of 2004 ("AT Act") provides states with financial assistance for programs designed to maximize disabled persons' ability to obtain AT devices and services. Although each state will determine how the AT Act

impacts its school districts, the new law sets aside a per state allocation of funds from the federal government to be used for AT.

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IDEA Definitions



- AT Device: any item, piece of equipment or product system that is used to increase, maintain, or improve the functional capabilities of children with disabilities, except for a surgically implanted medical device

- AT Service: any service that directly assists a child with a disability in the selection, acquisition, or use of an AT device, except for the optimization, maintenance, or replacement of a surgically implanted device

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SAY:

As mentioned before, the IDEA defines the terms "assistive technology device" and "assistive technology service." These definitions were taken, almost word-for-word, from the Technology-Related Assistance for Individuals with Disabilities Act of 1988, the statute in which Congress first guaranteed the availability of AT for Americans with disabilities. During Congress' reauthorization of the IDEA in 1990, lawmakers added the definitions to the IDEA, as well. During Congress' reauthorization of the IDEA in 2004, lawmakers further revised these definitions.

The term "AT device" is defined by the IDEA 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 children with disabilities. The term does not include a medical device that is surgically implanted, or the replacement of that device."

The term "AT service" is defined by the IDEA as: "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." The IDEA regulations go on to list specific services that are AT services, including (in part) evaluation, acquiring AT devices, repairing and replacing AT devices, using therapies with AT devices, and training and technical assistance for a child with a disability and for professionals providing services. However, "related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g. mapping), maintenance of that device, or the replacement of that device." The 2006 regulations indicate that such services are therefore excluded from the definition of AT service as well.

These definitions of AT are very broad, and therefore almost any type of technical device, or service related to a technical device, that is used to address the educational needs of a student with a disability is considered AT, unless specifically excluded. The sophistication of the technology of AT varies, and the broad definition of AT includes low tech devices such as pencil grips, as well as complex, high tech computer hardware and software programs. Any services that are provided to assist a student to acquire or use any device in the broad range of AT devices are considered AT services.

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IDEA and AT

- AT needs must be considered
- If necessary, AT evaluation must be performed
- AT devices and/or services must be provided if required in the child's IEP



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SAY:

Now that we have defined AT, we'll discuss a few of the IDEA's basic requirements regarding the provision of AT.

The IDEA mandates that IEP teams, which are called “ARD committees” in Texas, of students with disabilities consider the potential AT needs of each and every student who is eligible for special education services. (Please note that because I will be talking about legal guidance regarding AT from Texas and from other jurisdictions, I will be using both the phrases “IEP team” and “ARD committee” throughout this presentation).

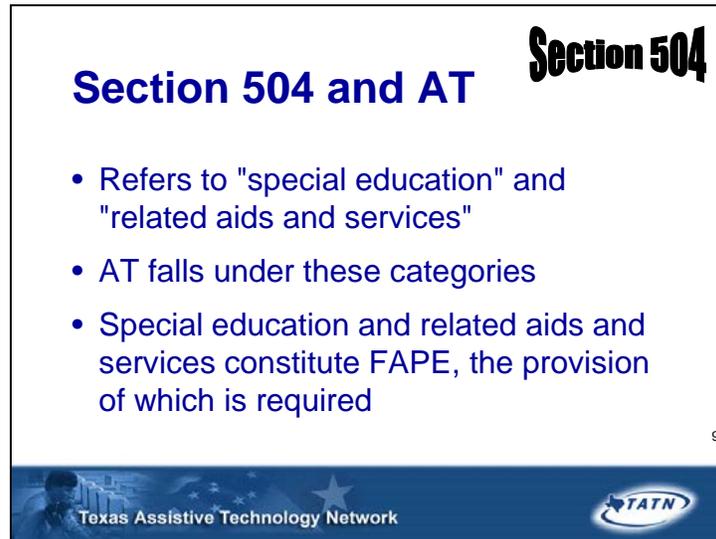
The IDEA's definition of AT services includes evaluations, and so school districts are required to administer AT evaluations to students whose ARD committees have determined a potential need for AT.

The IDEA mandates that if it is determined by a student's ARD committee that he or she needs AT in order to receive a free appropriate public education, the school district must provide that AT. The AT may be provided as special education, as related services, or as supplementary aids and services.

The IDEA requires a student with a disability be provided a free appropriate public education, or "FAPE," in the least restrictive environment, or "LRE." These concepts apply to the provision of all special education, including AT, and these requirements must be analyzed in any situation involving AT consideration, evaluation, and provision for a student.

While the IDEA will be the authority under which schools will be required to provide the majority of AT and AT services, there may be instances in which students who are not identified as eligible for special education services under the IDEA must receive AT under Section 504 and Title II of the ADA. Let's take a look at the AT requirements of those statutes.

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Section 504 and AT **Section 504**

- Refers to "special education" and "related aids and services"
- AT falls under these categories
- Special education and related aids and services constitute FAPE, the provision of which is required

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SLIDE 9

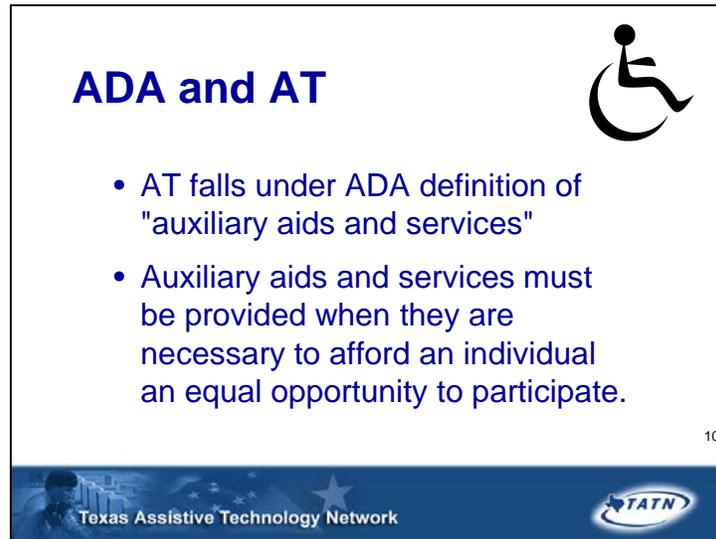
SAY:

Section 504 protects individuals who: (1) have physical or mental impairments which substantially limit a major life activity; (2) have a history of such an impairment; or (3) are regarded as having such an impairment, from discrimination in federally supported programs for which they are otherwise qualified. Section 504 covers all students who are provided services under the IDEA. Section 504 also protects students with disabilities who don't qualify for services under the IDEA, but meet Section 504's definition of disabled. This statute mandates that any program that receives federal funding must provide each student with a disability the special education and related aids and services that constitute a free appropriate education for the particular student.

The office of Civil Rights ("OCR") enforces compliance with Section 504. Compliance with the IDEA for students who are eligible for special education services will usually be sufficient for compliance with Section 504.

While we will focus our discussion today on the requirements of the IDEA, Section 504 may require the provision of AT services as related aids and services for certain students in order for them to receive FAPE.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

The slide features a white background with a blue border. At the top left, the title "ADA and AT" is written in a bold, blue, sans-serif font. To the right of the title is the international symbol of access, a black silhouette of a person in a wheelchair. Below the title, there are two bullet points in blue text: "• AT falls under ADA definition of 'auxiliary aids and services'" and "• Auxiliary aids and services must be provided when they are necessary to afford an individual an equal opportunity to participate." In the bottom right corner of the slide area, the number "10" is displayed. At the bottom of the slide, there is a dark blue horizontal bar. On the left side of this bar, the text "Texas Assistive Technology Network" is written in white. On the right side, there is a circular logo with the letters "TATN" inside, also in white.

ADA and AT

- AT falls under ADA definition of "auxiliary aids and services"
- Auxiliary aids and services must be provided when they are necessary to afford an individual an equal opportunity to participate.

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SAY:

Title II of the ADA prohibits any governmental entity from denying access to individuals with disabilities, and requires that "auxiliary aids and services" be provided when they are necessary to afford an individual an equal opportunity to participate. AT falls within this definition of auxiliary aids and services.

Like Section 504, Title II of the ADA is enforced by OCR in the public schools. The school's duties to students with disabilities under Title II and Section 504 are similar. For students with disabilities who qualify for services under the IDEA, compliance with the IDEA will usually be sufficient to comply with Title II. Some disabled students who do not qualify for IDEA services may have a right to AT as a type of auxiliary aid and service under Title II.

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Texas AT Rules & Policy Guidelines



- Texas Education Code § 30.0015
- Title 19 Texas Administrative Code § 89.1056

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SLIDE 11

SAY:

In addition to the federal statutes and regulations related to AT that public school districts must follow, school districts in Texas must also comply with provisions in Texas law regarding the provision of AT to students who are eligible for special education services. The sources of these provisions include the Texas Education Code, the Texas Administrative Code, and the Texas Commissioner of Education Rules.

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Transfer of AT Devices

- Transfer to new school, district, state agency following graduation, or to parents or student when they move
- Optional
- Agreement must be in writing and must contain specific provisions
- Written consent required

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SAY:

Though federal law does not address the issue, the Texas Education Code and the Texas Commissioner of Education Rules allow for the transfer of an AT device for the continuing use of a student through the sale, lease, or loan of the device. The AT device may be transferred to the student's new campus or new school district, to a state agency providing services to the student following graduation, or to the student's parents (or to the student if he or she has the legal capacity to enter into a contract). The district that owns the device has the option of transferring the device. No transfer of a device is mandatory.

The transfer of an AT device must meet a number of requirements, including that there be a written transfer agreement, a method of determining fair market value of the AT device, and that the parent of the child involved provide informed written consent to the transfer (or that an adult student with the legal capacity to enter into a contract provide his or her written consent). If the transfer is a sale, the parties must enter into a uniform transfer agreement, a form for which can be found on TEA's website.

If a district is considering the transfer of an AT device that it owns, it would be wise for the district personnel involved to read very closely Texas Education Code Section 30.0015 and Title 19 of the Texas Administrative Code Section 89.1056, which are listed on the previous slide, to ensure that all of the specific requirements are met.

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Statutory Obligations

1. Must consider AT needs
2. Must determine if an AT evaluation is necessary
3. If necessary, AT evaluation of student must be completed

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SLIDE 13

SAY:

As you have seen, school districts have numerous responsibilities under the IDEA with respect to AT. Before we jump into our discussion of specific AT issues and how judges and special education hearing officers have interpreted the statute, let's review the most basic of the AT-related obligations of school districts as established by the IDEA and its regulations.

Remember that this is just a list of the five most basic AT-related responsibilities of school districts. There are many others, as well.

- First, the student's ARD committee must consider the potential AT needs of the student.
- During that consideration, the ARD committee must determine if an AT evaluation of the student is necessary.
- If the ARD committee determines that an AT evaluation is necessary, an evaluation must be performed in order to assess the specific educational needs of the student.

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Statutory Obligations 

4. If necessary, AT must be written in as component of IEP

5. Must implement provision of AT device and/or AT services indicated in IEP

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SAY:

And continuing with the AT-related obligations of school districts:

- If, after considering the AT needs and/or reviewing the AT evaluation report, the ARD committee decides that an AT device and/or AT services are necessary, the committee must make the provision of the AT a component of the student's IEP.
- If the student's IEP indicates the provision of AT, the AT must be implemented for the student.

These obligations have led to a significant number of legal challenges regarding the provision of AT devices and/or services. A review of the cases involving the provision of AT shows that there are a number of prevalent areas of concern.

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Common AT-related Legal Issues

- Considering the AT needs of students
- AT evaluations
- Other specific issues

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SAY:

The most common areas of legal challenge involving the provision of AT are:

- Considering the AT needs of students with disabilities and determining the appropriate AT device and/or AT service for a specific child;
- AT evaluations—how and when they should be provided;
- Ownership of and liability for AT devices;
- Maintenance and repair of AT devices;
- The provision of AT for at-home use;
- The provision of medically related AT devices;
- The provision of personal AT devices; and
- AT and copyright law concerns.

For the remainder of the presentation, we will be discussing, through guidance from case law, these issues to highlight best and worst practices. Though I will discuss the decisions in some cases and how they impact these issues, you can find a much more thorough treatment of the issues, which includes extensive case law summary and analysis, in the Guide to Assistive Technology Legal Issues that you have been provided. All of the names and cites of the cases that I will be discussing are included in the Guide.

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Considering the AT Needs of Students

- Failure of an ARD committee to consider the AT needs of a special education student is a violation of IDEA.
- "Some explicit review" of each student's AT needs is most likely required.



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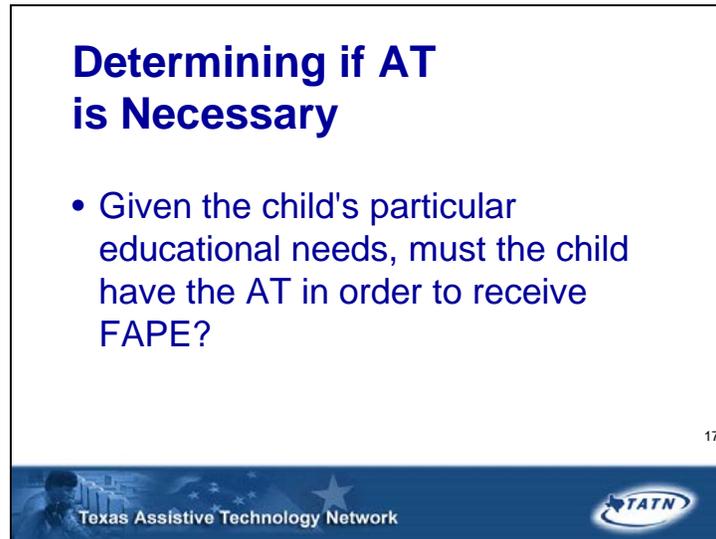
SAY:

As mentioned previously, the IDEA requires that an ARD committee consider the AT needs of a student who is eligible for special education services. It is unacceptable for an ARD committee to ignore the possible AT needs of such a student, even when it appears clear that the student does not need any AT.

In one Texas due process hearing, the parents of a student with mental retardation and a speech impairment failed to show that any AT was necessary for the girl. However, the evidence *did* show that the need for an AT evaluation of the girl had never been seriously considered by her ARD committee. The hearing officer stated that, at a minimum, the ARD committee should conduct "some explicit review" of a child's potential need for AT.

It is not clear exactly what amount of consideration by an ARD committee constitutes enough consideration under the IDEA. However, given this Texas due process hearing decision, the potential need for AT should be explicitly discussed and documented in IEP records. This should not be a section on the IEP document that is simply checked off without the ARD committee members giving serious thought to the possible need for AT.

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Determining if AT is Necessary

- Given the child's particular educational needs, must the child have the AT in order to receive FAPE?

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SAY:

Another major issue in the provision of AT is the ARD committee's determination of whether AT is a necessary component of a student's IEP. The Office of Special Education Programs at the U.S. Department of Education has established that the standard for determining that AT is necessary is that in light of the child's particular educational needs, the child must have the AT device and/or service in order to receive FAPE.

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Determining if AT is Necessary

- Must AT be included for an IEP to be reasonably calculated to provide the student with a disability some meaningful educational benefit?

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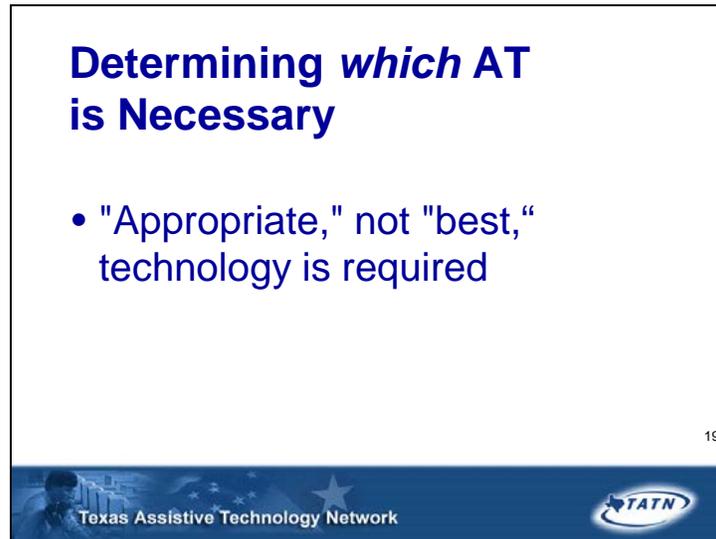
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SAY:

In addition to the standard established by the Department of Education, hearing officers across the country have stressed that the standard established by the U.S. Supreme Court in *Board of Education of Hendrick Hudson Central School District v. Rowley* with respect to the meaning of "appropriate" applies to a district's provision of AT as part of an educational program. The court in *Rowley* held that an appropriate educational program does not mean one that maximizes progress, but rather means a program that is reasonably calculated to provide a student with a disability some educational benefit. The benefit must be more than trivial. It must be meaningful in light of the individual student's disability.

If an ARD committee considers that AT may be necessary for a student with a disability to receive a free appropriate public education, and if an AT evaluation (which we will discuss in detail later), determines that AT is required, the ARD committee must decide which AT device or service to provide.

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A rectangular box with a white background and a black border. The title "Determining which AT is Necessary" is in blue. A bullet point is also in blue. The bottom of the box has a blue banner with the Texas Assistive Technology Network logo and the number 19.

Determining *which* AT is Necessary

- "Appropriate," not "best," technology is required

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SLIDE 19

SAY:

In applying the *Rowley* standard to the provision of AT, hearing officers, including those in Texas, have found that though there might be a better technology available for a student to use, if a lesser technology provides some educational benefit, it is appropriate and therefore sufficient. In other words, a school district is not required to provide a student with the best or highest technology available, just technology that provides some meaningful educational benefit.

It is not unusual that the parent of a student who is provided an AT device by a school district requests that the district provide a more sophisticated, higher-tech device than the one currently provided. In some cases, though parents may be seeking what appear to be upgrades, the more advanced devices are actually inappropriate. For example, in a due process hearing in Texas, a district had been providing an 8-year-old boy with a portable word processor that was designed for use by small children. His parents requested that the district provide a laptop computer for his use. The hearing officer held that the parents had failed to show that the boy would need the added sophistication and fragility of a laptop over a word processor designed for the use of children the boy's age.

In an Alabama due process hearing, the parent of a 15-year-old student with a severe expressive language impairment sought to have a school district upgrade the augmentative communication device that her child was provided. The boy was using a "Superhawk," and his mother wanted the district to provide him a "DynaVox" instead. Though the expert witnesses for the mother testified that the boy would receive more educational benefit from the DynaVox, they did not dispute that he would also receive educational benefit from the use of the lower

tech Superhawk. The district's witnesses were able to show that they were not recommending an AT device upgrade because the boy had not yet maximized or exhausted the capability of the Superhawk. They also testified that the district would provide a device upgrade when the boy was no longer receiving any educational benefit from his use of the Superhawk. Using the *Rowley* standard, the hearing officer held for the district, stating that because the boy was receiving educational benefit from his use of the Superhawk, it was an appropriate AT device.

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Considering the AT Implications of IEP Components

Plan for:

- **Proper and timely implementation**
- **Maintenance and repair**
- **AT training**

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SLIDE 20

SAY:

An ARD committee must consider the practical implications of providing AT that is written into an IEP. Problems with the actual use of an AT device or program can result in the denial of FAPE.

There are a few issues that an ARD committee must not overlook. A committee should develop plans that address the following issues:

First: Proper and timely implementation of the AT.

Adequately considering the proper and timely implementation of AT is critical in providing FAPE for certain students with disabilities. The importance of these issues have been shown in hearing officer and court decisions. For example, in a Delaware due process proceeding, the IEP of a student with a learning disability stated that he could use a computer to complete class assignments, and that he should use voice recognition software in the classroom. However, the facts of the situation showed that the software called for in the child's IEP had never been installed on the computers that he was able to use, and that the voice recognition software was inappropriate for use in the classroom because the presence of other students in the classroom interfered with its use. The appellate hearing officers, in ordering that the district perform an AT evaluation, stressed that appropriate use of the AT must be contemplated initially—that perhaps voice recognition software could be used with the student at home or during times when he is pulled out of the classroom in order to avoid disruption by other students.

Also, an ARD committee should create a plan of action regarding the maintenance and repair of an AT device, an issue which we will discuss in detail later in the presentation.

As mentioned above, the IDEA includes training and technical assistance for an AT device in its definition of AT services. Therefore, ARD committees must also determine what training on the device for the student, parents, and staff is necessary and plan for the provision of such training.

If it is determined that training is needed, the ARD committee should create a plan for the implementation of that training to ensure that it is actually provided. Even if the specific device or other technology is absolutely appropriate, it may be inappropriate if it is not used by a properly trained student and/or properly trained staff member or parent.

Hearing officers and judges have consistently held that proper training for various appropriate people is essential for a student to receive FAPE through the use of certain AT. In cases in which districts have failed to train the educational aides and parents of students, or have delayed the training of the student inexplicably, parents have been awarded significant relief in the form of compensatory services.

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AT Evaluations

- 1. Determining if an AT evaluation is warranted**
- 2. Providing sufficient AT evaluations**
- 3. Timeliness of AT evaluation**
- 4. Credentials of AT evaluators**

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SLIDE 21

SAY:

The issue of AT evaluations is a common subject of legal challenges. There are several key sub-issues that cases regarding AT evaluations have involved, which will be discussed in the following slides:

- First: Determining if an AT evaluation is warranted.
- Second: Providing an AT evaluation that meets IDEA standards.
- Third: The importance of the timeliness of AT evaluations.
- Fourth: The significance of the professional credentials of those performing AT evaluations.

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Determining if an AT evaluation is warranted

- Not every special education student needs formal AT evaluation
- ARD committee determines need to seek further information or formal evaluation

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- SAY:** Turning to the issue of determining if an AT evaluation is warranted. . . Though an ARD committee is required to *consider* the AT needs of each and every special education student, a formal AT evaluation need not be conducted for every student who is eligible for special education services. The determination regarding whether or not an evaluation is needed is made during the ARD committee's consideration of the AT needs of the student, and the determination is, of course, made on a case-by-case basis through analysis of the individual needs of a particular student. Practically, the ARD committee can take one of three actions. First, the ARD committee may determine that no AT devices/services are required by the student. Second, the committee may determine that AT devices/services are required and include them in the IEP. Finally, the committee may refer the student for an evaluation after determining that more information is necessary to analyze the needs of the student, to determine whether an AT device/service is required, and to determine what AT devices/services are appropriate.
- SAY:** In some cases, members of the ARD committee are knowledgeable about the student's functional needs and the range of appropriate AT devices/services to meet those needs. The ARD committee may decide what AT devices/services should be provided for the student without the necessity of a formal AT evaluation. The devices/services may be provided as supplemental aids and services, as a related service, as part of the IEP, or as equipment or material to use to implement the IEP. In other situations the ARD committee may not have sufficient in-depth knowledge of the student's functional needs, or the members of the ARD committee may not have the expertise or technical knowledge about what AT devices/services are available to meet the student's needs. The ARD committee may seek information from other sources such as an outside expert, a vendor of a device, or other district personnel. The ARD committee may seek an AT evaluation, in which case all IDEA requirements regarding evaluations, such as notice and parent consent, apply. If a parent or school personnel refers a student for an AT evaluation, the ARD committee will determine whether the evaluation is needed and, if so, the scope of the evaluation.
- SAY:** The decisions of school districts not to perform AT evaluations of some students with disabilities have led to legal challenges. In one Oregon hearing, a student's new IEP excluded the portion of a previous IEP that allowed her to tape record her classes. The parents asserted that the district should not have discontinued the provision of the AT without first evaluating its effectiveness, and requested an AT evaluation. The hearing officer stated that the fact that the student could

complete written assignments without dictation was itself an evaluation of the necessity of that component of her IEP. In other words, the hearing officer found that enough of a consideration of the need for AT had been conducted to determine that an AT evaluation was unnecessary. This case is just an illustration of a situation in which an AT evaluation would not be necessary. Again, an ARD committee must make a separate determination on this issue for each individual child.

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Providing Sufficient AT Evaluations

- Texas districts get to choose which assessment instruments or strategies to use
- Detailed review and analysis of needs and abilities most likely meets IDEA requirements

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SAY: Though it is clear that AT evaluations must be conducted if necessary, there are no specific guidelines about what must be included as part of an AT evaluation for it to be sufficient. The statutory provisions regarding special education evaluations in general are applicable and should be considered. In addition, a few Texas due process hearing decisions have provided some pretty specific and useful guidance on this issue.

SAY: One Texas case has established that Texas districts have the discretion to determine what type of assessment instruments and strategies they will use in conducting AT evaluations. In this case, the foster parents of a special education student alleged, in part, that the district had failed to provide notice as required under the IDEA regarding the nature of proposed assessment strategies for AT evaluation of the student, and failed to propose adequate standardized and/or validated measures for the AT evaluation. The parents believed that the district's AT evaluation must use validated testing and that the district must have provided notice of that validation when it sought written consent for the AT evaluation from the parents. In holding for the district, the hearing officer established that in Texas, districts have the discretion to choose the method of evaluation, including informal evaluation measures, and other strategies appropriate to determine the individual student's needs.

SAY: Another Texas special education hearing officer found a district's AT evaluation to have met IDEA standards because the evaluation consisted of:

"a detailed review and analysis of the student's needs and abilities, based on then current information and data derived from a review of the student's educational records, observations and discussions with his classroom teacher and parent."

Because the AT evaluation met this standard, the parent was denied her request that the district pay for an independent AT evaluation. If an AT evaluation meets this standard, it will most likely survive a legal challenge.

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Timeliness of Evaluation

Failure to provide timely evaluation could be violation of IDEA



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SLIDE 24

SAY: On the issue of the timeliness of the administration of AT evaluations, it is important to know one basic fact: the failure to provide a timely AT evaluation could constitute a violation of the IDEA.

SAY: For example, in one case, a communication consultant engaged by the parents of an 8-year-old with autism and a severe language disorder recommended that the boy undergo a trial period with "DynaVox" augmentative communication software. The fact that the student's school district had not followed this recommendation was reviewed by a hearing officer. Approximately 10 months after the consultant recommended the trial period, the parents requested an ARD committee meeting to discuss the provision of the DynaVox as had been recommended the year prior. After several ARD committee meetings and mediation, none of which ended in an agreement regarding the AT, the parents rented an augmentative communication device on the advice of an independent evaluator and had the independent evaluator conduct an assessment. The district finally obtained the software so that a trial period on the program could be conducted at school 2 ½ years after the initial recommendation. The hearing officer held for the parents on the issue of reimbursement for the private evaluation of the appropriateness of the AT. The district had erred by not conducting the evaluation or agreeing to a requested evaluation in a timely manner.

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Professional Credentials of AT Evaluators



- Comply with legal requirements regarding evaluations in general
- Comply with legal requirements regarding the qualifications of special education providers

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SAY: There are no federal or state statutes or regulations that specifically address what the professional credentials or qualifications of those performing AT evaluations must be. In addition, it appears that there have been no reported legal challenges regarding the quality or validity of AT evaluations based on credentials of the evaluators. However, in conducting AT evaluations, districts should consider the regulations that apply to all special education evaluations and the regulations that govern the qualifications of personnel who work with students with disabilities.

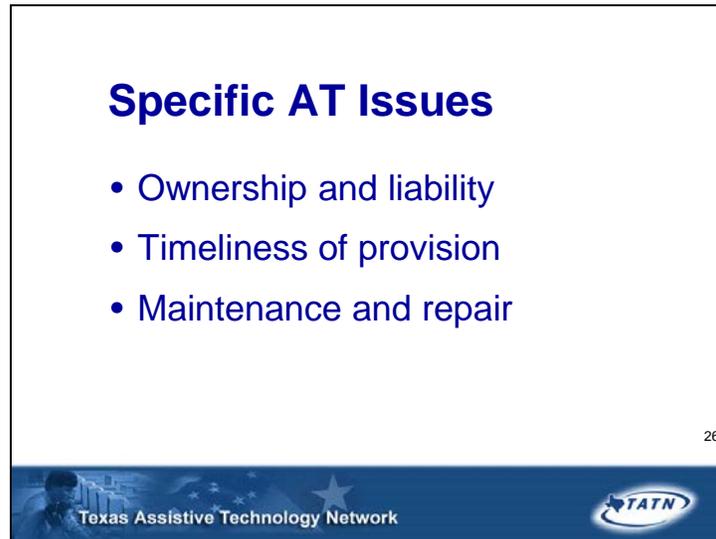
SAY: State and federal law requires that individuals who provide special education and related services must be certified, endorsed, or licensed in the areas in which they are assigned. Under the IDEA and the Texas Education Code, certain related services must be provided by only individuals with specific credentials. Also, the State Board for Education Certification in Texas has developed standards which explicitly require that a newly certified special education teacher have specific knowledge, understanding, and competencies related to AT.

SAY: In addition, there are several legal provisions related to special education evaluations in general that are important to consider when determining the appropriate staffing of an AT evaluation. The IDEA requires that evaluations involve a variety of assessment tools and that a child must be assessed in all areas related to a suspected disability or disabilities.

SAY: Given these relevant statutory and regulatory provisions, AT evaluations should be carefully staffed. Clearly, the individual assessing a student's need for AT as related to a particular disability or suspected disability should have expertise in that area. For instance, if a child has physical disabilities for which an AT device could be necessary, a licensed occupational therapist and a licensed physical therapist should be involved in the child's AT evaluation. If there is a speech or

language problem, a speech language pathologist could be added to the evaluation team. Because the IDEA requires assessment through a variety of tools and strategies, it might be necessary for several different professionals with different certifications and/or licenses to participate in a particular student's AT evaluation. The best practice is for the AT evaluation to be a comprehensive assessment conducted by a group of qualified professionals.

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Specific AT Issues

- Ownership and liability
- Timeliness of provision
- Maintenance and repair

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SLIDE 26

SAY: Moving on now from the consideration and evaluation of AT needs....

There are several other specific issues regarding AT that are frequently litigated in special education cases. These issues, which I will discuss in detail in the following slides, include:

- The ownership of and liability for AT devices;
- The timeliness of the provision of AT; and
- Maintenance and repair of AT devices.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.



Specific AT Issues

- At-home use
- Medically related devices and services
- Personal devices
- Copyright concerns

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SLIDE 27

SAY:

- The provision of AT for use at-home;
- The provision of medically related AT devices and services;
- The provision of personal AT devices; and
- AT and copyright law concerns.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

Ownership and Liability for AT Devices

- District using family-owned device that is component of IEP assumes liability for device
- District not liable for family-owned device that is not component of IEP

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SAY: Situations may arise in which a family-owned AT device is used at school or a district-owned device is used at home. These situations can sometimes lead to confusion regarding what arrangements are proper and who should be responsible for the upkeep and maintenance of the device. There are a few basic concepts you should understand regarding this issue.

SAY: First, in a 1996 due process hearing, a Texas special education hearing officer established that a Texas district that uses a family-owned device that is a component of a student's IEP assumes liability for the device.

SAY: Though school districts assume liability when a family-owned device is an IEP component, in a case in which a student was using portable tape recorders at school that were family-owned, but were not necessary under his IEP, the Office of Civil Rights at the U.S. Department of Education determined that the school district was not responsible under Section 504 for reimbursing his parents after the devices were damaged at school. AT devices owned by parents that are not provided for in a student's IEP are not the responsibility of school districts.

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**Ownership and Liability
for AT Devices**

Parent could be liable for
damage to or loss of district-
owned AT device

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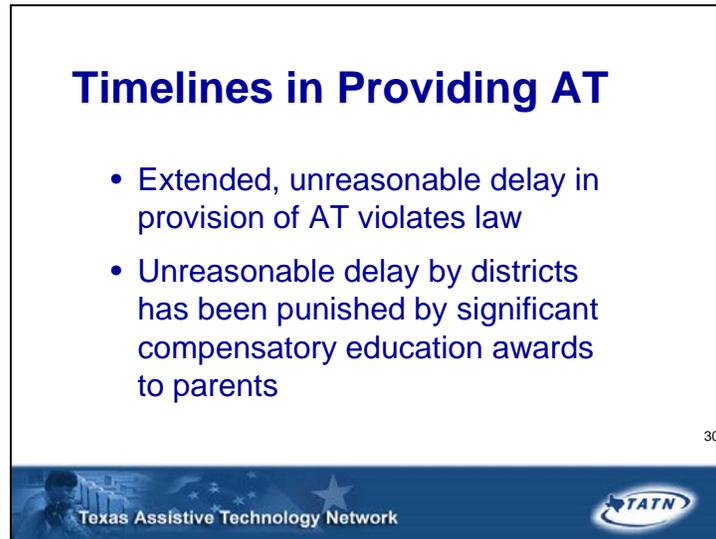
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SAY: It is possible that parents could be held liable for damage to or loss of a district-owned AT device. If a parent had the duty of control of his or her child, and damage to a district-owned AT device was proximately caused by the parent's negligent failure to exercise that duty, the parent could be held liable under a provision in the Texas Family Code.

SAY: In addition, Texas school district boards of trustees have the authority to require payment of a security deposit for the return of materials, supplies, and equipment. School districts may require deposits in connection with the provision of AT devices and ask a parent to sign a statement that sets out the terms and conditions for use of the AT equipment, the guidelines and time for its return, and the understanding that it is to be returned in the same condition, less usual wear and tear, or the parent may be liable for the loss.

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Timelines in Providing AT

- Extended, unreasonable delay in provision of AT violates law
- Unreasonable delay by districts has been punished by significant compensatory education awards to parents

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SAY: Alleged time delays in providing the AT that is necessary under a student's IEP has been an issue in due process and court proceedings. Though there is no statutory language regarding when, specifically, AT must be available for a child's use, the IDEA requires that a child's IEP must be implemented as soon as possible following its finalization and without delay. Moreover, the 2006 regulations indicate that certain AT devices and services must be provided to students in a "timely manner."

SAY: Like any other IEP provision, if the AT component is not being implemented, the district may be in violation of the IDEA. Hearing officers have assessed significant penalties against school districts in situations in which the delay in providing AT to a student has negatively impacted the student's ability to obtain educational benefit.

SAY: For example, in a Pennsylvania case, a federal district court awarded a significant number of compensatory education hours to a student with multiple disabilities after the boy's school district failed in several capacities related to AT. The court found that the district had "dragged its feet." The need for the AT had been recognized in 1994, the device had been acquired in September of 1995, and the device was not functional until February of 1996. The court stated that it thought one school semester to be a reasonable amount of time for the district to have obtained the necessary laptop and word prediction software and to have implemented a plan for use of the AT. The district's failure to do so led to a compensatory education award for AT-related deficiencies of 270 hours of services.

SAY: In a Texas due process hearing concerning AT, a district and the parents of a student with a disability entered into a written mediation agreement in which the district was to provide to the student, within one month of the signing of the agreement, a Power Notebook computer with a color screen. The mediation agreement was signed in May of 1996. Because of supply problems, the district first provided the student a word processor, and then later a Power Notebook with a monochrome screen. The district did not provide the Power Notebook with a color screen, as stipulated in the mediation agreement, until February of 1997. Because of the district's delay, the hearing officer ordered the district to pay the parents, as compensatory services, the fair market cost for rental of a computer equivalent to a Power Notebook with a color screen for the period of delay.

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Maintenance and Repair of AT Devices

- Responsibility of district
- Failure to repair in a timely manner might deny a student FAPE
- ARD committees should establish plans for maintenance and repair of certain devices

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SLIDE 31

SAY: Today, many of the higher-tech devices that are provided by schools to students with disabilities are complicated devices that require complex programming and upkeep. For many schools and parents, the operability of a device is a constant concern, especially when the student cannot sufficiently make educational progress with any other type of alternative AT device. A Texas special education hearing officer has stated that "[u]nreasonable delays in repairing a critical piece of hardware or software could result in harm to the educational program and constitute a denial of FAPE." In another Texas case, the AT device at issue, a laptop computer, was broken several times in the course of a school year, sometimes by the special education student using the device. The cumulative delays, some of which were caused by delays in repairing the laptop or acquiring a replacement, led to a holding for the parents.

SAY: There have been a couple of cases in which, though the AT device at issue was inoperable for a period of time, the hearing officer did not find a denial of FAPE. However, those situations were somewhat special in that devices other than those specified in the IEPs were sufficient to meet the students' needs. It would obviously not be wise for a school district to delay in the repair of an AT device that is a component of a student's IEP. However, because AT devices will malfunction, and because some of the devices are very complex and take time to fix, it appears that if a district makes a good faith effort to use other AT or services that could serve as short-term substitutes for the broken device during the repair period, and that would allow the student to make progress toward his or her IEP goals and objectives, a reasonable lapse in the availability of the AT due to its repair would most likely not violate the IDEA. If, however, there is one particular device for which no other even short-term substitute device will suffice for a student's use, the district involved might want to exercise caution by securing the same device through a short-term lease or some other arrangement while the district-owned device is being repaired.

SAY: A pair of Texas due process hearing decisions have addressed the need for a plan from the ARD committee regarding the maintenance and repair of an AT device. These two cases involved the same student with a hearing impairment. Her parents were concerned that the FM monitor that she used at school was not consistently operable. In the second decision, the hearing officer determined that the preponderance of the evidence showed that the district had fulfilled its obligation, under the order issued in the previous hearing to maintain the AT device. The district had added additional personnel to the list of individuals who could be contacted should a problem with the device occur and had purchased and made readily available additional units and fresh batteries. In addition, the school nurse maintained a written log documenting the condition of the device. An arrangement had been made with the parents that if the school FM monitor was inoperable for more than 24 hours, the school would borrow the family-owned FM monitor that the student used at home. Despite all of this evidence, the hearing officer thought that there was some confusion on the part of the parents regarding the procedures for maintaining and repairing the device, and ordered the district to write an addendum to the student's IEP that need not contain a "rigid step by step protocol," but could instead be a "set of choices school personnel may make in order to respond most effectively to whatever

circumstances arise." In addition, the hearing officer directed that the terms of the agreement between the parents and the district regarding the school's borrowing of the family-owned FM monitor be specified in the IEP addendum. Though such an addendum to an IEP, and such documentation of the proper functioning of AT devices, might seem beyond IDEA requirements in most situations, it could be the best way to address inevitable issues regarding the repair of AT devices.

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AT for At-home Use

- If IEP states that AT at home is necessary, it must be provided
- If at-home device is "want" rather than "need," district need not provide it

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SAY: Another significant issue is whether or not it is necessary that a school district provide an AT device or services for a child's use at home. It is clear that, if a child's ARD committee determines that he or she must have a certain AT device or certain AT services at home, the child's school district must provide such. In some cases, if a child with a disability requires the AT device to complete homework that non-disabled students in his or her class are asked to complete at home, the district may have to provide the AT at home. However, the at-home AT issue most often arises in legal challenges when parents believe that their child needs a device at home (usually a computer of some sort), and the child's ARD committee disagrees. In more cases than not, this type of challenge by parents fails because the at-home device is determined to be more than is necessary for the district to meet the *Rowley* standard of providing the student some meaningful educational benefit.

SAY: For example, in a Texas case, the parents of a child with autism sought relief from the hearing officer because, they alleged, their daughter's school district had violated the IDEA in not providing a computer at their home for her use during necessary in-home training. The hearing officer found that the parents had failed to prove that a computer at home was necessary, and that though there was no doubt that the child could benefit from the use of a computer at home, under *Rowley*, the school district's obligation was not to provide the child with the best educational program available, but merely a program reasonably calculated to provide her some meaningful educational benefit. This "want but not need" analysis has been used by other hearing officers in situations in which parents are seeking at-home computers. Though a home computer may very well be of educational benefit to a student, FAPE is not denied a student without a home computer who is provided the opportunity to obtain some meaningful

educational benefit from the use of AT devices and services at school in a manner that is adequate for the student to make progress in his or her IEP goals and objectives.

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AT for At-home Use

- Efficiency arguments by parents in support of need for at-home device might not be enough to show district's obligation

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SAY: Continuing on the topic of AT for at-home use:

Arguments by parents in support of their child's need for an at-home device that are really based on efficiency, rather than on the individual needs of the child, probably won't be enough to obligate a school district to provide the device. In a California case, the mother of a student who was receiving AT at school requested a laptop with voice output capabilities for use at school and at home. The language development specialist who testified as an expert for the parent stated that the student required the laptop for personal use so that she would be able to use the same computer throughout the day and at night and so all of her work would be stored on one hard drive for her ready access. The hearing officer determined that because this expert was making an efficiency argument rather than identifying the student's educational need, and because her concerns could be easily remedied and did not relate specifically to any of the girl's needs, her arguments in support of the necessity of the laptop were unpersuasive.

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Medically Related AT Services

- IDEA Medical service exception does not always apply
- Mapping, programming, maintenance, and replacement of Cochlear Implants and other surgically implanted medical devices are NOT AT services
- Students with surgically implanted medical devices still entitled to services necessary for FAPE

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SAY: Because the disabilities of many children are medically related, the provision of AT devices and AT services can often be intertwined with the provision of medical services. The IDEA excludes medical services other than those for diagnostic or evaluative purposes from the definition of related services which must be provided by a school district to a child with a disability. However, some services that seem medical in nature, are actually related services or AT services of some other classification that must be provided by a school district.

SAY: In *Irving Independent School District. v. Tatro*, the U.S. Supreme Court analyzed the use of a medical device with a student. The court used a two-step analysis to determine if the services were medical in nature and therefore not required to be provided by the district. First, are the requested services included within the definition of related services? The court referenced related services as those that enable a child to remain in school during the day so that the student has meaningful access to education as contemplated by the IDEA. Second, are the requested services excluded as medical services? Medical services are defined as those "provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services". The court held that clean intermittent catheterization of an 8-year-old with spina bifida was a related service because it could be provided by a layperson with minimal training and was necessary for the student to remain at the school during the day. Since the catheterization involved manipulating technological devices, the school health services that the district was obligated to provide free of charge were, in effect, AT services.

SAY: In recent years, more and more children with hearing impairments are undergoing surgery that involves the implanting of a device in a child's skull (internal component) and in the cochlea of one of his or her ears (external component). This cochlear implant, which I will call "CI," is intended to provide the child with the ability to use his or her hearing. The increase in the number of cochlear implant operations performed was accompanied by an increase in legal disputes surrounding the proper implementation of education programs for children with the implants. For the CI to work appropriately for a child, it must be mapped, or programmed, to stimulate the cochlea in various ways to increase the child's ability to make sense of the sounds being received. According to federal district courts, only a specially trained audiologist can properly map a CI, and though speech/language pathologists may work closely with audiologists in determining the proper mapping of implants, they cannot map the devices themselves. The 2006

regulations specifically *exclude* mapping, replacement, programming, and maintenance of CIs and other surgically implanted devices from the definition of AT services.

SAY: Educational agencies are still required to routinely check the external components of surgically implanted devices. This includes checking the battery or repositioning a child so that he can better see his teacher. Additionally, students with surgically implanted medical devices are still entitled to receive services that are determined by his IEP team to be necessary for the child to receive FAPE, such as proper AT services, educational support services (e.g., educational interpreters), or related services such as speech and language services.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

Medically Related AT Devices



- Obligation to provide medically related AT devices is unclear
- Surgically implanted medical devices, such as CIs, and the replacement of such medical devices is excluded from definition of AT device
- Schools still required to monitor and maintain medical devices necessary for child's health and safety

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SAY: The guidance from Texas case law regarding a district's obligation to provide medically related devices, rather than services, does not provide a clear picture of when devices must be provided. In one due process hearing decision, the hearing officer determined that the child did not require a nutrition pump device to meet his educational needs. Though the pump "derivatively rendered the student more amenable to education by keeping him nourished," it did not directly contribute to the implementation of his educational program. However, in a different Texas decision, the hearing officer determined that oxygen tanks that had to be used in emergency situations at school and on the school bus for a student who had a seizure disorder were AT devices that the district had to provide. The hearing officer determined that the tanks were AT devices because they were used to increase, maintain, or improve the functional capabilities of a child with disabilities. Though the nutrition pump and the oxygen tanks appear to be relatively similar in nature, the hearing officers came to different conclusions regarding whether they had to be provided by the school. Therefore, it remains unclear which medically related AT devices the school is responsible for providing.

SAY: However, it is clear that surgically implanted medical devices, and the replacement of such devices, is not the responsibility of the school. Nevertheless, schools are still responsible for monitoring and maintaining medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school.

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Personal AT Devices

- District's obligation to provide a personal AT device is same as that for any other AT device
- If student requires personal AT device to receive FAPE pursuant to IEP, district must provide device

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SAY: Some AT devices, like hearing aids or eyeglasses, are personal devices that are custom made for the use of a particular student and travel with the student in all environments. Because these devices are so personal and customized to the student, it is sometimes difficult for school district staff to understand that they may be AT devices just like any other with respect to the obligation of districts to provide them for the use of students with disabilities.

SAY: There is much confusion in this area. However, policy guidance from the Office of Special Education Programs at the U.S. Department of Education takes the position that personal AT devices are to be treated no differently than any other AT devices with respect to considering the need for AT, including the AT in an IEP, and implementing the provision of the AT. If a student's ARD committee determines that a personal AT device is necessary for the child to receive educational benefit, the device should be specified in the child's IEP. If the IEP provides for the use of the device, the district must provide the device to the student, even if it is a device that is used exclusively by that one student, and even if the student uses the device outside of school. In certain situations, school districts might be responsible for the purchase of hearing aids, glasses, laptop computers, and maybe even wheelchairs.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

AT and Copyright Issues

- National Instructional Materials Accessibility Standards
- National Instructional Materials Accessibility Center
- Texas law

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SAY: The use of some AT devices necessitates the reproduction of copyrighted works into formats that are usable for students with certain disabilities. For instance, written text might be scanned into a machine in order to make a Braille copy of the work, or an audio recording of printed material may be made for use by a student with a visual impairment. The need for this type of reproduction of copyrighted materials raises questions about the legality of making such copies.

SAY: Also, the Department of Education and the US Congress developed NIMAS and NIMAC. NIMAS is the standard that each SEA must adopt regarding the preparation of electronic files for conversion of print instructional materials into accessible formats for students who are blind or print impaired. Under NIMAS, educational agencies are required to timely provide instructional materials in an accessible format.

SAY: While NIMAS is the standard to be used in preparing electronic files, NIMAC is the center for retrieving such files. NIMAC is the national repository authorized to receive and maintain a catalogue of print instructional materials in a NIMAS-compliant format from the textbook publishing industry, SEAs, or LEAs; to provide access to such materials in an accessible media, free of charge, to NIMAS-eligible students; and to develop, adopt, and publish procedures to protect against copyright infringement with respect to such materials.

SAY: Compliance with NIMAS is mandatory, but use of NIMAC is not.

SAY: Because Texas had laws mandating that the state be allowed to receive specialized files directly from the publishers before the implementation of NIMAC, Texas has not chosen to utilize NIMAC. Nevertheless, NIMAS has had some impact on Texas law regarding the provision of electronic files by publishers to educational agencies. Pursuant to the revisions approved on September 15, 2006 in Proclamation 2005, Texas law incorporates NIMAS and requires publishers to grant permission to the state to have adopted instructional materials transcribed into NIMAS-compatible formats without penalty or royalty. Proclamation 2005 also has included a detailed timeline to ensure that Braille versions of materials are produced and delivered to Braille readers in Texas schools at the same time that other students receive their printed versions.

SAY: NIMAS' limited applicability means that schools may not rely solely on NIMAS when dealing with copyright issues pertaining to students' AT devices. For example, NIMAS requires that certain instructional materials be made available to NIMAS-eligible students only, i.e., students who are blind and print disabled. Moreover, just as NIMAS is limited to certain students, it is also limited to certain materials. For example, NIMAS is a source file for converting print instructional

materials into specialized formats. It does not apply to on-line material. Moreover, NIMAS file sets do not include all specifications graphic parts of text or for text that does not use literary Braille (such as mathematics, science, and geography).

SAY: In light of NIMAS' limited applicability to certain students and certain text, LEAs and SEAs must also rely on other bodies of law for further guidance on providing student with access to copyrighted material when such access is necessitated by their AT device.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

AT and Copyright Concerns

- Districts may be able to use "fair use" exception, which allows reproduction of some copyrighted works for educational purposes
- Districts should explore borrowing and sharing reproduced works

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SAY: There are two exceptions in federal copyright law that are of interest in considering this issue.

SAY: First, there is a federal copyright statute that provides an exception to copyright infringement for certain entities that reproduce copyrighted works for the blind or for others with disabilities. This exception is for agencies that have the *primary mission* of providing specialized services to the blind and to others with disabilities. Public schools do not appear to qualify for this exception.

SAY: However, another exception in federal copyright law could serve to allow school districts to legally reproduce copyrighted materials for teaching students with disabilities. The fair use exception provides that some reproduction of copyrighted works used for teaching may not infringe on the copyright protections on those works. The determination of whether or not a use is fair use is a complex consideration that involves analyzing a list of four factors. A discussion of those factors is included in the Guide provided to you. Depending on the facts of each specific situation, if a school district's actions in audio recording or scanning a textbook or novel pursuant to a specific student's IEP are challenged as a violation of copyright, the fair use exception would provide a strong defense to liability. However, there is no formula to use to determine absolutely what use is fair use, and these factors must be applied to the specific facts of each situation in which a school is considering reproduction of a work for this purpose.

SAY: While school districts are not given the absolute authority to make reproductions of materials for students with disabilities, as I just mentioned, other agencies are. In order to avoid copyright issues, educators are encouraged to explore options related to borrowing texts already modified into the proper form for the use of children with disabilities from agencies whose primary focus is assisting individuals with disabilities.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

A Quick Review of Basic Requirements

- AT may be required by IDEA, ADA, or Section 504
- AT needs must be considered

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SAY: To wrap up the presentation, I will quickly review some of the most basic requirements for school districts that you should remember and apply in all situations in which you are providing AT to a student with a disability.

- Remember that though most AT will be required by IDEA, there might be some situations in which the ADA or Section 504 will require that AT be provided.
- The AT needs of special education students must be considered.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

A Quick Review

- If ARD committee determines AT is necessary, it must be included in IEP
- If AT is included in IEP, it must be implemented

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SAY:

- If an ARD committee determines, either through its own consideration of the AT needs of a student, or through consultation or evaluation by someone outside the team, that a child requires AT, it must be written in as a component of the IEP.

SAY: And finally:

- If AT is a component of the IEP, it must be provided to the student.

CLICK THE MOUSE TO PROCEED TO THE NEXT SLIDE.

In Conclusion...

- The provision of AT is a very important part of guaranteeing that students with disabilities receive the educational services that they have a right to receive under federal and state law.

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SAY: In conclusion...

The provision of AT is a very important part of guaranteeing that students with disabilities receive the educational services that they have a right to receive under federal and state law. The AT related issues that are litigated in state due process hearings and in federal courts are varied and numerous, and there are some areas in which it remains unclear what the proper course of action for school districts should be. However, for the most part, a review of the statutory and regulatory mandates, as well as the legal standards established by case law, provide important and significant guidance for school districts to follow.

THE END